

## Private Governance, State Regulation and Employment Standards: How Political Factors Shape their Nexus in Australian Horticulture

### Gouvernance privée, régulation étatique et normes du travail : comment les facteurs politiques en façonnent les liens dans l'horticulture australienne

### Gobernanza privada, regulación estatal y normas de empleo: Cómo los factores políticos configuran sus conexiones en la horticultura australiana

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Résumé de l'article

Dans une économie globalisée, la faiblesse de la négociation collective et de la régulation étatique a suscité un intérêt croissant envers la protection de l'emploi par le biais de la gouvernance privée. Toutefois, le scepticisme au sujet de l'efficacité de codes de conduite privés n'est pas sans soulever des questions au sujet de la discipline externe provenant de la régulation étatique. Cet article se veut une contribution aux débats entourant les processus qui façonnent les liens étroits entre la gouvernance privée et la réglementation de l'État.

Il prend appui sur une recherche empirique menée auprès de travailleurs agricoles qui, formellement, devraient bénéficier de la régulation étatique en matière de salaire, ainsi que de santé et sécurité au travail (SST). Toutefois, des changements survenus dans les normes de l'industrie ont miné les normes existantes. Les pressions exercées par les supermarchés sur le marché des produits ont réduit la capacité de payer des producteurs. Également, le marché du travail australien est de plus en plus envahi par une main-d'oeuvre migrante asiatique temporaire (incluant des travailleurs sans papier), souvent référée aux producteurs par des agences de placement temporaire sans scrupules. Bien que les pratiques en matière de salaire et de SST soient variables, de nombreux travailleurs agricoles sont victimes d'exploitation. De plus, la gouvernance privée (qui s'étend à l'horticulture à travers les codes de conduite des supermarchés et de d'autres types d'agences de placement en période de pointes) ne s'avère pas efficace. Tous ces codes établissent leurs normes à partir des conditions légales minimales d'emploi, et tous comportent des échappatoires qui permettent d'échapper à l'attention, les infractions demeurant impunies.

En 2015, l'attention médiatique et politique s'est portée sur les conditions de travail des travailleurs migrants temporaires. Des enquêtes gouvernementales ont fait ressortir la présence d'exploitation, sans toutefois donner lieu à des solutions partagées. Des politiciens progressistes (influencés par les syndicats) se sont déclarés en faveur d'un renforcement du pouvoir de l'État et d'un meilleur encadrement des agences de placement temporaire. Cependant, des politiciens conservateurs (influencés par les lobbies d'affaires) ont soutenu que cette approche était vouée à l'échec, préférant le statu quo. En conséquence, toute tentative de réforme politique est demeurée au point mort.

Cette étude illustre l'importance des processus politiques qui façonnent le lien étroit entre la régulation étatique et la gouvernance privée. Dans le cas présent, l'impasse politique qui subsiste rend tant la réglementation que la gouvernance déficiente. Sans protection de l'une et de l'autre, les travailleurs agricoles demeurent sujets à de l'exploitation et à des conditions de travail difficiles.

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# Private Governance, State Regulation and Employment Standards: How Political Factors Shape their Nexus in Australian Horticulture

Elsa Underhill and Malcolm Rimmer

**Private governance is often thought to compensate for the decline of union bargaining and state employment regulation. The paper explores their nexus by looking at Australian harvest workers whose state employment protection has been undermined by factors including growing supermarket power and the influx of temporary migrants controlled by temporary work agencies. Supply chain codes of conduct (adopted by supermarkets) and codes of conduct (covering temporary work agencies) appear to be a possible remedy. However, recent public exposure of labour abuses has led to political demands to re-regulate employment, which are met by counter-claims that voluntary codes are adequate. A political stalemate has arisen revealing the key role played by political factors in determining how private governance and state regulation intersect.**

**KEYWORDS: supply chain regulation, codes of conduct, temporary work agencies, temporary migrant workers, horticulture.**

## Introduction

As traditional methods of collective bargaining and state regulation have fallen into decline, interest has grown in protecting employment conditions through private governance mechanisms such as codes of conduct (Bartley, 2007; Mayer and Gereffi, 2010). The best known codes operate through the supply chains of large multi-national corporations in footwear (Locke *et al.*, 2007), apparel (Rodriguez-Garavito, 2005) and electronics (Locke *et al.*, 2013). Private governance is typically underpinned by reputational considerations. Businesses self-regulate for fear of public or consumer backlash should they be connected to labour exploitation.

However, the idea that private governance is effective if left unsupervised arouses scepticism. 'Walls of codes' designed to deflect criticism of labour abuse

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appear to mean little in practice (Chatterji and Levine, 2006; Esbenschade, 2004). Studies find codes restricted in their impact, improving outcome standards (such as occupational health and safety) rather than process rights concerning freedom of association and collective bargaining (Anner, 2012; Egels-Zanden and Merk, 2014; Esbenschade, 2014), leaving workers with no means of redress for grievances. More generally, it seems likely that reputational sensitivity will only drive private governance where businesses have a reputation to protect. That this may not always be so is suggested in Walters *et al.*'s (2016: 49) study of shipping, which only showed supply chain leverage succeeding at the 'better end' of the industry.

The limitations of self-regulation suggest that external discipline is needed. Typically, state monitoring and supervision are proposed (Estlund, 2010; Short and Toffel, 2010; Walters *et al.*, 2016). However, there are several options for the form of state involvement. A return to detailed prescriptive regulation seems problematic in a context of rapid change that leads to obsolescence and a regulatory gap. This, in turn, encourages a preference for responsive regulation that is more adaptable and outcomes focused (Ivec and Braithwaite, 2015). Given the spread of such options, it follows that the way state regulation and private governance intersect is varied and complex (Eberlein *et al.*, 2014; Kolben, 2011). Locke *et al.* (2013) found codes may operate as either supplements or substitutes for legal standards depending on factors including how active governments are in enforcing regulation. Vogel (2010), on the other hand, concluded that private codes (at a global level) are effective only when integrated with strong government regulation. Alternatively, a second external force acting to stiffen business self-regulation has been found in unions collaborating over governance with businesses, sensitive to the impact of supply chain labour abuses on their brand image (Wright and Brown, 2013: 33). These studies note the need for closer study of the processes leading to a successful fusion between regulation and governance. Our central concern lies with how political processes can influence the nexus between private governance and state regulation.

The paper explores this issue in the context of the employment conditions and occupational health and safety (OHS) of harvest workers in Australian horticulture. However, two questions must first be considered about the appropriateness of this case selection. First, is Australian horticulture an industry where state regulation and collective bargaining have been weakened? Formally, this is not so. Pay and employment conditions are protected by legally enforceable tribunal awards supported by unions, and OHS obligations are regulated and enforced by state authorities. Yet, itinerant harvest workers are known internationally to be vulnerable to exploitation, especially when they are temporary or undocumented migrants (Pena, 2010; Preibisch, 2010; Refslund, 2014). The legal standards applicable in Australia are also under challenge (Underhill and Rimmer, 2016),

making this industry suitable to illustrate regulatory decay. Second, have private governance mechanisms emerged to fill this regulatory gap? We examine below two types of private governance: the codes of conduct of Australian supermarkets (at the apex of the horticultural supply chain) and the codes applicable to Australian temporary work agencies (that increasingly manage harvest labour supply). It is reasonable to ask whether private governance effectively fills the void left by receding state regulation.

Empirical data for this study were collected in 2013-2014 with focus groups of 64 harvest workers in three States, and interviews with farmers, temporary work agencies, union officials, backpacker hostel operators (who find jobs for harvest workers), and OHS agency staff. Telephone interviews were also conducted with 36 hostel operators throughout Australia. Furthermore, an online survey was administered to harvest workers. The questionnaire was presented in English and Chinese (10% opted for the latter), yielding 303 useable responses. Of these, 72.4% were temporary migrants holding working holiday visas. Under-represented as a proportion of the population in our sample, but still significant, were Asian harvest workers (23.1% of survey respondents). More methodological detail is given in Underhill and Rimmer (2016).

This article begins by looking at product and labour market pressures that provide the context for weak regulatory compliance. On the product market side is growing supermarket dominance allied to cost pressures on growers; on the labour market side is growing reliance on temporary migrant workers (especially young Asians) hired through temporary work agencies (or 'contractors', as they are known). Employment conditions are then described, looking at underpayment, the special vulnerability of Asian temporary migrants, and the enforcement problems of the Fair Work Ombudsman (FWO). We also consider how OHS is similarly problematic. Private governance is then analyzed to reveal the loopholes that weaken it. Finally, we consider how political processes shape the interface between state regulation and private governance, explaining how a stalemate now exists between progressive groups (seeking a stronger state role) and conservative groups (determined to avoid state interference).

## **Product market pressures in horticulture**

The central feature of the horticultural product market in Australia is concentration. Two supermarket chains (Coles and Woolworths) owned 80% of all supermarkets in 2014 and accounted for approximately 50% of fresh fruit and vegetable retail sales (Australian Government, 2014). This concentration of market power allows these supermarkets to enforce profit transfer from suppliers and smaller competitors. One investment analyst claimed that \$3<sup>1</sup> billion in profits were transferred from smaller retailers and food and grocery suppliers to the

major chains between 2007-2014 (Food and Drink Business, 2014). This profit transfer was accomplished by using devices that, for example, required suppliers to fund in-store promotions and customer discounts. By 2014, one in four dollars received by suppliers from the major supermarket chains then had to be refunded (Australian Food and Grocery Council, 2014).

Such market power enables supermarkets to expand market share by discounting prices at the expense of suppliers. Growers and food processors are price-takers operating in intensely competitive markets (Australian Senate, 2016). Food processors are especially vulnerable because supermarkets prefer selling fresh produce that yields more price flexibility and higher margins (Mitchell and Stewart, 2013), and their products are squeezed out by cheaper imported 'home-brand' frozen and canned produce (AFGC, 2014: 16-17). In 2013, the Managing Director of one major food processor described how the entry of a new German supermarket chain had "seen our net pricing in those two categories [frozen and canned vegetables] actually go down ... we are locked into this cost spiral that is killing us" (Mitchell and Stewart, 2013: 5). Because of the price squeeze on Australian food and beverage processors, their rate of return is estimated to be half that of international competitors (Retailer & Supplier Roundtable Ltd, 2014). Ultimately, cost pressures on processors are transmitted to growers (AusVeg, 2011).

Large and small growers are affected differently by these market pressures. More than 30,000 fruit and vegetable growers operate in Australia and these are mostly small- to medium-sized family businesses (Voice of Horticulture, 2014). However, larger growers perform better than smaller ones. In 2014/15, the top 25% of vegetable growers (large farms with substantial capital investment) had an average rate of return of over 10%, compared to a negative return of -11% for the bottom 25% (Mifsud and Valle, 2015: vi). Thus, price discounting by the major supermarket chains can be absorbed by large, efficient growers, but drives smaller growers out of business.

The cost structure of growers allows minimal room to offset price cuts transmitted down the supply chain. Most horticultural costs—seed, fertilizer, fuel, transport and interest on debt—are exogenously determined and rising. Only labour costs can be minimized by paying flexible piecework rates, or outsourcing harvest work to contractors (Mifsud and Valle, 2015). Labour costs make up a medium to large share of total production costs, varying between 25% and 60% (De Jong, 2016). When cornered by falling produce prices, some growers turn to cutting labour costs illegally. One grower was prosecuted in 2014 for underpayment, unsuccessfully defending his practice by arguing that the business "has no capacity to negotiate (with) the supermarket chains as there are no substitute purchasers .... the farm would not be commercially viable if it had to pay (award rates) during the picking season because the wages costs

would exceed the prices that the supermarkets paid” (FWO v Eastern Colour Pty Ltd, 2014: 5). Cutting wages below the legal minimum remains the last resort for many marginal growers.

## Labour market developments

Another problem facing horticulturalists is recruiting labour. Harvest jobs are short-term and unpredictable, linked to the vagaries of harvest conditions. This creates a challenge for growers who must find sufficient numbers of casual workers in remote locations when the harvest is ripe. Because the work is physically demanding and often performed in high summer heat, the available supply of Australian harvest workers has fallen, creating labour shortages that, in the early 2000s, resulted in growers ploughing spoilt crops back into the ground (Australian Senate, 2016: 109).

Responding to these labour shortages, the National Farmers’ Federation has periodically lobbied government to change visa arrangements so that growers can tap into the supply of young international visitors holding a working holiday maker visa (WHM). First introduced in 1975 as a 12-month visa to visitors from the UK, Ireland and Canada, the visa is now available to youth from 19 countries. In 2005, the scheme was amended to allow a second year visa for WHMs who spent 88 working days in their first 12 months doing agricultural, construction, or mining work in regional Australia. In practice, this meant harvest work—the main type of work available. Subsequently, the number of WHM visas increased from 96,479 (2004/05) to 214,802 in 2014/15, peaking at just under 250,000 in 2012/13. Table 1 shows the regional distribution of visa holders since 2009/10 (when these data first became available) (Department of Immigration and Border Protection (DIBP), 2015).

**TABLE 1**  
**Region of origin of WHM visas**

Country grouping	Number of visas issued, and percentage distribution in each year					
	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15
UK, Ireland, Canada	59,994 34.2%	68,626 37.0%	75,468 35.2%	72,737 29.2%	64,378 28.1%	60,228 28.0%
European Union (12 countries, dominated by Germany, France and Italy)	58,722 33.4%	59,997 32.4%	67,516 31.5%	84,098 33.7%	86,480 37.7%	81,136 37.8%
Asia (South Korea, Japan, Taiwan and Hong Kong)	56,839 32.4%	56,627 30.6%	71,658 33.4%	92,392 37.1%	78,505 34.2%	73,438 34.2%
Total	175,555 100.0%	185,250 100.0%	214,642 100.0%	249,227 100.0%	229,363 100.0%	214,802 100.0%

The share of native English-speaking WHMs has fallen, replaced by visa holders from the European Union (EU) and Asia (especially Taiwanese, whose numbers increased from 10,175 in 2009/10 to 26,648 in 2014/15). These changes reflect both the loss of job opportunities in Europe following the global financial crisis, and high wages in Australia relative to Asia (Mares, 2016; *Focus Taiwan*, 2015). In 2014/15, just over 41,000 WHMs received a second year visa, almost all completing their required 88 days of regional employment in horticulture. As one employer association official said: “Working holiday makers are the life-blood of our industry... without those workers this industry would be in dire straits” (Australian Senate, 2016: 108). Once a minority, WHMs from Asia now make up almost half (46.2%) of second year visa holders. Pay is an incentive. In 2015, the minimum hourly wage in the Australian Horticulture Award was \$17,10 an hour, compared to \$4,95 in Taiwan and \$5,35 in Hong Kong (*Focus Taiwan*, 2015; *Taipei Times*, 2012).

Undocumented (illegal) temporary migrant workers have also become an important part of the horticultural workforce. These workers typically enter on a tourist visa, often intending to work in contravention of their visa conditions. Their travel into Australia is usually organized by agencies or contractors (of the same ethnicity), who arrange work and accommodation for a substantial fee, effectively enslaving workers. The hidden nature of undocumented workers was well illustrated following the death of a Malaysian national in rural Victoria, whose body had been dumped in a public toilet. He had arrived in Perth and, within 12 months, had travelled 3000 kilometres to remote Nyah where he was thought to have worked in harvesting before becoming fatally ill. It was believed that he did not seek medical treatment for fear his illegal status would lead to deportation. According to local police, “We don’t know where he went, or who he was associating with and we certainly don’t know how he came to be [here]...” (ABC, 2015a). While undocumented harvest workers cannot be accurately counted, their numbers appear to be large. A recent survey of growers found 79% knew about the hiring of undocumented workers, and 25% thought they were used to a substantial extent (Doyle and Howes, 2015: 38-41). In some horticultural regions, locals regard them as the main labour supply.

Accompanying the growing numbers of WHMs and undocumented workers has been a shift by growers towards hiring through contractors. These agencies guarantee a full complement of workers. They assume all the farmer’s legal obligations (except OHS duties)—to pay wages, tax, workers’ compensation and superannuation—saving growers from the ‘paperwork’. They also manage work effort and discipline. For these reasons, many growers find them attractive. A 2016 survey of 540 growers found 37% used a contractor (De Jong, 2016).

Studies of this workforce identify both good contractors—established businesses that fully comply with the law—and bad ones, which exploit undocumented workers and WHMs (Hall and Partners/Open Mind, 2012). Growers under product market pressure often turn to the latter (Australian Senate, 2016).

## Underpayment and enforcement

The Horticulture Award (2010) sets standards for pay and working conditions, including a legally binding minimum hourly wage, an additional 25% casual loading, and a condition that piecework rates must allow the ‘average competent worker’ to earn at least 15% more than the minimum hourly rate. Clause 15.9 of the award weakens piecework entitlements, stating “nothing in this award guarantees an employee on a piecework rate will earn at least the minimum ordinary time wage...as the employee’s earnings are contingent on their productivity” (Fair Work Commission, 2010). The award requires piecework rates to be agreed by voluntary negotiation between employers and individual workers—a process open to abuse. We have argued elsewhere that hourly pay rates are often lower than the award minimum (Underhill and Rimmer, 2016). Table 2 shows survey data on hourly earnings in 2013/14 when the basic award hourly minimum wage was \$16,87.

Table 2 shows wide variations in earnings above and below the legal minimum (note high standard deviations). Many factors cause pay variability, including type of crop, worker experience, and effort. Table 2 highlights three other causes of variability: growers pay higher wages than contractors; hourly paid workers earn

**TABLE 2**  
**Average hourly pay of WHMs**

	Mean	Median	Minimum	Maximum	Standard Deviation
Employed by growers (n=202)	\$14,70	\$15,00	\$3,30	\$30,00	5,21
Employed by contractors (n=76) <sup>(1)</sup>	\$12,60	\$12,00	\$2,00	\$28,25	5,73
Paid by the hour (n=158)	\$16,20	\$18,00	\$3,00	\$28,50	4,83
Paid piece rates (n=120) <sup>(2)</sup>	\$11,69	\$12,00	\$2,00	\$30,00	5,01
<b>By regional origin of worker <sup>ns</sup></b>					
UK, Ireland and Canada (n=76)	15,11	15,00	2,00	30,00	5,76
EU (n=97)	14,49	15,00	3,50	28,85	5,52
Asia (n=63)	13,47	13,50	3,50	20,65	5,10

• t (276) = 2,92, p = 0,00 (two tailed)

• t (276) = 7,589, p = 0,00 (two tailed)



more than pieceworkers (notwithstanding the 15% loading in the award); and Asian workers (who are more reliant on contractors) tend to be worse paid than other nationalities. Underpayment is found among all classes of worker.

One Korean woman employed on a Queensland tomato farm described the vagaries of payment she encountered:

Ten people sit in one machine to pick tomatoes and three people with baskets pick tomatoes the machine has missed. Each team member is paid about \$10,00 an hour, although the price depends on grades of tomatoes ... When there are not many ripened tomatoes, you can end up with \$30-40 after 14 hours of work. All wages are put in an envelope with a name and an amount, and sometimes an envelope goes missing, which means a worker is just not paid (United WHY, 2014: 16).

The vulnerability of Asian harvest workers is made worse by language problems that leave them unaware of legal rights, restrict their ability to hunt for jobs, and leave them exposed to co-ethnic exploitation by contractors (Li, 2015). These problems are compounded amongst undocumented workers who have no legal right to work. Evidence on the employment conditions of such workers is scarce. However, one authoritative source described the threats that are applied to undocumented workers (especially deportation), widespread underpayment and bullying, the involvement of overseas criminal gangs, and violence, including murder (Howells, 2010: 57). Another account described how undocumented apricot pickers were paid \$14,00 hourly by their contractor who then deducted \$80,00 a week for providing crowded, unsanitary accommodation, \$5,00 a day for transport, and \$4,00 an hour for his fee (Stubager, 2012). Media accounts suggest such practices are common (ABC, 2015b).

The FWO is the regulatory agency responsible for enforcing employment standards and is empowered to investigate award breaches, seek voluntary rectification by employers, and litigate persistent breaches (Stewart *et al.*, 2016: ch. 19). Horticulture is a priority area of interest for the FWO. In August 2013, the FWO began a three-year investigation of temporary work visa holders in harvesting, finding contractors responsible for many abuses, including underpayment, crowded accommodation, and sexual harassment (FWO, 2015). In November 2015, Taskforce Cadena was established, bringing together the FWO, the DIBP, the Australian Federal Police, and other government agencies in a combined, almost para-military operation, to attack the problem of unscrupulous contractors and the exploitation of temporary foreign workers.

Several factors obstruct the work of the FWO. Amongst these is the contested nature of proceedings. While temporary visa holders produce only 10% of requests for assistance, they lead to 20% of legal activity because of serious and wilful non-compliance by contractors (Australian Senate, 2016: 292). The

FWO is also under-resourced, and has limited powers to compel employers to supply hard evidence for legal action (Australian Senate, 2016: 297-303). For these reasons, the FWO assists few harvest workers. Non-payment of wages was reported by 14,8% of survey respondents. While most tried to recover lost pay, only 1% succeeded. One typical case involved a worker who contacted the FWO but gave up after receiving forms that were 'too long and complicated' and discovering his employer (a contractor) had fled the district (WHM Interview, 6 February, 2013). Both growers and contractors can underpay harvest workers with minimal fear of prosecution.

### **OHS: risk mismanagement**

Occupational health and safety throughout Australia is regulated by state-based legislation that reproduces in all but two States a model act established by the federal government in 2012. All States create similar obligations on growers and contractors alike to eliminate risk and protect workers (Johnstone, 2011). Furthermore, OHS authorities are empowered to inspect horticultural workplaces, require hazard rectification, and prosecute for breaches.

Amongst the duties of growers and contractors is an obligation to provide OHS training. When contractors are engaged, the grower and contractor share this obligation to ensure workers are sufficiently informed about work safety. Survey evidence suggests that training is usually provided, but in a cursory manner. Four out of five survey respondents reported receiving some safety instructions prior to commencing work, although the quality of that training was questionable, as half the respondents also said they were not informed about the risks they might encounter (Underhill and Rimmer, 2015). Similarly, about 80% of Asian survey respondents reported receiving a safety brief, yet only 44% agreed they had enough training to perform work safely. Half felt they were required to perform work that they were not trained or qualified to perform.

Flowing from the inadequacy of training was a high incidence of OHS problems. Frequent cuts, abrasions, falls from ladders, exposure to chemicals, and musculoskeletal strain were reported by a majority of respondents. More serious, although less common, were dehydration (reported by 17,8% of respondents) and sunburn (26,5%). These figures were paralleled by evidence of employer neglect of their statutory duties to eliminate risk by ensuring the provision of personal protective equipment or drinking water (Underhill and Rimmer, 2015). Asian harvest workers were especially aware of the extreme risks they occasionally faced, 38% reporting a serious OHS concern compared to 14% of other harvest workers. For example, an Asian worker in a remote region in the Northern Territory reported:

Picking mango, employers catching up before the rainy season, rush day and night shift, night shift hourly rate same, thunderstorm cannot shelter at night, did not provide adequate lighting, machines often malfunction, unable to wash hands - mango juice burns!! ooloo!

Asian harvest workers hired by contractors were especially likely to encounter OHS problems. They were also disinclined to raise OHS problems with their employer, impeded by the fear of losing their job (Focus group participants, Mildura 2013).

Far less is known about the OHS experience of undocumented temporary migrant workers performing horticultural work in Australia. However, like undocumented agricultural workers in the USA, they are likely to have a higher than normal exposure to hazards and receive less OHS instruction (Hall and Greenman, 2015). Lack of knowledge exposed workers to unfamiliar risks. In one instance, an undocumented worker reported still experiencing back pain that developed whilst continually picking asparagus six months earlier (Focus group participant, Harcourt 2013). In another case, an orchardist described an undocumented Asian worker proudly holding above his head a snake intended for his next meal, only to learn from horrified onlookers that it was highly venomous. Illustrating poor OHS communications, this orchardist could not give instructions directly to his Vietnamese workforce, but had to telephone a contractor—located elsewhere—who would then relay instructions over the phone to the worker.

Australian agriculture as a whole has a very poor safety record ranking along with construction and mining. These are the three industries most prone to fatalities and workers' compensation claims (Fragar *et al.*, 2011). While largely due to mechanization in broad acre farming, horticulture is far from risk free. The aim of OHS regulation is to minimize these risks and provide sanctions when contraventions of standards occur. Although Australian OHS authorities have extensive legal powers, much of their work is educational, with prosecutions limited to serious incidents. Education is not always well received in horticulture. A major challenge for OHS agencies is to ensure that horticulturalists act on advice, despite their individualism and cultural predisposition to resist external interference (Fragar *et al.*, 2011). A related cultural problem lies in the dismissive attitude of both growers and workers that avoiding OHS problems such as sore backs, cuts, blisters, sunburn and dehydration, is just a matter of common sense. Regulatory authorities struggle to achieve good OHS practice in an industry that is accustomed to the routinization of suffering.

### **Private governance: a mosaic of loopholes**

The previous two sections exposed the failure in practice of state regulation governing minimum wages and OHS. However, those regulations continue to

dictate standards that are replicated by private governance mechanisms—the codes of supermarkets and temporary work agencies. These codes typically require compliance with workplace laws. It follows that the evidence showing regulatory failure equally demonstrates the shortcomings of private governance. Therefore, our aim in this section is not to explore whether private governance successfully protects employment standards, but why it does not.

First are individual supermarket codes of conduct that might permeate through the supply chain to reach horticultural producers. The Deputy FWO is on record stating that the major supermarkets can do much to prevent employment abuses in the horticultural supply chain:

....the more work we are doing in the horticultural sector the more I see part of the solution being pressure put on employers at the top of the supply chain to take responsibility for what is happening down the lines....If Coles, Woolworths and others intend to sell the produce, I think they need to care about how it got to their stores (Australian Senate, 2016: 283).

Supermarket codes of conduct apply to commercial relations in the supply chain linking horticulturalists to the major supermarket chains—Coles and Woolworths—and operators with a smaller market share like ALDI and Costco. These retailers developed supplier codes as part of their corporate social responsibility portfolio. Thus, Woolworths' trading terms require suppliers to comply with all relevant laws, and their ethical sourcing policy obliges suppliers to ensure that subcontractors also comply with workplace laws. The latter was introduced in 2010, and can lead to supplier auditing in 'high-risk' source countries (Australian Senate, 2015: 1-14). Coles also has an ethical sourcing policy, introduced in 2005 and upgraded several times since.

These individual supermarket codes were in place in 2015 when a major national scandal broke exposing the employment conditions of Asian temporary migrants in horticulture and food processing (ABC, 2015b). All but one supermarket chain responded to public outcry with media statements referring to their ethical codes (ABC, 2015c). Only Woolworths attempted to publicly explain and defend its conduct (Australian Senate, 2015: 1-14). The defence revealed many loopholes in Woolworths' codes. First, the ethical sourcing policy excluded Australian suppliers because Australia (unlike China or Indonesia) is classified internationally as a low-risk country. Second, Woolworths handles complaints about supplier employment breaches by directing workers to the appropriate government agency. It neither investigates nor acts on such complaints, claiming they are within the jurisdiction of the regulator and beyond Woolworths' reach. Third, because Woolworths enters into contracts with major growers, and not the contractors supplying labour to those growers, it claims to have no contractual right to interfere in these arrangements. If an alleged

breach was considered sufficiently serious, Woolworths may request a supplier audit their own practices, or those of any contractor who actually manages labour. Woolworths reserves the right to terminate unsatisfactory suppliers, but this ultimate sanction has only been invoked once (Australian Senate, 2015: 1-14). These defences allow Woolworths to remain at arm's length from the reality of employment abuses.

Second, supermarkets are now also subject to an external code of conduct, the *Food and Grocery Code of Conduct* introduced by the Australian Competition and Consumer Commission (ACCC) in 2015. This code does not apply directly to the employment conditions of suppliers, but seeks to alleviate cost pressures down the supply chain by penalizing supermarkets that impose harsh or unjust contracts on suppliers. The *Code* is voluntary; its provisions only become mandatory once an organization has signed up to it, which all major retailers have now done. The ACCC enforces the *Code* by prosecuting companies for unconscionable conduct (ACCC, 2014). It is too early to evaluate whether the *Code* will ease cost pressures on growers and food processors. However, the ACCC expressed disappointment when the *Code* was first introduced, criticizing the major retailers' compliance and reporting on their failure to yet negotiate in good faith (ACCC, 2015). It has also complained that penalties are too small to deter large companies (Hyland, 2016). Recognizing the need for a multi-pronged approach to constraining supermarket power, the ACCC now also encourages collective bargaining between organized growers and the supermarkets (ACCC, 2016). Whether horticulturalists can organize effectively for this purpose remains untested.

Third, temporary work agencies are subject to codes of conduct adopted by their peak industry bodies. There are two of these. First is the code of conduct prescribed by CIETT, the international association of temporary hire agencies. This code applies in Australia to some large multi-national temporary work agencies, as well as its Australian affiliate peak body, the Recruitment and Consulting Services Association (RCSA). The *CIETT Code* requires "respect for laws, including health and safety and anti-discrimination, respect for freedom of association and collective bargaining, not withholding workers' passports, and the provision of information to workers in a language they can understand" (CIETT, 2015). Better known in Australia is the RCSA's own code, the *Code for Professional Conduct*. This duplicates much of the *CIETT Code*, although it is silent on freedom of association and collective bargaining, emphasizing instead disputes between members over poaching of each other's work. One objective of the *RCSA Code* is to "achieve self-regulation of the on-hire worker services sector, wherever possible and effective, rather than see the introduction of additional legislative regulation" (ACCC, 2014: 3).

The *RCSA Code* has several loopholes. Its coverage is limited to member firms, failing to reach the ‘rogue’ or illegal contractors widespread in horticulture; and it is enforced by an RCSA committee that may penalize member firms, but cannot award restitution to underpaid employees. In 2015, the public outcry about contractor abuse of horticultural workers prompted the RCSA to consider these two weaknesses. A revised *Industry Code of Conduct* was proposed that would extend to non-members. Also, the *Code* would allow complaints about employment conditions to be heard. However, the revised *Code* is unlikely to check the worst contractors in horticulture who are itinerant, employ undocumented workers, and operate phoenix companies that can be opened and closed at will to evade responsibility. Nor is the *Code* likely to encourage employees to raise complaints when the process requires them first to approach their employer (or an agent of the employer)—a significant deterrent for casual harvest workers. In its present form, the *RCSA Code*—like the supermarket codes—leaves considerable scope for labour abuses to go unchecked.

In the introduction, we noted the variety and complexity of the processes by which state regulation and private governance can be integrated. It is helpful to compare here the situation in horticulture (characterized by weak regulation and loophole-ridden governance) and the Australian textile, clothing and footwear industries (TCF) where extensive government regulation of supply chain end users has been successfully implemented as the only viable way to protect vulnerable outworkers (Nossar *et al.*, 2015). Eberlein *et al.* (2014) refer to a ‘rationalist approach’ in which governance structures are shaped by power-based bargaining. Following variations in power-based bargaining, diverse outcomes can evolve spanning the regulatory tightness (now seen in TCF) and the combined failure of regulation and governance (in horticulture).

### **Public pressure and political stalemate: the contested politics of reform**

The political processes we discuss in this section involve a blend of public interest journalism, political investigation, and interest group lobbying to influence regulatory change. Until 2015, public and political interest in the exploitation of temporary migrants in horticulture was negligible. In March 2015, the Australian Senate (the upper house of federal parliament) initiated an inquiry into the impact of Australia’s temporary work visa programs on the Australian labour market, with particular reference to “whether the programs carve out groups of employees from Australian labour and safety laws and, if so, to what extent this undermines the integrity of such laws” (Australian Senate, 2016: 1). Then on May 4 2015, the Australian Broadcasting Commission (ABC) aired a program entitled “Slaving Away: The Dirty Secrets behind Australia’s Fresh Food” (ABC,

2015b). This highlighted the role of unscrupulous labour suppliers exploiting vulnerable temporary work visa holders, especially those from Asia.

The ABC program turned the abuse of temporary migrants in horticulture into a heated political issue and clearly influenced the Senate inquiry then underway and already interested in horticulture. This inquiry was conducted by a Committee drawing from all Australia's major political parties. Taking evidence from a wide cross section of the community, the Committee heard of a range of abuses, mainly involving 'fly-by-night' contractors. These included underpayment, bullying, extortionate rents, and threats to block second year visa applications unless sexual favours were granted. The inquiry concluded that the "scale of abuse is extraordinary, both in terms of the numbers of young temporary visa workers involved, and also in terms of the exploitative conditions they endure" (Australian Senate, 2016: 196). The inquiry did not mince words, titling its report *A National Disgrace: The Exploitation of Temporary Work Visa Holders*.

However, the Committee split over recommendations. A majority (the Australian Labor Party (ALP) and Australian Green (AG) members) recommended ways to protect exploited workers. These included offering all temporary migrants the same award protection available to Australian workers; reviewing the resources and powers of the FWO; and establishing a licensing regime for temporary work agencies, requiring them to demonstrate compliance with all workplace, employment, tax and superannuation laws. The minority Liberal National Party (LNP) senators disagreed, especially with the recommendation to establish a contractor licensing system. They argued that licensing contractors would punish those agencies doing the right thing, and the minority of 'shonky operators' should be prosecuted under existing laws. The LNP senators also passed the buck, looking forward to other (state level) inquiries then underway into temporary work agencies.

Those other inquiries are in three States, traditionally the level of government that regulates hiring practices. Following the ABC program in May 2015, the governments of South Australia (June 2015), Victoria (September 2015), and Queensland (December 2015) announced inquiries into temporary work agencies. At the time of writing, only Queensland has reported. The parliamentarians that conducted this review were drawn equally from the government and the opposition. The ALP government members quoted with approval testimony from employers, individual labour-hire agencies, academics and lawyers supporting licensing for temporary work agencies. One lawyer stated: "employers that do the right thing have nothing to fear from a licensing regime... applying legislative insecticide to the cockroaches who skew the playing field for responsible employers is to the advantage of employers, workers, and government" (Queensland Parliament, 2016: 55-56). Growcom (the peak body for Queensland horticulture)

backed licensing, as did MADEC (the main government-funded harvest trail agency) and Broadspectrum (a large temporary work agency), provided it did not impose unreasonable costs. However, the inquiry split along party lines and could not reach agreement over licensing. The three LNP inquiry members were influenced by a submission from the RCSA, some of which was quoted verbatim in their *Statement of Reservation* (Queensland Parliament, 2016: 61-65).

The RCSA's views on licensing were expressed in a submission to the Victorian inquiry. First, the RCSA opposed 'new forms of negative regulation' which they believe will not curb the minority of exploitative labour contractors and will only impose costs on the industry. Second, agencies were claimed to perform better than direct hire employers in complying with labour laws. Third, a national approach to the industry was deemed preferable. Finally, the RCSA's proposed *Industry Code of Conduct* was offered (in conjunction with the *Competition and Consumer Act 2010*) as a better way to clean out rogue contractors (RCSA, 2016). The RCSA acknowledges malpractice by a minority of contractors in horticulture, but insists this is unrepresentative of the reputable temporary work agencies (mainly placing skilled and professional workers) from which it draws its membership. Representing an industry that places 1.8% of the Australian workforce in jobs, the RCSA is a powerful lobby group with good access to politicians from all sides of politics. Although remote from the particular problems of horticulture, it has the capacity to obstruct contractor licensing in that industry.

Offsetting the pressure group role of the RCSA are several unions with an interest in horticulture and food processing. Two unions are particularly active: the National Union of Workers (NUW) (packing sheds) and the Australian Meat Industry Employees' Union (meat and poultry processing). Both attempt to recruit and lobby for temporary migrants. The NUW has most involvement in horticulture. First, in 2015, it assisted the ABC's "Slaving Away" program, and it maintains an active media role. Second, it seeks to negotiate with employers to recover entitlements for underpaid agency workers. Third, the NUW has offered to collaborate with supermarkets to monitor and control employment standards in the horticultural supply chain—an offer already declined by Woolworths (Australian Senate, 2016: 286-7). The NUW is particularly responsive to Asian harvest workers, hiring Asian organizers and translating material for them. Paralleling this need for Asian-oriented union organization is United WHY, which is made up by three groups of working holiday makers—Korean Working Holiday Youth (KOWHY), Taiwanese Working Holiday Youth (T-WHY), and Hong Kong Working Holiday Youth (HKWHY). Formed around 2013, these organizations report back (often in a negative way) to unions and government recruitment agencies in their home countries about employment conditions in Australia; translate awards and other regulations to inform workers of their rights; and



lobby governments in Australia on behalf of young WHMs (United WHY, 2015). The NUW led the way in lobbying for the introduction of licensing for temporary work agencies. This is now incorporated into the policies of the Australian Council of Trade Unions, the ALP government in Victoria, and was adopted as a policy platform by federal labour in the July 2016 election (which returned an LNP government). To date, lobbying by unions has not succeeded in matching that by the RCSA, and the Australian political process has been deadlocked, failing to bring forward stronger regulation to protect harvest workers.

## Conclusion

The aim of this paper is to examine how political processes can shape the nexus between state regulation and private governance in protecting employment standards in Australian horticulture. Formal state regulation of pay and OHS has come under pressure from both product markets (where powerful supermarkets dominate supply chains) and labour markets (increasingly supplied by vulnerable Asian temporary migrants, some undocumented, and many employed by contractors). While employment conditions vary, sub-standard pay and OHS practices are widespread. This demonstrates both regulatory failure and the ineffectiveness of private governance in curbing labour abuses. This case does not demonstrate successful blending of state regulation and private governance: both are failing. It reinforces the findings of Vogel (2010) that private codes cannot fill gaps in state-based regulation, but instead become a means for shirking responsibility by blaming outliers such as rogue contractors.

In 2015, the exploitation of temporary visa holders became headline news, spawning several public inquiries, some to consider licensing contractors. Both sides of politics could agree that labour abuses were rife, but not upon remedies. The progressive view (ALP and AG) supported stronger powers for the FWO and licensing for temporary work agencies. The conservatives held that existing laws were adequate, that licensing was an unfair impost on good agencies, and that voluntary codes were preferable to regulation. These views generally match those of competing lobby groups—unions and the RCSA—revealing a political process characterized by divisions between both lobby groups and political parties, and buck-passing between federal and state governments.

Other studies of the process by which state regulation and private governance interact emphasize that outcomes can vary (Locke *et al.*, 2013; Wright and Brown, 2013). Common to those studies was evidence showing the importance of business sensitivity about the reputational effects of supply chain labour abuses. Australian horticulture is different. Like international experience in industries where working conditions are hidden from the public, the voluntary codes of supermarkets and temporary work agencies serve to deflect criticism

of supply chain exploitation without providing labour protection (Vogel, 2010; Esbenshade, 2004). Corporate commitment to private governance is weak. As the head of group corporate responsibility for Woolworths said: "Australian awareness of supply chain issues had increased significantly...but consumers and companies in other regions, Europe in particular, had made far greater progress" (Simplot, 2015). Shaped by power-based bargaining (Eberlein *et al.*, 2014), the Australian political process has taken a negative course, allowing a regulatory gap to continue as state regulation and private governance prove collectively ineffective.

## Note

- 1 Australian dollar (AUD). In this article, all references to monetary values are to the Australian dollar.

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## SUMMARY

### Private Governance, State Regulation and Employment Standards: How Political Factors Shape their Nexus in Australian Horticulture

The global weakness of collective bargaining and state regulation has spawned growing interest in employment protection through private governance. However, scepticism about the efficacy of unsupervised codes of conduct has triggered debate about external discipline through state regulation. This article seeks to contribute to debates about the processes that shape the nexus between private governance and state regulation.

It is based on an empirical study of Australian harvest workers who formally benefit from state regulation of pay and occupational health and safety (OHS). However, industry changes have undercut standards. Product market pressures from supermarkets squeeze growers' capacity to pay. Also, the labour market is increasingly supplied by vulnerable Asian temporary migrants (including undocumented workers), often supplied to growers by unscrupulous temporary work agencies. While pay and OHS practices vary, many harvest workers are exploited. Nor is private governance (which extends to horticulture through the codes of conduct of supermarkets and peak temporary work agency bodies) effective. All codes draw their standards from minimum legal employment conditions, and all possess loopholes allowing breaches to escape attention and rectification.

In 2015, media and political attention fell on the working conditions of temporary migrants in horticulture. Government inquiries found evidence of exploitation, but were divided over solutions. Progressive politicians (influenced by unions) favoured stronger state enforcement powers and temporary work agency licensing. Conservative politicians (influenced by business lobbies) claimed these steps would fail, and favoured the status quo. Political reform therefore stalled.

This study illustrates the importance of political processes in shaping the nexus between state regulation and private governance. In this case, a political stalemate leaves both regulation and governance deficient. Lacking protection from either source, harvest workers remain exposed to exploitative employment conditions.

KEYWORDS: supply chain regulation, codes of conduct, temporary work agencies, temporary migrant workers, horticulture.

## RÉSUMÉ

### Gouvernance privée, régulation étatique et normes du travail : comment les facteurs politiques en façonnent les liens dans l'horticulture australienne

Dans une économie globalisée, la faiblesse de la négociation collective et de la régulation étatique a suscité un intérêt croissant envers la protection de

l'emploi par le biais de la gouvernance privée. Toutefois, le scepticisme au sujet de l'efficacité de codes de conduite privés n'est pas sans soulever des questions au sujet de la discipline externe provenant de la régulation étatique. Cet article se veut une contribution aux débats entourant les processus qui façonnent les liens étroits entre la gouvernance privée et la réglementation de l'État.

Il prend appui sur une recherche empirique menée auprès de travailleurs agricoles qui, formellement, devraient bénéficier de la régulation étatique en matière de salaire, ainsi que de santé et sécurité au travail (SST). Toutefois, des changements survenus dans les normes de l'industrie ont miné les normes existantes. Les pressions exercées par les supermarchés sur le marché des produits ont réduit la capacité de payer des producteurs. Également, le marché du travail australien est de plus en plus envahi par une main-d'œuvre migrante asiatique temporaire (incluant des travailleurs sans papier), souvent référée aux producteurs par des agences de placement temporaire sans scrupules. Bien que les pratiques en matière de salaire et de SST soient variables, de nombreux travailleurs agricoles sont victimes d'exploitation. De plus, la gouvernance privée (qui s'étend à l'horticulture à travers les codes de conduite des supermarchés et de d'autres types d'agences de placement en période de pointes) ne s'avère pas efficace. Tous ces codes établissent leurs normes à partir des conditions légales minimales d'emploi, et tous comportent des échappatoires qui permettent d'échapper à l'attention, les infractions demeurant impunies.

En 2015, l'attention médiatique et politique s'est portée sur les conditions de travail des travailleurs migrants temporaires. Des enquêtes gouvernementales ont fait ressortir la présence d'exploitation, sans toutefois donner lieu à des solutions partagées. Des politiciens progressistes (influencés par les syndicats) se sont déclarés en faveur d'un renforcement du pouvoir de l'État et d'un meilleur encadrement des agences de placement temporaire. Cependant, des politiciens conservateurs (influencés par les lobbies d'affaires) ont soutenu que cette approche était vouée à l'échec, préférant le statu quo. En conséquence, toute tentative de réforme politique est demeurée au point mort.

Cette étude illustre l'importance des processus politiques qui façonnent le lien étroit entre la régulation étatique et la gouvernance privée. Dans le cas présent, l'impasse politique qui subsiste rend tant la réglementation que la gouvernance déficiente. Sans protection de l'une et de l'autre, les travailleurs agricoles demeurent sujets à de l'exploitation et à des conditions de travail difficiles.

**MOTS-CLÉS :** supervision des activités, chaînes d'approvisionnements, codes de conduite, agence de placement temporaire, travailleurs migrants temporaires, horticulture.

## RESUMEN

### Gobernanza privada, regulación estatal y normas de empleo: Cómo los factores políticos configuran sus conexiones en la horticultura australiana

En una economía globalizada, la debilidad de la negociación colectiva y de la regulación estatal ha suscitado un interés creciente en la protección del empleo a través de la gobernanza privada. Sin embargo, el escepticismo sobre la eficacia de los códigos de conducta sin supervisión que parecen entrar en conflicto con la disciplina externa asociada a la regulación estatal. Este artículo pretende contribuir al debate sobre los procesos que configuran las conexiones entre gobernanza privada y regulación estatal.

Se basa en un estudio empírico sobre los trabajadores australianos de la cosecha que benefician formalmente de la reglamentación estatal sobre la remuneración y la salud y seguridad ocupacional (SSO). Sin embargo, los cambios en la industria han socavado la aplicación de las normas. Las presiones ejercidas por los supermercados sobre el mercado de productos han reducido la capacidad de pago de los cultivadores. De otro lado, el mercado de trabajo australiano está cada vez más invadido por una mano de obra temporal migrante proveniente de Asia (incluyendo los trabajadores indocumentados), que es referida a los productores por las agencias de empleo temporal sin escrúpulos. A pesar que las prácticas en materia de salario y de SSO son variables, numerosos trabajadores agrícolas son víctimas de explotación. Además, la gobernanza privada (que se extiende a la horticultura a través de los códigos de conducta de los supermercados y de las agencias de empleo temporal durante los periodos de punta) no parece ser eficaz. Todos los códigos establecen sus normas a partir de condiciones legales mínimas de empleo y todos ellos contienen escapatorias que permiten dejar las infracciones en la penumbra y sin penalidad.

En 2015, la atención mediática y política se focalizó en las condiciones de trabajo de los trabajadores migrantes temporales. Las encuestas gubernamentales hicieron resaltar la presencia de explotación, sin dar lugar a soluciones compartidas. Políticos progresistas (influenciados por los sindicatos) se declararon en favor de un reforzamiento del poder del Estado y de un mejor encuadramiento de las agencias de empleo temporal. Sin embargo, los políticos conservadores (influenciados por los lobbies empresariales) afirmaron que este enfoque estaba dirigido al fracaso, prefiriendo el statu quo. Por consecuencia, la reforma política se estancó.

Este estudio ilustra la importancia de los procesos políticos en la modulación de los vínculos estrechos entre la regulación estatal y la gobernanza privada. En el caso presente, un impase político que subsiste mantiene deficiente tanto la regulación como la gobernanza. Sin protección de una y de la otra, los trabajadores agrícolas siguen siendo sujetos a explotación y a condiciones de trabajo difíciles.

**PALABRAS CLAVES:** regulación de la cadena de suministro, códigos de conducta, agencias de trabajo temporal, trabajadores migrantes temporales, horticultura.