

How Effective Are Legal Interventions for Addressing Precarious Work? The case of Temporary Migrants in the Australian Horticulture Industry

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Abstract

A significant body of academic literature and popular media has explored the vulnerability of temporary migrant workers working in the Australian horticulture industry and abroad. This vulnerability is largely attributed to the low skilled nature of harvest work, which is often physically demanding, occurs in remote locations, requires long hours and characterised by a low level of trade union oversight and representation. In Australia, the majority of low-skilled horticultural workers are visa holders, either Working Holiday Makers or Pacific workers. In this context, this article considers the role of legal and institutional frameworks in both creating and responding to vulnerability to labour exploitation in the horticulture industry. The article draws upon a review and analysis of novel regulatory approaches in overseas industries comparable to the Australian horticulture industry to understand the potential of regulation to alleviate worker vulnerability. This comparative analysis provides insights into the regulatory potential of atypical types of regulation to consider the extent to which these regulations are effectively enforced and have a real impact on the protection of migrant workers' rights. The article concludes by examining whether regulation can be used more effectively in the Australian context to address the vulnerability of Working Holiday Makers and Pacific workers in the horticulture industry and to minimise the incidence of labour exploitation.

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I. Introduction

There is now considerable evidence of the precarity of temporary migrant workers employed in the Australian horticulture industry.¹ This is largely attributed to the low-skilled nature of farm work, which is often physically demanding, occurs in remote locations, requires long hours and is characterised by a low level of trade union oversight and representation. These factors, which combine to produce labour market vulnerability for farm workers, are exacerbated by the fact that the horticulture industry is heavily reliant on different types of temporary visa holders,² through visa programs which are poorly regulated and managed.³ In this context, this paper addresses the following research question: whilst legal and institutional frameworks play a significant role in creating vulnerability to labour exploitation in certain industries such as the Australian horticulture industry, what role can and do legal interventions perform in meaningfully counteracting or addressing precarious work?⁴

The first part of the paper briefly reviews the literature to identify why the Australian horticulture industry faces a persistent challenge of exploitative work and the extent to which this is created by weak or absent regulation. This section concludes by suggesting that there are a number of factors causing poor compliance with labour standards in the Australian horticulture industry, including labour market segmentation through reliance on different sources of visa workers, poorly designed and enforced visa programs, the absence of regulation of labour hire and accommodation providers and poor enforcement of labour standards and, in particular, provisions on the payment of piece rates.

The second section of the paper undertakes a comparative analysis between regulatory interventions in industries based overseas and the Australian horticulture industry. In this section, we examine two cases: first, the introduction of an employer permit scheme in the Irish fishing industry and second, the introduction of a new visa scheme for Pacific workers in the New Zealand horticulture industry. Each of these regulatory interventions was designed to regulate, at least in part, seemingly intractable problems of temporary migrant worker vulnerability in these industries.

¹ See, generally, Caro Meldrum-Hanna and Kerry O'Brien "Slaving Away: The Dirty Secrets behind Australia's Fresh Food" (4 May 2015) Four Corners <www.abc.net.au>; Fair Work Ombudsman *Harvest Trail Inquiry: A Report on Workplace Arrangements along the Harvest Trail [Harvest Trail Inquiry]* (November 2018); Ben Doherty "Hungry, Poor, Exploited: Alarm over Australia's Import of Farm Workers" *The Guardian (Australia)* (online ed, Sydney, 3 August 2017); Nick McKenzie and Richard Baker "Fruits of their Labour: Investigation into Exploitation of Migrant Fruit Picking Workers in Australia" (November 2016) *The Sydney Morning Herald* (online edition, Sydney, November 2016); Elsa Underhill and Malcolm Rimmer "Layered Vulnerability: Temporary Migrants in Australian Horticulture" (2015) 58 JIR 608; Senate Education and Employment References Committee, Parliament of Australia *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (17 March 2016); Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia* (December 2017); and Fair Work Ombudsman *Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program [Inquiry into Wages and Conditions]* (October 2016).

² Joanna Howe and others *Sustainable Solutions: The Future of Labour Supply in the Australian Vegetable Industry* (Horticulture Innovation Australia, 2017). Similarly, a 2016 study conducted by the Australian Bureau of Agricultural and Resource Economics and Sciences found that close to 70 per cent of seasonal horticulture workers were visa holders: Hayden Valle, Niki Millist and David Galeano *Labour Force Survey* (Department of Agriculture and Water Services, Australia, May 2017) at 6.

³ Joanna Howe and others "Towards a durable future: Tackling labour challenges in the Australian horticulture industry" (January 2019) The University of Sydney <sydney.edu.au>.

⁴ For more on precarious work, see Judy Fudge and Rosemary Owens *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (Hart Publishing, Oxford, 2006); See also Nicola Kountouris "The Legal Determinants of Precariousness in Personal Work Relations: A European Perspective" (2012) 34 CLLPJ 21; and Laurie Berg *Migrant Rights at Work: Law's Precariousness at the Intersection of Immigration and Labour* (Routledge, Abingdon, 2016).

Undertaking such a comparative analysis provides insights into the regulatory potential of different forms of regulation to address the challenge of worker vulnerability which in some industries, like the Australian horticulture industry, appears widespread and systematic. The article concludes by considering whether the types of regulatory interventions explored in the second section can be appropriated in the Australian context to address the vulnerability of temporary migrant workers in the horticulture industry.

II. The Australian Horticulture Industry and the Persistent Problem of Migrant Worker Exploitation

A significant and growing body of evidence suggests that non-compliance is widespread in the Australian horticulture industry. Growers and labour hire contractors acting in their individual, short-term interests have been found to underpay wages and otherwise mistreat workers. The media has been a source of much information on non-compliance.⁵

The Australian horticulture industry is increasingly reliant on a temporary migrant workforce. There are a number of different types of temporary visa holders employed in low-skilled work as pickers, packers and graders. These are: Working Holiday Makers (WHMs), Seasonal Workers from the Pacific in the Seasonal Worker Program (SWP), annual workers from the Pacific in the Pacific Labour Scheme (PLS) and international students. Of these four types of temporary migrants, WHMs are by far the most common source of harvest labour used in Australia; however, their engagement varies regionally. In 2017–18, 36,617 WHMs were granted a second-year extension on their visa, with a likely 90 per cent of these earning this extension through working for 88 days in the horticulture industry. In contrast, in that same year, only 8,459 workers from the Pacific on the SWP were employed in horticulture. The PLS only came into effect on 1 July 2018 and there is only one PLS employer approved to sponsor Pacific workers in horticulture. The number of international students working in horticulture is unknown. Undocumented workers are also prevalent in the horticulture industry, although it is impossible to determine the extent and nature of their involvement. Evidence from a recent report suggests that the numbers of undocumented workers also vary from region to region, with virtually no presence in some regions, and in others, amounting to almost all the harvest workforce.⁶

The competition between visa classes contributes to non-compliance with labour standards because of the different regulatory architecture of different visas, and whether a worker has a documented or undocumented status, makes some groups of visa workers more likely to accept wages and conditions which do not comply with the law. Although there is a universal dimension to the challenge of addressing the exploitation of temporary migrant workers in developed countries' horticulture labour markets, in neither Canada,⁷ New Zealand,⁸ the United

⁵ Ben Doherty, above n 1; ABC, above n 1; and McKenzie and Baker, above n 1.

⁶ Howe and others, above n 3.

⁷ Employment and Social Development Canada "Hire a Temporary Worker through the Seasonal Agricultural Worker Program: Overview" (18 September 2018) Government of Canada <www.canada.ca>; See also Marie-Hélène Budworth, Andrew Rose and Sara Mann *Report on the Seasonal Agricultural Worker Program* (Inter-American Institute for Cooperation on Agriculture Delegation in Canada, March 2017) <repositorio.iica.int>.

⁸ Charlotte Elisabeth Bedford "Picking Winners? New Zealand's Recognised Seasonal Employer (RSE) Policy and its Impact on Employers, Pacific Workers and Their Island – Based Communities" (PhD Thesis, University of Waikato, 2013); and Richard Curtain and others "Pacific Seasonal Workers: Learning from the Contrasting

States,⁹ nor Sweden,¹⁰ is there segmentation arising from so many different visa types as there is in Australia.

There is also significant evidence of wage underpayments in horticulture, particularly among WHMs, in academic research,¹¹ parliamentary inquiries¹² and in publications from the Fair Work Ombudsman (FWO).¹³ A FWO report found that 39 per cent of horticulture employers were non-compliant with labour standards.¹⁴ The FWO's Harvest Trail Inquiry recovered over a million dollars in wages but its report indicated the FWO's belief "*that the full extent of wage underpayments is significantly higher than this*".¹⁵ In 2016, another FWO report, following a two-year inquiry into the performance of work by WHMs, found that more than one-third of WHMs surveyed were paid less than the minimum wage, 14 per cent had to pay to secure regional work and six per cent had to pay an employer to "sign off" on their regional work requirement.¹⁶

In 2017, an online survey of 4,322 temporary migrants in Australia found that the worst paid jobs were in fruit and vegetable picking, where 15 per cent of respondents said they had earned \$5 an hour or less and 31 per cent had earned \$10 an hour or less.¹⁷ A three-year study investigating the conditions of work in the Australian horticulture industry found that "non-compliance is endemic and multi-faceted" and that the employment of WHMs typically involved substantial wage underpayments, with the lowest wage reported being \$1 an hour.¹⁸

A number of factors contribute to non-compliance in Australian horticulture. Workers are vulnerable to mistreatment when working in remote locations, particularly when they do not have their own transport. In Australia, WHMs are required to work in horticulture for a certain period in order to obtain a visa extension.¹⁹ This possibility of a visa extension introduces a condition that makes WHMs highly dependent on employers. According to the Fair Work Ombudsman, this visa extension has created:²⁰

... a cultural mindset amongst many employers wherein the engagement of 417 visa holders is considered a licence to determine the status, conditions and remuneration levels of workers ... without reference to Australian workplace laws.

Temporary Migration Outcomes in Australian and New Zealand Horticulture" (2018) 5 Asia Pac Policy Stud 462 at 471.

⁹ Philip Martin *Immigration and Farm Labor: From Unauthorized to H-2A for Some?* (Migration Policy Institute, August 2017) <www.migrationpolicy.org>.

¹⁰ Bjarke Refslund and Annette Thörnquist "Intra-European labour migration and low-wage competition—comparing the Danish and Swedish experiences across three sectors" (2016) 47 IRJ 62.

¹¹ Underhill and Rimmer, above n 1.

¹² Senate Education and Employment References Committee, above n 1; and Joint Standing Committee on Foreign Affairs, Defence and Trade, above n 1.

¹³ Fair Work Ombudsman, *Inquiry into Wages and Conditions*, above n 1.

¹⁴ Fair Work Ombudsman *Horticulture Industry Shared Compliance Program 2010* (Final Report, November 2010) at 1.

¹⁵ Fair Work Ombudsman *Harvest Trail Inquiry*, above n 1, at 4 (emphasis added).

¹⁶ Fair Work Ombudsman, *Inquiry into Wages and Conditions*, above n 1.

¹⁷ Laurie Berg and Bassina Farbenblum "Wage Theft in Australia: Findings of the National Temporary Migrant Worker Survey" (21 November 2017) Migrant Worker Justice Initiative <static1.squarespace.com> at 30.

¹⁸ Howe and others, above n 3.

¹⁹ Fair Work Ombudsman *Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program*, above n 1.

²⁰ At 33.

Other groups of temporary migrant workers are also vulnerable. SWP workers rely on continuing sponsorship from their employers to remain in Australia and to return. Undocumented workers have limited access to jobs in Australia and rely on farm work to earn an income. Many of these workers also possess the usual vulnerabilities common to temporary migrants and young workers, such as poor English language skills and temporary migration status.

The financial circumstances of growers can create downward pressure on wages. Growers interviewed reported rising costs but stagnant income in recent decades. The nature of the product market contributes to this, with 73 per cent of it made up of only two supermarkets which use price competition to keep wholesale prices down,²¹ even below cost price in some cases.²²

There are also quite weak employment law enforcement institutions. The FWO has limited capacity to effectively enforce employment laws due to the geographically dispersed locations of farms, difficulties locating some labour hire contractors and under-resourcing of the inspectorate.²³ Unions also have a limited, albeit growing, presence in the horticulture sector. Additionally, the industry's reliance on unregulated labour hire contractors and accommodation providers to source, transport and house its workforce has created greater opportunities for migrant worker exploitation.²⁴

Thus, it is clear that horticulture workers in Australia are a vulnerable workforce. This vulnerability is created by inherent aspects of low skilled farm work, but is exacerbated by the dominant use of visa holders in the industry, in particular WHMs and, to a lesser extent, Pacific workers, and the regulatory design of these two visas contributes to migrant workers' labour market vulnerability. The dependence of Pacific workers on employer sponsorships to remain in Australia, and for the opportunity to return for subsequent harvest seasons, creates an unwillingness to question or report exploitative treatment by their employer. Likewise, for WHMs, the regulatory incentive to complete a period of work on a farm in order to attain a visa extension also contributes to their susceptibility to exploitation. Furthermore, the existence of a large cohort of undocumented migrant workers produces a core horticulture workforce that is unable to report workplace exploitation because of fear of deportation. This segmentation of the temporary migrant workforce, coupled with the poor enforcement of labour standards in the industry, has entrenched precarious work as a norm in the Australian horticulture industry.²⁵

²¹ Senate Education and Employment References Committee, above n 1; and Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, above n 1.

²² See, generally, Chloe Booker "Big supermarkets blamed for driving 'ridiculous' strawberry prices" *The Sydney Morning Herald* (online ed, Sydney, 19 September 2016).

²³ Stephen Clibborn and Chris F Wright "Employer Theft of Temporary Migrant Workers' Wages in Australia: Why has the State Failed to Act?" (2018) 29 ELRR 207.

²⁴ Joanna Howe and others "A critical examination of the relationship between growers and labour hire intermediaries in the Australian Horticulture industry" (2019) 32 AJLL 83.

²⁵ Joanna Howe and others "Slicing and Dicing Work in the Australian Horticulture Industry: Labour Market Segmentation within the Temporary Migrant Workforce" (2020) FL Rev (forthcoming).

III. Comparative Examples of Legal Intervention to Address Precarious Work

This section of the paper considers the introduction of two new forms of legal intervention to address precarious work in Ireland and New Zealand. Although mindful of the challenges of comparative study,²⁶ these two countries have been selected as the focus for this comparative study for two reasons. Both are advanced and developed economies which, like Australia, rely on temporary migrant labour in low-skilled sectors where attracting a supply of local workers has proven challenging. Further, these two jurisdictions have many of their legal fundamentals in common. Legal origins theory recognises that Australia, Ireland and New Zealand are from the same legal family, with all three adopting the United Kingdom's common law system and Westminster political system.²⁷ These jurisdictions are social democracies and have a common economic system. These characteristics suggest that labour migration policy in relation to temporary migrant workers in Australia, Ireland and New Zealand share similar foundations.

In both Ireland and New Zealand, a new regulatory scheme was introduced to address a seemingly intractable problem of temporary migrant worker vulnerability in a particular industry. In the case of Ireland, a new system of employer permits was introduced by the government to address reports of systematic human trafficking and substantial migrant worker exploitation in the fishing industry. In New Zealand, a new visa scheme was introduced to meet the horticulture industry's labour needs whilst seeking to guarantee a more effective system of protection for vulnerable temporary migrant workers from the Pacific. This section considers the impetus for the introduction of these new forms of regulation, their effect on driving greater employer compliance with labour standards and their ability to remedy worker vulnerability.

A. *The Introduction of a New Atypical Work Scheme for the Irish Fishing Industry*

In 2015, after a *Guardian* newspaper investigation revealed the severe exploitation of Irish migrant fisherman, the Irish Government convened a special Taskforce to develop recommendations to improve compliance with labour laws in the Irish fishing industry.²⁸ This industry was heavily reliant on temporary migrant workers from the European Economic Area.²⁹ As with horticulture, the Irish fishing industry has inherent requirements that made it more likely to produce exploitation in its workforce: the work is seasonal, physically demanding and dangerous, often informally arranged and in isolated locations. Typically, prior to 2015, the migrants worked as "share fishermen", in that they were not deemed employees, because they received a share of the vessel's catch rather than a regular wage. The media investigation exposed that many of the workers were in a human trafficking situation and were confined to their vessels, not receiving rest days and typically earning less than GBP 500 for unlimited hours over a monthly period.³⁰ The intergovernmental Taskforce proposed a new atypical work scheme which would create an additional regulatory apparatus intended to

²⁶ Otto Kahn-Freund *Labour and the Law* (2nd ed, Stevens & Sons, London, 1977) at 117; see also Konrad Zweigert and Hein Kötz *An Introduction to Comparative Law* (3rd ed, Oxford University Press, Oxford, 1998).

²⁷ Rafael La Porta and others "Legal Determinants of External Finance" (1997) 52 J Fin 1131; Rafael La Porta and others "Law and Finance" (1998) 106 J Pol Econ 1113; and Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer "Corporate Ownership around the World" (1999) 54 J Fin 471.

²⁸ Felicity Lawrence and others "Revealed: trafficked migrant workers abused Irish fishing industry" *The Guardian* (online ed, London, 2 November 2015).

²⁹ Migrant Rights Centre Ireland "Left High and Dry – The Exploitation of Migrant Workers in the Irish Fishing Industry" (December 2017) <www.mrci.ie>.

³⁰ Felicity Lawrence and others, above n 28.

remedy the vulnerability of migrant workers in the Irish fishing industry.³¹ Under this scheme, 500 12-month permits were made available to workers, requiring that the worker enter into a contract of employment with the fishing boat license holder (the employer) and that the contract of employment operate before the worker travels to Ireland. In the pre-approval application stage, the employer was required to supply a range of documents and the contract of employment to the relevant regulatory body and demonstrate that they can provide an adequate level of healthcare to the employee. The scheme was also intended as a mechanism to encourage undocumented migrant fisherman to come forward and regularise their status by moving onto a work permit which gave them a right to work in the Irish fishing industry.

Within three years of the introduction of the atypical work scheme, it was patently clear that it did not drive greater compliance with labour standards in the Irish fishing industry. The first issue was that very few employers signed up to the scheme and arranged for work permits for their migrant workforce. Of the 500 permits available at the end of June 2017, only 199 were taken up.³² The International Transport Workers Federation considered that employers were reluctant to sign up to an employment contract in order to avoid paying the minimum wage.³³ It was also noted that employers did not want to engage with the levels of formality associated with the scheme and the solicitor's fees associated with certifying the contract were too expensive. Thus, many fishing operators ignored the scheme altogether by employing undocumented migrant workers, a situation which has been made possible through fragmented and weak enforcement of the permit system.³⁴

Accompanying the introduction of the scheme was the appointment of 10 inspectors who were trained and made available for fisheries enforcement operations. Their target was to oversee the Irish fishing fleet of 176 vessels which were over 15 metres in length, and thus likely to engage a temporary migrant fishing crew because of their larger scale of operation.³⁵ In the first six months of the scheme's operation, the inspectorate had undertaken 208 inspections, including 150 pertaining to the 176 vessels over 15 metres in length, detecting almost 200 contraventions and embarking on five prosecutions.³⁶ These inspections were largely pre-arranged "educational" visits, although the inspectorate did launch two strategic investigations, "Operation Egg Shell" and "Operation Trident", which involved several unannounced inspections focussing on uncovering human trafficking and labour exploitation in the fishing industry.³⁷

Nonetheless, it appears that the appointment of new inspectors and their enforcement activities did little to disrupt the normal practice of relying on undocumented workers, the pre-existing human trafficking networks and the wage underpayments, long hours and unsafe practices which had characterised the industry prior to the scheme's introduction. A hearing of the Joint Committee on Jobs, Enterprise and Innovation in July 2017 was told that the enforcement

³¹ Simon Coveney *Report of the Government Taskforce on non-EEA Workers in the Irish Fishing Fleet* (Department of Agriculture, Food and the Marine, 14 December 2015).

³² Workplace Relations Commission *Report on WRC Enforcement of the Atypical Worker Permission Scheme in the Irish Sea Fishing Fleet* (June 2017) <www.workplacerelations.ie> at 7.

³³ Clíodhna Murphy "Tackling Vulnerability to Labour Exploitation through Regulation: The Case of Migrant Fishermen in Ireland" (2017) 46(3) *ILJ* 417 at 428.

³⁴ Paul O'Donoghue "'The system is a joke': A quarter of Irish fishing vessels caught with illegal workers" (9 April 2017) *TheJournal.ie* <www.thejournal.ie>.

³⁵ Workplace Relations Commission, above n 32, at 8.

³⁶ At 3.

³⁷ At 10.

system was ineffective and that “gross forms of exploitation” were continuing,³⁸ with a recent survey of migrant fisherman finding that around one-third of migrant workers reported routine verbal and physical abuse and nearly half of migrant workers reported injuries, such as serious cuts and crushed limbs, in addition to feeling unsafe as a result of exhaustion from long working-hours and sleep deprivation.³⁹

Media stories continued to expose human trafficking after the introduction of the atypical work scheme⁴⁰ and, in 2018, the United States Department of State’s *Trafficking in Persons* report criticised the Irish Government’s failure to adequately protect victims of trafficking for sexual exploitation and labour abuse, and failure to convict traffickers.⁴¹ This was followed in 2019 with an open letter by four UN rapporteurs issuing a strong rebuke to the Irish government, saying they had received information that the permits were making migrants from outside the EU vulnerable to modern slavery and serious abuse on Irish fishing vessels.⁴² In that same year, the International Transport Federation (ITF) sought an injunction against the atypical work scheme and the issuing of work permits on the basis that the scheme sanctioned “modern day slavery”.⁴³ Although ultimately unsuccessful, this legal action did lead to a settlement between the ITF and the Irish government which involved a new immigration agreement stipulating that non-European workers will no longer be tied to individual employers, and a commitment by the government to introduce new measures to reinforce regulations on pay, hours of work, hours of rest and minimum safe manning on fishing vessels.⁴⁴ The agreement also stipulated tougher sanctions on employers in breach of the atypical work scheme, improved cooperation between government departments responsible for enforcement, preventing boat owners from deducting permit fees from fishers’ wages and providing information about employment rights to migrant workers in their language.⁴⁵

Although it is too early to tell whether the 2019 reforms will be effective, it is clear that the original regulatory intervention introducing the permit system had very little success in meeting its objectives. Irish scholar Cliodhna Murphy suggests that, within the Irish fishing industry, there was a “continuum of exploitation” of migrant workers, ranging from relatively minor breaches of the law to trafficking and slavery.⁴⁶ She notes that labour law regulation has to be capable of responding to the different regulatory challenges produced by different types of exploitative work. Other scholars have observed how the “modern slavery” frame of criminal law and trafficking focusses on “individualised instances of domination” and thus operates to exclude analyses that attempt to account for how states are involved in structuring labour

³⁸ See Edel McGinley in Joint Committee on Jobs, Enterprise and Innovation “Atypical Work Permit Scheme: Discussion” (4 July 2017) Houses of the Oireachtas.

³⁹ Joint Committee on Jobs, Enterprise and Innovation, above n 38.

⁴⁰ Felicity Lawrence and Ella McSweeney “‘We thought slavery had gone away’: African men exploited on Irish boats” *The Guardian* (online ed, London, 18 May 2018).

⁴¹ United States Department of State *Trafficking in Persons Report* (June 2018).

⁴² Felipe González Morales and others *Mandates of the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences; and the Special Rapporteur on trafficking in persons, especially women and children* UN Doc OL IRL 1/2019 (12 February 2019).

⁴³ Aodhan O’Faolain “Group alleging ‘slavery’ in fishing industry denied injunctions” *The Irish Times* (online ed, Dublin, 7 December 2018).

⁴⁴ International Transport Workers’ Federation “ITF secures major agreement to protect migrant workers in the Irish fishing industry” (press release, 23 April 2019).

⁴⁵ International Transport Workers’ Federation, above n 44.

⁴⁶ Cliodhna Murphy “Tackling Vulnerability to Labour Exploitation through Regulation: The Case of Migrant Fishermen in Ireland” (2017) 46(3) ILJ 417.

markets for migrant workers that encourage exploitative practices by employers.⁴⁷ In the case of the atypical work scheme, in its first three years of operation, it was ineffective in either detecting and disrupting human trafficking, or in ensuring the enforcement of minimum legal standards in relation to pay, rest breaks and other conditions under the contract of employment.

A key aspect in the scheme's limited success in the first three years of operation was the limited buy-in by the Irish fishing industry, who were largely resistant to its introduction. Murphy attributes this to the fact that the scheme was designed by an inter-departmental Taskforce comprised solely of government agencies, to the exclusion of fish producers and migrant worker support groups. This then had the effect of producing a new scheme which was being introduced 'within a regulatory vacuum',⁴⁸ but which introduced a substantial level of regulation, with the pre-approval mechanism for securing work permits being costly, administratively complex and time-consuming for employers. In giving evidence to a government committee hearing, a fishing industry representative was critical about the lack of engagement with industry when designing the scheme and the failure to take into account the practical realities of fishing operations:⁴⁹

Only one consultation was held with fishing industry experts prior to the atypical scheme. It would have been preferable if the industry had been fully included in its drafting. There is a consensus among fishermen with whom I have spoken that the complexities of how vessels operate and how operators often have to change a plan of operation in a moment was not understood or taken into consideration.

It is also notable that the fishing industry disputed the need for the atypical work scheme, largely rejecting claims of endemic exploitation of temporary migrant workers. Industry representatives tended to characterise the reported stories of exploitation and trafficking situations as isolated examples. One industry representative told a government hearing that "there probably are rogue operators in the Irish fishing industry, like any other industry and they need to be weeded out"⁵⁰ but was disappointed that:⁵⁰

... very little of a positive nature has been said in the media about, for example, those in my organisation who are fully compliant with the atypical scheme for migrant workers and who are paying well above the minimum wage.

Another industry representative accused the ITF and the Migrant Rights Centre of giving false evidence to the Government hearing about the extent of non-compliance with labour standards in the industry. He stated:⁵¹

⁴⁷ Judy Fudge "Migrant Domestic Workers in British Columbia, Canada: Unfreedom, Trafficking and Domestic Servitude" in Howe and Owens eds *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (Hart Publishing, Oxford, 2016) at ch 7; See also Genevieve LeBaron "Unfree Labor Beyond Binaries: Insecurity, Social Hierarchy, and Labor Market Restructuring" (2015) 17 IFJP 1 at 2.

⁴⁸ Murphy, above n 46.

⁴⁹ See Patrick Murphy in Joint Committee on Jobs, Enterprise and Innovation "Atypical Work Permit Scheme: Discussion (Resumed)" (21 September 2017) Houses of the Oireachtas.

⁵⁰ See Francis O'Donnell in Joint Committee on Jobs, Enterprise and Innovation debate, above n 49.

⁵¹ See Hugo Boyle in Joint Committee on Jobs, Enterprise and Innovation debate, above n 49.

We take issue with the fact that people who had vilified the industry with misleading and unsubstantiated accusations at every opportunity in various media were invited to come before this committee and make false allegations against the industry ... wildly inaccurate figures for [exploited] migrant workers ... have been bandied about. But of course, sensational stories make the news.

This, combined with the lack of a robust and strategic mechanism for oversight and enforcement, meant there was little incentive for employers to move to the new scheme.

B. The Introduction of a New Visa for Pacific Workers in the New Zealand Horticulture Industry

The Recognised Seasonal Employer (RSE) scheme was introduced in New Zealand in 2007.⁵² The scheme had the twin aims of meeting the labour needs of employers in horticulture and viticulture, and providing work opportunities to workers from Pacific Island countries, as part of New Zealand's contribution to the economic development in these countries. The visas are for a maximum of 11 months.⁵³ In 2017, the cap on migrant workers under the scheme was 11,000,⁵⁴ but this was increased in 2019 to 14,400.⁵⁵

A key driver for the introduction of the RSE was the horticulture industry's reliance on undocumented workers and the poor level of labour standards more generally. According to an industry association official, prior to the introduction of RSE, there were over 17,000 undocumented workers in the industry, comprising almost a third of its harvest workforce. In an interview he stated:⁵⁶

The policy driver [for RSE] was all about changing the behaviour of our industry. And the carrot was RSE ... we had to change our industry because government was going to throw the book at our industry. So we had to change our industry as we would have been unviable without those illegal workers. So we understood we needed to change our industry, so we all came together.

Alongside the introduction of the RSE in 2007, the New Zealand Government increased its efforts to detect and deport undocumented workers employed in the horticulture industry,⁵⁷ and closed down pre-existing visa pathways for workers from Asia and Pacific allowing temporary work in horticulture. These two reforms meant that growers had less access to a cheaper, unregulated labour source once the RSE was introduced, although there remained an incentive for WHMs to work in horticulture to gain a three-month visa extension.

The RSE introduced a robust pre-approval mechanism for growers, including labour hire contractors seeking to supply labour to the industry. The program requires growers to apply to

⁵² Immigration New Zealand "Recognised Seasonal Employer (RSE) scheme research" <www.immigration.govt.nz>.

⁵³ Immigration New Zealand "Operational Manual" (19 June 2017) <www.immigration.govt.nz> at WH1.15.6.

⁵⁴ At WH1.15(a)(c).

⁵⁵ Immigration New Zealand, above n 52.

⁵⁶ Howe and others, above n 3, at ch 13.

⁵⁷ Richard Curtain "New Zealand's Recognised Seasonal Employer Scheme and Australia's Seasonal Worker Program: Why So Different Outcomes?" (paper presented to New Research on Pacific Labour Mobility Workshop, Australian National University, Development Policy Centre, Canberra, 2 June 2016).

become an RSE employer before accessing temporary migrant workers, and to be subject to additional checks and balances on the ongoing employment of Pacific workers through the RSE, including regular audits, an annual accommodation inspection and union induction for workers. Although the New Zealand horticulture industry has been identified as a key industry in which exploitation of temporary migrants occurs, this has been largely identified as involving other cohorts of temporary migrant labour rather than RSE workers, such as international students, WHMs and undocumented workers on tourist visas without an entitlement to work.⁵⁸ A government official referred to RSE workers as “the best protected migrant workers in New Zealand”.⁵⁹ This view is supported by an interview with a union official, saying that the RSE has been largely effective in improving compliance by those growers participating in the scheme and in removing the industry’s dependence on undocumented workers provided by unscrupulous labour hire contractors:⁶⁰

Before the RSE came in, 90 per cent of the contractors were crooks, with the RSE coming in, it has improved, but there’s still a certain amount of things going on, such as excessive deductions for rent, linen, and petrol but it is much better than it was. Most of ours here are getting at least the minimum wage which is \$16.50 and going up another dollar in April to \$17.50 and Labour’s promised to put it up to \$20 by the end of their first term. Maybe some of the contractors outside of the RSE are paying them bugger all, but within the RSE, I don’t think so, at least the minimum wage is paid.

A key aspect of the RSE’s success is the strong and enforced penalties for growers who fail to comply with its requirements and the likely adverse impact of this on their reputational risk, given their supply of fresh produce to European export markets who are more conscious of buying products within ethical labour supply chains, often indicated through Global GAP accreditation.⁶¹ Growers can lose their RSE status if they engage labour contractors who are non-compliant with labour standards or are unregistered. Growers and contractors who are expelled from the RSE are subsequently “blacklisted” for a period of months or years, and their names are published on a Government website. As the quote below indicates, while the system is not foolproof,⁶² greater regulation has reduced the prevalence of labour exploitation and grower undercutting. According to an immigration compliance officer:⁶³

RSE employers never have illegal workers in their workforce. MBIE’s Immigration Compliance team monitors RSE employers very closely. RSE employers are asked to set up a system of pre-employment checks and demonstrate that they are using Visa View. Because employers know we have compliance officers and they are regularly monitored, they don’t want to do anything to jeopardise their RSE status. Just the thought of having their RSE status rescinded means they don’t want to go near illegal workers.

⁵⁸ Francis Collins and Christina Stringer *Temporary Migrant Worker Exploitation in New Zealand* (Ministry of Business, Innovation and Employment, July 2019) <<https://www.mbie.govt.nz/dmsdocument/7109-temporary-migrant-worker-exploitation-in-new-zealand>>.

⁵⁹ Howe and others, above n 3.

⁶⁰ At ch 13.

⁶¹ For more on GlobalGAP see GlobalGAP <<https://www.globalgap.org>>.

⁶² See, generally, Workers First “Union calls on Coalition Gov’t to reassess RSE scheme” (January 17 2019) <workersfirst.nz>.

⁶³ Howe and others, above n 3, at ch 13.

Another more recent reform introduced a mechanism for enabling growers to verify that workers are legally entitled to work in New Zealand. The New Zealand Government's Ministry of Social Development has also funded and developed a Contractor ID Scheme, which developed a worker ID card that proves a worker holds a valid work visa and has a tax file number.⁶⁴ Growers can ask to see a worker's ID cards as proof of eligibility to work in New Zealand.

A key aspect of the RSE scheme is that it allows multiple growers to share Seasonal Workers through two mechanisms. The first way this occurs is through the facility known as a 'Joint Agreement to Recruit'. Many smaller and medium-sized growers have successfully used joint agreements to access RSE workers. Growers apply at the same time for a joint agreement and they can share the costs associated with the scheme, such as the contribution to up-front costs like airfares. It also means that they can provide RSE workers with a longer and more consistent term of employment. The second facility that assists small and medium-sized growers to access the RSE is the Grower Cooperatives, as these allow small growers in the same regional area to employ the same group of Seasonal Workers.

Despite the RSE increasing the level of regulation on growers, it appears that the scheme has been largely accepted by industry and growers as a key solution to the industry's labour supply challenges. The RSE is viewed positively by growers with RSE status. In a 2018 survey of RSE employers, 98 per cent believed that the benefits of participating in the scheme outweighed the costs, with 90 per cent strongly agreeing that this was the case.⁶⁵ In this same survey, 92 per cent of RSE employers expanded their area of cultivation in the past 12 months, with 86 per cent reporting that participation in the RSE was a contributing factor in the expansion because of the scheme's ability to improve labour supply as well as present and future productivity.⁶⁶

There is also strong industry buy-in and support for the RSE. The peak industry body, Horticulture New Zealand (HortNZ), employs a full-time staff member with primary responsibility for promoting the RSE amongst employers and for assisting them to access the scheme. HortNZ also coordinates a national RSE Conference, which in 2018 attracted over 200 attendees, including key representatives from government, other stakeholders and growers. HortNZ's leadership in promoting discussion and dialogue between all stakeholders within the RSE has been critical to the scheme's success and to ensuring the scheme is not used to exploit Pacific workers. HortNZ has also shown leadership on a number of key issues related to horticulture labour supply, including the industry's need to eliminate non-compliant employment practices. The CEO of HortNZ was quoted in 2018 as stating:⁶⁷

We have a lot of employers in horticulture that are not playing the game as they should. They will pull us all down. They could put the Recognised Seasonal Employer Scheme down. We have to unite to deal with them.

⁶⁴ At ch 13.

⁶⁵ James Maguire and Mark Johnson *Recognised Seasonal Employers Survey – 2018* (Working Report, Research New Zealand, 2018) at 9.

⁶⁶ At 39.

⁶⁷ Heather Chalmers "Horticulture Employers Must Clean Up Their Act to Address its Worker Shortage" (26 July 2018) Stuff <www.stuff.co.nz>.

This pressure from growers and the industry as a whole has been a critical factor in the RSE's success, as exemplified by the following quote from a government official:⁶⁸

There's a lot of pressure from other employers, no one wants to bring the scheme ruined or brought into dispute. Industry leadership has been very important to making RSE employers the most compliant of any group of employers in any industry in New Zealand. They have to do pastoral care, they have to do accommodation ... there's a lot of responsibility that comes with the rights [to access Pacific workers under the RSE] and industry's been very supportive of those extra responsibilities.

Thus, the RSE scheme introduced in New Zealand in 2007 has been largely successful on a number of levels. Firstly, the scheme has been effective in terms of its responsiveness to employer needs and, secondly, it has contributed to grower compliance with labour standards within the horticulture industry for those within the RSE. Growers report high levels of support for the program to deliver a reliable and consistent source of labour supply, and it appears that unions are largely supportive of the RSE's design and ongoing operation. Nonetheless, it does appear that the wider concerns of systematic exploitation of migrant workers within the New Zealand horticulture industry continue to exist more generally and that, within the RSE, there is scope for government and industry to more proactively draw on trade unions to provide additional monitoring and oversight of the employment of RSE workers.

C. Analysis

To varying degrees, these two case studies of legal interventions to address precarious work show that the law by itself was insufficient in fully achieving the goals of the intervention.

First, the case studies demonstrated the importance of developing a broad consensus in favour of the legal intervention amongst key stakeholders. Developing a genuinely tripartite support base and joint stakeholder approach to reform was important in the introduction of a new visa in New Zealand, whereas the Irish example demonstrates that the absence of industry buy-in and a failure to co-design a regulatory intervention can lead to employers resisting the shift to a new form of regulation. In Australia, there is an absence of consensus amongst government, industry and unions on how to resolve migrant worker exploitation in the horticulture industry. Within government, there are four government departments (Home Affairs, Jobs, Agriculture, Foreign Affairs and Trade) responsible for addressing labour supply challenges in the horticulture industry and for managing different aspects of that labour supply. This fragmentation within government creates challenges when developing a coherent response to the industry's labour needs. Moreover, within the Australian horticulture industry, there is no clear consensus on how to respond to the challenge of migrant worker exploitation, with some industry groups advocating labour hire licensing and others proposing an amnesty for undocumented workers. There is also no official industry position on how to address the problem arising from the visa extension incentives in the WHM scheme which can lead to this cohort of workers being particularly susceptible to accepting precarious work.

Relatedly, the two case studies illustrate the importance of union involvement in designing and enforcing new forms of regulation aimed to address worker precarity. In the Irish example, the ITF was critical to exposing the ineffectiveness of the work permits scheme and putting

⁶⁸ Howe and others, above n 3, at ch 13.

pressure on government to reform its operation. In New Zealand, unions were critical in designing the RSE and have an ongoing role in providing worker inductions and participating in the regional and national steering groups responsible for managing the RSE. In Australia, there is a clear need for greater engagement between unions, industry and government through a formal framework to design reforms to address the labour challenges in the horticulture industry. Extensive international research has shown that multi-stakeholder forms of supply chain regulation are generally more effective at maintaining labour standards and minimising supply chain risks for lead firms and suppliers than industry-driven regulation.⁶⁹ These initiatives also provide a channel for worker involvement and participation, which can provide a valuable feedback mechanism that can allow deficiencies in supply chain regulation to be readily identified and addressed.⁷⁰ By contrast, industry-driven regulation has been criticised for being more difficult to enforce, ineffective at providing sustained improvements in working conditions, and for often being adopted by businesses whose main concern is to portray themselves as socially responsible rather than to systematically improve standards.⁷¹ Thus, it is disappointing that, in Australia, the Government has provided funding for the development of an industry-led certification scheme aimed at facilitating an improvement in labour standards but that this has not been accompanied by a stipulation that the scheme includes the involvement of unions.⁷²

The two examples demonstrate the importance of appropriately balancing the level of regulation with the needs of employers. If the regulatory burden is too onerous and does not have the requisite level of industry support, it can drive employers to find work arounds in a less formal economy, as exemplified by the Irish example. However, if the regulatory burden is too light, it can produce a situation where compliance is broadly achieved but substantive improvement is less remarkable. A key learning from the New Zealand example is that employers need to be involved in designing the regulatory intervention so that it is likely to work in practice. Although there appears to be increasing employer involvement within the management and oversight of the SWP, the lack of flexibility within the scheme compared with other readily available pools of temporary migrant workers has meant that there has been less incentive for Australian growers to move to the SWP than there was for the RSE in New Zealand.

Relatedly, the two case studies expose the importance of ensuring that less and unregulated forms of temporary migrant labour are minimised when a new regulated visa option is introduced. In Ireland, the continued supply of undocumented migrants to the fishing industry via human trafficking networks meant that employers did not need to use the new work permits scheme to source workers. In contrast, the New Zealand example, which saw the RSE's introduction accompanied by the closure of other visa options and the removal of many undocumented workers from the industry by enforcement authorities meant that growers had an incentive to apply for accreditation through the RSE. Both examples are instructive for the Australian horticulture industry which has a highly segmented labour market where there is a

⁶⁹ See generally Christina Niforou "International Framework Agreements and Industrial Relations Governance: Global Rhetoric versus Local Realities" (2012) 50 BJIR 352; and Chris F Wright and Sarah Kaine "Supply Chains, Production Networks and the Employment Relationship" (2015) 57 JIR 483.

⁷⁰ Kelly Pike and Shane Godfrey *Two Sides to Better Work – A Comparative Analysis of Worker and Management Perception on of the Impact of Better Work Lesotho* (International Labour Organization, Better Work Discussion Paper Series No 20, September 2015).

⁷¹ Niklas Egels-Zandén and Jeroen Merk "Private Regulation and Trade Union Rights: Why Codes of Conduct Have Limited Impact on Trade Union Rights" (2014) 123 JBE 461.

⁷² Growcom "Fair Farms Training & Certification Program: Information Sheet" (2018) <www.growcom.com.au>.

clear substitution effect arising from the availability of different pools of temporary migrant labour. Ruhs and Anderson note that, “[e]mployer demand for labour is malleable, aligning itself with supply: ‘what employers want’ is critically influenced by what employers ‘think they can get’ from different groups of workers”.⁷³ In Australia, although the SWP provides employers with a regulated visa option, its operation, alongside the loosely regulated WHM scheme and the substantial presence of undocumented workers, has hampered the growth of this scheme. There has been continued pressure on the Australian Government to reduce the level of regulation of the SWP over time to make it more attractive to employers but even these reforms have not reduced the “substitution effect” created by the existence of strong incentives for WHMs to work in horticulture in order to obtain a second and third year on their visa,⁷⁴ and the ready availability of undocumented workers provided to growers through labour hire contractors.

Finally, in both case studies, it is clear that the effectiveness of robust regulation depends on sound oversight and enforcement frameworks.⁷⁵ Enforcement processes need to include strong penalties for non-compliance, as well as a clear risk that non-compliant behaviour will be detected.⁷⁶ Depending on the type of intervention, this typically requires regular audits and unannounced site visits and a well-resourced independent authority to store and build on existing expertise. In the New Zealand example, the willingness of the industry peak body to monitor employers and report ongoing and wilful non-compliance to the authorities communicated to its members the importance of the new visa for Pacific workers to the viability of the industry as a whole. In Australia, the industry peak bodies appear more reluctant to acknowledge and report non-compliant growers. Furthermore, the Australian horticulture industry lacks a robust framework for oversight and enforcement of growers’ employment practices. Although the Fair Work Ombudsman (FWO), the generalist labour law regulator in Australia, has coverage over the horticulture industry and has been active in conducting inquiries and other types of enforcement action such as litigation, it acknowledges that the scale of wage underpayments, particularly in relation to piece rates, is likely to be far higher.⁷⁷ It is also revealing that FWO’s site visits have failed to detect undocumented workers on farms⁷⁸ and, similarly, although the increasing presence of unions in the industry was also created, its report on the harvest trail contains no mention of the contribution of undocumented workers to the industry’s labour force.⁷⁹ Furthermore, union coverage is not consistent or strong across the entire industry and, although the NUW’s Fair Food campaign has been effective in engaging more farm workers to join the union, their presence tends to be concentrated in certain geographical regions in Victoria and South Australia.

⁷³ Martin Ruhs and Bridget Anderson *Who Needs Migrant Workers?: Labour Shortages, Immigration, and Public Policy* (Oxford University Press, Oxford, 2010) at 16.

⁷⁴ Joanna Howe and others “A Tale of Two Visas: Interrogating the Substitution Effect between Pacific Seasonal Workers and Backpackers in Addressing Horticultural Labour Supply Challenges and Worker Exploitation” (2018) 31 AJLL 209; and Curtain and others, above n 8.

⁷⁵ For more on the importance of enforcement, see Howe and Owens, above n 47, at Ch 18.

⁷⁶ Leah F Vosko and others “The Compliance Model of Employment Standards Enforcement: An Evidence-Based Assessment of its Efficacy in Instances of Wage Theft” (2017) 48(3) IRJ 256.

⁷⁷ Fair Work Ombudsman, *Harvest Trail Inquiry*, above n 1, at 4.

⁷⁸ Per report of FWO inspector (Qld): “[W]e hear about all these illegal workers, but [when we visit farms] we just don’t see them.” See Howe and others, above n 3, at 40.

⁷⁹ See, generally, Fair Work Ombudsman *Harvest Trail Inquiry*, above n 1.

IV. Conclusion

Around the globe, temporary migrant workers often toil in workplaces with unacceptable wages and conditions. There is now considerable evidence that temporary migrant workers in the Australian horticulture industry face substantial precarity. Just as this precarity is multi-pronged, so too are the potential solutions to it. But while legal and institutional frameworks can be responsible for creating such vulnerability, legal tools may also be significant in minimising such vulnerability. In the two cases considered in this article, a number of key factors determined the effectiveness of the legal intervention in meeting the goals of the intervention and are instructive for developing reform proposals for the Australian horticulture industry.

In the Irish fishing industry, the potential for continued exploitation remained despite the introduction of the employer permits scheme. In part, this was due to the limited industry involvement and buy-in to the atypical work scheme. The regulatory burden associated with the new work permits and the costs associated with complying with it also resulted in the low take-up by both employers and workers. There was also little incentive for employers to move to the new regulated system, given that the enforcement and oversight mechanisms were weak and there remained a consistent supply of undocumented workers who could be employed with little chance of detection, without an employment contract and outside of the new work permits scheme. The precarious nature of the Irish fishing industry and the dependency of workers on sponsoring employers led to a “hyper-precarity” and “hyper-dependency” that was difficult to dissolve through the introduction of the atypical work scheme.⁸⁰ This example demonstrates the ineffectiveness of regulation which is not embedded in strong institutional, industry and stakeholder support and combined with a robust oversight and enforcement mechanism.

In contrast, the introduction of a new visa for Pacific workers in New Zealand has proven to largely be a success in reducing migrant worker exploitation and addressing employers’ labour supply needs for those employers operating within the new visa scheme. However, the success of this reform is not purely based on its legal framework but on the involvement of industry, unions and government in designing the new visa and promoting its implementation and use on a widespread basis by growers. This new visa was also accompanied by a suite of other reforms that contributed to the RSE’s success. For employers, the benefits of participating in the RSE in providing access to a stable labour supply enabling easier accreditation for the purpose of accessing export markets has also proven an important driver in moving growers into the regulated scheme. That the scheme was co-designed and continues to evolve and build in flexibilities to meet employer needs has also assisted in encouraging greater take-up.

In sum, both the Irish and New Zealand examples attest to the potential for regulation to ameliorate the precarious status of temporary migrant workers in the labour market and the importance of contextual factors, the institutional setting and other drivers which will affect the success of a new regulatory scheme. For the Australian horticulture industry, which faces an ongoing challenge of widespread non-compliance with labour standards, there is an urgent need to rethink the mix of pathways for temporary migrants into the industry, the role and function of the social partners and government departments, and the apparatus for oversight and enforcement.

⁸⁰ Mimi Zou “The Legal Construction of Hyper-Dependence and Hyper-Precarity in Migrant Work Relations” (2015) 31(2) *IJCLIR* 141.