

## IT TAKES A VILLAGE: CIVIL SOCIETY REGULATION OF EMPLOYMENT STANDARDS FOR TEMPORARY MIGRANT WORKERS IN AUSTRALIAN HORTICULTURE

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*How can civil society actors address regulatory deficiencies in complex systems? The challenge of regulating employment standards in non-unionised industries is shared by many developed countries. In industries like horticulture, violation of minimum employment standards for vulnerable temporary migrant workers is widespread and state employment regulators struggle to enforce laws. This article examines the challenge at a system level incorporating a range of civil society stakeholders. It conceptualises a regional town and its surrounding horticulture-dependent economy and society as a complex system in which stakeholders face the challenge of reputational damage among temporary migrant farm workers, threatening future labour supply. This ‘tragedy of the commons’ was created by some stakeholders acting solely in their individual interests by underpaying and otherwise mistreating the workers. Using a qualitative approach including 30 interviews, focusing on a single farming region in Queensland, Australia, this article identifies the conditions in which civil society stakeholders in a horticulture system regulate employment standards through orienting and connecting with one another to advance both individual and shared interests.*

### I INTRODUCTION

Employer non-compliance with minimum employment standards has become commonplace.<sup>1</sup> Many developed countries share the challenge of regulating

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1 Annette Bernhardt et al, ‘Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities’ (Report, Center for Urban Economic Development, National Employment Law Project, and UCLA Institute for Research on Labor and Employment, 2009); Matthew Amengual, ‘Pathways to Enforcement: Labor Inspectors Leveraging Linkages with Society in Argentina’ (2014) 67 *Industrial and Labor Relations Review* 3; Stephen Clibborn, ‘Multiple Frames of Reference: Why International Student Workers in Australia Tolerate Underpayment’ [2018] *Economic and Industrial*

employment standards, which is heightened by work increasingly taking place in complex systems, particularly given the prevalence of fragmented work structures.<sup>2</sup> It is also problematic in the context of the decline of the standard employment contract,<sup>3</sup> weakening unions and bargaining coverage across countries of the Organisation for Economic Co-operation and Development ('OECD'),<sup>4</sup> under-resourced state labour enforcement bodies<sup>5</sup> and growing vulnerable temporary migrant populations with limited access to workplace rights.<sup>6</sup>

As states and worker representatives grapple with how best to enforce employment laws, labour regulation scholarship has concentrated on the regulatory roles of these traditional employment actors. Yet, while under-researched, civil society stakeholders outside of this labour paradigm are also interested in, and exert influence over, compliance outcomes, particularly in complex systems in which regulatory deficits commonly occur. This article contributes to scholarship, addressing this under-researched aspect of regulation theory, through a case study of a single farming region, by identifying non-traditional actors involved in regulatory collaboration in a complex horticulture system and explaining the circumstances in which these phenomena occur. Non-traditional employment regulators within the system include a local council compliance officer, caravan park owners and a recruitment office manager. These key regulatory players in this case study, which are absent from extant literature, are found to influence employment law compliance by acting as 'connectors' between employees and state labour enforcement agencies, as 'gatekeepers' between vulnerable employees and employers, and as 'facilitators' of alignment of stakeholder interests.

Australia's horticulture industry, like those in many developed countries worldwide, is notable for its seasonal work, itinerant workers, geographically dispersed workplaces, negligible union presence and an immigration scheme under which work is performed. These characteristics present strong challenges to regulators, struggling with widespread violations of minimum employment

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*Democracy 1*; Senate Education and Employment References Committee, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (2016).

- 2 David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014).
- 3 Katherine V W Stone and Harry Arthurs, 'The Transformation of Employment Regimes: A Worldwide Challenge' in Katherine V W Stone and Harry Arthurs (eds), *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (Russell Sage Foundation, 2013) 1; Judy Fudge, 'The Future of the Standard Employment Relationship: Labour Law, New Institutional Economics and Old Power Resource Theory' (2017) 59 *Journal of Industrial Relations* 374, 378.
- 4 Lucio Baccaro and Chris Howell, 'A Common Neoliberal Trajectory: The Transformation of Industrial Relations in Advanced Capitalism' (2011) 39 *Politics and Society* 521.
- 5 David Weil, 'A Strategic Approach to Labour Inspection' (2008) 147 *International Labour Review* 349, 350; Stephen Clibborn, 'Why Undocumented Immigrant Workers Should Have Workplace Rights' (2015) 26 *Economic and Labour Relations Review* 465, 469.
- 6 International Labour Organization, 'ILO Global Estimates on Migrant Workers' (Report, 15 December 2015); Stephen Clibborn and Chris F Wright, 'Employer Theft of Temporary Migrant Workers' Wages in Australia: Why Has the State Failed to Act?' (2018) 29 *Economic and Labour Relations Review* 207, 214.

standards across the industry,<sup>7</sup> demanding re-examination of theoretical approaches to employment regulation.

Australia's labour inspectorate, the Fair Work Ombudsman, has noted that working holiday makers, a class of temporary migrant, are particularly vulnerable to employment law violations if they choose to undertake 88 days of work in regional areas, which is a requirement to extend their visas to a second year. This vulnerability arises from the remote working locations and visa holders' dependence on employers for their second-year visas.<sup>8</sup> The Australian Government introduced the major change to the working holiday maker temporary migration program in 2005, allowing subclass 417 visa holders to extend their visas to a second year if they worked for at least 88 days in a designated regional area during the first year of their visa.<sup>9</sup> This incentive was introduced to meet apparent labour shortages in regional areas, particularly in horticulture.<sup>10</sup> The policy change successfully encouraged considerable supply to meet fruit and vegetable farmers' seasonal demand for low-skill picking and packing labour. The number of working holiday maker visas granted increased by 246 per cent from 105 051 in 2004–05, to 258 248 in 2012–13, before dropping to 239 592 in 2013–14.<sup>11</sup>

It is well established that this policy placed employees in dependent relationships with their employers and that there have been many breaches of employment standards in Australian horticulture.<sup>12</sup> In order to receive the second-year visa extension, employees are required to provide to immigration authorities certification of relevant work performed in the form of documents signed by their employers. For many of these workers their dependence on employers exists alongside the usual vulnerabilities common to temporary migrant and young workers. Farmers have also faced rising costs and stagnant income in recent decades. They are under considerable pressure in the product market, 73 per cent of which is made up of only two supermarkets which use price competition to keep

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7 Michael Holley, 'Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights' (2001) 18 *Hofstra Labor and Employment Law Journal* 575; Elsa Underhill and Malcolm Rimmer, 'Layered Vulnerability: Temporary Migrants in Australian Horticulture' (2016) 58 *Journal of Industrial Relations* 608; Fair Work Ombudsman, 'Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program' (Report, October 2016) 48–50; Joanna Howe et al, 'Sustainable Solutions: The Future of Labour Supply in the Australian Vegetable Industry' (Report, The University of Adelaide, 1 February 2017).

8 Fair Work Ombudsman, 'Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program', above n 7, 3.

9 *Migration Amendment Regulations 2005* (No 9) (Cth).

10 Explanatory Statement, *Migration Amendment Regulations 2005* (No 9) (Cth) Attachment C: 'Regulation Impact Statement – Changes to the Migration Regulations: Proposal [sic] to Expand the Working Holiday Makers Program'.

11 Department of Immigration and Border Protection, 'Australia's Migration Trends 2013–14' (Report, 2014) 39.

12 Alexander Reilly, 'Low-Cost Labour or Cultural Exchange? Reforming the Working Holiday Visa Programme' (2015) 26 *Economic and Labour Relations Review* 474, 482; Productivity Commission, 'Workplace Relations Framework' (Inquiry Report No 76, 30 November 2015) 921; Senate Education and Employment References Committee, above n 1, ch 7; Howe et al, above n 7.

wholesale prices down, even below cost price in some cases.<sup>13</sup> These factors naturally contribute pressure to reduce labour costs by underpaying workers. Approximately seven per cent of Australia's working population are visa holders and 13 per cent of all reports received by the Fair Work Ombudsman are from visa holders.<sup>14</sup> Yet, while 44 per cent of working visa holders who lodged a claim with the Fair Work Ombudsman are on a working holiday maker visa,<sup>15</sup> the Fair Work Ombudsman noted that visa holders are reluctant to report wage theft,<sup>16</sup> so incidences of reported underpayment are likely higher than recorded. The Fair Work Ombudsman has also observed the close relationship between work, accommodation and transport for these workers, warning that '[n]ew arrivals to Australia can also find themselves being ripped-off on transport or accommodation costs ... the most common issue encountered by the Fair Work Ombudsman is in relation to rates of pay or piece work agreements'.<sup>17</sup>

For migrant workers, we know that a range of civil society members may influence their actions. Accommodation and transport, for instance, are intrinsic to work for many of these workers and, as well as potentially contributing to vulnerability, present opportunities for connection, communication and regulation between workers and civil society stakeholders. This is particularly so for temporary migrant workers whose connections to the labour market and to accommodation and transport providers are less established than for permanent residents.

Less recognised than employee dependence on employers is that the policy incentive for working holiday makers to perform work in horticulture also made farmers, and their surrounding communities, dependent on the working holiday maker labour. Howe and colleagues argue convincingly that the working holiday maker policy has reshaped the horticulture labour market in this way.<sup>18</sup> Less known in the literature is how farmers' dependence on temporary migrant labour influences their actions and those of the community systems to which they are connected. This dependence, and fears about threats to that labour supply and its implications for a range of stakeholders in the system, are central features of the case study.

Considering farmers' dependence on temporary migrant labour and interconnectedness with other stakeholders in the community, this article draws on Cutcher-Gershenfeld and Lawson's and Cutcher-Gershenfeld and Rubinstein's approach to sociotechnical systems, to conceptualise a regional town and its

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13 Howe et al, above n 7, 95; Richard Curtain et al, 'Pacific Seasonal Workers: Learning from the Contrasting Temporary Migration Outcomes in Australian and New Zealand Horticulture' (2018) 5 *Asia and the Pacific Policy Studies* 462, 473.

14 Fair Work Ombudsman, 'Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program', above n 7, 2–3.

15 Ibid 2.

16 Ibid 17.

17 Fair Work Ombudsman, 'A Warning for Growers, Hostel Owners and Labour-Hire Contractors on Wage Rates' (Media Release, 6 March 2017) <<https://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/march-2017/20170306-warning-for-growers-mr>>.

18 Howe et al, above n 7.

surrounding horticulture-dependent economy and society as a complex system.<sup>19</sup> Viewing horticulture work as taking place in complex systems, comprising a range of geographically proximate and economically connected stakeholders with disparate individual interests, will provide insights overlooked in extant, more narrowly focused employment regulation literature, allowing detailed examination of employment regulation beyond the traditional labour paradigm. These stakeholders, including farmers, labour hire contractors, recruiters, accommodation providers, local council and a selection of law enforcers, play interconnected roles impacting compliance outcomes, the experiences of workers and the viability of the system itself.

Using a broad definition of regulation as ‘any measure or intervention that seeks to change the behaviour of individuals or groups’,<sup>20</sup> and acknowledging the importance to work performed by itinerant workers of accommodation and transport in particular, this article examines the challenge of regulating employment standards at a system level. In doing so, it highlights the interconnectedness of civil society stakeholders with aligned interests, exercising both formal and informal roles, undertaking an effective alternative method of promoting employment law compliance.

The findings presented in this article are from a case study of a complex system contained within a single geographical region. This system is centred on a small town (population of about 5500) in South-East Queensland, Australia, located in the Granite Belt region, a major source of a wide range of fruit and vegetables, about three hours’ drive from the nearest major city. The region’s farms demand significant supply of labour to perform low-skill jobs picking crops and packing produce during the annual peak harvest time from November to March. Like almost all of their Australian peers, the horticulture farmers of the region rely heavily on temporary migrant workers, via Australia’s working holiday maker program, to perform these short-term, casual picking and packing jobs.

Farmers in the region had a few main options for sourcing seasonal temporary migrant labour. A government-funded harvest recruitment office operated in the town offering free recruitment and placement services along with visa checks. Two caravan parks and a backpacker hostel also referred workers directly to farms and a small number of labour hire contractors operated in the region. Otherwise, farmers could source labour directly, for instance via internet advertisements.

This system’s stakeholders were found to be facing the challenge of reputational damage to the region among temporary migrant farm workers, threatening future labour supply. By underpaying or otherwise mistreating migrant workers, some stakeholders, particularly employers and accommodation providers, acting in their individual interests and ignoring the shared interests of the system, caused this reputational crisis. A range of influential civil society

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19 Joel Cutcher-Gershenfeld and Chris Lawson, ‘Valuing the Commons: A Fundamental Challenge across Complex Systems’ (White Paper, National Science Foundation Directorate of Social, Behavioral, and Economic Sciences: SBE 2020, 2010); Joel Cutcher-Gershenfeld and Saul A Rubinstein, ‘Innovation and Transformation in Public Sector Employment Relations: Future Prospects on a Contested Terrain’ (2013) 28 *Ohio State Journal on Dispute Resolution* 107.

20 Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010) 18.

stakeholders, however, recognised this challenge to the common good, or ‘tragedy of the commons’, and that their individual interests aligned with the shared interests of the whole system. This article examines efforts by those stakeholders to ensure compliance with employment standards and seeks to answer the question: *What are the conditions by which individual stakeholders in the horticulture system orient and connect with one another to advance individual and shared interests?*

The remainder of this article is structured as follows. Part II reviews extant literature examining regulation of employment standards and develops the conceptual framework. Part III details the research methods used and Part IV presents the main findings. Part V analyses and discusses the findings before concluding in Part VI.

## II REGULATION OF EMPLOYMENT STANDARDS COMPLIANCE

In light of regulatory deficiencies in complex systems, this section examines current scholarship on regulation of employment standards, identifying an empirical and theoretical gap. Despite civil society stakeholders playing a significant role impacting compliance with employment standards, there has been little consideration and theorising regarding the circumstances in which it takes place. In order to best account for the role of these non-traditional employment law regulators in a way that extant literature has done inadequately, I argue for using a systems approach which will then be applied to the case study and tested in the following empirical sections of the article.

Extant literature examining regulation of employment standards in developed countries has predictably focused on the state’s role in enforcing legislated standards.<sup>21</sup> Those few studies that have looked beyond the role of the state have largely limited their scrutiny to the other members of the traditional tripartite of employment actors: employers and employees, along with their representatives. This is particularly so given their roles in joint regulation through collective bargaining and more recently as enforcers of employment standards.<sup>22</sup> Within this traditional frame, employment regulation scholars have posited a number of explanations for non-compliance and suggestions for effective regulation. Yet very little attention has been given to the role of actors beyond this narrow paradigm – an oversight that warrants correction given the limitations of ‘command and control’ models of state employment regulation exposed by the rise of non-compliance.<sup>23</sup>

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21 John Howe, ‘Labour Regulation Now and in the Future: Current Trends and Emerging Themes’ (2017) 59 *Journal of Industrial Relations* 209, 209–10.

22 Ibid 214.

23 John Howe, “‘Deregulation’ of Labour Relations in Australia: Towards a More “Centred” Command and Control Model’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation

Major changes in the composition of labour markets globally, precipitated by temporary migration, demand revisiting the traditional labour paradigm when considering how best to regulate minimum employment standards. Ignoring actors outside of this traditional employment tripartite is a potentially significant omission. Workers regularly interact with individuals and organisations beyond the workplace and those interactions may have significant influence on work. Such connections with civil society are particularly significant for temporary migrant workers in geographically dispersed, complex industries like horticulture, as they must arrange transport and accommodation in order to gain employment thus drawing new key stakeholders into the system.<sup>24</sup>

Literature examining the regulatory roles of traditional employment actors has exposed limitations of compliance interventions that operate solely within this paradigm. A major concern with any regulatory system relying heavily on state-run enforcement is resourcing and capacity to police large workforces, as state regulatory agencies tend to be under-resourced.<sup>25</sup> Weil called limited resources the root of labour inspectorates' fundamental problem.<sup>26</sup> In this event, and particularly as they seek to enforce employment standards in increasingly fissured workforces and in the context of declining union support, Weil proposed a model of 'strategic enforcement'.<sup>27</sup> Arguing that state labour inspections were precious resources, he recommended that their enforcement efforts should be guided not by individual reports of breached employment laws but by strategically identifying areas of most need and allocating resources to those areas. Others have identified the importance of maintaining the independence of state regulatory agencies in order for them to function effectively. This independence might be in the form of freedom from interference by, for example, government<sup>28</sup> or conflict of interests.<sup>29</sup>

However, as highlighted by Amengual, scholars such as Evans,<sup>30</sup> Ostram,<sup>31</sup> and Tendler<sup>32</sup> 'have shown that state capacity is not just a function of bureaucratic organisation but is also related to the ties that states have with society'.<sup>33</sup> Studies in this tradition, examining the regulatory space beyond purely state enforcement and promoting some form of co-regulation, have argued that effective enforcement

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Press, 2006) 147, 163; Cynthia Estlund, *Regoverning the Workplace: From Self-Regulation to Co-regulation* (Yale University Press, 2010) 76.

24 Underhill and Rimmer, above n 7, 616–17; Howe et al, above n 7, 85.

25 Weil, 'A Strategic Approach to Labour Inspection', above n 5, 350; Bernhardt et al, above n 1; Clibborn, 'Why Undocumented Immigrant Workers Should Have Workplace Rights', above n 5, 469–70.

26 Weil, 'A Strategic Approach to Labour Inspection', above n 5, 350.

27 Ibid 354; Weil, *The Fissured Workplace*, above n 2, ch 9.

28 Sean Cooney, 'China's Labour Law, Compliance and Flaws in Implementing Institutions' (2007) 49 *Journal of Industrial Relations* 673, 680.

29 *Labour Inspection Convention*, opened for signature 11 July 1947, 54 UNTS 4 (entered into force 7 April 1950) art 15; Clibborn, 'Why Undocumented Immigrant Workers Should Have Workplace Rights', above n 5, 470.

30 Peter Evans, *Embedded Autonomy: States and Industrial Transformation* (Princeton University Press, 1995).

31 Elinor Ostrom, 'Crossing the Great Divide: Coproduction, Synergy, and Development' (1996) 24 *World Development* 1073.

32 Judith Tendler, *Good Government in the Tropics* (Johns Hopkins University Press, 1997).

33 Amengual, above n 1, 7.

regimes possess state inspectorates that collaborate with non-state actors to assist in ensuring compliance.<sup>34</sup> Nonetheless this scholarship has mainly limited its consideration of non-state actors to employers, employees and their representatives in various forms. Such research in Australia has particularly focused on unions, noting that they are losing their traditional role of ‘joint regulator’ due to legislative changes since the 1990s. During this time, Australia has moved to a ‘command and control’ system of workplace regulation with a state agency in the main enforcement role, marking a shift from what was previously a more ‘responsive’ system involving unions in a central regulatory role.<sup>35</sup> Australia’s state labour enforcement agency, the Fair Work Ombudsman, has embraced the strategic enforcement model that David Weil introduced to the United States’ equivalent Wage and Hour Division of the Department of Labor, given their similar primary regulatory burden and modest resources.<sup>36</sup>

Ayres and Braithwaite’s influential model posited that effective regulation could best be achieved by regulators using enforcement tools ranging from litigation to encouraging participation of stakeholders.<sup>37</sup> They conceptualised a mix of ‘deterrence’ and ‘persuasion’ employed in a ‘regulatory enforcement pyramid’.<sup>38</sup> This approach has also been reinforced in a number of more recent studies.<sup>39</sup> Yet, despite the intent for what Ayres and Braithwaite called ‘responsive regulation’ to involve non-state stakeholders, it also extended only to the traditional direct employment actors.

Despite ongoing emphasis on the role of the state and its agencies, the deficiencies of traditional means of employment regulation are exposed in complex systems, requiring examination of alternatives. Scholars’ relative neglect of non-state actors’ roles in regulation of employment standards is just now starting to be addressed.<sup>40</sup> This nascent literature examines interactions within the ‘regulatory space’, in which it is understood that regulation is not only performed by states but by any number of interested individuals and groups.<sup>41</sup> For example, analysis of the rise of worker centres representing the interests of vulnerable, and

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34 See, eg, Tess Hardy and John Howe, ‘Partners in Enforcement? The New Balance Between Government and Trade Union Enforcement of Employment Standards in Australia’ (2009) 23 *Australian Journal of Labour Law* 306; Janice Fine and Jennifer Gordon, ‘Strengthening Labor Standards Enforcement through Partnerships with Workers’ Organisations’ (2010) 38 *Politics and Society* 552; Janice Fine, ‘Enforcing Labor Standards in Partnership with Civil Society: Can Co-enforcement Succeed Where the State Alone Has Failed?’ (2017) 45 *Politics and Society* 359.

35 Sean Cooney et al, ‘Time and Money under WorkChoices: Understanding the New *Workplace Relations Act* as a Scheme of Regulation’ (2006) 29 *University of New South Wales Law Journal* 215; Estlund, above n 23.

36 Interview with Office of Fair Work Ombudsman (Sydney, 3 December 2014) (copy on file with author).

37 Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

38 Ibid 39.

39 L Bluff and R Johnstone, ‘Infringement Notices: Stimulus for Prevention or Trivialising Offences?’ (2003) 19 *Journal of Occupational Health and Safety – Australia and New Zealand* 337, 338; Robert Baldwin and Julia Black, ‘Really Responsive Regulation’ (2008) 71 *Modern Law Review* 59; Hardy and Howe, above n 34, 311.

40 John Howe, ‘Labour Regulation Now and in the Future’, above n 21, 214.

41 Colin Scott, ‘Analysing Regulatory Space: Fragmented Resources and Institutional Design’ [2001] (Summer) *Public Law* 329; Freiberg, above n 20.

particularly migrant, workers in the United States has made a key contribution.<sup>42</sup> Some recent research has also examined how state agencies and unions have sought to harness support from civil society to enhance their own enforcement efforts.<sup>43</sup>

A number of recent studies in this line have explored the utility of co-regulation. For instance, Fine argued convincingly that increasing state enforcement resources and using strategic enforcement mechanisms are inadequate to ensure compliance with employment standards.<sup>44</sup> Instead she presented a model of co-enforcement, potentially more suited to the realities of work taking place in complex systems, predicated on ‘negotiated interdependence between regulators and societal organisations’,<sup>45</sup> between government and industry organisations. The concept of public–private partnerships with direct employment actors has also been explored to increase state regulators’ effectiveness. For example, Locke and colleagues examined the role of corporate codes of conduct in global supply chains, finding that state regulations are effectively enhanced by private regulation,<sup>46</sup> and Amengual considered how state bureaucrats leverage their relationships with civil society organisations to harness community involvement.<sup>47</sup> And Fine and Gordon demonstrated the benefits of the state directly engaging with worker centres.<sup>48</sup> However even these studies that looked beyond state regulators have limited their view of non-state regulators to the traditional employment parties, albeit incorporating contemporary forms of worker representation.

In a rare piece of research into regulation of minimum employment standards looking beyond traditional employment stakeholders, Hardy examined how the Fair Work Ombudsman sought to become more effective by recruiting assistance from non-state actors such as unions and employer associations but also other community stakeholders including ‘migrant resource networks, ethnic business groups, community legal centres, training providers and others as critical contact points for both awareness-raising and whistleblowing’.<sup>49</sup> However, Hardy noted, this kind of community engagement was only in the early stages of development. Similarly, Heery and colleagues identified the recent rise of civil society

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42 Ruth Milkman, *L.A. Story: Immigrant Workers and the Future of the US Labor Movement* (Russell Sage Foundation, 2006); Fine and Gordon, above n 34; Christian Lyhne Ibsen and Maite Tapia, ‘Trade Union Revitalisation: Where Are We Now? Where to Next?’ (2017) 59 *Journal of Industrial Relations* 170, 183.

43 Tess Hardy, ‘Enrolling Non-State Actors to Improve Compliance with Minimum Employment Standards’ (2011) 22 *Economic and Labour Relations Review* 117; Sarah Kaine and Cathy Brigden, ‘Union Responses to Regulatory Change: Strategies of Protective Layering’ (2015) 26 *Economic and Labour Relations Review* 614, 620–3.

44 Fine, above n 34, 362.

45 Ibid.

46 Richard M Locke et al, ‘Complements or Substitutes? Private Codes, State Regulation and the Enforcement of Labour Standards in Global Supply Chains’ (2013) 51 *British Journal of Industrial Relations* 519.

47 Amengual, above n 1. See also Matthew Amengual and Janice Fine, ‘Co-enforcing Labor Standards: The Unique Contributions of State and Worker Organizations in Argentina and the United States’ (2017) 11 *Regulation and Governance* 129.

48 Fine and Gordon, above n 34.

49 Hardy, above n 43, 131.

organisations, such as ‘community, identity-based, single-issue, campaigning and advocacy organisations’ and their interactions, and limitations of their relationships, with unions.<sup>50</sup> However, such research remains both rare and narrow in its conceptualisation of potentially influential civil society stakeholders.

Research in the regulatory space has implicitly assumed that employment and civil society stakeholders with whom the state interacts are motivated by their own individual interests. In this way Freiberg argued that regulation involving non-state actors is ‘built on concepts of contract rather than administrative law, on bargains and incentives rather than rules and regulations, on exchanges rather than orders and commands’.<sup>51</sup> However, given the interdependent nature of stakeholders in networked regulation, this article argues that such focus on individual interests is too narrow and one needs also to consider the impact and operation of shared interests of system stakeholders. Outside of employment regulation scholarship, Huising and Silbey illustrated the importance of considering a range of actors within complex systems, observing the significance of individual actors to ensuring organisational compliance with legal regulations when using an environmental management system.<sup>52</sup> Central to outcomes were managers they called ‘true believers’ who undertook ‘relational regulation’ in a ‘complex web of interactions and processes’.<sup>53</sup> The authors argued that this type of relational regulation is most likely to succeed in situations where external observers, government inspectors, or third-party auditors provided a credible threat of periodic review and demand for accountability.<sup>54</sup> However, Short argued that this kind of self-organised regulation is only likely to occur in a void left by inadequate state regulation and, in those circumstances, is unlikely to succeed.<sup>55</sup>

Thus, in light of ineffective state regulation, decreasing involvement of unions and the rise of civil society actors, current research incompletely conceptualises employment regulation. With work increasingly taking place in complex systems, highlighted by the growth of temporary labour migration and the accompanying integral roles of accommodation and transport, we need an analytical framework that best accounts for the role of a wide range of civil society stakeholders within

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50 Edmund Heery et al, ‘The Involvement of Civil Society Organizations in British Industrial Relations: Extent, Origins and Significance’ (2012) 50 *British Journal of Industrial Relations* 47; Edmund Heery et al, ‘Civil Society Organizations and Trade Unions: Cooperation, Conflict, Indifference’ (2012) 26 *Work, Employment & Society* 145. See also, in relation to civil society organisations and the United Kingdom’s experiment with the ‘Big Society’ policy: Brian Abbott, ‘Deciphering the Coalition’s Big Society: Issues and Challenges for Work and Employment Relations’ in Steve Williams and Peter Scott (eds), *Employment Relations under Coalition Government: The UK Experience, 2010–15* (Routledge, 2016) 207; Louise Floyd, ‘The Elephant in the Room: The *Public Services (Social Value) Act 2012*’ (2013) 129 *Law Quarterly Review* 180; Louise Floyd, ‘Procurement, Social Enterprises, Co-operatives and Public Service: The United Kingdom’s “Big Society” Reforms and Australian Business Law’ (2012) 40 *Australian Business Law Review* 280.

51 Freiberg, above n 20, 25.

52 Ruthanne Huising and Susan S Silbey, ‘Governing the Gap: Forging Safe Science Through Relational Regulation’ (2011) 5 *Regulation and Governance* 14.

53 Ibid 15, 36.

54 Ibid 33.

55 Jodi L Short, ‘Self-Regulation in the Regulatory Void: “Blue Moon” or “Bad Moon”?’ (2013) 649 *ANNALS of the American Academy of Political and Social Science* 22.

such systems. Emerging literature on complex systems offers much potential to better understand the roles of non-state actors in regulation of employment standards independent from state engagement. Systems theory, originating in the mathematics discipline, purports to show ‘that collective order may emerge purely from local interaction at the micro level, without any need of central control’.<sup>56</sup> Corbett argued that this also presents opportunities for regulators of complex systems to influence events by changing system dynamics.<sup>57</sup> Thus, the first step must be ‘to explain the spontaneous emergence of order by self-organising processes at multiple levels in nature and society’.<sup>58</sup>

In order to explain the emergence of self-organised regulation among both traditional and non-traditional employment actors, this article draws on Cutcher-Gershenfeld and Lawson’s, and Cutcher-Gershenfeld and Rubinstein’s approach to complex sociotechnical systems.<sup>59</sup> It defines a system as comprising multiple stakeholders with a common interest, that may be known or unknown, in addition to their individual interests. Their definition of a complex system in which stakeholders share an interest in the whole system implies that the approach is best applied to systems within large organisations or collaborations between multiple organisations such as joint ventures. However, I argue that this approach also suits less formally connected systems. It is applied here to explore the common interests of, and challenges faced by, a variety of stakeholders within a single complex community system to establish the conditions by which its stakeholders orient and connect with one another in their own interests and in the interests of the system as a whole.

Under this systems approach, if stakeholders act only in their individual interests it risks damage to the system itself to everyone’s detriment, known as a ‘tragedy of the commons’, referring to the historical example of over-farming of a village commons.<sup>60</sup> The challenge for any system is therefore to align stakeholders’ individual interests with those of the whole system to create value and mitigate harm, referred to as ‘valuing the commons’.

Complex systems are characterised by regulatory deficiencies, which can result in non-traditional actors being involved in regulation in ways where they might eschew their ‘rational’ short-term interests in order to pursue the long-term interests of the system as a whole. Through identifying the conditions by which, and to what extent, individual stakeholders in a single system orient and connect with one another to advance both individual and shared interests, this article seeks to contribute to employment regulation literature. It addresses deficiencies in existing literature through utilising the systems approach. By analysing the challenge of regulating minimum employment standards at a system level, it finds

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56 Volker Schneider, ‘Governance and Complexity’ in David Levi-Faur (ed), *Oxford Handbook of Governance* (Oxford University Press, 2012) 129, 135.

57 Angus Corbett, ‘A Systems Approach to Regulatory Excellence’ (Paper, Penn Program on Regulation, June 2015); Angus Corbett, ‘A Systems Approach to Regulatory Excellence’ in Cary Coglianese (ed), *Achieving Regulatory Excellence* (Brookings Institution Press, 2016) 255.

58 Schneider, above n 56, 133.

59 Cutcher-Gershenfeld and Lawson, above n 19; Cutcher-Gershenfeld and Rubinstein, above n 19.

60 Ibid.

interconnected stakeholders, with aligned interests, exercising both formal and informal roles.

### III RESEARCH METHODS

The previous section established that a range of civil society actors are involved in employment law regulation, yet are under-represented in extant literature. To overcome this omission, I argued for using a systems approach to best interrogate those actors' roles. In that event, a case study methodology is most suited to identify relevant stakeholders, how they are connected to each other and how they influence outcomes within the system. This approach captures the dynamic processes taking place within a single complex system.<sup>61</sup> It is ideal for examining stakeholders' individual interests, potentially aligned interests and interactions with other stakeholders within the system.

The particular horticulture system was examined at a time during which its stakeholders were reconsidering their individual and joint interests under considerable external pressure and while changes were occurring within the system. The flexibility afforded by the case study method, including undertaking two research visits to the region, enabled me to take advantage of the dynamic situation and a rich study resulted. In order to triangulate data and to facilitate exploration of a range of individual interests and perspectives within the system, interviews were conducted with people holding a variety of positions and responsibilities within numerous organisations.<sup>62</sup>

The bulk of the data were drawn from extensive semi-structured interviews with 30 key informants conducted in 2016 and participant observation at community events in 2015 and 2016. Based on information gained from observing a community forum on itinerant workers in horticulture, held in the case study town in 2015, it was clear that the system was entering a period of potential disruption and change, and key stakeholders were identified. To best understand their interests, motivations and actions, the writer interviewed stakeholders in the system holding positions of potential influence over employment compliance outcomes in three broad categories: employers/farmers, state employment regulators, and other civil society stakeholders.

Ten people working in farming businesses were interviewed, comprising eight farmers and two people in charge of packing sheds and on-farm accommodation. Eight of these were owners of the farming businesses. They were chosen as they could speak of their individual interests, challenges faced and interactions with other stakeholders. From the state employment regulator, the Fair Work Ombudsman, a senior manager from head office and the manager of the regional office were interviewed to investigate the issues they faced in the region and potential roles of community stakeholders. Other civil society stakeholders

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61 Kathleen M Eisenhardt and Melissa E Graebner, 'Theory Building from Cases: Opportunities and Challenges' (2007) 50 *Academy of Management Journal* 25.

62 Robert K Yin, *Case Study Research: Design and Methods* (Sage, 5<sup>th</sup> ed, 2014).

interviewed, chosen for their potential influence over employment outcomes as identified at the 2015 community forum, were three accommodation providers, the manager of the harvest recruitment office, a local council compliance officer, the local Mayor and the local Police Sergeant. Additionally, 12 temporary migrant workers were interviewed, each holding working holiday maker (subclass 417) visas and working towards their 88 days to earn a second-year visa extension. No union representatives were interviewed as they had no presence in the region at the time of research. Other sources of data included participant observation at the community forum and a backpacker welcome barbeque, inspecting a range of accommodation and publicly available reports of inquiries into conditions of horticulture workers. Secondary sources of data providing particularly useful insight were reports by the Fair Work Ombudsman,<sup>63</sup> Productivity Commission<sup>64</sup> and Senate<sup>65</sup> including transcripts of evidence and written submissions, and Federal Court documents relating to a Fair Work Ombudsman prosecution of an employer within the case study system.

Interviewing this range of stakeholders allowed investigation of differing individual interests as well as understanding of common interests and the potential for alignment in support of the system. It also allowed identification of the sources of, and factors shaping, decisions impacting employment law compliance and non-compliance, and of changes in the system. Schedules of interview were drafted to elicit information on these factors. Interviews were semi-structured, allowing for consistency and exploration of emergent themes. They were conducted in accordance with ethics approval and with consent provided by each interviewee. All interviews were recorded and transcribed for later analysis using NVivo software, coded by themes based on the theoretical framework focusing on individual and common interests, catalysts for change and employment regulation outcomes.

#### IV REGULATION OF EMPLOYMENT STANDARDS BY CIVIL SOCIETY ACTORS

This section presents findings from the case study horticulture system, identifying among system stakeholders a perceived ‘tragedy of the commons’ as well as examining the extent to which stakeholders’ interests were aligned and to which they ‘valued the commons’ by taking action to mitigate harm or add value.<sup>66</sup> This necessarily focuses on the actions of a number of individual community members who the research identified as particularly influential in aligning the interests of system stakeholders and regulating employment law compliance.

Within the case study system, numerous stakeholders holding a range of occupations and individual interests were involved in regulation of employment

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63 Fair Work Ombudsman, ‘Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program’, above n 7.

64 Productivity Commission, above n 12.

65 Senate Education and Employment References Committee, above n 1.

66 Cutcher-Gershenfeld and Lawson, above n 19; Cutcher-Gershenfeld and Rubinstein, above n 19.

standards. They included the state employment regulator, the Fair Work Ombudsman, and employers, but also non-traditional actors. A local council compliance officer, a recruitment provider, caravan park owners and local police each influenced employment outcomes within the system. Their actions took place in the context of what they perceived as a threat to their shared interests, or a ‘tragedy of the commons’: concern that the reputation of the region as a destination for working holiday makers would deteriorate to the point of labour shortage and consequently damage the local economy.

### A Tragedy of the Commons

Civil society stakeholders in the system perceived that their community was at risk of severe reputational harm due in large part to some stakeholders acting in their own interests to the detriment of the system as a whole. Some of the events contributing to this potential ‘tragedy of the commons’ occurred recently, some a few years prior, some within the region and others elsewhere in the state, and participants at the community forum and in interviews mentioned them often. They all impacted the experience of working holiday makers in the workplace, in their accommodation and in transport. What they had in common was a strong influence on the system stakeholders as the events remained fresh in their minds, related to negative experiences for temporary migrant workers and had potential to damage the region’s reputation and reduce labour supply.

First, in recent years some labour contractors operating in the region had earned a reputation for underpaying and mistreating migrant workers. The most notable incident was one, in Thulimbah, Queensland that received some mainstream media coverage. A Japanese visa holder apparently told a contractor who employed him that he no longer wished to work at a particular farm and, in response, the contractor threw boiling water on the man.<sup>67</sup> Second, a fire in a backpackers hostel in Childers, Queensland killed 15 residents. The coronial enquiry found that the hostel had some overcrowded rooms, inoperative fire alarms and an obstructed exit door.<sup>68</sup> Third, in Stanthorpe, Queensland three German visa holders were injured and another person died in a car crash. The visa holders were driving in a car from a caravan park towards town on the incorrect side of the road at night. They drove for over a kilometre before colliding with an oncoming vehicle.<sup>69</sup>

Fourth, a German tourist performing picking work on a farm at Childers, Queensland died of dehydration and her employer was fined for failing to provide

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- 67 Kate McKenna, ‘Businessman Eskander Alokaily Threw Boiling Water of Worker Who Wanted to Leave’, *The Courier Mail* (online), 31 May 2015 <<https://www.couriermail.com.au/news/queensland/crime-and-justice/businessman-eskander-alokaily-threw-boiling-water-of-worker-who-wanted-to-leave/news-story/ec97b2fd396c738ee101917dde4a4527>>.
- 68 *Inquest into the Palace Backpackers Hostel Fire* [2006] Coroner’s Court of Queensland 40–1 (State Coroner Barnes).
- 69 Paige Ashby, ‘German Backpacker Jailed over Fatal Collision’, *Stanthorpe Border Post* (online), 27 August 2015 <<https://www.stanthorpeborderpost.com.au/news/man-jailed-over-collision/2753932/>>.

adequate water and sun protection.<sup>70</sup> Fifth, stakeholders also mentioned various cases of sexual harassment by farmers including incidents of employers withholding documents confirming work towards the 88 days in exchange for sexual favours.<sup>71</sup> Sixth, a high profile nationally broadcast television report of underpayment and other mistreatment of migrant harvest workers gave the problem of apparent exploitation of seasonal horticulture workers considerable publicity.<sup>72</sup> Seventh, the Federal Government had announced in the previous budget that income tax rates for subclass 417 visa holders would soon increase, known as the ‘backpacker tax’, thus reducing the net income of horticulture workers.<sup>73</sup> One farmer interviewed was so apprehensive about the effect of this tax on labour supply that he planned to withhold planting strawberries next season.<sup>74</sup> Finally, stakeholders were aware of reports that the number of applicants for both first and second year working holiday maker visas were dropping after peaking in 2012–13. This was reinforced by their personal perceptions that fewer visa holders were coming to the region to work. They were concerned that news of poor conditions in the region, in the state of Queensland, or in the Australian horticulture industry in general might spread, or have already spread, via social media to potential future seasonal workers.

### **B Sources of Vulnerability: Accommodation and Transportation**

Two potential contributors to vulnerability for visa holder horticulture workers were their accommodation and transport arrangements. This was key to alignment of interests of otherwise disparate stakeholders within the system. For temporary migrants travelling to work well outside of major centres, accommodation and transport were factors inseparable from the work itself. The region offered four main types of accommodation for seasonal workers: a working hostel, caravan parks, on-farm accommodation and sublet houses.

The town’s working hostel operated in a manner that potentially contributed to the tragedy of the commons by increasing workers’ vulnerability and dependence on their employers. The hostel referred and transported all of its residents to only four of the region’s large farms. No person was allowed to stay in the hostel unless they were working on one of those farms and no person was allowed to perform casual, seasonal work on one of those farms without staying in the hostel. If workers lost their jobs, they were required to leave the hostel immediately. Similarly, if they broke one of the hostel’s rules, such as drinking

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70 Amelia Bentley, ‘Farm Guilty of Neglect on Day of Fruit Picker’s Death’, *Brisbane Times* (online), 9 June 2011 <<https://www.brisbanetimes.com.au/national/queensland/farm-guilty-of-neglect-on-day-of-fruit-pickers-death-20110609-1fuftr.html>>.

71 See, eg, Interview with Council Officer (South-East Queensland, 20 January 2016); Interview with Caravan Park Owner (South-East Queensland, 19 January 2016) (copies on file with author).

72 Australian Broadcasting Corporation, ‘Slaving Away: The Dirty Secrets behind Australia’s Fresh Food’, *Four Corners*, 4 May 2015 (Caro Meldrum-Hanna and Ali Russell) <<http://www.abc.net.au/4corners/stories/2015/05/04/4227055.htm>>.

73 Clancy Yeates, ‘Federal Budget 2015: Backpackers Hit With Higher Taxes’, *Sydney Morning Herald* (online), 12 May 2015 <<https://www.smh.com.au/national/federal-budget-2015-backpackers-hit-with-higher-taxes-20150512-1mzghx.html>>.

74 Interview with Farmer A (South-East Queensland, 21 January 2016) (copy on file with author).

any alcohol, whether on the premises or not, they would have to leave the hostel and would lose their jobs.

Accommodation in local houses was mainly arranged by local real estate agents on behalf of property owners. The quality and safety of that accommodation varied depending on the efforts of the owners and real estate agents to comply with regulations and to register their properties for use as short-term accommodation. Houses were generally shared with other seasonal workers, known or unknown to each other, and there was not necessarily a direct relationship between accommodation and work unless workers had signed up to an accommodation and work package prior to arriving. Anyone living in this type of accommodation needed their own vehicle in order to travel to and from farms for work each day.

Similarly, accommodation on farms ranged in quality and carried the potential for mistreatment associated with employees' dependence on employers inherent in the link between work and accommodation. The council officer noted how vulnerable temporary migrant workers were when living on farms and in private houses:

A few times I have done inspections and there's been girls hiding in cupboards and where I have talked to some in others, where they're sort of sitting together very close, I found out they've just been taken there by someone that's promised them work and they're just waiting there to get a job and they're in a house with a whole lot of men and you can tell they're absolutely terrified.<sup>75</sup>

Access to personal means of transportation would also change this kind of experience and potentially reduce vulnerability to mistreatment, as workers could more easily leave a bad situation and it would open them to a geographically wider range of workplaces and accommodation options.

### **C Civil Society Stakeholders Valuing the Commons**

Influenced by the perceived 'tragedy of the commons' relating to treatment of vulnerable temporary migrant workers, key stakeholders became aware that their individual interests were aligned with those of others in the wider system. The following examines the roles played by these key stakeholders in 'valuing the commons': a local council compliance officer, a harvest recruitment office manager, caravan park owner/managers, farmers and local police.

One of the most influential individual stakeholders in the system was an employee of the local council, working as a compliance officer. Her official role, acting in her individual interests, involved enforcing local government laws relating to land use. However, her unofficial influence, acting in shared system interests, extended beyond this role when she became concerned about treatment of temporary migrant workers in their accommodation and work as well as the negative influence that this might have on the system. She became aware of the issue in 2012 when a person complained to council about accumulated rubbish and a septic smell at a neighbouring property. She discovered that council employees such as herself had no legal right to inspect inside the property so she approached local fire service officers to find a way around this legal barrier. Forming an

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75 Interview with Council Officer (South-East Queensland, 20 January 2016) (copy on file with author).

alliance with the fire service allowed her to ‘piggy back’ on their right to enter and inspect properties, thus improving her access. Inspecting this particular property revealed bedding for 36 temporary migrant workers, fire risks with overloaded power outlets and a blocked septic system. Based on this discovery and subsequent ones like it, the council officer believed that people performing seasonal horticulture work (almost exclusively temporary migrants) were being subjected to exploitative conditions in accommodation and she deduced that they might also be suffering similar conditions working on the local farms. She expressed her concern for individuals and for the system: ‘The fact that they will be mistreated and that in the end our growers won’t have the backpackers coming to our region to assist them in the harvesting of their crop’.<sup>76</sup>

With this in mind, she took a number of steps acting as ‘facilitator’ of a network of stakeholders, explaining her goals of influencing system outcomes: ‘So that was one aspect of the local community that I really had to try and turn around, making them think that these people don’t deserve it, they shouldn’t be treated this way’.<sup>77</sup>

First, she arranged for the council to formally regulate short-term accommodation in the region’s domestic dwellings, within the council’s registration of short-term accommodation. She did this to make registered dwellings more accessible for seasonal workers so that fewer people would be left staying in non-compliant, dangerous or exploitative arrangements. Second, concerned that temporary migrants might also be suffering mistreatment at work, and despite it being outside her formal job responsibilities, she set about building a network of state regulators, to positively influence the treatment of temporary migrants at work. These included the Fair Work Ombudsman, responsible for enforcement of national employment laws, Queensland’s Anti-Discrimination Commission, responsible for enforcing state anti-discrimination laws and other local councils in the wider region. These network-building efforts achieved only modest success until the compliance officer inspected a property on which she found a large marquee tent accommodating over 70 temporary migrants working in the region. The council successfully prosecuted the owner of the property and news of this discovery was published widely in mainstream regional media. This publicity, together with the other events threatening the shared system interests discussed above, proved to be a useful catalyst for change, making a range of stakeholders in the system aware that their interests were aligned in relation to the treatment of temporary migrant workers. This publicity also made government departments more receptive to the council officer’s attempts to form a wider network in support of temporary migrant workers.

The council officer also coordinated a number of specific activities that were instrumental in raising awareness within the system that stakeholders’ interests were aligned. In July 2015 she organised a one-day community forum, focusing on itinerant workers, to which she invited a wide range of stakeholders including farmers, accommodation providers, real estate agents, harvest recruiters, local

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76 Ibid.

77 Ibid.

police and fire services, the Fair Work Ombudsman, Anti-Discrimination Commission, Department of Immigration and Border Protection and the local Mayor. Representatives of many of these stakeholders gave presentations, speaking from the perspectives of their individual interests, but the clear central concern of forum participants was the continued supply of labour to meet seasonal demand, and perceived threats to that supply related to temporary migrants' experiences at work, in accommodation and in the wider community.

Together, the stakeholders attending the forum believed that these threats might crystallise in a negative reputation for the region, in turn keeping future working holiday makers away. In relation to work, they were primarily concerned about underpayment and sexual harassment; in accommodation, they were worried mainly about overcrowding and fire risks; and in the wider community they identified risks such as traffic accidents and criminal assaults. The forum served to raise awareness among stakeholders of threats to the 'commons' and that their individual interests were aligned in the need to 'value the commons' by improving the experiences of temporary migrants visiting the region. During the following harvest season, the council officer also instigated two 'welcome barbeques' for temporary migrant harvest workers. These were free events, intended to both let them know they were valued guests of the community and to inform them about rights and safety. The Fair Work Ombudsman and police had information booths at the barbeques, providing information in multiple languages, and the Mayor gave a welcome speech.

As community stakeholders became increasingly aware of the threat to the commons posed by poor treatment of seasonal harvest workers, a number of them recognised that their individual and shared interests aligned and they took actions in the interest of the system as a whole. The council officer observed that many more real estate agents were complying with occupancy regulations, although a minority had still failed to register properties and offered overcrowded accommodation, evidenced by a number of houses inspected for this research, including one three-bedroom house in which there were 13 mattresses on the floor, overloaded power outlets next to bedding and visibly unclean bathrooms. The Queensland Police appointed officers to a new 'Cultural Unit' whose role was to liaise with and provide a point of contact for temporary migrants. They attended the backpackers' welcome barbeques organised by the local council. Local police also led an initiative to place reflective directional arrows on roads near backpacker accommodations to ensure that visitors drove on the correct left side of the road. Specific examples of actions by the council officer and, as discussed below, the harvest recruitment office, a caravan park and farmers illustrate this 'valuing of the commons'.

Located in the town was a federal government-funded harvest recruitment office. This was one of 11 regions nationwide in which a private provider had been awarded a contract to provide free recruitment services to harvest job seekers and farmers after submitting to a federal government tender process. The recruiter maintained a storefront in the town to receive job candidates. It recruited workers to fill vacant positions in picking or packing jobs on farms in the region and also checked the visa status of workers to ensure they were legally entitled to work.

The harvest recruitment office operated beyond its formal role and individual interests, positioning itself as an informal ‘gatekeeper’ between workers and employers and a ‘connector’ between workers and state regulators. The manager of the recruitment office noted her formal obligation to periodically report breaches of employment laws to the government; but it was in her informal capacity that she had most influence regulating employment outcomes. She was motivated by a clearly strong social conscience and by the shared interests of the system, exhibited by her keenness to ensure that employers complied with their legal obligations and treated their employees well. In relation to this she said, ‘I just don’t like seeing the misuse of people in any form’.<sup>78</sup> The manager acted as a connector between workers and state regulators by actively encouraging underpaid or mistreated workers to report their employers to authorities and she made some referrals directly. She said she had directly complained about many farmers to either the Fair Work Ombudsman or the Anti-Discrimination Commission for, ‘a lot of situations of non-payment ... sexist, racist sort of comments. Sexism I’ve reported that quite a bit as well’.<sup>79</sup> She also encouraged workers to report complaints themselves and even kept a stock of printed report forms in the office and invited workers to complete the forms immediately when they complained to her of mistreatment. She did, however, identify inadequacies in the Fair Work Ombudsman, noting that many complaints were not investigated:

The Fair Work [Ombudsman] will quite openly tell you that they don’t have the staff to actually investigate every complaint. They’ll quite openly tell you that. They say, ‘still make the complaint and we’ll have it on file.’ It will only be if there’s 10, 15, 20 complaints about the same farm that they might open an investigation into it. For one they won’t.<sup>80</sup>

In these circumstances, it was her actions as a gatekeeper between workers and employers that were most influential. She acted as a gatekeeper, ‘valuing the commons’ by keeping workers away from certain employers she considered to be ‘bad’ by not referring workers to them at all. The manager made her own assessments of whether or not a farm was a suitable employer, based on previous experience and workers’ reports to her. She would only refer workers to farms that paid legally compliant wages and treated workers respectfully, noting for example that she, ‘would refuse to deal with [farmer’s name] even if they asked me to’.<sup>81</sup>

While, as noted above, accommodation arrangements can contribute to horticulture workers’ vulnerability, accommodation also provided an important point of contact with civil society stakeholders who valued the commons and contributed to legal compliance. The caravan park owner-managers offered the most support to seasonal workers of all of the accommodation providers. This husband and wife team’s primary individual interest was the financial success of their caravan park business. That success was dependent on supply of workers drawn to the region’s farms during the harvest season. Although guests were not

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78 Interview with Harvest Recruitment Office Manager (South-East Queensland, 18 January 2016) (copy on file with author).

79 Ibid.

80 Ibid.

81 Ibid.

required to work in order to stay, the majority of guests were visiting the area in order to work. Some of their guests had arranged their own work through the harvest recruitment office or directly with farms. The caravan park owners also operated as no-fee de facto harvest recruitment agents, referring guests to farms with whom the owners maintained relationships, and they transported workers to and from the farms in mini busses. They gave priority to guests who had been the longest without work on a rotating basis. These owners attended the community forum arranged by the council officer and brought their guests to the welcome barbeque by bus. They were aware that their interests aligned with those of the wider system and that continued supply of seasonal labour to the region depended on valuing the rights of current temporary migrant workers. Similar to the harvest recruitment office, they assumed the role of regulatory gatekeepers, shielding their guests from farmers who treated workers poorly or underpaid them. They explained that they chose farmers who they assessed to be, 'good farmers and they pay well' and decided, 'not to [send workers] wherever there's exploitation'.<sup>82</sup> They also chose not to send female workers to one particular farm with whom they nonetheless maintained a relationship saying: '[The supervisor] works beside them and quietly says rude things. So we only ever send boys out there'.<sup>83</sup>

When they suspected that there might be a similar issue at another farm they 'said [to a male worker] "if you have any trouble or you see any of the girls being spoken to badly, then as far as I'm concerned you all leave". [The farmer] would have no workers'.<sup>84</sup>

Negotiating this kind of arrangement indicated potential tension between their individual interests on one hand and those of the individual workers and the overall system on the other. While it was in their immediate interests, and those of the particular farmer, to refer workers, the longer-term interests of maintaining the region's reputation aligned with the immediate interests of protecting the workers.

Additionally, similar to the harvest recruitment office, the caravan park owners operated as informal connectors with state regulators. In this informal role, they referred some workers who had been underpaid or harassed to the relevant state enforcement agencies. They recently took an additional step to ensure that all of their guests were more aware of their rights: 'This year I have actually put on my forms, "if you have any problems with your farm this is the number you have to ring [Fair Work Ombudsman and Anti-Discrimination Commission] or come and see us"'.<sup>85</sup>

Farmers were clearly key stakeholders in the system whose main individual interest was the financial viability of their farms. In order to achieve this, they necessarily had to employ workers during the peak harvest season to pick their crops. If the produce was not picked at the appropriate time, it would spoil and could not be sold. One farmer illustrated the wider importance of working holiday makers not just to individual farmers but also to the wider economy of the region:

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82 Interview with Caravan Park Owner (South-East Queensland, 19 January 2016) (copy on file with author).

83 Ibid.

84 Ibid.

85 Ibid.

In all honesty, the backpackers are what's keeping the bloody lot of [the town] alive really. In the wintertime you'll notice you'll go to IGA or Woollies [supermarkets] or whatever, there's hardly anyone in there. You go in now, it's chocka [full]. ... Like they're all bloody backpackers but it's full isn't it? So it's creating work there for the locals.<sup>86</sup>

Some farmers played an important role in 'valuing the commons'. They did this by paying workers appropriately, treating them with respect, recruiting workers from reputable sources and by providing quality accommodation. These farmers were influenced in a variety of ways to recognise that the common interests of the system aligned with their own individual short-term interests. Some came to value the commons independently, some were influenced by the message from the community forum or by peers, some by direct interventions from the council officer, some by the labour providers on which they relied and some, to a lesser extent, by intervention from state employment regulators.

One farm visited for this research had previously been one of the worst offenders for both accommodation and pay but made some improvements in both ways since state authorities intervened. It is also an example of the limitations of formal state-based command and control regulation. The Local Council compliance officer described the farm when she first inspected it in 2012/13: 'There was just all septic all over the ground ... there was only [one house]' accommodating workers who had to use buckets as the septic system was blocked. She said, 'I saw them and said, "no you can't have people living like this"'.<sup>87</sup> At around the same time, the Fair Work Ombudsman investigated the farm and discovered widespread underpayment of minimum wages, casual loading, overtime and penalty rates as well as failure to keep proper pay records. They entered an agreement with the farm's owners to rectify the underpayments. However, after subsequently discovering ongoing non-compliance with employment standards, they prosecuted the owners of the farm, who were fined and ordered to repay the workers. The state authorities' efforts appeared to have achieved some success as, when visited for this research, the farm had comfortable accommodation with well-appointed common areas including air-conditioned rooms, large common kitchen, games room etc. The Council compliance officer was pleased with the progress made in the quality of accommodation despite much of it having been built without formal council development approval.

In an interview on the farm, a manager described the current detailed piece-rate system of calculating wages for picking and packing work that they monitored to ensure compliance with employment standards for the farm's direct core employees. However, the manager did note that labour hire contractors also provided some workers whose pay was not monitored other than an anecdotal observation that it was less than their direct employees.<sup>88</sup> The farm owners had also recently acquired a radio-frequency identification ('RFID') system for more efficiently and accurately keeping piece-work and pay records. Another local

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86 Interview with Farmer B (South-East Queensland, 21 January 2016) (copy on file with author).

87 Interview with Council Officer (South-East Queensland, 20 January 2016) (copy on file with author).

88 Interview with Farm Manager (South-East Queensland, 21 January 2016) (copy on file with author).

farmer confirmed the apparent turnaround in this farm and said that he had also encouraged the owners to better value their workers, telling one of them:

‘You’ve got to look after your people’ and I got it through to [farmer’s name] and he’s doing it now which is good. ... He’s worked out to keep his core workers, you’ve got to look after them. If you don’t look after them, they walk.<sup>89</sup>

However, in 2017 the Department of Immigration and Border Protection raided the farm and identified 27 workers in breach of immigration laws. One of the owners claimed ignorance of the immigration breaches, stating that labour hire contractors provided these undocumented workers.

According to a number of informants, there were fewer labour hire contractors operating in the region than in other comparable regions. A major reason for this was the service offered by the local harvest recruitment office, in addition to the civil-minded caravan park operators. As there was a reliable supply of labour through these sources, along with visa checks by the harvest recruitment office, taking risks with labour hire contractors was a less enticing option for farmers. A number of farmers explained their decisions not to source labour from labour hire contractors. In each case, contractors had offered them workers at exactly the minimum legal hourly wage which meant that, after the contractor took its cut, workers would be underpaid. One farmer expressed the reason he didn’t use contractors:

I reckon the whole of them are shonky myself. ... How can they just come to me and say, it’s only going to cost me \$21 an hour [when] workers [are] costing me about \$26 [including all additional costs].<sup>90</sup>

He also saw it as being in his own interest to hire workers directly and pay them appropriately saying:

We’d pay the contractor \$21 but [the labour hire contractor will] pay his people between 15 and 18 bucks an hour. That’s all he pays you see. So if [the workers] can come here and then all of a sudden they’re up on \$24–25 an hour, well they’ll stay here too.<sup>91</sup>

Thus, farmers’ choices to source labour from reputable sources was valuing the commons.

Husband and wife farmers interviewed sourced all of their seasonal workers from the caravan park discussed above. They recognised a joint interest, considering their relationship with the caravan park to be important because, ‘happy caravan parks have happy people too ... I think they’re good to them in there, they’ve all been fair ... They don’t have any trouble because of it too’.<sup>92</sup> They articulated alignment of their individual and system interests clearly: ‘If you’ve got a good name it’s not hard to get people’ and to get a good name as a grower amongst those workers, all a farmer had to do was, ‘just be fair [because] they’re always someone’s kids’.<sup>93</sup> It was good for their business and for the wider

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89 Interview with Farmer B (South-East Queensland, 21 January 2016) (copy on file with author).

90 Ibid.

91 Ibid.

92 Interview with Farmer C (South-East Queensland, 20 January 2016) (copy on file with author).

93 Ibid.

system to attract and retain good workers, and not attract bad ones, to treat them well and to source them from a place that also treated them well.

This recognition that it was in both individual and system interests to treat workers fairly was mirrored by a number of farmers who relied on the harvest recruitment office for seasonal workers, clearly influenced by that gatekeeper. One who said he was concerned about reputation issues for the system focused on what he could directly control saying, ‘my conscience is clear so I’m not worried. I worry about what I’m doing’.<sup>94</sup> Demonstrating the gatekeeper effect of the harvest recruitment office, he also saw that it was in his direct interest to treat workers fairly, hoping that the harvest recruitment office would recognise his good reputation and ‘give us the good people because of that’.<sup>95</sup> Another farmer also noted that the harvest recruitment office manager, ‘won’t put people into businesses that she thinks are going to exploit them’ and he was confident that:

She knows when they come here, they’re going to be looked after, they’re going to be treated well, they will be treated almost like another family member as much as you can and so we tend to get a really, really good quality of backpackers because we look after them.<sup>96</sup>

## V DISCUSSION

Evaluation of the actions of a range of civil society stakeholders within this case study horticulture system reveals significant orientation and connection with one another, advancing individual and shared interests. These non-traditional employment regulators effectively influenced positive outcomes for vulnerable temporary migrant workers as well as for the region’s farmers and the surrounding community. These findings, novel in employment regulation literature, will now be analysed with reference to the systems approach and regulation scholarship.

Applying the systems approach<sup>97</sup> to these findings, some stakeholders within the horticulture system and beyond, acting solely in their individual interests, created a ‘tragedy of the commons’. Some farmers, labour hire contractors and accommodation providers in particular, had underpaid and otherwise mistreated working holiday makers who were vulnerable, due largely to their dependence on employers in geographically remote areas to certify completion of work to qualify for visa extension.

Key system stakeholders perceived this tragedy of the commons as a significant enough threat to the viability of the system as a whole to make them aware that their interests were aligned and to warrant acting in those shared interests, in some cases against short-term rational individual interests. That is, stakeholders were concerned that news of mistreatment of temporary migrant workers would spread to potential future workers, reducing labour supply and damaging both the functioning of seasonal labour-dependent farms and the regional economy. In order to maintain future labour supply, a number of

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94 Interview with Farmer D (South-East Queensland, 20 January 2016) (copy on file with author).

95 Ibid.

96 Interview with Farmer E (South-East Queensland, 22 January 2016) (copy on file with author).

97 Cutcher-Gershenfeld and Lawson, above n 19; Cutcher-Gershenfeld and Rubinstein, above n 19.

stakeholders took steps to improve conditions for temporary migrant workers, including regulating employment standards.

The systems approach allowed examination of a range of stakeholders, otherwise overlooked in extant employment regulation scholarship, finding civil society actors outside of the traditional employment paradigm exerting significant influence. Underlying this was the intrinsic link between work, accommodation and transport for temporary migrant seasonal workers as well as farmers', and their surrounding community's, strong dependence on temporary migrant workers during the harvest season. These factors, together with system stakeholders' perception of the tragedy of the commons, created conditions suitable for aligning the interests of a range of otherwise little-connected stakeholders, and for actors exogenous to the tripartite employment paradigm to play key roles in regulating minimum employment standards.

Huising and Silbey identified the importance to organisational regulatory outcomes of 'true believer' managers undertaking 'relational regulation' in a 'complex web of interactions and processes'.<sup>98</sup> The current research extends this to civil society actors and their actions undertaken outside of the firm, in even more complex interactions among less clearly interrelated stakeholders. Nonetheless, 'true believers' is an apt analogy, applicable in particular to the individuals who recognised early the threat to the commons and exerted influence over regulatory outcomes within the system. Notably, the local council compliance officer and local suppliers of labour, the harvest recruitment manager and the caravan park owners, influenced behaviour of other stakeholders such as accommodation providers and farmers, helping them to recognise the shared interests of the system and to value the commons by complying with employment and interrelated laws, in turn protecting the reputation of the region. While farmers were under cost pressures, to underpay or otherwise mistreat workers were not their only options particularly in the context of those these shared interests.

Vulnerable workers' prospects of being paid at least the minimum legal wages and of not being subject to sexual harassment depended to a large extent on decisions they made regarding transport, accommodation and means of sourcing of work. These decisions separated workers into those exposed and vulnerable to underpayment and other mistreatment, and those who found themselves within the orbit of horticulture system stakeholders who valued the commons. Workers with their own transport had the advantage of being less isolated, able to easily leave bad situations. Driving did, however, expose them to traffic hazards on unfamiliar roads with foreign road rules. Nonetheless, in this region, one such hazard was reduced by police stakeholders' actions. A decision to stay in the caravan park or to source work from the harvest recruitment office connected workers to employment in which they were more likely to be paid appropriately and treated with respect. For those workers who gained work directly with a farm, their experience and chances of enjoying the protections of employment and discrimination laws, depended on whether they chanced upon employers who valued the commons.

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98 Huising and Silbey, above n 52, 15, 36.

An additional extension of the systems approach is achieved through developing the typology of regulatory actions taken by stakeholders valuing the commons by creating value and mitigating harm as ‘gatekeepers’, ‘connectors’ and ‘facilitators’. By analysing system stakeholders in this way, the actions of key civil society actors facilitating orientation and connection among other stakeholders come into high relief. These non-traditional employment regulators exerted profound influence on compliance with employment standards as ‘gatekeepers’ between workers and employers, as ‘connectors’ between workers and state regulators and, most influentially, as ‘facilitators’ through their actions raising awareness among employers that their individual interests were aligned with the shared interests of the system.

Regulatory deficiencies are likely to be found in complex systems where state and union regulators face particular challenges.<sup>99</sup> Further, as Short argued, self-organised regulation is only likely to succeed in such regulatory enforcement voids left by absent or under resourced unions and state inspectors.<sup>100</sup> In this complex horticulture system, non-traditional actors were centrally involved in employment regulation, filling the void left by absent or under-represented traditional actors: unions and state agencies. The local council compliance officer was the main ‘facilitator’, aligning the interests of the other system stakeholders. The harvest recruitment office and caravan park, as major labour suppliers for the region, acted as ‘gatekeepers’, ensuring that vulnerable temporary migrant workers were only supplied to legally compliant employers in the system, putting pressure on those farmers to maintain standards and removing easy avenues of labour supply from non-compliant farmers.

However, stakeholders also utilised and enhanced those limited state resources through their actions as ‘connectors’, consistent with Huising and Silbey’s argument that this type of relational regulation is most likely to succeed in situations where external observers, government inspectors, or third-party auditors provided a credible threat of periodic review and demand for accountability.<sup>101</sup> As ‘connectors’, the harvest recruitment office and caravan park addressed one of the challenges facing the state labour enforcement agencies of under-reporting by temporary migrant workers<sup>102</sup> of employment law breaches by encouraging self-reporting and by making some reports directly to state agencies. Nonetheless, given the limitations of traditional state and union employment regulators, it was the stakeholders’ actions as ‘gatekeepers’ and ‘facilitators’ that were particularly necessary and influential.

As Schneider suggested of systems theory, this research shows that, ‘collective order may emerge purely from local interaction at the micro level, without any need of central control’.<sup>103</sup> However, in doing so, it is also instructive for traditional employment regulators seeking to return to the field by identifying points within a

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99 Weil, *The Fissured Workplace*, above n 2, 110.

100 Short, above n 55.

101 Huising and Silbey, above n 52, 33.

102 Fair Work Ombudsman, ‘Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program’, above n 7, 17; Fine, above n 34.

103 Schneider, above n 56.

complex system suitable for intervention, answering Corbett's call to explain system dynamics to aid this purpose.<sup>104</sup> This research suggests that there are new ways for states to regulate employment, extending Fine's appeal for co-enforcement to a wider range of society members.<sup>105</sup> It has identified a number of key stakeholders within the horticulture system as potential targets for interventions by state regulators aimed at improving compliance with minimum employment standards. By considering the regulatory roles of stakeholders beyond employers and employees, the state now has an opportunity to maximise its reach that is otherwise limited by the modest resources of its enforcement agencies.

Civil society 'connectors' between workers and state enforcement agencies, and 'gatekeepers' between vulnerable workers and employers, are prospective resources to be harnessed by the state more formally. For instance, the success, identified in this article, of informal community regulators suggests much potential for expanding Australia's harvest recruitment office program into major horticulture regions for two main benefits. First, it offers farmers an inexpensive and reliable alternative to labour hire contractors that have been the source of much of the documented employment law breaches. Second, it provides a regulatory connection to temporary migrant workers before, during and after each placement on a farm that the state could formally harness. This regular contact with vulnerable workers is invaluable for providing information about rights as well as gathering intelligence on breaches, in a way that is less reliant on reporting by those vulnerable workers, and ensuring timely enforcement action. Additionally, the important role of civil society 'gatekeepers' suggests potential for state intervention in horticulture systems via accommodation providers.

## VI CONCLUSION

While there has been much scholarship on employment regulation, it has remained largely limited to that performed within the labour paradigm of employers and employees, their representatives and the state.<sup>106</sup> With work increasingly taking place in complex systems, particularly given the prevalence of fragmented work structures and the rise of temporary labour migration, this field warrants revisiting using a new perspective to examine the regulatory space. Doing so, this article highlights an effective alternative method of promoting employment law compliance involving civil society actors outside of the traditional paradigm.

This article's primary contribution is to demonstrate the extent to which non-traditional, civil society stakeholders may play a role as regulators, positively influencing compliance with employment standards. This addresses a significant gap in employment regulation literature that has, to date, focused on the traditional actors of the state, employers, employees and their representatives. While a few studies have shown that civil society actors can be involved in employment

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104 Corbett, 'A Systems Approach to Regulatory Excellence' (2015), above n 57; Corbett, 'A Systems Approach to Regulatory Excellence' (2016), above n 57.

105 Fine, above n 34.

106 John Howe, 'Labour Regulation Now and in the Future', above n 21, 210.

regulation, enhancing state regulatory efforts,<sup>107</sup> it is now clear that civil society employment regulation can be effective even independent of the state. This is particularly the case in complex systems in which state regulators and unions are poorly placed to intervene.

The second contribution is to apply and test the systems approach in employment regulation in a horticulture system. Doing so brings into focus the interconnected nature of stakeholders outside of the traditional employment regulation paradigm. This facilitates identification of influential non-traditional civil society actors whose role in employment regulation might otherwise have gone unnoticed.

The third contribution is to develop a typology of regulatory actions taken by civil society stakeholders, providing a framework for better understanding system dynamics. In addition to its conceptual merit, this should prove useful for state agencies wishing to identify points of contact within systems towards which they can direct their limited resources to most effectively enhance enforcement efforts.

The findings could possibly be criticised for not being generalisable. Certainly many of the findings were dependent on policy and system context. In particular, the immigration policy encouraging working holiday makers to perform horticulture work created arguably unique labour market conditions. However, the challenge of enforcing employment standards in complex systems is shared by many developed nations and differing collections of civil society stakeholders might also be informally regulating employment, recognising that their individual and shared interests align. Further, as the focus of this research was limited to one geographical region there will inevitably be some factors specific to it. However, this in-depth focus on a single system allowed the rich analysis necessary to gain these valuable insights that would likely be unattainable in research with a broader frame of view. Nonetheless, applying a wider focus might be appropriate in future comparative research taking into account a range of circumstances across a number of horticulture systems.

Finally, the implications of this research apply more broadly to state regulators seeking to ensure compliance with employment standards in a range of complex systems beyond horticulture, involving a range of vulnerable workers. A number of individual stakeholders outside of the traditional employment relationship potentially share common interests in compliance with the law. This was clear for vulnerable temporary migrant workers in horticulture, as accommodation and transport were central to their working experience. It could potentially be equally relevant to a range of workers in other systems as they make contact with a range of civil society stakeholders apparently peripheral to work. Identifying these stakeholders and their impact upon compliance with employment standards is a potentially rich area for future research. Work takes place in a range of complex systems and conceptualising it as such opens avenues of enquiry relating to how stakeholders within those systems regulate by interacting and orienting amongst themselves, and to new ways of examining their individual and broader interests.

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107 Hardy, above n 43; Kaine and Bridgen, above n 43.