

The case for industry-managed compliance and how to maximise its effectiveness

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1. Overview

The Pacific Australia Labour Mobility (PALM) scheme reforms discussion paper (16 August 2022) states (p 8) that: ‘The Government is committed to expanding and improving the PALM scheme by making short term/seasonal deployments more attractive to Australian employers and reducing disincentives for employers to join the scheme’. The discussion paper (p 9) also asks for feedback on streamlined employer accreditation options with the questions:

- What role do you see industry accreditation schemes playing in the PALM scheme?
- Which schemes are sufficiently robust to give confidence to Government that would enable fast-tracking of approval processes? How would this apply outside the agriculture sector?

This submission responds to these issues. It presents the case that the top-down, heavy handed nature of the current governance arrangements will be self-defeating because of their narrow focus on compliance with employment relation issues and its strong disincentives for growers to participate. A range of positive incentives are needed to ensure greater employer support for PALM and compliance with its desired outcomes. These incentives need to be based on the market conditions that enable growers, and those providing labour services to them, to gain longer term supply contracts, based on their commitments to a third-party comprehensive accreditation system. These supply contracts in turn will enable growers to invest more in ensuring they have access to a stable and reliable workforce. These additional investments could include funding for real-time survey feedback from their workers to identify and resolve quickly workplace problems. The longer term supply contracts could also provide funding for the essential components of expanding employment such as new accommodation facilities.

The current governance arrangements in place have been shaped by the concentration of employment by labour hire operators. The government as regulator has persisted in using top-down, centrally administered control mechanisms to monitor approved employers for several reasons. First, the concentration of employment among a relatively small number of large labour hire firms makes them more easily monitored using this approach to governance. Second, labour hire firms are exposed to a draconian penalty of the suspension of its operations if the regulator believes there is a case for doing so or a formal complaint is lodged by a third party. Third, the absence of growers or their representative associations in the design of and ongoing role in the governance arrangements has led to a lack of appreciation of the wider operating conditions growers face.

The result has been a narrow reliance by the government regulator on employment law, and on an under-resourced Fair Work Ombudsman to identify rogue employers. The use by government of rigid compliance standards may be effective in addressing issues that are transparent and unchanging. However, as COVID-19 operating conditions showed, rigid compliance standards may do more harm than good in achieving program outcomes if the issues involved are complex, diverse and often changing (Wijen and Flowers 2022).

2. Governance requirements discourage growers from taking part

The whole focus of the PALM approach to regulation is to use top-down controls to manage risks. The tone of the draft Deed of Agreement (DoA), as with the previous SWP DoA, is draconian. To ensure compliance, Canberra-based contract managers, supplemented by Pacific Labour Mobility officers on the ground, will use the methods of prevention and deterrence, detection and correction, as spelt in the Assurance Scheme in the Guidelines (Section 9). This approach is based on the scrutiny of core documents related to recruitment, accommodation and welfare and wellbeing. It includes as well both announced and unannounced monitoring visits, to respond to information such as anonymous complaints and tip offs (p 47).

The Guidelines state that ‘a constructive and positive relationship between Us and You is central to the success of the PALM Scheme’ (p 46). But then in the same paragraph the following sentences make it clear that the relationship is completely one-sided and without recourse to a mediation process based on fairness even if the Assurance Framework is followed by the approved employer.

Nothing in this chapter 9 limits or otherwise affects Our rights or Your obligations under the Deed (including the Mandatory Guidelines). This section is provided for information purposes only and is not to be relied upon by You. You acknowledge that Our acts or omissions in implementing this framework as specified in this chapter is [sic]not a matter capable of dispute under clause 27 of the Deed or otherwise (p 46).

In the medium term, it is hard to see that this resource-intensive, government-funded and top-down regulatory approach can survive due to its cost, rigidity and longer-term ineffectiveness. A key limitation of the PALM scheme is its high cost to government. This includes not only the high cost of the Pacific Labour Facility (PLF). It also includes the cost to government of staff resources taken up in overseeing a complex domestic program, with high political visibility and major reputational risks, based on responding to often sensational media reporting.

3. Taking the nature of Australia horticulture into account

Australian horticulture has many defining characteristics that make it a complex setting for growers, labour hire companies and workers. This complexity has to be taken into account in the design and implementation of an industry accreditation system.

Horticulture’s complex setting includes a range of farms of varying size, but most growers are small. Most vegetable producers have farms that range in size up to 70 hectares, with 10 per cent of large vegetable producers with farms of more than 70 hectares. It is the latter group that accounts for 60 per cent of vegetable production (ABARES 2015-16, 2016-17). The fact that some 60 per cent of vegetable farms are under 20 hectares, and half of that proportion under five hectares is a key reason that many growers turn to labour hire companies to source and employ their harvest workforce

Unlike New Zealand, Australia’s horticulture is spread from north to south and east to west, resulting in year-round harvest work in each of Australia’s different temperate zones. Within these zones, many workplaces are remote, often with limited accommodation options. New Zealand’s RSE (Recognised Seasonal Employer) growers, on the other hand, are more geographically concentrated. They also are better organised and resourced, due to being either large employers or collectively organised as major labour cooperatives. This ownership structure and geographical concentration provides stronger incentives for RSE employers to ensure they have a stable and reliable supply of workers by, for example, investing in new accommodation facilities. Another collective benefit of being a labour cooperative is that

piecework rates can be worked out in a more systematic and transparent way. This can be done by the labour cooperative identifying which of its member growers are paying below the going rate and asking them to lift their piecework rate.

A key lesson from the SWP and RSE comparison is that a bottom-up, employer-based system of compliance is both possible and more effective in resolving problems. One indicator of this effectiveness is the relative absence of absconding workers under COVID in New Zealand, fewer than 30 in 2020. In contrast, between July 2020 and June 2021, 1,181 SWP workers are reported to have absconded, up from 225 the previous year (Bedford 2022). As the submission to this consultation from Ms Evie Sharman and Professor Howes notes, currently the number of applicants for protection visas from the Pacific, many of whom are absconding SWP workers, has increased to 300 a month, up from 100 a month.

A key part of the explanation for this difference in absconding numbers is that New Zealand growers, to provide fruit to export markets, must be GlobalGAP certified. Growers and labour contractors have little incentive to employ workers illegally because the risks are too great to their international accreditation and loss of access to export markets. As Charlotte Bedford notes, without 'rogue employers' willing to employ RSE workers on their farms outside of the RSE, the incentive for workers to abscond is much weaker.

As just noted, this bottom-up compliance approach in New Zealand has been driven by a stronger export market orientation, led by the umbrella industry association, Horticulture New Zealand. In 2012, there were 10 times more accredited producers in New Zealand under the Global GAP than in Australia (Curtain et al 2018, p. 472). As explained further below, this accreditation system has been adapted to New Zealand conditions in the form of NZGap. The latter is described as a comprehensive set of good agricultural practices to provide a 'simplified, cost-effective, and integrated assurance in New Zealand horticulture that is trusted and valued'.¹ NZGAP is owned and operated by Horticulture New Zealand.

4. The dominance of the major supermarket chains

A predominant feature of Australian horticulture is the market dominance of four supermarket chains. These supermarket chains dominate the domestic market accounting for 83 per cent. Based on 2021 figures, Woolworths accounts for 37 per cent market share, and Coles 28 per cent, with these two together accounting for nearly two thirds (65 per cent) of the domestic market.² Aldi Stores and IGA supermarkets account for another 17 per cent of the domestic market. These two supermarkets' share of the fresh food market may be larger. This high level of concentration has produced intense price competition, at the expense of suppliers.³ As the head of the ACCC, Rod Sims, recently noted in a keynote speech to the Law Council of Australia ([27 August 2021](#)):

Many small businesses and farmers are largely reliant on Coles and Woolworths to access grocery shoppers. As recent history has shown us, this power imbalance places small businesses and farmers in particularly precarious positions with consequent damage to our economy.

¹ <https://www.nzgap.co.nz/> NZGAP is overseen by the NZGAP Committee, which is a subcommittee of Horticulture New Zealand.

² <https://www.finder.com.au/supermarket-statistics-2021>

³ <https://www.abc.net.au/news/2017-10-25/wesfarmers-results-cost-cutting-slows-coles-sales-growth/9083406>

Response to media reports and the annual reporting requirements of the Modern Slavery Act

The supermarket chains have in recent years developed codes of conduct for their supply chains related to fair employment practices as well as other desired practices. The Woolworths Group, operating in both Australia and New Zealand, produces annual reports detailing its audit activities related to its standards for labour hire operators.⁴ These standards now also include a responsible recruitment commitment.

The Coles Group, the second largest supermarket chain in Australia, also reports through its Ethical Sourcing Program, its actions to assess modern slavery risks within its supply chain.⁵ In November 2019, Coles entered into the Ethical Retail Supply Chain Accord (ERSCA) with three of Australia's largest trade unions. The aim of the Accord is to improve and protect the rights of all workers regardless of visa or employment status. According to Coles 2021 Modern Slavery Statement, 'members of the Accord meet regularly to discuss opportunities to lift social compliance standards in the Australian supply chain. Horticulture has been a key focus area of the Accord'.

The international supermarket chain, Aldi Stores, make use of third-party audits in Australia such as Sedex Members Ethical Trade Audit and Growcom's Fair Farms as part of its Australian Fresh Produce Social Monitoring Program (Aldi Stores, 2022, pp 9-10). Metcash (IGA Supermarkets) asks its fresh food suppliers to join SEDEX which requires a self-assessment questionnaire and conducts independent third-party social audits (Metcash 2022, p 35).

These responses by the supermarkets, especially the more detailed scrutiny reported by Woolworths Group, show the potential for large corporates, with strong brand recognition, to invest in setting standards and in monitoring their implementation. However, these efforts are limited as far as they go. There is no indication from the four leading supermarkets of a coordinated response among themselves to reduce harm in their supply chains or to reward good performers. Such a coordinated response would reduce a key element in the complexity of private regulation of business standards in this sector. In particular, supermarket chains need to address the mixed messages they are sending when they ask suppliers to invest in greater compliance while also demanding price reductions for the produce they are buying (Kuruville et al 2020, p 845-846).

5. Need for a common industry accreditation system

This complexity which generates a lack of transparency is in major part driven by the perception that there are too many industry accreditation standards, with their own third-party audit arrangements. These accreditation systems include two general types. One type is based broad-based standards such as GlobalGAP which covers a range of good agricultural practices (GAP) and is aimed at suppliers wanting to engage with export markets. As noted above, the New Zealand adaption of this standard is called [NZGAP](#). New Zealand growers have widely adopted NZGAP, covering in 2022, up to 55 per cent of fruit growers and 45 per cent of fresh vegetable producers (NZGAP 2022).

⁴ See Woolworths Group, [2022 Modern Slavery Statement](#), Framework for monitoring labour providers in our operations, pp 12-14 & 17; Woolworths Group Responsible Sourcing Standards - [Addendum Requirements for Labour Providers in our Australian Horticulture Supply Chain](#), February 2019; and [Responsible Recruitment Addendum: Supplier Requirements, Guidance & Remediation Protocols](#), June 2022.

⁵ The Coles Group, 2022, [Our Commitment to Human Right 2021 Modern Slavery Statement](#). P 24-25.

NZGAP will continue to provide growers with the best pathway to meet their compliance obligations, while also moving beyond compliance on a continuous improvement journey. The organisation continues to work towards aligning grower practices with regulatory and market requirements...

The other type of accreditation systems in use in Australia such as StaffSure and Fair Farms are much narrower in their focus which is on meeting minimal employment standards. These accreditation schemes are aimed at the meeting the requirements of buyers in the domestic market.

With multiple accreditation systems operating within one industry, the danger is a lack of public transparency about the functioning of industry self-regulation. This in turn is likely to encourage suppliers to appear to adopt the standard being promoted but in practice doing little to implement the required practices, an outcome called symbolic adoption (Kuruvilla et al 2020, p 842). This needs to be addressed not only by the supermarket chains agreeing on a common approach that is comprehensive in the issues covered. This common approach should include a standard for providers of labour hire services, as NZGAP has done recently (see box below).

Contractor Standard NZGAP

Using NZGAP certified contractors is a means for growers and other supply chain operators to demonstrate the contractors they engage have met the requirements of these standards at both a production and social practice level

In New Zealand, horticulture is considered a high-risk industry regarding worker welfare meaning regulators are also supporting Social Practice certification. International legislation such as the Modern Slavery Acts in Australia and the UK are having a knock-on effect on supermarket sourcing policies, resulting in them being required to report on social practices all the way from the grower and contractor level on the ground in New Zealand.

Growers are ultimately responsible for the business practices of contractors they use on their properties, including how workers are treated. The common practice of using contractors, especially for seasonal tasks, means that certification is an effective pathway for contractors to demonstrate compliance to growers, and for growers to engage the services of contractors with confidence. As a result, supermarkets in New Zealand and overseas are increasingly seeking Social Practice certification in addition to the core GAP (Good Agricultural Practice) Food Safety certification.

Also needed is for large produce buyers to offer incentives to compliant suppliers, not just disincentives for non-compliance with their codes of practice. For example, the supermarket chains need to devise ways of rewarding those suppliers who receive each year a favourable audit report (see Recommendation 2 below).

Recommendation 1: Australian horticulture has a large range of conditions that create an overly complex set of arrangements. These factors include as degrees of remoteness, the dominance of small farms as employers, different payment systems due to differences in crops and terrain and pressures from large supermarket chains to cut costs. Good employment practices which are additional to minimal legal requirements cannot be easily identified and captured by a simple set of compliance checks based on fixed rules. A more flexible system for setting standards and ensuring compliance is needed.

Recommendation 2. It is recommended that all four of the leading supermarket chains collaborate and agree on common standards for good agriculture practices, including good employment practices. Specific standards for SWP workers need to be developed separately, taking into account Recommendations 3 to 5 below.

The four supermarket chains also need to agree on how best to conduct third-party compliance audits flexibly to achieve measurable outcomes such as enhanced worker welfare and productive workplaces. This proposed common approach by the supermarket chains needs to include incentives for suppliers to show by third-party audit that they are compliant. These positive incentives are needed in addition to the obvious disincentives such as non-engagement for non-compliant suppliers.

Industry needs to design and implement the good practice standards in such a way that adopters will comply substantially with the standard's requirements. This requires clear rules, strong incentives and best practice transfer to improve the chances of adopter compliance (Wijen 2014, p 307).

However, this will not be easy to do. If the standards are too general or the audit process is too superficial or perfunctory, adopters and auditors, in a complex setting like horticulture, may aim for minimal compliance ('tick the box') at the expense of the achievement of the outcomes sought by the standards. There needs to be a balancing of compliance requirements against a mechanism that achieves outcomes (Wijen 2014, p 309). A more flexible approach to compliance enables an auditor to work with the adopter to 'problem solve' the issue that does not conform to the standard but aims to achieve the desired outcome (ie overlooking the letter of the law to achieve its spirit).

This approach has been applied successfully in the governance arrangements for New Zealand's RSE in the form of a relationship manager. These relationship managers, who are government employees operate, as trusted 'go betweens' who can sort out problems between the RSE program administration and employers (Curtain 2019).

6. The problems with assessing compliance by focusing on fixed rules

On the surface, concrete and uniform rules help compliance because they make it clear what the desired behaviour is and so making monitoring easier (Wijen 2014, p 310). This reduces adopter uncertainty and ambiguity and makes it easier for the third-party auditors to check compliance. However a narrow focus on rules does not consider differences in local conditions or recent unanticipated events (Wijen 2014, p 310). Nor does a narrow focus on rules recognise that potential for unintended consequences which may affect the achievement of the standard's desired outcome (Wijen 2014, p 311).

So if a standard's rules are narrowly defined and the compliance follows a simple, perfunctory approach, then the result can be an inflexible system that does not meet the needs of the adopters. Narrow compliance with standards can be counterproductive because this does not allow adopters to use creative solutions to achieve the standard's intended goals (Wijen 2014, p 312, Wijen and Flowers 2022).

A good example of these problems with a fixed rule is the way the quality of accommodation for SWP was assessed by DESE contract managers. Their narrow focus on minor details about the quality of the accommodation required for SWP workers failed to consider the differing conditions in regional rental housing markets, such as rental costs and low vacancies rates. The long delays granting labour hire firms approval for new accommodation meant that workers could not start work. The effects of these delays became more obvious under COVID when workers were moved between farms to give them access to work. These delays in accommodation approval resulted in a deterioration in workers' welfare as workers were unable to work and had to pay rent and cover their living expenses until they could move. Also the strong emphasis by the regulator on the high quality of the required accommodation meant that accommodation was seen by many workers as too expensive for their needs. This extra expense became one reason why some workers absconded to seek cheaper accommodation.

7. How to achieve a compliance and outcome balance?

In a diverse and changing industry settings, the insistence on using a well-defined and rigid process to ensure substantive compliance can be at the expense of achieving a key desirable outcome such as worker welfare. On the other hand, favouring a more flexible compliance process runs the risk of adopters going through the process but not wanting to make real changes. A process needs to be in place which can find the balance between compliance with a standard and goal achievement. Three ways this can be done are: (1) designing key rules which take in account unintended consequences; (2) encouraging adopters to internalise the program's goals; and (3) develop ways to accommodate the features of specific contexts (Wijen 2014, pp 312-315).

Recommendation 3: It is important in setting compliance standards to identify the effects of a standard, including its unintended effects as well as intended effects.

To set and promote rules that do not have side-effects that undermine achieving a standard's own goals requires careful investigation of conditions on the ground. This involves charting the effects of intended policy measures and assess their impact in terms of both direct and indirect consequences. The DESE's Deed of Agreement with approved employers emphasised the quality of accommodation because this was the subject of media reports about some workers' living conditions. This was a partial solution aiming at improving worker welfare, but its implications for other important factors were ignored. These unintended consequences include delayed access to work, the higher expense of the accommodation for workers and increased risk of absconding. DESE, in its design of the new Agreement launched in early 2020 and its application under COVID-19 conditions, made no effort to work out with approved employers the causal chain of flow-on effects of how this sole focus on accommodation quality could harm worker welfare.

Recommendation 4: Adopters need support, such as training workshops and taking part in communities of practice, to work through and understand the deeper benefits that their organisations can gain from achieving the goals of the standards set for their industry.

It is important to help adopters to see the deeper benefits of an industry-based accreditation system. These perceived benefits need to go beyond their immediate reasons for adoption such as responding to economic opportunities and or seeking social legitimacy. This may require training for adopters and sharing of experiences between adopters through a community of practice. The focus of these exchanges should be on information about the benefits of a focus on better worker welfare as a way of achieving a more productive workplace.

Recommendation 5. For complex settings, specific adaptive capacities are needed within an accreditation system to allow adopters who are compliant to achieve the goals promoted by the standards.

The third way proposed to balance compliance with goal achievement is to distinguish between core principles which are treated as universal rules and rules that are tailored for specific settings (Wijen 2014, p 314). The latter may include a focus on adapting to a specific industry sector such as horticulture, or for a geographical location, or for specific social groups such as SWP workers or low-skilled migrant workers more generally. The industry body sponsoring the accreditation scheme should both define (1) the 'untouchable' principles that apply for all adopters and (2) specify the conditions under which the operating contexts are sufficiently different to develop new or adjust existing rules to address the different conditions. The latter arrangements may arise from employers' locally developed practices and feasible solutions aimed at achieving the stated goal.

8. Conclusion

A key challenge for industry self-regulation is to design an accreditation system that offers incentives for employers to go beyond mere 'symbolic' adoption. This refers to employers merely paying lip service to the standards or limiting their efforts to the highly visible but in real terms insignificant actions. Another, contrary challenge, is for an accreditation system to be flexible in addressing complex operating conditions. This refers to where the design of an accreditation system is based on universal rules and is backed by an inflexible compliance system but does not deliver the desired results. This happens when compliant adopters are denied the opportunity to achieve the goals of the accreditation system because they are stopped by narrow compliance requirements from working out ways to respond to complex settings.

Operating in a setting where there is a high degree of complexity requires that the accreditation scheme has a built-in capacity to adapt to and respond to the context in which adopters are operating. Labour hire firms working in horticulture with low-skilled migrant workers with limited English face a range of issues that will be more diverse than an accreditation system designed for a grower employing workers in one location. Flexibility needs to be incorporated into the design of the standards and their implementation to meet the needs of specific operating conditions that are outliers.

A bottom-up system of compliance is needed, based on both the legal framework set by government and the standards of good practice set by industry supply chains. This system needs to be managed by the market actors, ranging from the growers, labour hire firms, third-party auditors and produce buyers. These market actors have the most to lose in terms of their reputation and profitability if the system they are responsible for is not working well.

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