

Australia's organic trilemma: public versus private organic food standardisation

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Abstract

The Australian organic food industry has reached a political impasse. Despite being one of the fastest growing sectors of the food economy, the organic industry in Australia remains largely self-governed. There is no specific legislation for domestic organic food standardisation and labelling at the state or federal level as there is in the USA and the EU. The situation has engendered deep division within the sector. While there is recognition among most organic industry actors about a need for regulatory reform and greater engagement with government, there is disagreement over the appropriate nature and extent of government intervention. Some sectoral actors seek government regulation to facilitate the maturation and expansion of the organic industry and to protect consumers and producers from labelling fraud. Others fear that government regulation may undermine the values and traditions of the Australian organic agriculture movement. Drawing upon the social theories of Jurgen Habermas, Niklas Luhmann and Gunther Teubner, the paper argues the Australian situation represents an example of a regulatory trilemma. Inappropriate government regulation may: (1) be ignored and thus redundant; or (2) it may destroy the inherent structure and normative dynamics of Australia's organic food system; or (3) be counteracted by positive systemic resistance from the organic sector. The paper finds a reflexive approach provides a sound critical basis for surveying the limits of government regulation of the organic sector and represents an effective response to the trilemma.

Introduction

In May 2007 the newly formed Standards Australia Technical Committee (FT-032) held its inaugural meeting to develop an Australian national domestic standard for organic food production. The event should represent an important milestone in the evolution of the Australian organic industry, but it also highlighted ongoing controversy and political fault-lines forming around the issue of sectoral governance. On the day of the meeting, Biological Farmers Australia (BFA) issued a press release calling for the process to be stopped, claiming, 'the development of an organic standard with Standards Australia will be a retrograde step which will undermine the existing self-regulatory system in Australia and one that will encourage uncertified organic produce' (BFA 2007). BFA is the organisation behind 'Australian Certified Organic' – the organic label with the largest number of certified producers in the country. Somewhat ironically, while criticising the Standards Australia process for threatening to undermine organic industry self regulation, BFA also advocated the implementation of mandatory organic food standards via the Food Standards Code administered by the Australian and New Zealand joint statutory food authority. A step that would not just undermine the current self-regulatory system; it would effectively end it by handing control to government.

Unlike governments in Europe and North America and Asia, no Australian government has implemented specific regulations for the domestic organic industry. There is some Federal Government engagement through the Australian Quarantine and Inspection Service (AQIS) which oversees a standards and accreditation arrangement for licensing organic exports. Although it has been used by most of Australia's six private organic certifying agencies as a *de facto* national standard, the export standard is not legally enforceable in domestic markets. Since the early 1990s the Australian organic industry has been calling for a national domestic standardisation regime backed by federal laws. Proponents argue government regulation will protect consumers and producers from fraud and misrepresentation concerning uncertified and imported produce traded as organic. Despite more than a decade of lobbying from the organic sector, the Australian Government has been unwilling to implement domestic organic regulations, maintaining that a self-regulatory regime is sufficient. The Government's policy, anchored in a neoliberal agenda of free-market deregulation and privatisation, has engendered deep frustration among key industry stakeholders unable to reach agreement over the formulation of an alternative governance regime.

This paper explores some theoretical implications of the political impasse concerning institutional design for Australian organic food governance, particularly the merits of government regulatory intervention. It outlines the policy context of organic agriculture and surveys the remedies available to combat misrepresentation, evaluating the

protection for consumers and organic stakeholders under Australia's existing food labelling regulations. It compares the Australian Government's neoliberal market policy regarding organic standardisation with a 'reflexive governance' approach drawn from evolutionary legal theories of Habermas, Luhmann and Teubner, and discusses whether the Government's policy represents a credible response to the 'regulatory trilemma' confronting it.

The organic food phenomenon

In an essay decrying the growing political power of consumer and environmental movements, British academic Frank Furedi (1999) laments:

Consumer activism has succeeded in transforming the issue of food into one of the most high profile political issues facing British society. Although genetically modified foods have been the main target of a bitter environmentalist crusade, the entire food industry has become stigmatised by the claim that it puts profits before people's safety.

The modern food economy demands order, control and predictability but the problem with nature is its propensity for disorder, unpredictability and recalcitrance (Goodman, Sorj.B. & Wilkinson 1987). Oblivious to politics, drought, floods, weeds, disease and feral pests continue to torment contemporary farmers, as they undoubtedly did the first ancient Sumerian farmers in 8000 BC. A philosophical dichotomy regarding this 'problem of nature' (Rutherford 2000) has emerged from the normative discourse accompanying agricultural modernisation: the *synthetic – organic* dichotomy. The synthetic philosophy underpins modern industrial agriculture, whereby nature's unruliness is confronted scientifically by reducing it to its constituent chemical and molecular elements in order to manipulate biological traits and processes. The countervailing organic philosophy eschews such reductionism; the unruliness of nature is accepted holistically as setting systemic constraints to work within rather than against. Farmers should recruit to the fullest extent natural systems of pest control, nutrient and energy recycling while avoiding the use of external synthetic inputs which might damage those systems (Lockie & Salem 2005).

The synthetic philosophy is now exemplified by the drive to develop food production using GMO (genetic modified organisms) or biotechnology – technology to modify and transplant genes between crop species and create living organisms through DNA cloning. At the other end of the spectrum, epitomising the organic approach is 'biodynamic' farming. Based on the teachings of Rudolph Steiner (founder of 'anthroposophy') biodynamic farming treats the whole farm as a living organism. It prohibits the use of synthetic chemicals, requires exponents to plan crop rotations according to an astronomical calendar, and to promote soil fertility by burying cow horns filled with natural herb and mineral preparations (Leiber, Fuchs & Spief 2006). In

1928 the 'Demeter' label was created in Europe to market biodynamic produce; establishing the first certification and labelling system of what has since evolved and diversified into the broader international organic agriculture movement (Demeter).

Organic agriculture is described in the following terms by the International Federation of Organic Agriculture Movements (IFOAM) its peak international body:

Utilising both traditional and scientific knowledge, organic agricultural systems rely on ecosystem management rather than external agricultural inputs. It is a system that excludes the use of synthetic inputs, such as synthetic fertilizers and pesticides, veterinary drugs, genetically modified seeds and breeds, preservatives, additives and irradiation (IFOAM 2007).

What distinguishes organic from both modern industrial (or conventional) agriculture and traditional subsistence agriculture is its normative imperative. The conventional agricultural paradigm is relentlessly pragmatic; dictating the use of whatever technology is reasonably affordable and considered likely to produce highest yields or desired product attributes. Organic agriculture repudiates the use of synthetic external inputs on principle, regardless of their claimed effectiveness or legality. Organic farmers might adopt many of the techniques of traditional farmers, not because of unavailability of modern agricultural technology, but in the belief they are healthier for humans and the environment. So organic food is a phenomenon associated with industrialised world rather than traditional rural societies where the sorts of low-tech, low-input farming techniques used in organic farming actually predominate by necessity.

The organic movement is a modern reaction against industrial agriculture and arguably represents the most significant 'alternative' agricultural paradigm to challenge it. By 2004 the estimated annual global trade in organic food and drink had reached 27.8 billion \$US (Sahota 2006), and (according to 2006 figures) there are at least 31 million hectares of land managed organically by 623,174 farms spread worldwide (Yuseffi 2006). For a number of years organic food sales in developed countries have been increasing by up to 20% per annum, making organics one of the fastest (if not *the* fastest) growing sectors in the world food economy and Australia is no exception to this trend (Lockie et al. 2006). The rise of organic agriculture involves pivotal issues in agricultural, environmental and consumer politics, and a unique nexus of market, state and civil-society governance. A key ingredient in the organic movement's success is the way diverse movement actors have organised into local, national and global networks and developed their own market based mechanisms for governing food production through voluntary, non-government (NGO) endorsed production standards, accreditation of third-party auditors, and product certification and labelling. These

market based standards initiatives rate as pioneering efforts in the development of eco-labelling and environmental management systems (EMS) that have now been taken up by other industry sectors such as fisheries, forestry, mining and manufacturing (Gale & Haward 2004).

The politics of organic food standardisation

As markets for organic produce have grown, driven largely by strong consumer demand, the organic industry has had to withstand attacks on its credibility from conventional agribusiness stakeholders such as GM seed and agrichemical manufacturers for whom it poses a commercial and political threat. At the same time organic markets represent an enticing prospect for retailers and other agribusiness actors seeking access to price premiums and the green or 'ethical' consumer dollar (Ikerd 2006). The international organic movement, via IFOAM, responded to such challenges by seeking to strengthen the integrity of the worldwide organic 'brand' through harmonisation and enhancement of its organic standardisation systems (Ikerd 2006). The international network overseen by IFOAM has become one of the largest and most sophisticated private governance systems in world trade (Courville 2006).

Along with civil society, national and regional governments have also been drawn into legally regulating organic sectors under their jurisdiction. According to Ikerd (2006), much of the impetus for government regulation originated with the organic community itself. He argues the success of the organic movement had, by the 1990s, sparked optimism among movement stakeholders that organic agriculture could challenge and displace conventional agriculture. The unruly patchwork of competing private standards, certification agents and labels was seen as a hindrance to growth. Organic stakeholders turned to their respective governments for industry support, identifying as a priority the development of internationally recognised standards to facilitate organic food trade in domestic and export markets. In 1991 the European Union implemented the supranational *EC Council Regulation 2092/91 on Organic Agriculture* requiring EU states to legislate harmonised national organic regulations. In 2000 the Japanese Government implemented the *Japanese Agricultural Standard of Organic Agricultural Products* (JAS). After a decade of politically fraught development and consultation the United States Department of Agriculture (USDA) finally assumed statutory responsibility for US organic standardisation in 2002 pursuant to the federal *Organic Foods Production Act 1990*. Counting EU states individually, there currently exists more than 70 countries with legislative organic regulations either in the pipeline or fully implemented (Kilcher, Huber & Schmid 2006).

Worldwide, organic standardisation now involves a myriad of competing government and private systems riddled with jurisdictional overlaps and duplication. The

regulatory confusion and compliance burden has become such that many potential and existing smallholder farmers, ostensibly the backbone of organic agriculture, now balk at undergoing full organic certification (Courville 2006). Of perhaps greater significance for the movement, government regulation can and has led to displacement of the civil-society actors and voluntary market mechanisms inherently responsible for organic standardisation in private systems. The phenomenon is graphically illustrated by the US experience with the *Organic Foods Production Act 1990* and associated *National Organic Program* regulations. As indicated above, the regulations give the USDA ultimate statutory responsibility to formulate organic standards and accredit agents to audit and certify organic producers. Section 205:501 of the regulations provides *inter alia*:

... A private or governmental entity accredited as a certifying agent under this subpart may establish a seal, logo, or other identifying mark to be used by production and handling operations certified by the certifying agent to indicate affiliation with the certifying agent: Provided, That, the certifying agent:

(1) Does not require use of its seal, logo, or other identifying mark on any product sold, labelled, or represented as organically produced as a condition of certification and

(2) Does not require compliance with any production or handling practices other than those provided for in the Act and the regulations in this part as a condition of use of its identifying mark: Provided, That, certifying agents certifying production or handling operations within a State with more restrictive requirements, approved by the Secretary, shall require compliance with such requirements as a condition of use of their identifying mark by such operations.

The effect of the provision is to mandate government controlled standards as both the minimum and *maximum* benchmark for organic production; in other words they function as both a floor and a ceiling. Private certifiers are legally prohibited from claiming organic status if they promulgate standards that add extra or more restrictive requirements than the government standards.

The US laws curtail private organic certifying agents' ability to differentiate their programs in the market through promotion of unique or more rigorous standards and continue representing themselves as organic. Evolving 'organic' practices are no longer legitimised in the US through the voluntary and competitive interplay of ideologically driven NGOs, farmers and consumers in the marketplace. The organic label has become the exclusive property of USDA bureaucrats and ultimately lawmakers who may have minimal commitment to the traditions and ideology of the organic movement, if any. The implications were well and truly brought home to the movement in December 1997

when the USDA first released the draft National Organic Program Proposed Rule to establish the National Organic Program. The draft regulations proposed authorising the use of genetically modified organisms, municipal sewage sludge and food irradiation in the production of organic food, a move which according to Vos (2000, p248) was, '...a sobering indication of a bureaucratic process extraordinarily out of touch with a constituency it is ostensibly meant to serve.'

The draft regulations provoked a massive negative reaction. The USDA received around 300,000 written, mostly negative, public comments; more than for any other legislative proposal in US history (Vos 2000). The public response forced a revision of the regulations before final implementation in 2002, but the US National Organic Program remains the focus of sustained criticism from many traditional organic proponents who consider the USDA and Congress susceptible to capture by corporate interests. Their fears appear to have been borne out by a recent amendment to the *Organic Foods Production Act 1990* that potentially allows the use of hundreds of synthetic chemicals and other non-organic ingredients in organic food production. The amendment was achieved through an inconspicuous rider attached by the Republican majority leadership to a large 2006 Agricultural Appropriations bill, allegedly at the behest of agribusiness lobbyists (Gilman 2006).

The US example provides a cautionary tale of how the imposition of a substantive legal regime onto an organic food sector led to the organic movement losing ownership of perhaps its most essential institutional asset – use of the term 'organic'. The situation is not unique to the US and government regulation of organic standardisation has created similar tensions in European jurisdictions. The following is an excerpt from a 2006 submission to government by one of Europe's premier private organic labels (Sweden's 'KRAV') regarding proposed EU amendments to *EC Council Regulation 2092/91*:

If the proposal is adopted, private labels will be forced to approve all products that fulfil the EU regulation, even if these do not fulfil their own standards. For KRAV, this would mean that other certification bodies will have the right to issue KRAV certification. ..Great immaterial value that has been built up over time is therefore confiscated. If we take a look at the KRAV label, others will have access to a trademark that most likely would cost many hundreds of million Swedish kroner to build up... We are also decidedly against detailed standards being introduced about what can be stated in marketing of the private label... To attempt to regulate whether one may say that something is better or not is the same as involving oneself in a regulation of value judgments, which should be extremely difficult at the EU level (KRAV 2006).

The theory of autopoiesis and the organic trilemma

Courville (2006) asserts that regulatory initiatives devised to protect the integrity of organic agriculture are having the paradoxical effect of threatening the institutions and values at the very heart of the movement that created it. This paradox is the basis of what is referred to here as the *organic trilemma*, a variation on Gunther Teubner's 'regulatory trilemma' (Teubner 1987). The trilemma stems from Jurgen Habermas' concept of *juridification* – when law colonises the social 'lifeworld', imposing formal bureaucratic norms and modes of organisation, triggering conflict, loss of individual freedoms and a crisis of legitimacy (Vincent-Jones 1998). Building on juridification, the regulatory trilemma denotes the predicament in attempting to superimpose legal norms onto inherently functional, normatively autonomous social systems: (1) the legal intervention will be ignored and thus redundant; or (2) the law may destroy the structural and functional integrity of the targeted system; or (3) the system's resistance to legal intervention may be as strong as to counteract the law or legal institutions involved (Black 1996). It follows that the 'organic trilemma' is realised in tensions (as outlined above) between government regulation of organic sectors and existing private organic governance systems. The Australian Government and organic sector now find themselves drawn into just such a trilemma by virtue of the ongoing pressure to regulate organic food standards in domestic markets.

Teubner's work on juridification and the trilemma is a synthesis of Habermas' and Niklas Luhmann's neo-evolutionary theories of law (Vincent-Jones 1998). A thorough rendition of this growing body of theory is beyond the scope of this paper but it is worthwhile outlining salient elements before focusing on the Australian organic sector. In Luhmann and Teubner's *systems theory*, society is viewed as the sum of interactive yet discrete subsystems such as law, politics, religion and business, operating as specialised cycles of communication and meaning (Luhmann 1985; Teubner 1993). Social systems and subsystems are *autopoietic* – reflexive, self-organising, evolving and reproducing according to unique internal logic and communicative dynamics. Similar to how biological organisms form into distinct species at a certain point in their evolution, social systems become distinct from their social environment when they reach the evolutionary threshold of *normative closure*, in short, once they begin determining their own rules (Teubner 1993). The systemic integrity of a social system is reflected in the degree, strength and structural sophistication of this normative closure. So the legal system, a highly evolved social system, will only recognise a norm as 'law' if it is the product of its specialised lawmaking institutions: legislation, judicial decisions and contracts (Teubner 1993). Social systems are normatively closed but they are *cognitively open*, meaning they perceive and respond to their environment (which includes other social systems) but internally construe perceptions according to their own logic and 'binary' normative codes (King 1993). For instance an insult might have one meaning in an informal social network (loss of friendship), but it may also

simultaneously have another meaning in the legal system (defamation, provocation) and another in the economic system (loss of business goodwill). A system's normative codes are binary in that their specified values have counter-values; to illustrate: profitable – unprofitable (business); legal – illegal (law); scientific – unscientific (science); Christian – unchristian (church); democratic – undemocratic (politics); and organic – synthetic (organic agriculture).

The autopoiesis (or reflexive self-determination) of social systems has profound implications for the governance of industry at either sectoral or enterprise level by governmental systems (legal and political) that are themselves autopoietic. Governments will actively try to destroy some social systems like organised crime and terrorist networks; a task demanding heavy if not prohibitive commitment of power backed by force. But governments are rarely aiming to destroy business or industry sectors by regulation, quite the opposite. Industries provide essential goods and services to society and regulation seeks to address perceived negative 'externalities' or failure to fulfil desired functions on the part of a targeted sector (or individual enterprise such as a factory) while supporting performance of its valued functions (Lindblom 1980). So, for example, in agricultural regulation governments might aim to support the vital performance of food production and deter negative environmental impacts such as landclearing and agrichemical pollution in water catchments. The problem lies in how to motivate the desired behaviour patterns among private actors bound by their own peculiar normative logic. Business succeeds on the basis of entrepreneurship, competition, mercurial innovation and relentless commitment to the pursuit of profit. Teubner points out that a regulatory initiative, heavily sanctioned or not, stands little chance of success with business actors if it conflicts with their profit motive and no chance at all if it threatens them with bankruptcy (Teubner 1993).

Reflexive governance

Autopoiesis dictates that normative imperatives will not be adopted by disparate systems and subsystems purely because they have the force of law. A government that tries to superimpose conflicting norms or logic on another social system inevitably risks either irrelevance or destructive reaction; ergo the regulatory trilemma. The trilemma implies intractable difficulties in regulation through command and control interventions. The perceived failure of numerous well-intentioned regulatory programmes throughout the 20th Century has generated a substantial body of literature, spawning the notion of a 'crisis of the welfare state' (Black 1996). In the Anglo-Saxon world, renewed neoliberal faith in market rather than government coordination of economic activity has been a core tenet of public policy since the 1980s. But for Teubner, the trilemma does not signify a wholesale return to *laissez faire* deregulation and privatisation. Taking his cue from Nonet and Selznick's idea of 'responsive law' he

develops the notion of *reflexive* law which takes advantage of the cognitive openness of social systems while respecting their normative closure (Black 1996; Nonet & Selznick 1978; Teubner 1983). Acknowledging the limits of prescriptive regulation, reflexive regulation relies on indirect strategies that aim to facilitate, rather than override, the internal self-regulatory mechanisms of systems it seeks to influence (Vincent-Jones 1998). As Gunningham notes, a business is likely to have more expertise and skill within its sphere of operation than governments are ever likely to have and, '...the most appropriate role of the state is to channel industry expertise in the public interest' (Gunningham 2003).

Reflexive regulation, or more broadly 'governance', can be contrasted with neoliberal deregulation in that government does not abandon the field, leaving the private sector purely to its own devices; it proactively develops strategies tailored to stimulate private actors' innate self-regulatory impulses. For example, a government website which publishes environmental performance data concerning a range of industrial competitors may prompt voluntary pollution reduction initiatives from companies keen to demonstrate their corporate social responsibility and avoid a community or shareholder backlash. In the case of food production, a legal labelling requirement to inform consumers about the presence of GMO ingredients may cause loss of sales for a particular product line, leading to retailers switching to competing products that do not use GMOs. In both cases government has undertaken a monitoring role but has not attempted to command or control behaviour directly. By causing publication of crucial information it simply enabled all the relevant stakeholders to make their own informed determination of how best to respond, if at all.

Governments can operationalise the concept of reflexive governance by providing institutional frameworks to enhance democratic participation within and between societal organisations. This aspect of reflexive governance furthers the powerful democratic theme in Habermas' work on communicative rationality. For Habermas, the rationality of social norms and actions is not determined by their instrumental effectiveness but rather the quality of communication that gives rise to them. In other words, the extent of free communication and mutual acceptance that underlies a group decision is what determines its legitimacy for group members, notwithstanding its substantive effect (Habermas 1984). The criteria for legitimacy therefore are found in decision-making *procedures* rather than results. In autopoietic systems, norm legitimacy is the product of reflexion, and reflexion is a process of communication. Government 'institutional design' initiatives which enhance the procedural scope and quality of democratic communication throughout society (and its subsystems) should encourage reflexion, and consequently, legitimated social outcomes. Such techniques are referred to as 'proceduralisation' or 'constitutionalisation', where the law acts as an external

constitution to guarantee procedural freedoms of communication and participation among social systems, without dictating outcomes (Teubner 1983). According to Teubner:

Law as an external constitution can provide the discursive decision processes and consensus-oriented procedures of negotiation and decision. It does so by providing norms of procedure, organisation, and competences that aid other social systems in achieving the democratic self-organisation and self-regulation which, according to Habermas, are at the heart of procedural legitimacy. Reflexive law, in other words, will neither authoritatively determine the functions of other social systems nor regulate their input and output performances, but will foster mechanisms that *further the development of reflexion structures within other social subsystems* (Teubner 1983).

In reflexive governance, just because government should function as a catalyst and facilitator of self regulation in other social systems does not mean that it must always intervene. A reflexive approach requires that governments act cautiously and strategically to avoid regulatory trilemmas, intervening only when independently evolved self-regulatory mechanisms are either underdeveloped or dysfunctional. On that point I now return to the primary subject of this paper: the governance of the organic food sector in Australia. Has the Australian sector spontaneously developed an effective private governance system? Are there legal/institutional mechanisms already in place that enable the sector to effectively self govern, or is there need for government intervention? Can the hands-off approach of the Australian Government be characterised as one of reflexive governance or neoliberal neglect? The rest of this paper will elaborate on these questions.

Australian organic sector governance

As of 2006 there were more than 12.1 million hectares under organic management in Australia; almost twice the area of all organically managed land in Europe, and the largest portion of any single country or continent (Yuseffi 2006). This deceptively impressive statistic reflects the distinct economic geography of Australian agriculture rather than high levels of organic production, with the vast majority of certified land used to run cattle. In keeping with Australia's low population density there are comparatively few certified organic farms, probably less than 2000 in total (Wynen 2006). By contrast, Italy has an estimated 36,639 organic farms covering 954,361 hectares, an organic acreage of around one twelfth that of Australia (Yuseffi 2006).

Nevertheless, in line with most of the developed world, the Australian organic food sector has been one of the most rapidly growing in the domestic food economy. The growth has been consumer and industry driven with minimal assistance from government (Wynen 2006). That is consistent with contemporary Australian

agricultural policy overall, which has been in the grip of a neoliberal agenda of trade liberalisation and open market competition since the Hawke/Keating reforms of the 1980s. Australia has one of the least protected agricultural sectors in the OECD (Brett 2007). As a founding member of the Cairns Group of agricultural exporting countries, the Australian Government is committed to the dismantling of government agricultural subsidisation and protection worldwide.

Organic farmers in the UK receive a subsidy from the UK Government to assist with conversion to organic certification. They are then entitled to further subsidies in recognition of improved environmental impacts attributed to organic farming methods, in addition to the usual benefits available pursuant to the EU Common Agricultural Policy (DEFRA 2007). By contrast the Australian organic community has never received nor sought any specialised government subsidies. But for a decade the industry has campaigned in vain for the establishment of a government backed regulatory scheme for domestic organic standardisation. The reason is the same one behind the push for government regulation elsewhere: to promote expansion of the local organic industry. Government standards are seen as necessary to build consumer confidence and reduce consumer confusion associated with the proliferation of inconsistent private standards and labels. Of particular concern to organic stakeholders is the potential for fraudulent or misleading claims in organic food trade without a basic, legally controlled definition of the term organic (BFA 2006; NASAA 2006).

There are currently six private certifying agencies operating on the Australian domestic scene. The two largest are National Association for Sustainable Agriculture Australia (NASAA) established in 1986, and Biological Farmers Australia (BFA), established in 1987. Of these two, BFA accounts for around 70% of the market share for organic produce and NASAA around 25%. The remaining 5% of producers are spread between the Organic Food Chain (OFC); Safe Food Production Queensland (SFPQ); Tasmanian Organic-Dynamic Producers (TOP); and the Australian Demeter label –Biodynamic Dynamic Research Institute (BDRI). All of these organisations are accredited by AQIS to certify organic export produce (NASAA 2006; Wynen 2006). The Commonwealth *Export Control (Organic Produce Certification) Orders*, and *Export Control Act 1983 (Cth)* proscribes the export of produce labelled or described as organic without a government export certificate. AQIS acts as the competent government authority to accredit private certification agents, authorising them to issue organic export certificates on behalf of the Australian Government.

In the early 1990s, as part of the export scheme, AQIS and key representatives from the Australian organic community established the Organic Industry Export Consultative Committee to develop and maintain the *Australian National Standard for Organic and*

Biodynamic Produce (the 'export standard'). The export standard, in current form, runs for some fifty pages and sets out basic requirements for crop management, animal husbandry, food processing, handling, transport and labelling (Wynen 2006). To be AQIS accredited private certification agencies must implement the minimum requirements of the export standard, although they are free to add extra and more rigorous requirements in their own version of the standards. Consequently, the export standard has become the benchmark used by all established certification agencies in the Australian organic sector for both domestic and export certification. However there is no requirement for the export standard to be applied to goods sold on domestic markets. Nor is there any legal requirement to be AQIS accredited before certification agents can certify domestic produce. There is no specific legal requirement for certification of locally sold organic produce at all. While the Australian Government refers to the current standardisation arrangements as a 'co-regulatory' scheme, this is only correct insofar as organic exports are concerned. The domestic organic industry is essentially self-regulated, and the evolution of domestic standards remains subject to voluntary market participation only.

Apart from the spurious organic claims of uncertified domestic producers, Australian organic stakeholders fear the lack of legal protection exposes the domestic industry to unfair competition from uncertified imports. Australia's commitments under World Trade Organisation (WTO) agreements on technical barriers to trade mean restrictions or standards cannot be imposed on food imports that exceed those applying to domestically produced foodstuffs. The absence of a mandatory domestic standard precludes any corresponding legal requirement for accredited certification of imported goods labelled organic (Chang 2005). Moreover, there is no way for AQIS to test the veracity of foreign organic food labels when it conducts random audits of imported produce under the *Imported Food Control Act 1992*. Organic standards are *process* standards that relate to the way the food is produced and do not necessarily result in any identifiable change in the final product. The organic status of food is what the marketing literature refers to as a *credence* attribute, meaning it is difficult or impossible for remote consumers to ascertain its existence, as opposed to an *experience* attribute such as 'fresh' or 'frozen' (Harris 2003). It was precisely to overcome this 'asymmetry of information' hurdle that independent third-party standards and certification schemes, with their certifying logos, became such an integral part of organic agriculture worldwide.

In 2005 the Commonwealth Department of Agriculture Fisheries and Forestry (DAFF) convened a series of roundtable consultations with key organic industry stakeholders to identify threats and opportunities facing the industry. The consultant's report emanating from those meetings identified the development of a well recognised and

enforceable national domestic organic standard as a priority (Hassall&Associates 2005). It discussed three possible options to achieve this: first, a legally mandated standard in the *Food Standards Code* administered by Food Standards Australia New Zealand (FSANZ); second, a voluntary code developed in conjunction with the Australian Competition and Consumer Commission (ACCC); and third, the development of a voluntary non-government standard with Standards Australia: Australia's representative on the International Organisation for Standardisation (ISO) and peak non-government standards development body. Of the three, the report suggests the Standards Australia option was most favoured by participants, and it is the one now being pursued by the peak national organic body, Organic Federation of Australia (OFA) with the support of NASAA (NASAA 2007; Standards-Australia 2007).

That brings us back to the inaugural meeting of Standards Australia Technical Committee (FT-032) of May 2007 referred to in the introduction to this paper. As indicated, the decision to pursue the Standards Australia option is not supported by BFA, who remain committed to a mandatory organic standard in the *Food Standards Code*. BFA disagree with Standards Australia's refusal to make certification by an accredited agency a mandatory component of the standard, as is currently the case for organic exports (BFA 2007). Standards Australia has made it clear that it won't be involved in certification and accreditation and that it will develop a *voluntary* standard (Standards-Australia 2007). The consultant's report from the industry partnership program succinctly outlines the Standards Australia approach:

...as industry representatives are part of the standards development process, they ensure the requirements in the Standard are practicable in terms of implementation and cost to the community. The commitment of the industry stakeholders to the entire consensus process and its implementation in the Standard is fundamental to the effectiveness of the Standard. Standards developed by Standards Australia are prepared, and are intended to be, for voluntary application... Standards Australia is a strong supporter of the concept of industry and business self-regulation with regulatory action only being used as a last resort based on an analysis of the risks associated with non-compliance and marketplace behavior. The use of Australian standards and other normative documents and guidelines can provide the tools for industry and business to regulate itself (Hassall&Associates 2005).

One can find elements of both Habermas' notions of communicative rationality and Teubner's notion of reflexive regulation in the above quoted passage. The weakness BFA sees in a purely voluntary standard is arguably its greatest strength from a reflexive governance perspective. It will stand or fall on consumer, producer and certifier acceptance and if it is not accepted by a particular stakeholder, that stakeholder is free to pursue an alternative and put it to the market for validation. From this

perspective a proliferation of inconsistent and competing standards is not such a bad prospect. It provides choice, and those private labels that succeed in gaining the trust of both consumers and producers in such an unruly competitive environment will have enhanced not diminished legitimacy. That is, after all, the way brands and trademarks are supposed to work. The pioneering organic labels of Europe and the US such as the Soil Association (UK), KRAV (Sweden) Demeter (international) and the Rodale Institute (US) established the solid credentials of organic agriculture in the marketplace long before the advent of government regulation (Kristiansen & Merfield 2006). Given the absence of government standards, the same claim can still be made for Australian organic labels. Even the threat from uncertified organic imports could be turned into an opportunity for local certifiers to promote the benefits and integrity of locally certified produce, a likely marketing advantage with 'sustainability' minded consumers. Regulatory interference with the voluntary, free-wheeling dynamics of market standardisation risks weakening the key 'reflexive' mechanism (i.e. the market – civil society nexus) traditionally underpinning organic food's legitimacy, and the US experience provides a classic illustration of the consequences.

Of course, there is a place for legal protection of the actual market mechanisms in play, the most important of which is the labels themselves. Recent action by the ACCC suggests that sufficient protection already exists under general state and federal fair trading legislation. The ACCC took Federal Court action against GO Drew Pty Ltd under Section 52 of the *Trade Practices Act 1974* for false and misleading conduct relating to organic claims. GO Drew Pty Ltd, an egg producer, admitted to selling eggs labelled as certified organic by NASAA, when the eggs were not in fact certified. As a result of the proceedings GO Drew has agreed to pay \$54,000 to NASAA to help it enhance its certification and monitoring programmes; and \$216,000 to the Organic Federation of Australia to assist in the development of a national domestic standard through Standards Australia (ACCC 2007).

The decision by the Organic Federation of Australia to pursue a voluntary standard with Standards Australia may well see the Australian organic sector resolve its regulatory trilemma. Even though BFA has opposed this course of action, there are indications it too recognises the potential value of a private national standard. In an article published in The Bulletin, Dr Andrew Monk, chairman of the BFA Organic Standards Committee is quoted saying, '[t]he industry will probably go down that track with Standards Australia and will probably have a good outcome if there's enough consultation and engagement with the industry' (Merten 2006). Australian governments have also expressed their support for the initiative. A communiqué from a meeting of the Primary Industries Ministerial Council on 20 April 2007 states:

Council noted that the development of an Australian Standard for Organic and Biodynamic Produce by Standards Australia will provide greater certainty and credibility for the industry and consumers and will help the industry maintain its recent strong rate of growth. Council agreed to consider the need for a regulatory framework once the Australian Standard is developed and agreed to consult the organic sector as part of this process.

Conclusion

This paper has elaborated the notion of the regulatory trilemma and, as it pertains to organic agriculture, an organic trilemma. The trilemma thesis is at odds with intuitively attractive arguments supporting government regulation of Australian organic food standards. The decision by industry stakeholders to collaborate with Standards Australia in the development of a voluntary domestic standard will ensure that for the time being organic standardisation remains in the control of producers, consumers and civil society. If the resulting standard is useful and gains acceptance among existing and emerging organic stakeholders, it will stand as a successful exercise in reflexive governance. The Australian organic sector is one of the last in the OECD to have the key elements of an effective private governance system left intact. The experience in other countries, most notably the US, suggests the Australian organic food industry has little need for the 'protection' of government regulation. On the contrary, the overseas evidence suggests that if anything the Australian industry needs continued protection *from* regulation.

Bibliography

- ACCC 2007, *Press Release 22.06.07*, Australian Competition and Consumer Commission, viewed 5 July 2007
<<http://www.accc.gov.au/content/index.phtml/itemId/790453/fromItemId/2332>>.
- BFA 2006, *Regulation of Organic Foods in Australia and New Zealand: A Concept Paper*, viewed 4 July 2007

- <<http://www.bfa.com.au/files/Regulation%20of%20Organic%20Foods%20in%20Australia%20and%20NZ.pdf>>.
- 2007, *Biological Farmers Australia Media Release 07.05.07*, viewed 6 July 2007 <http://www.bfa.com.au/files/20070507_Standards%20Australia.pdf>.
- Black, J 1996, 'Constitutionalising Self-Regulation', *The Modern Law Review*, vol. 59, no. 1, pp. 24-55.
- Brett, J 2007, 'The Country the City and the State in Australian Settlement', *Australian Journal of Political Science*, vol. 42, no. 1, pp. 1-17.
- Chang, H-S 2005, *Labelling issues of organic and GM foods in Australia*, University of Melbourne, Melbourne.
- Courville, S 2006, 'Organic Standards and Certification', in P Kristianson, J Reganold & A Taji (eds), *Organic Agriculture: A Global Perspective*, CSIRO Publishing, p. 201.
- DEFRA 2007, *Department for Environment Food and Rural Affairs UK: Organic Farming Scheme*, viewed 4 July 2007 <<http://www.defra.gov.uk/erdp/schemes/ofs/default.htm>>.
- Demeter, I *History of the Biodynamic Movement*, viewed 10/04/07 <<http://www.demeter.net/>>.
- Gale, F & Haward, M 2004, 'Public accountability in private regulation: contrasting models of the Forest Stewardship Council (FSC) and Marine Stewardship Council (MSC)', paper presented to Australasian Political Studies Association Conference, Adelaide, South Australia, .
- Gilman, S 2006, 'A Grassroots Perspective Concerning Big Foods Threat to Organic Standards', *The Natural Farmer*, vol. 68, no. 2.
- Goodman, D, Sorj, B. & Wilkinson, I 1987, *From Farming to Biotechnology: A Theory of Agro-Industrial Development*, Oxford: Blackwell.
- Gunningham, N 2003, 'Reconfiguring Environmental Regulation: Where Labelling Fits', paper presented to The Future of Eco-labelling in Australia, Canberra, Australia.
- Habermas, J 1984, *The Theory of Communicative Action, Volume 1 Reason and Rationalization of Society*, Polity Press, Cambridge.
- Harris, J 2003, 'The Role for Government in Ecolabelling: On the Scenes or Behind the Scenes', paper presented to The Future of Eco-labelling in Australia, Canberra.
- Hassall & Associates 2005, *DAFF Industry Partnerships Program: Organic Industry Taking Stock and Setting Directions*, Department of Agriculture, Forestry and Fisheries, Sydney.
- IFOAM viewed 10/04/07 <<http://www.ifoam.org/sub/faq.html>>.
- Ikerd, J 2006, 'Contradictions of Principles in Organic Farming', in P Kristianson, A Taji & J Reganold (eds), *Organic Agriculture: A Global Perspective*, CSIRO Publishing.
- Kilcher, L, Huber, B & Schmid, O 2006, 'Standards and Regulations', in H Willa & M Yuseffi (eds), *Organic Farming Worldwide 2006: Overview and Main Statistics*, International Federation of Organic Agriculture Movements (IFOAM) & Research Institute of Organic Agriculture FiBL.
- King, M 1993, 'The 'Truth' About Autopoiesis', *Journal of Law and Society*, vol. 20, no. 2, p. 218.

- KRAV 2006, *Response to Request for Comments on Proposed Amendment to EEC 2092/91*, viewed 30 May 2007
<http://arkiv.krav.se/arkiv/internationellt/answereeg2092_91.pdf>.
- Kristiansen, P & Merfield, C 2006, 'Overview of Organic Agriculture', in P Kristiansen, J Reganold & A Taji (eds), *Organic Agriculture: A Global Perspective* CSIRO Publishing, Melbourne, pp. 1-23.
- Leiber, F, Fuchs, N & Spief, H 2006, 'Biodynamic agriculture today', in P Kristiansen, J Reganold & A Taji (eds), *Organic Agriculture: A Global Perspective*, CSIRO Publishing, p. 141.
- Lindblom, C 1980, 'The Privileged Position of Business in Policy Making', in *The Policy-Making Process*, 2nd edn, Prentice-Hall, London, pp. 71-82.
- Lockie, S, Halpin, D, Gordon, R & Pearson, D 2006, 'Understanding the Market for Organic Food', in P Kristiansen, J Reganold & A Taji (eds), *Organic Agriculture: A Global Perspective*, CSIRO Publishing, pp. 245-259.
- Lockie, S & Salem, N 2005, 'Governing consumption: mobilising 'the consumer' within genetically modified and organic food networks ', in V Higgins & G Lawrence (eds), *Agricultural Governance: Globalization and the new politics of regulation*, Routledge: Taylor & Francis Group.
- Luhmann, N 1985, *A Sociological Theory of Law*, Routledge & Kegan Paul, London.
- Merten, M 2006, 'Uncertainly Organic', *The Bulletin*, vol. 124, no. 6549, pp. 34-35.
- NASAA 2006, *Organic Chicken Debacle Reinforces Urgent Need for New Independent Australian Organic Standard*, viewed 3 July 2007
<http://www.nasaa.com.au/data/pdfs/Organic_Chicken_Debacle_6.11.06.pdf>.
- 2007, *Press Release 19.04.07*, viewed 4 July 2007.
- Nonet, P & Selznick, P 1978, *Law and Society in Transition: Toward a Responsive Law*, Harper, New York.
- Rutherford, P 2000, 'The Problem of Nature in Contemporary Social Theory', Ph.D. thesis, Australian National University.
- Sahota, A 2006, 'Overview of the Global Market for Organic Food and Drink', in H Willa & M Yuseffi (eds), *The World of Organic Agriculture: Statistics and Emerging Trends*, IFOAM (International Federation of Organic Agriculture Movements), pp. 69-74.
- Standards-Australia 2007, *Committee meets to develop organic standard: Media Release 8 May 2007*, viewed 5 July 2007
<http://www.standards.org.au/downloads/070508_Committee_meets_to_develop_new_Organic_Standard.pdf>.
- Teubner, G 1983, 'Substantive and Reflexive Elements in Modern Law', *Law and Society Review*, vol. 17, no. 2, pp. 239-286.
- 1987, 'Juridification: concepts, aspects, limits, solutions.' in G Teubner (ed.), *Juridification of Social Sphere: a comparative analysis in the areas of labour, corporate, antitrust, and social welfare law*, de Gruyter, Berlin.
- 1993, *Law as an Autopoietic System*, Blackwell Publishers, Oxford.
- Vincent-Jones, P 1998, 'Responsive Law and Governance in Public Services Provision: A Future for the Local Contracting State', *The Modern Law Review*, vol. 61, no. 3, p. 362.
- Vos, T 2000, 'Visions of the Middle Landscape: Organic Farming and the Politics of Nature', *Agriculture and Human Values*, vol. 17, pp. 245-256.

- Wynen, E 2006, 'Organic Farming in Australia', in H Willa & M Yuseffi (eds), *The World of Organic Agriculture: Statistics and Emerging Trends 2006*, International Federation of Organic Agriculture Movements (IFOAM) & Research Institute of Organic Agriculture FiBL.
- Yuseffi, M 2006, 'Organic Farming Worldwide 2006: Overview and Main Statistics', in H Willa & M Yuseffi (eds), *The World of Organic Agriculture: Statistics and Emerging Trends 2006*, International Federation of Organic Agriculture Movements (IFOAM) & Research Institute of Organic Agriculture FiBL.