APPENDIX 1

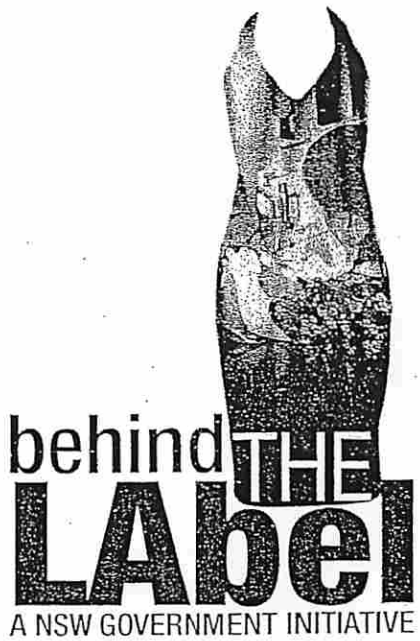
NEW SOUTH WALES
DIR
NSW Department of Industrial Relations

NSW RETAILERS/TCFUA

ETHICAL CLOTHING
CODE OF PRACTICE

An Agreement between the Australian Retailers Association NSW and the Textile, Clothing and Footwear Union of Australia, NSW Branch negotiated through the Ethical Clothing Trades Council as part of the NSW Government's *Behind the Label* Strategy

Signed on 18 September, 2002



New South Wales
Special Minister of State
Minister for Industrial Relations
Assistant Treasurer
Minister Assisting the Premier on Public Sector Management and
Minister Assisting the Premier for the Central Coast

Foreword by the Minister for Industrial Relations, John Della Bosca

This Agreement, which establishes a new Code of Practice for retailers on the rights of home-based outworkers, is a milestone on the road to a fairer, stronger and better NSW clothing industry.

It is a credit to the parties involved, the Australian Retailers Association NSW and the Textile Clothing and Footwear Union of Australia, NSW Branch and to the forum that brought these parties together, the Ethical Clothing Trades Council.

Established under the Government's *Behind the Label* strategy, the Council is a key element of our efforts to deliver a better deal for outworkers, some of the most vulnerable people in our workforce.

Under the Agreement, leading Australian companies such as Target, Coles Myer, Big W and David Jones are making a commitment to protecting the rights and interests of outworkers, and to giving their customers a chance to choose ethically made clothing.

These major retailers have recognised that a truly viable clothing industry in this country must be based on quality, efficiency and fair labour practices.

Through the Ethical Clothing Trades Council and *Behind the Label,* the NSW Government will do all it can to ensure that those who are genuinely committed to building an ethical industry receive the support, recognition and rewards they deserve.

This Agreement confirms that cooperation, not confrontation, can deliver real solutions to the challenges that face us as a community. I congratulate all those involved in this historic

Hon John Della Bosca MLC
Special Minister of State
Minister for Industrial Relations
Assistant Treasurer

TCFUA

AUSTRALIAN RETAILERS ASSOCIATION NEW SOUTH WALES

Working for Retail

N.S.W. RETAILERS/TCFUA

ETHICAL CLOTHING CODE OF PRACTICE

AGREEMENT

Between **TEXTILE, CLOTHING AND FOOTWEAR UNION OF AUSTRALIA (NEW SOUTH WALES BRANCH)** ("the TCFUA")

and **THE AUSTRALIAN RETAILERS ASSOCIATION (NEW SOUTH WALES DIVISION)** ("the ARA")

PREAMBLE

This Agreement is the outcome of deliberations between the parties under the auspices of the Ethical Clothing Trades Council of New South Wales.

This Agreement between the signing parties and its endorsement by the witnessing parties will form the basis of discussions about the establishment of a parallel national code by appropriate variation of Part 1 of the TCFUA Homeworkers Code of Practice and the Homeworkers Code of Practice-Retailers and TCFUA (15 August 1997).

RECITALS

A. For the benefit of its members and other workers in the clothing industry, the TCFUA wishes to ensure that employees and contractors to Suppliers are engaged upon terms and conditions no less favourable than those contained in either the Federal Award or the State Award.

B. The ARA endorses the objective of the TCFUA set out in Recital A and has agreed to assist the TCFUA to achieve this objective by undertaking the obligations contained in this Agreement.

C. The TCFUA has agreed to assist the ARA by providing it regularly with information and advice relating to the Federal Award and the State Award and their operation.

D. The TCFUA has agreed to publicly acknowledge that while the ARA observes the conditions of this Agreement it will be acknowledged by the TCFUA as an Outwork Best Practice Organisation.

AGREEMENT

CLAUSE 1 – DEFINITIONS

In this Agreement including the Recitals:

"Contract" means a contract between the Retailer and a Supplier for the supply or manufacture of Goods for resale by the Retailer.

"Exploitation" occurs where a Supplier breaches the Federal Award or State Award or an award of an industrial tribunal or legislation in respect of the engagement of its employees and/or contractors, and such breach involves either a failure by the Supplier to comply with award obligations binding upon the Supplier to register or provide lists for notification of contracts or keep records or else (in relation to any other type of breach by the Supplier) such breach is, in all the circumstances, detrimental to those employees and contractors.

"Federal Award" means the Clothing Trades Award 1999 as amended from time to time, or any award replacing that Award.

"Goods" means:

(a) the whole or any part of any male or female garment or of any article of wearing apparel including articles of neckwear and headwear;

(b) handkerchief, serviette, pillowslip, pillowsham, sheets, tablecloth, towel, quilt, apron, mosquito net, bed valance, or bed curtain; and

(c) ornamentations made of textiles, felts or similar fabrics, and artificial flowers.

"Records" means the documents referred to in clause 3.1.

"Retailer" means any retailer business which is a member of the ARA.

"State Award" means the Clothing Trades (State) Consolidated Award (New South Wales).

"Supplier" means a person, company or organisation which agrees with the Retailer to supply or manufacture or arrange the manufacture within Australia of Goods or part of Goods for resale by the Retailer under a Contract.

CLAUSE 2 – TERM

This Agreement shall operate from the date of the Agreement and continue until terminated under clause 9.

CLAUSE 3 – RECORDS

3.1 a) Each Retailer must retain for not less than 12 months full details of all Contracts entered into with Suppliers,

b) Each Retailer must make available to the TCFUA for up to six years after they were created, those records which the Retailer is required to keep pursuant to legislation such as taxation law and corporations law and which pertain to the manufacture or supply of Goods to the Retailer by a Supplier, and

c) In order to ensure that employees and contractors involved in the supply or manufacture of Goods are engaged upon terms and conditions no less favourable than those contained in either the Federal Award or the State Award:

i) the TCFUA may reasonably request each Retailer to obtain any of the records or other information held by each Supplier of that Retailer in accordance with subclauses 4.3(c) or 4.3(d) of this Agreement, and

ii) within five (5) days of such request, the Retailer will require the Supplier to make available to the Retailer such records and other information which have been requested by the TCFUA, and

iii) the Retailer will make available to the TCFUA any such records and other information as soon as they have been provided by the Supplier to the Retailer.

3.2 The Records required to be kept under Clause 3.1(a) must contain the following:

a) the name of the Supplier,

b) the address of the Supplier,

c) the date of the Contract,

d) the date for the delivery of the goods to be made under the Contract,

e) the number of Goods to be made,

f) either the relevant standard product specification for that garment in accordance with the operation of Schedule 9 of Part 2 of the TCFUA Homeworkers Code of Practice or the information contained in sub-clauses (f) (i), (f) (ii) and (f) (iii) of this clause,

f)(i) the wholesale price or cost paid by the Retailer for each item of Goods to be made, and

f)(ii) the total wholesale price or cost paid by the Retailer for the Goods under the Contract, and

f)(iii) a description, including size, style, image or sketch drawing and any other relevant information in order to identify the Goods to be made.

3.3 Each Retailer must:

(a) make the Records immediately available to a person properly authorised in writing by the TCFUA, after that person has given

reasonable notice to the Retailer of a request for access to the Records; and

(b) allow the TCFUA to make appropriate copies of the Records as reasonably required by the TCFUA.

CLAUSE 4 – OBLIGATIONS OF EACH RETAILER

4.1 Each Retailer must send to the National Secretary of the TCFUA the name and address of each Supplier contained in the Records as follows -

(a) a full list of the Retailer's current Suppliers within 14 days of the signing of this Agreement, and

(b) a full list of the Retailer's Suppliers over the preceding six months within 14 days of 28 February and 31 August in each year.

4.2 Each Retailer agrees to inform all its Suppliers of the existence of this Agreement by taking the following action:

(a) The Retailer will forward a copy of this Agreement to all its existing Suppliers immediately following signing,

(b) The Retailer will provide a copy of this Agreement to any new Suppliers with whom it contracts following the signing of this Agreement, and

(c) The Retailer agrees to advise all Suppliers that, as part of the implementation of this Agreement, the TCFUA will be making regular visits to those establishments operated by the Supplier.

4.3 Each Retailer agrees to use its best endeavours to amend the standard terms and conditions of trading entered into with its Suppliers so that each Contract already entered into with a Supplier prior to the signing of this Agreement contains the further following obligations on the Supplier –

(a) the Supplier must undertake to comply with all applicable laws and regulations relating to the manufacture of the Goods,

(b) the Supplier must warrant that it is registered pursuant to the Federal Award and the State Award for the purposes of sub-contracting out any work associated with the manufacture of the Goods,

(c) the Supplier undertakes to keep appropriate records of where and with whom the Supplier has further contracted the work to be performed under the Contract between the Retailer and the Supplier,

(d) the Supplier must retain for at least 12 months after the Contract is entered into the Supplier's product specification for each garment supplied or manufactured by the Supplier for the Retailer pursuant to that Contract,

(e) the Supplier must make available to the Retailer those records and product specifications referred to in sub-clauses (c) and (d) above, within five days of such a request being made by the Retailer, and

(f) the Supplier must acknowledge the existence of this Agreement and further acknowledge that the Retailer has entered into this Agreement which provides that the Retailer may either terminate a Contract with that Supplier (where legally possible) or refuse to enter into any future Contract with that Supplier in the event that an incident of Exploitation has been proved to exist during the course of the supply or manufacture of the Goods by that Supplier.

4.4 Each Retailer agrees to amend the standard terms and conditions of trading entered into with its Suppliers so that each future contract entered into with a Supplier on or after the date of the signing of this Agreement contains each of the obligations listed above in Clause 4.3(a) to (f) inclusive of this Agreement.

4.5 Each Retailer agrees to appoint a liaison officer for the purpose of handling all enquiries or allegations validly raised by the TCFUA for the purposes of this Agreement.

4.6 The name of the liaison officer (or officers if more than one) appointed by each Retailer must be provided by the Retailer to the TCFUA on the signing of this Agreement. Any changes to

the liaison officer must be advised to the TCFUA by the Retailer.

4.7 If any Retailer becomes aware that a Supplier has been or may be, or is using the services of sub-suppliers or contractors or sub-contractors who have been or may be engaging in Exploitation, then the Retailer agrees to immediately inform the TCFUA of this fact.

4.8 Each Retailer will enter into a separate Deed of Agreement with the TCFUA whereby the provisions of that separate Deed of Agreement will mirror the obligations upon each Retailer contained in Clause 1 to Clause 10.2 inclusive of this NSW Ethical Clothing Code of Practice.

CLAUSE 5 – OBLIGATIONS OF THE TCFUA

The TCFUA must:

(a) provide the ARA with a current copy of the Federal Award and the State Award and promptly provide the ARA with any variations to those Awards;

(b) provide reasonable assistance to each Retailer in interpreting the provisions of the Federal Award or the State Award;

(c) promptly inform each Retailer in writing of any Exploitation or suspected Exploitation of which the TCFUA becomes aware and provide the Retailer with any material it has which supports the allegation;

(d) upon request promptly meet with the Retailer concerned to consider any matter arising out of this Agreement; and

(e) keep confidential the copy Records made available to it by any Retailer and not disclose their contents to any other person, company or organisation except to the Supplier specified in the Records or as required by law or in enforcement proceedings in a court or in industrial dispute resolution proceedings in an industrial tribunal without the written consent of the Retailer.

6. CONDUCT IN THE EVENT OF ALLEGED EXPLOITATION

6.1 If the TCFUA has notified any Retailer that it believes a Supplier to that Retailer is engaging in Exploitation then the Retailer agrees to immediately investigate the claims made by the TCFUA and further agrees that it will within 14 days (or such other period of time as is mutually agreed) of receipt of the notice either advise the TCFUA as follows:

(a) that the Retailer believes that Exploitation has occurred,

(b) that the Retailer believes that Exploitation has not occurred, or

(c) that the Retailer has not been provided with sufficient information to formulate a belief as to whether or not either Exploitation has occurred, and in such event, the Retailer must request such further evidence as is reasonable from the TCFUA to enable a belief to be formulated.

6.2 If any Retailer believes that Exploitation has occurred, the Retailer agrees that it will take all action reasonably required by the TCFUA to remedy the Exploitation or achieve such other outcome acceptable to both parties ("Agreed Outcome") within not more than 14 days (or such other period of time as is mutually agreed) of that requirement by the TCFUA.

6.3 If a Supplier fails to comply with a requirement of any Retailer to remedy the Exploitation or submit to an Agreed Outcome, the Retailer must:

(a) in relation to any Contract already entered into before the signing of this Agreement, if legally possible and without the Retailer incurring any legal liability, terminate the relevant Contract consistent with its terms and conditions; and

(b) in relation to any future Contract entered into on or after the date of the signing of this Agreement, terminate the relevant Contract consistent with its terms and conditions (if reasonably required by the TCFUA); and

(c) not enter into any further Contract with that Supplier until the Retailer and the TCFUA agree that the Exploitation has been remedied.

6.4 If any Retailer advises the TCFUA that it does not believe that Exploitation by a Supplier has occurred and the TCFUA continues to assert that Exploitation has in fact occurred, then this issue must be mediated pursuant to clause 7 of this Agreement.

CLAUSE 7 - DISPUTE RESOLUTION

7.1. It is the intention of the parties that they should co-operate with the other in good faith to resolve any differences arising under this Agreement. In order to achieve this objective the dispute settlement procedure under this clause 7 is agreed to.

7.2 The parties must meet to consider any issue if:

(i) either party considers the obligations of the other party under this Agreement are not being performed, and the other party disagrees;

(ii) the TCFUA considers that Exploitation is occurring and any Retailer disagrees; or

(iii) the TCFUA believes that any Retailer has not acted reasonably in continuing to contract with the Supplier pursuant to Clause 6.3(b) of this Agreement.

7.3 (a) If agreement on any issue referred to in clause 7.2 cannot be reached or a party (or any Retailer) refuses to observe its obligations under this Agreement, and this failure to reach agreement (or to observe obligations) occurs during the life of the Ethical Clothing Trades Council of New South Wales, then the parties must enter into mediation to be conducted by the Chairman of that Council (unless both parties agree to use another mediator in relation to the dispute concerned).

(b) the parties must each pay half the costs of the mediation, and

(c) the mediation must be held and completed promptly.

CLAUSE 8 – "NO SWEATSHOP LABEL"

The ARA acknowledges that the Homeworkers Code of Practice Committee registers and maintains trade marks, logos and other labels, including the "No Sweatshop" label, (jointly called the "Identification Marks") to promote compliance. Where any Goods have been provided to any Retailer pursuant to a Contract between the Retailer and a Supplier, the Retailer will not discourage that Supplier from attaching a label or a swing ticket to those Goods which incorporates any of the Identification Marks.

CLAUSE 9 – TERMINATION

Either party may terminate this Agreement:

(a) upon no less than 3 months written notice to the other,

(b) forthwith if the other party refuses to mediate in good faith as detailed in clause 7, or

(c) upon the giving of 7 days notice where the other party has committed a breach of this Agreement and that breach has not been rectified within the 7 day notice period.

CLAUSE 10 – ENTIRE AGREEMENT / FUTURE VARIATION

10.1 This represents the entire agreement between the parties on the matters referred to in the Recitals.

10.2 The parties agree that should this Agreement prove incapable of achieving its objective, then the parties will negotiate in good faith to effect an appropriate variation to its terms.

10.3 Within twelve (12) months of the signing of this Agreement, the parties will review the operation of this Agreement.

Signed by:

....

(New South Wales Branch Secretary) (on behalf of the **New South Wales Branch of the Textile Clothing and Footwear Union of Australia**)

.....

(New South Wales Division Executive Director) (on behalf of **the New South Wales Division of The Australian Retailers Association)**

Dated: .....18/9/02.....

APPENDIX 2

Association Act Authorised by ACCC

TCFUA

AUSTRALIAN RETAILERS ASSOCIATION

Working for Retail

NATIONAL RETAILERS/TCFUA ETHICAL CLOTHING CODE OF PRACTICE

AGREEMENT

Between **TEXTILE, CLOTHING AND FOOTWEAR UNION OF AUSTRALIA ("the TCFUA")**

and **THE AUSTRALIAN RETAILERS ASSOCIATION ("the ARA")**

RETAILER SIGNEE: .....

.....

.....

RECITALS

A. For the benefit of its members and other workers in the clothing industry, the TCFUA wishes to ensure that employees and contractors to Suppliers are engaged upon terms and conditions no less favourable than those contained in either the Federal Award or the relevant State Award.

B. The ARA endorses the objective of the TCFUA set out in Recital A and has agreed to assist the TCFUA to achieve this objective by undertaking the obligations contained in this Agreement.

C. The TCFUA has agreed to assist the ARA by providing it regularly with information and advice relating to the Federal Award and the relevant State Award and their operation.

D. The TCFUA has agreed to publicly acknowledge that while the ARA observes the conditions of this Agreement it will be acknowledged by the TCFUA as an Outwork Best Practice Organisation.

AGREEMENT
CLAUSE 1 – DEFINITIONS

In this Agreement including the Recitals:

"Contract" means a contract between the Retailer and a Supplier for the supply or manufacture of Goods for resale by the Retailer.

"Exploitation" occurs where a Supplier breaches the Federal Award or State Award or an award of an industrial tribunal or legislation in respect of the engagement of its employees and/or contractors, and such breach involves either a failure by the Supplier to comply with award obligations binding upon the Supplier to register or provide lists for notification of contracts or keep records or else (in relation to any other type of breach by the Supplier) such breach is, in all the circumstances, detrimental to those employees and contractors.

"Federal Award" means the Clothing Trades Award 1999 as amended from time to time, or any award replacing that Award.

"Goods" means:

(a the whole or any part of any male or female garment or of any article of wearing apparel including articles of neckwear and headwear;

(b) handkerchief, serviette, pillowslip, pillowsham, sheets, tablecloth, towel, quilt, apron, mosquito net, bed valance, or bed curtain; and

(c) ornamentations made of textiles, felts or similar fabrics, and artificial flowers.

"Records" means the documents referred to in clause 3.1.

"Retailer" means any retailer business which is a member of the ARA.

"State Award" means the relevant state industrial instrument eg. Clothing Trades (State) Consolidated Award (New South Wales) or equivalent in a state jurisdiction.

"Supplier" means a person, company or organisation which agrees with the Retailer to supply or manufacture or arrange the manufacture within Australia of Goods or part of Goods for resale by the Retailer under a Contract.

CLAUSE 2 – TERM

This agreement shall operate from the date of the Agreement and continue until terminated under clause 9.

CLAUSE 3 – RECORDS

3.1 a) Each Retailer must retain for not less than 12 months full details of all Contracts entered into with Suppliers,

b) Each Retailer must make available to the TCFUA for up to six years after they were created, those records which the Retailer is required to keep pursuant to legislation such as taxation law and corporations law and which pertain to the manufacture or supply of Goods to the Retailer by a Supplier, and

c) In order to ensure that employees and contractors involved in the supply or manufacture of Goods are engaged upon terms and conditions no less favourable than those contained in either the Federal Award or the relevant State Award:

i) the TCFUA may reasonably request each Retailer to obtain any of the records or other information held by each Supplier of that Retailer in accordance with subclauses 4.3(c) or 4.3(d) of this Agreement and,

ii) within five (5) days of such request, the Retailer will require the Supplier to make available to the Retailer such records and other information which have been requested by the TCFUA, and

iii) the Retailer will make available to the TCFUA any such records and other information as soon as they have been provided by the supplier to the Retailer.

3.2 The Records required to be kept under Clause 3.1(a) must contain the following:

a) the name of the Supplier,

b) the address of the Supplier,

c) the date of the Contract,

d) the date for the delivery of the goods to be made under the Contract,

e) the number of Goods to be made,

f) either the relevant standard product specification for that garment in accordance with the operation of Schedule 9 of Part 2 of the TCFUA Homeworkers Code of Practice or the information contained in sub-clauses (f) (i), (ii) and (iii) of this clause,

(i) the wholesale price or cost paid by the Retailer for each item of Goods to be made, and

(ii) the total wholesale price or cost paid by the Retailer for the Goods under the Contract, and

(iii) a description, including size, style, image or sketch drawing and any other relevant information in order to identify the Goods to be made.

3.3 Each Retailer must:

(a) make the Records immediately available to a person properly authorised in writing by the TCFUA, after that person has given reasonable notice to the Retailer of a request for access to the Records; and

(b) allow the TCFUA to make appropriate copies of the Records as reasonably required by the TCFUA.

CLAUSE 4 – OBLIGATIONS OF EACH RETAILER

4.1 Each Retailer must send to the National Secretary of the TCFUA the name and address of each Supplier contained in the Records as follows –

(a) a full list of the Retailer's current Suppliers within 14 days of the signing of this Agreement, and

(b) a full list of the Retailer's Suppliers over the preceding six months within 14 days of 28 February and 31 August in each year.

4.2 Each Retailer agrees to inform all its Suppliers of the existence of this Agreement by taking the following action:

(a) The Retailer will forward a copy of this Agreement to all its existing Suppliers immediately following signing,

(b) The Retailer will provide a copy of this Agreement to any new Suppliers with whom it contracts following the signing of this Agreement, and

(c) The Retailer agrees to advise all Suppliers that, as part of the implementation of this Agreement, the TCFUA will be making regular visits to those establishments operated by the Supplier.

4.3 Each Retailer agrees to use its best endeavours to amend the standard terms and conditions of trading entered into with its Suppliers so that each Contract already entered into with a Supplier prior to the signing of this Agreement contains the further following obligations on the Supplier –

(a) the Supplier must undertake to comply with all applicable laws and regulations relating to the manufacture of the Goods,

(b) the Supplier must warrant that it is registered pursuant to the Federal Award and the State Award for the purposes of sub-contracting out any work associated with the manufacture of the Goods,

(c) the Supplier undertakes to keep appropriate records of where and with whom the Supplier has further contracted the work to be performed under the Contract between the Retailer and the Supplier,

(d) the Supplier must retain for at least 12 months after the Contract is entered into the Supplier's product specification for each garment supplied or manufactured by the Supplier for the Retailer pursuant to that Contract,

(e) the Supplier must make available to the Retailer those records and product specifications referred to in subclauses (c) and (d) above, within five days of such a request being made by the Retailer, and

(f) the Supplier must acknowledge the existence of this Agreement and further acknowledge that the Retailer has entered into this Agreement which provides that the Retailer may either terminate a Contract with that Supplier (where legally possible) or refuse to enter into any future Contract with that Supplier in the event that an incident of Exploitation has been proved to exist during the course of the supply or manufacture of the Goods by that Supplier.

4.4 Each Retailer agrees to amend the standard terms and conditions of trading entered into with its Suppliers so that each future contract entered into with a Supplier on or after the date of the signing of this Agreement contains each of the obligations listed above in Clause 4.3(a) to (f) inclusive of this Agreement.

4.5 Each Retailer agrees to appoint a liaison officer for the purpose of handling all enquiries or allegations validly raised by the TCFUA for the purposes of this Agreement.

4.6 The name of the liaison officer (or officers if more than one) appointed by each Retailer must be provided by the Retailer to the TCFUA on the signing of this Agreement. Any changes to the liaison officer must be advised to the TCFUA by the Retailer.

4.7 If any Retailer becomes aware that a Supplier has been or may be, or is using the services of sub-suppliers or contractors or sub-contractors who have been or

may be engaging in Exploitation, then the Retailer agrees to immediately inform the TCFUA of this fact.

4.8 Each Retailer will enter into a separate Deed of Agreement with the TCFUA whereby the provisions of that separate Deed of Agreement will mirror the obligations upon each Retailer contained in Clause 1 to Clause 10.2 of this agreement.

CLAUSE 5 – OBLIGATIONS OF THE TCFUA

The TCFUA must:

(a) provide the ARA with a current copy of the Federal Award and the relevant State Award and promptly provide the ARA with any variations to those Awards;

(b) provide reasonable assistance to each Retailer in interpreting the provisions of the Federal Award or the relevant State Award;

(c) promptly inform each Retailer in writing of any Exploitation or suspected Exploitation of which the TCFUA becomes aware and provide the Retailer with any material it has which supports the allegation;

(d) upon request promptly meet with the Retailer concerned to consider any matter arising out of this Agreement; and

(e) keep confidential the copy Records made available to it by any Retailer and not disclose their contents to any other person, company or organisation except to the Supplier specified in the Records or as required by law or in enforcement proceedings in a court or in industrial dispute resolution proceedings in an industrial tribunal without the written consent of the Retailer.

CLAUSE 6 – CONDUCT IN THE EVENT OF ALLEGED EXPLOITATION

6.1 If the TCFUA has notified any Retailer that it believes a Supplier to that Retailer is engaging in Exploitation then the Retailer agrees to immediately investigate the claims made by the TCFUA and further agrees that it will within 14 days (or such other period of time as is mutually agreed) of receipt of the notice either advise the TCFUA as follows:

(a) that the Retailer believes that Exploitation has occurred,

(b) that the Retailer believes that Exploitation has not occurred, or

(c) that the Retailer has not been provided with sufficient information to formulate a belief as to whether or not either Exploitation has occurred, and in such event, the Retailer must request such further evidence as is reasonable from the TCFUA to enable a belief to be formulated.

6.2 If any Retailer believes that Exploitation has occurred, the Retailer agrees that it will take all action reasonably required by the TCFUA to remedy the Exploitation or achieve such other outcome acceptable to both parties ("Agreed Outcome") within not more than 14 days (or such other period of time as is mutually agreed) of that requirement by the TCFUA.

6.3 If a Supplier fails to comply with a requirement of any Retailer to remedy the Exploitation or submit to an Agreed Outcome, the Retailer must:

(a) in relation to any Contract already entered into before the signing of this Agreement, if legally possible and without the Retailer incurring any legal liability, terminate the relevant Contract consistent with its terms and conditions; and

(b) in relation to any future Contract entered into on or after the date of the signing of this Agreement, terminate the relevant Contract consistent with its terms and conditions (if reasonably required by the TCFUA); and

(c) not enter into any further Contract with that Supplier until the Retailer and the TCFUA agree that the Exploitation has been remedied.

6.4 If any Retailer advises the TCFUA that it does not believe that Exploitation by a Supplier has occurred and the TCFUA continues to assert that Exploitation has in fact occurred, then this issue must be mediated pursuant to clause 7 of this Agreement.

CLAUSE 7 – DISPUTE RESOLUTION

7.1. It is the intention of the parties that they should co-operate with the other in good faith to resolve any differences arising under this Agreement. In order to achieve this objective the dispute settlement procedure under this clause 7 is agreed to.

7.2 The parties must meet to consider any issue if:

(i) either party considers the obligations of the other party under this Agreement are not being performed, and the other party disagrees;

(ii) the TCFUA considers that Exploitation is occurring and any Retailer disagrees; or

(iii) the TCFUA believes that any Retailer has not acted reasonably in continuing to contract with the Supplier pursuant to Clause 6.3(b) of this Agreement.

7.3 (a) If agreement on any issue referred to in clause 7.2 cannot be reached or a party (or any Retailer) refuses to observe its obligations under this Agreement, the parties must enter into mediation to be conducted by the Chairperson of an Ethical Clothing Trades Council or by a mediator as agreed by both parties.

(b) the parties must each pay half the costs of the mediation, and

(c) the mediation must be held and completed promptly.

CLAUSE 8 – "NO SWEATSHOP LABEL"

The ARA acknowledges that the Homeworkers Code of Practice Committee registers and maintains trade marks, logos and other labels, including the "No Sweatshop" label, (jointly called the "Identification Marks") to promote compliance. Where any Goods have been provided to any Retailer pursuant to a Contract between the Retailer and a

Supplier, the Retailer will not discourage that Supplier from attaching a label or a swing ticket to those Goods which incorporates any of the Identification Marks.

CLAUSE 9 – TERMINATION

Either party may terminate this Agreement:

(a) upon no less than 3 months written notice to the other,

b) forthwith if the other party refuses to mediate in good faith as detailed in clause 7, or

(c) upon the giving of 7 days notice where the other party has committed a breach of this Agreement and that breach has not been rectified within the 7 day notice period.

CLAUSE 10 – ENTIRE AGREEMENT / FUTURE VARIATION

10.1 This represents the entire agreement between the parties on the matters referred to in the Recitals.

10.2 The parties agree that should this Agreement prove incapable of achieving its objective, then the parties will negotiate in good faith to effect an appropriate variation to its terms.

10.3 Within twelve (12) months of the signing of this Agreement, the parties will review the operation of this Agreement.

Signed for and on behalf of The)
Textile Clothing and Footwear)
Union of Australia)
By an authorised officer in the)
Presence of)

.....
Signature of authorised officer

.....
Signature of witness

.....
Name of authorised officer

.....
Name of witness (print)

.....
Office held

Signed for and on behalf of)
The Retailer)
By an authorised officer in the)
Presence of)

.....
Signature of authorised officer

.....
Signature of witness

.....
Name of authorised officer

.....
Name of witness (print)

.....
Office held

APPENDIX 5

AUSTRALIAN COMPETITION & CONSUMER COMMISSION

Determination

Application for revocation of A91354-A91357 and the substitution of authorisation AA1000418

lodged by

Homeworker Code Committee Incorporated

in respect of

the Homeworkers Code of Practice (to be renamed 'Ethical Clothing Australia's Code of Practice incorporating Homeworkers')

Date: 30 August 2018

Authorisation number: AA1000418

Commissioners: Rickard
Keogh
Featherston

Summary

The ACCC has decided to re-authorise the Homeworker Code Committee to give effect to a revised version of the Homeworkers Code of Practice until 21 September 2028.

The ACCC has decided to grant authorisation to the Homeworker Code Committee (**the Code Committee**) for it, its committee members and current and future accredited businesses to give effect to a revised version of the Homeworkers Code of Practice. The Code Committee sought re-authorisation because the Code may constitute an agreement affecting competition and contains compliance measures, including boycotts of businesses which are not compliant with their legal obligations, that may otherwise breach the *Competition and Consumer Act 2010.*

The Homeworkers Code of Practice, which is to be renamed 'Ethical Clothing Australia's Code of Practice incorporating Homeworkers' (the **Code,** attached at Annexure A), is a voluntary mechanism within the textile, clothing and footwear (**TCF**) industry designed to assist businesses to ensure that they, and their outsourced supply chains (if any), comply with relevant Awards and workplace laws.

The TCF industry, as noted by the Fair Work Ombudsman in 2015, has the following features:

- pressure on the price of local production, rendering those at the lower levels of the supply chains particularly vulnerable,
- relatively high levels of female workers, including from culturally and linguistically diverse backgrounds who may not be aware of their rights and entitlements, and
- a high contravention rate of industry awards and legal obligations (40%), which may reflect difficulties in navigating supply chain arrangements, which are both varied and fragmented.[1]

The Code is a response to these industry features and provides education of, and auditing against, the legal requirements. Signatories must be able to demonstrate compliance with relevant Australian Awards and workplace laws in relation to all workers directly engaged by them and in any outsourced supply chain, in order to gain accreditation. Accredited businesses with compliant supply chains are permitted to display insignias from the Ethical Certification Trade Mark series to promote their compliance to consumers.

Under the Code, principal businesses that use suppliers who do not comply with their legal obligations may be required to boycott those suppliers in order to retain their accreditation. However, to date, this has not been required as the Code Committee works with businesses to address issues.

Various versions of the Code have been authorised by the ACCC since 2000. A number of revisions to the Code are now proposed which clarify and modernise the Code and streamline the accreditation application and renewal processes. The most substantial of these changes being the removal of several statutory declarations to be completed by principal companies and contractors in the supply chain (if any) confirming whether businesses utilise homeworkers and recording details around their employment. The ACCC previously identified that these statutory declarations were likely to be the most costly of the compliance requirements that the Code imposed on businesses.

[1] Fair Work Ombudsman. Designed to Fit – Insights and outcomes from the Fair Work Ombudsman's education phase of the National Textile, Clothing and Footwear Campaign 2015. <https://www.fairwork.gov.au/ArticleDocuments/557/TCF-campaign-report.docx.aspx> page 3.

The information available to the ACCC indicates that the Code has resulted, and is likely to continue to result, in public benefits in the form of increased compliance by businesses with legal obligations relating to workers, efficiencies in the management of supply chains and efficiencies in businesses' signalling their compliance with legal obligations, which provides better information to customers.

The ACCC has considered whether the Code has resulted, or is likely to result, in public detriments including restricting competition between suppliers and increasing costs and administrative burdens for businesses. Since obtaining accreditation under the Code is voluntary, the ACCC considers the operation of the Code is likely to result in little if any public detriment.

Based on the information before it, the ACCC considers that the likely public benefits will outweigh the likely public detriments. Accordingly, the ACCC has decided to re-authorise the Homeworker Code Committee, its committee members, and current and future accredited businesses to give effect to a revised version of the Homeworkers Code of Practice until 21 September 2028.

Abbreviations

ACCC	Australian Competition and Consumer Commission
accredited manufacturer	a supplier or manufacturer in the textile, clothing and footwear industry who has gained accreditation under Part 1 the Code.
CCA	the *Competition and Consumer Act 2010 (Cth)*
Code	the Homeworkers Code of Practice (proposed to be renamed 'Ethical Clothing Australia's Code of Practice incorporating Homeworkers') in the form provided to the ACCC on 26 April 2018 (Annexure A).
Code Parties	The entities listed in paragraph 2 of this determination.
Code Committee	the Homeworker Code Committee Incorporated.
ECA	'Ethical Clothing Australia', the Code Committee's trading name
Ethical CTM series	means the series of trademarks described by Certification Trademark No. 1338510
Fair Work Act	the *Fair Work Act 2009*
outworkers	individuals and employees who perform work in the textile, clothing and footwear industry from home (homeworkers) or at other premises that would not commonly be regarded as business premises.
Proposed Conduct	Has the meaning set out in paragraph 3 of this determination.
retail signatory	a retailer in the textile, clothing and footwear industry which has become a signatory to Part 2 of the Code.
TCF Award	the Textile, Clothing, Footwear and Associated Industries Award 2010. This is the current Federal employment award which covers workers in the textile, clothing and footwear industry.
TCF	Textile, Clothing and Footwear.
the Tribunal	the Australian Competition Tribunal
Union	Construction, Forestry, Maritime, Mining and Energy Union of Australia; in particular, the TCF sector.
work record	A written record relating to work which is contracted out by a principal, the required details are specified by clause F.2.2 of Schedule F of the TCF Award.

1. The application for authorisation

1. On 26 April 2018 the Code Committee lodged with the ACCC an application for the revocation of authorisations A91354-A91357 and the substitution of AA1000418 (**re-authorisation**).[2]

2. The Code Committee seeks re-authorisation on behalf of:

   a. itself,

   b. each of the entities that have one or more representatives on its committee now and for any representative on its committee for the period of the authorisation. These currently include: representatives of the NSW Business Chamber, Ai Group, the Union and accredited business representatives,

   c. current accredited businesses and signatories of the Homeworkers Code of Practice, and

   d. future accredited businesses and signatories of the Homeworkers Code of Practice

   (collectively, the **Code Parties**).

The Proposed Conduct

3. The Code Committee seeks re-authorisation to enable the Code Parties to give effect to the Code Annexure A(the **Proposed Conduct**).[3]

4. The Code Committee requested authorisation to engage in the Proposed Conduct for five years and sought re-authorisation because the Code may constitute an agreement affecting competition and contains compliance measures, including boycotts of businesses which are not compliant with their legal obligations, that may otherwise breach the *Competition and Consumer Act* (**CCA**).

The Applicant

5. The Code Committee oversees the operation and management of the Code through a joint employer and Union initiative and receives funding from the Victorian Government Department of Economic Development, Jobs, Transport and Resources.

6. The Code Committee trades under its registered business name, 'Ethical Clothing Australia' (**ECA**).

The Code

7. The Code is a mechanism within the textile, clothing and footwear industry which seeks to encourage industry compliance with legal obligations relating to workers' entitlements and working conditions.

8. The intention of the Code is to require compliance with existing legal obligations in relevant Awards and legislation, rather than to extend these obligations, with one

---

[2] Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the Competition and Consumer Act 2010. Applicants seek authorisation where they wish to engage in conduct which is at risk of breaching the CCA but nonetheless consider there is an offsetting public benefit from the conduct. Detailed information about the authorisation process is available in the ACCC's Authorisation Guidelines at **www.accc.gov.au/publications/authorisation-guidelines-2013**

[3] The revised version of the Code is in Annexure A and Appendix 2 of the application for authorisation AA1000418 which is available on the **ACCC's pubic register**.

exception. Clause 9.4(d) of Part 1 of the Code extends the liability of some accredited manufacturers to cover unpaid remuneration to outworkers within their outsourced supply chains (see paragraph 20).[4]

9. In order to protect vulnerable workers (in particular, outworkers) and assist businesses to ensure that they are compliant with their legal requirements, the Code provides the following measures:

   a) Yearly compliance auditing of accredited manufacturers and their supply chains by the Construction, Forestry, Maritime, Mining and Energy Union of Australia (the **Union**). This assists businesses to identify and assess the risks associated with sub-contracting practices within their supply chains.

   b) Education of businesses as to their legal obligations, as a component of the auditing process and through training programs overseen by the Code Committee.

   c) The right for accredited businesses to use the Ethical Certification trade mark series (see below) in association with their products, thus signalling their compliance to customers.

   d) Education of industry workers and customers regarding the Code and its operations.

10. The Code Committee has registered the following series of trademarks as Certification Trademark No. 1338510:

These marks comprise the '**Ethical CTM series'** and are available to accredited businesses to use as a means of communicating that they hold accreditation under the Code and observe its requirements.

Revisions to the Code

11. The following changes to the Code, as compared to the version considered by the ACCC in 2013, are proposed to be made or have already come into effect:

   a) Changing the title from 'Homeworkers Code of Practice' to 'Ethical Clothing Australia's Code of Practice, incorporating Homeworkers' in Part 1 and Part 2 of the Code.

   b) Removing schedules 1, 2, 4 and 5 (statutory declarations) and schedule 3 (agreement between accredited principal companies and their contractors) from Part 1 of the Code and minor amendments to reflect this change.

   c) Renaming Schedule 6 (letter to Homeworker) as Appendix A in Part 1 of the Code.

   d) Updating terminology and titles in Clauses 10 (Licensing and use of Trade Marks) and 12 (Code Funds) of Part 1 of the Code.

[4] Due to differences in the legal requirements that apply to incorporated vs unincorporated businesses and differences between laws applicable in each State and Territory, Australian law does not always impose liability for unpaid remuneration to outworkers on the principal manufacturer.

e) Updating definitions, dispute resolution clauses and further minor amendments in Clauses 1 (definitions), 3 (records), 4 (obligations of each retailer) and 7-10 (dispute resolution, trade marks, fees, termination of agreement) in Part 2 of the Code.

Previous authorisations

12. The Code has been authorised by the ACCC in various forms since 2000, generally for periods of five years.

13. The most recent re-authorisation of the Code (as it then stood) was granted by the ACCC on 3 October 2013 for five years, expiring on 26 October 2018 (authorisations A91354-A91357).

2. Background

The industry

14. The textile, clothing and footwear manufacturing industry covers all stages of production of textile, clothing, footwear and leather products.

15. Despite the broad coverage of the Code to include the entire industry, auditing under the Code only applies to accredited manufacturers and their outsourced supply chains.

16. Purchasing in the industry is, broadly, conducted via two different models:

a) Businesses in the industry buy products or product lines from suppliers on an arms-length basis. These products may either be finished items (e.g. a t-shirt) or they may be intermediate goods (e.g. fabric). The products are then resold or used to manufacture a value added product.

b) Businesses in the industry contract for products to be made for them, typically finished products (e.g. a t-shirt), or services to be provided to them (e.g. embroidery on the t-shirt), using materials supplied by them. The contractor they retain may fulfil the contract in-house or may sub-contract some or all of the work to one or more other businesses. This second model is referred to in the industry as ‘giving out work’. Any business which contracts or sub-contracts out work is referred to as a ‘principal’.

17. A business has different legal obligations (some of which are unique to the industry) under existing awards and workplace laws depending upon whether:

a) all of its textile, clothing or footwear inputs are bought at arms-length from suppliers and any production is conducted in-house;

b) any of its textile, clothing or footwear inputs or products are produced for the business by a contractor. However, that contractor (or its sub-contractors) use in-house workers only, so that no work is performed by an outworker; or

c) any of its textile, clothing or footwear inputs or products are produced for the business by a contractor and at least some of the work outsourced to that contractor is ultimately performed by an outworker.

18. The Fair Work Ombudsman's 2015 report identified that in 2012 there was a high contravention rate (40%) in the TCF industry and those at the lower levels of the varied and fragmented supply chains present are particularly vulnerable.[5]

Legal obligations in the industry

19. The Code requires compliance with existing legal obligations and is intended to complement those obligations. For example, the auditing of outsourced supply chains is intended to ensure that each business in an accredited supply chain has fulfilled its record keeping and other obligations under existing laws. The Code also relies upon the obligations of businesses to permit entry to the Union, under existing law, in order to implement an effective supply chain audit mechanism.

20. The main source of businesses' legal obligations in this context are the *Fair Work Act 2009* (the **Fair Work Act**) and the *Textile, Clothing, Footwear and Associated Industries Award 2010* (**TCF Award**). Since Western Australia does not apply the national workplace relations system to all businesses,[6] those businesses which are not subject to the national workplace relations system are subject to state law and awards.[7] The Code obliges unincorporated businesses in Western Australia to comply with the outworker provisions of the TCF Award, which obligations may differ from those that the businesses would otherwise be required by adhere to.[8] Incorporated Western Australian businesses are subject to the Fair Work Act and the TCF Award in the same way as incorporated businesses in other States. In addition, other more general, workplace laws also apply to and protect textile, clothing and footwear industry workers. These include State and Federal laws relating to: occupational health and safety, anti-discrimination, child labour, public holidays, long-service leave and superannuation.

3. Consultation

21. The ACCC tests the claims made by an applicant in support of its application for authorisation through an open and transparent public consultation process.

22. The ACCC invited submissions from a range of potentially interested parties including accredited and non-accredited businesses, customers of accredited businesses, academics, relevant industry associations or peak bodies, state and federal government and relevant regulatory bodies.[9]

23. Prior to the draft determination, the ACCC received 34 submissions in support of the application from accredited businesses, industry associations, government bodies and academics. The ACCC also received one submission opposing the application from a business requesting that their identity be kept confidential.

24. On 6 July 2018 the ACCC issued a draft determination proposing to re-authorise the Proposed Conduct for five years. A conference was not requested following the draft determination.

---

5 Fair Work Ombudsman. Designed to Fit – Insights and outcomes from the Fair Work Ombudsman's education phase of the National Textile, Clothing and Footwear Campaign 2015. <https://www.fairwork.gov.au/ArticleDocuments/557/TCF-campaign-report.docx.aspx> page 3.

6 In Western Australia sole traders, partnerships, non-trading corporations and other unincorporated entities are not covered by the national system.

7 See **https://www.fairwork.gov.au/about-us/legislation/the-fair-work-system**.

8 Clause 9.4 of the Code.

9 A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

25. A submission was received from the Victorian Department of Economic Development, Jobs, Transport and Resources following the release of the draft determination which supports the continued authorisation and notes that the Victorian Government provides funding to the Code Committee.

26. The Code Committee provided two submission responding to the draft determination. The first provides technical clarifications on the TCF Award and operation of the Code. The second responds to the '*Guide to procuring Uniforms and Personal Protective Equipment (PPE)'* released by the Victorian Government on 29 July 2018.

27. The submissions by the Code Committee and interested parties are considered as part of the ACCC's assessment of the application for re-authorisation and are available on the **ACCC's public register**.

4. ACCC assessment

28. Pursuant to subsections 91C(7), 90(7) and 90(8) of the CCA, the ACCC must not make a determination granting re-authorisation unless it is satisfied in all the circumstances that the Proposed Conduct would result or be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct.

Relevant areas of competition

29. The Code applies to businesses in the TCF industry that manufacture products in Australia. Consistent with previous decisions, the ACCC considers that the relevant areas of competition encompass the breadth of the TCF supply chain; through the processing of fibres for textile manufacture, to design, construction and manufacture of garments or footwear, wholesaling of finished products, concluding in retail of those products to the end consumer.

Future with and without

30. To assist in its assessment of the Proposed Conduct against the authorisation test, the ACCC compares the benefits and detriments likely to arise in the future with the conduct for which authorisation is sought against those in the future without the conduct the subject of the authorisation.

31. The ACCC notes that in the absence of the conduct for which authorisation is sought, TCF businesses would continue to be required to comply with existing State codes, the relevant award, the Fair Work Act, and other applicable legislation.

32. The ACCC considers that without authorisation it is unlikely that the Code Committee would fully implement the Code because it includes conduct which is at significant risk of breaching the CCA.

33. If it did not have authorisation, the Code Committee could potentially amend the Code to lessen the risk of breaching the CCA, but the ACCC considers that this would constitute a significant dilution of the Code. The effectiveness of the Code in encouraging compliance with legal obligations depends upon those provisions of the Code which potentially raise concerns under the CCA. In particular, the potential trading sanctions which retailers and manufacturers agree to impose on non-compliant suppliers along the production chain is a powerful mechanism to ensure compliance.

34. The ACCC therefore considers that the relevant future without the Proposed Conduct is the situation in which the proposed revised Code is not implemented and, potentially, a significantly diluted version of the Code is introduced in its place.

Public benefit

35. The CCA does not define what constitutes a public benefit and the ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (**the Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

> …anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements … the achievement of the economic goals of efficiency and progress.[10]

36. The public benefits claimed by the Code Committee may be summarised as:

    a) Increased business compliance with legal obligations in relation to textile, clothing and footwear workers.

    b) Efficiencies for business in the management of their supply chain risks.

    c) Efficiencies for business and industry in the way they signal their ethical status to interested consumers and for consumers to gain assurance as to the ethical status of accredited products.

37. Each of the public benefits are considered in more detail below.

Increased compliance with legal obligations in relation to workers

The Code Committee's submissions

38. The Code Committee submits that:

    a) Compliance officers usually observe multiple breaches of the TCF Award, the Fair Work Act and/or other legislation in the supply chains of first time applicants for accreditation under the Code. When audits are carried out for businesses seeking re-accreditation, compliance officers generally observe a narrower range of non-compliance issues.

    b) Where breaches are identified, the Code Committee aids businesses and supply chain participants in understanding their obligations and allows an opportunity for the breaches to be rectified before requiring the principal to make a decision about continuing to use that supply chain participant.[11]

    c) The Code Committee has prepared and continues to update resources assisting businesses through the accreditation process which summarise obligations and entitlements applicable in the industry.

    d) The Code Committee continues to provide a number of education and outreach programs, including:

        i. advising outworkers about their pay and legal entitlements,

        ii. supporting events that educate outworkers and allow the sharing of experiences,

        iii. producing resources for outworkers that raise awareness of the TCF Award and their entitlements, and

        iv. providing multilingual information.

[10] Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

[11] Accreditation will not be granted unless all supply chain participants become compliant within the Code Committee's specified timeframe.

Interested party submissions

39. Submissions received from government representatives and accredited businesses noted that the Code and Code Committee play an important role in informing businesses of their legal obligations.

40. Submissions received from Dr Shelley Marshall (RMIT University), Dr Annie Delaney (RMIT University) and Prof. Christina Cregan (University of Melbourne) support the application, noting that the Code plays an important role in improving the conditions of workers in the industry. Dr Marshall states that her research indicates a trend of increased compliance with legal obligations since the study conducted by Professor Cregan in 2001. Dr Marshall's submission states:

> In contrast with Cregan's study, in which she found no evidence of workers receiving their legal entitlements, a number of workers that I interviewed were either receiving legal wages and other entitlements or close to them. These interviewees were all working in supply chains that are linked to lead companies that accredited under the Homeworkers Code of Practice through Ethical Clothing Australia. For all the interviewees who were receiving close to their legal entitlements this was a relatively new phenomenon. Only a few months earlier, they have been receiving less favourable conditions close to those described by Cregan.

41. Asian Women at Work praises the Code Committee for providing information to workers in multiple languages to benefit workers from non-English speaking backgrounds, allowing them access to information about their pay and entitlements which was previously difficult to access.

ACCC consideration

42. The ACCC notes that there is evidence that some businesses in the industry have failed to comply with their legal obligations in relation to workers. The Code and initiatives of the Code Committee appear to have improved compliance. The ACCC considers that the Code Committee's activities in managing the Code and providing education and auditing against the legal obligations are likely to result in public benefits from increased compliance by businesses with their legal obligations.

Efficiencies in the management of supply chain risks

The Code Committee's submissions

43. The Code Committee considers that the Code assists accredited businesses and signatories in:

    a) Managing legal and reputational risk.

    b) Understanding legal obligations through the tools and information kits provided by the Code Committee.

    c) Demonstrating that their products are Australian Made and manufactured under ethical conditions through the use of the independent Ethical CTM series.

    d) Increasing their connection to potential customers, including consumers, government and major purchasers, through ECA promotion and advocacy.

    e) Being part of a wider community, increasing their connection to other local and ethical manufacturers.

44. In support of this view, the Code Committee notes that it provides a range of educational materials to businesses as part of the accreditation process, has introduced new end of year audit reports (which provide direct feedback to

businesses audited) and cited findings from a survey it conducted of accredited businesses in 2018 which shows:

a) 94% of respondents either strongly agreed or agreed that their businesses valued its accreditation under the Code.

b) 74% either strongly agreed or agreed that the ECA helped manage risks throughout their supply chain.

c) When asked about the benefits of ECA accreditation, the top three responses given were: being able to demonstrate Australian made, independent certification to show customers, and having support in ensuring the company is compliant with the law.

Interested party submissions

45. Interested parties provided submissions supporting the Code Committee's claim that the Code results in efficiencies in the management of supply chain risk. These include a number of accredited businesses, which together provided comments supporting each of the elements identified by the Code Committee in paragraph 43.

46. The Union's submission notes that through the accreditation process "[t]ransparency in TCF supply chains is greatly enhanced. Workers undertaking TCF work can be found and wages and conditions, and health and safety audited. Where contraventions of the award and other laws are identified, steps can then be implemented to remedy the breaches." In addition, "[f]or the accredited manufacturers themselves, the Code provides a degree of assurance that workers producing their garments have not been abused or exploited in the process".

47. The ACCC received a confidential submission from an interested party opposing the re-authorisation because:

a) It is unethical and potentially unlawful for audits to be conducted along the supply chain (and not just limited to signatory businesses). Requiring transparency on the part of supply chain businesses by requiring information to be provided to the Code Committee (and passed on to the union) poses a privacy risk and bypasses legal constraints imposed on the union.

b) The Code requires businesses to keep extensive time costing for each job and the obligation to provide a minimum amount of work to casual employees goes beyond what is required for any other casual worker in Australia and has led manufacturers to cease operating in Australia. "The cost to administer the giving of work to the homeworker is huge and outweighs the cost of the homeworker in many cases".

48. The Code Committee notes:

a) With respect to record keeping and privacy concerns, the Code only seeks to ensure compliance with Australian workplace laws and does not seek any information about individual employees beyond what is required to demonstrate compliance.

b) Any obligation to keep records and provide a minimum amount of work to particular workers is based on the relevant award and workplace laws (rather than a requirement stemming from the Code).The Code does not impose obligations on employers beyond what is already required by law.

ACCC consideration

49. The TCF Award and the Fair Work Act impose a range of legal obligations upon businesses which give out work to ensure the payment of workers who perform that

work. The majority of existing accredited manufacturers are incorporated[12] and thus, to the extent that these businesses give out work (that is, outsource), they are subject to the full range of obligations under the Fair Work Act and the TCF Award.

50. The ACCC notes that businesses in this industry are also vulnerable to other supply chain risks as a result of non-transparent outsourced supply chains. In particular, businesses may suffer from quality control issues and delivery delays.

51. Transparency and auditing obligations in the Code may assist many participating businesses to manage the risks which arise from outsourcing their supply chains.

52. The ACCC considers that the Code is likely to improve business efficiency in managing outsourced supply chain risks, particularly in relation to the risk that a sub-contractor is not compliant with its legal obligations to workers.

53. The ACCC also considers that the identification of sub-contracting practices may incidentally help businesses to more efficiently manage supply chain risks arising from quality control and delayed delivery.

54. Overall, the ACCC considers that the Code is likely to improve many businesses' efficiency in managing outsourced supply chain risks and that this constitutes a likely public benefit.

Efficiencies in signalling compliance with legal obligations

The Code Committee's submissions

55. The Code Committee submits that the Code, in conjunction with the Ethical CTM series, provides a benefit to businesses and signatories by signalling that they are compliant with their legal obligations.

56. The Code Committee's licensing agreement permits accredited companies to use the ECA trade mark and Ethical CTM series on swing tags, garment tags, websites, packaging and promotional materials. Significant use of these trade marks has been observed.

57. The Code Committee's 2018 survey of accredited businesses found that:

    a) 83.67% of companies mention ECA accreditation on their websites.

    b) 69.39% of companies promote ECA accreditation via social media.

    c) 61.22% of companies communicate their ECA accreditation to customers in-store.

    d) 55.1% of companies mention ECA accreditation when speaking at public events or to the media.

58. The survey also found that 63.27% of accredited companies agreed or strongly agreed that customers were asking more questions about labour rights and/or the people who make their clothing.

59. A literature review conducted by the Code Committee in 2017 found that the use of accredited labelling schemes (and social media influencers) is effective in communicating the ethical message to potential consumers and possibly converting them to ethical purchasing behaviour.

60. The information conveyed by the Ethical CTM series is supported and developed through public events, education and training instigated by the Code Committee where the purpose and remit of the Code is explained.

[12] Appendix 4 to the Application for Authorisation.

Interested party submissions

61. A number of accredited businesses advise that they value the Ethical CTM series as a means of conveying to customers that their products are ethically produced or Australian made. Business such as Thinksideways, Bluegum and Fraser and Hughes identified that they used the Ethical CTM series in social media, on swingtags, websites, and promotional materials and knew that the accreditation was important to their customers. To Barwyn and Back also states that the ECA accreditation program "assists my brand in creating a truly ethical product, guides my brand to find other brands to work with …and gives my brand exposure".

62. Thinksideways states: "[t]oo many businesses in this industry make claims without any evidence or validation as pure marketing ploy. Despite being in a busy space where the term 'Ethical' is used along with many others, it's good to have a certified trade mark that differentiates our businesses that have actually taken real steps to be audited and accredited."

63. Dr Shelley Marshall from RMIT University considers that one of the most important aspects of the Code is the way that it allows brands to demonstrate that their products are manufactured under ethical conditions through the use of the independent, third-party ECA trade mark, stating that "the ECA trade mark is the most credible of its type".

ACCC consideration

64. The ACCC accepts that the Code provides a method by which businesses can effectively signal to customers that Australian manufactured TCF products have been produced in compliance with the TCF Award and workplace laws.

65. The use of the Ethical CTM series by businesses allows these businesses to differentiate their products from those of competitors, who may not observe the same standards, and communicates this information to consumers. The ACCC considers that the Ethical CTM series facilitates the communication of manufacturing practices to consumers, improving transparency in the TCF industry.

66. The ACCC considers that this signalling provides more information to customers and results in a public benefit by enabling them to make better informed purchasing decisions.

Public detriment

67. The CCA does not define what constitutes a public detriment and the ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

> …any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.[13]

68. The ACCC has considered the following potential public detriments:

- Restriction of competition between suppliers and the ambit of the Code.
- Increased business costs and administrative burdens imposed by the Code.
- Adverse consequences resulting from the Union acting as auditor under the Code.

69. The ACCC's assessment of the likely public detriments from the Proposed Conduct follows.

[13] *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

Restriction of competition between suppliers and the ambit of the Code

The Code Committee's submissions

70. The Code Committee submits that:

    a) There is no evidence that the operation of the Code has had any adverse effect on competition to date and the Code is unlikely to do so in the future.

    b) Participation in the Code is voluntary.

    c) The Code seeks to ensure that existing legal obligations are being complied with. It does not impose new obligations on suppliers.

    d) It is reasonable for businesses seeking accreditation to wish to ensure that their suppliers are also compliant with existing workplace laws (particularly having regard to their existing legal obligations).

    e) It is critical that the Code Committee has the ability to act on breaches within the supply chain in order to maintain integrity, efficacy and effectiveness of the Code.

71. The Code Committee submits that in practice, when a breach is identified, compliance officers bring the breach to the attention of the principal and allow them the opportunity to take steps to rectify the breach identified without needing to rely on the formal processes set out in the Code. This leads to rectification of the issue/s in the majority of cases. The formal processes set out in clause 9.5 of Part 1 and 6.1 of Part 2 are used where inadequate progress is made by the principal in getting their supplier/manufacturer to comply.

72. The Code Committee submits that there have been instances of principals choosing to discontinue trading with non-compliant suppliers, however in these instances recourse has not been had to the mechanism in the Code.

73. On 3 August 2018, following the draft determination, the Code Committee lodged a further submission addressing the 'Guide to procuring Uniforms and Personal Protective Equipment (**PPE**)' (**the Guide**) released by the Victorian Government Purchasing Board on 29 July 2018. The Guide introduces ethical considerations to uniform and PPE tenders made to the Victorian Government and requires Australian manufacturers of TCF goods to hold or be seeking accreditation under the Code which must be maintained throughout the term of their contracts with the Victorian Government.

74. The Code Committee submits that requiring accreditation under the Code in the Guide demonstrates the Victorian Government's support for the TCF industry and that ethical production is important in the sector, but does not change the fact that the Code remains voluntary and does not limit the ability for companies to compete for contracts.

75. The Code Committee notes that the issue of Code accreditation as a government tender requirement was considered in Authorisations A91354-A91357. The Code Committee considers that the comments made by the Union at that time remain relevant:

    a) If a business considers the obligations imposed by government in its tender and grant process are excessively onerous and/or the business will not be adequately compensated for participating in government tenders or grant programs, then the business can choose not to participate.

b) In practice, the accreditation requirement imposed by government is just one of a large number of requirements and obligations imposed on government suppliers.

76. The Code Committee also submits that the Guide is State based and its impacts are likely to have less reach than the Commonwealth Government procurement rules considered by the ACCC in Authorisations A91354-A91357.

Interested party submissions

77. A number of interested parties, including Dr Annie Delaney (RMIT University), Minister Grace Grace (Queensland Minster for Education and Industrial Relations), Oxfam Australia, Asian Women at Work, and some accredited businesses do not consider that the Code has resulted in any public detriment.

78. The interested party that opposes the re-authorisation submits:

a) The revisions to the Code are more than just a name change and extend the reach of the Code beyond just homeworkers.

b) The amended Code extends the audits performed by the Applicant to businesses which do not employ homeworkers and outworkers, not just to signatories to the Code.

79. In response to the confidential submission, the Code Committee submits:

a) The changes being made do not widen the reach of the Code.

b) The Code has covered TCF workers whether they are employed directly on premises or as homeworkers since its inception. The strength and integrity of the accreditation program comes from ensuring compliance throughout the supply chain.

ACCC consideration

80. As part of the consideration of the previous Code, the ACCC strongly recommended that the Code Committee amend the name of the Code to clarify that it covers all workers in the industry and not just homeworkers.[14] This has been done as part of the revisions to the Code.

81. The ACCC considers that the proposed revisions to the Code do not extend the ambit of the Code. The ACCC accepts that the effectiveness of the accreditation program is strongly tied to its whole-of-supply-chain reach.

82. The ACCC acknowledges that the Code imposes restrictions on accredited manufacturers' and retail signatories' dealings with other businesses in order to provide an effective mechanism for businesses to ensure compliance with legal obligations.

83. The ACCC notes that, since the draft determination, accreditation under the Code has become a requirement for certain Victorian Government tenders. For some businesses who might otherwise have chosen to tender to supply the Victorian Government, this may now mean that they must either apply for (or continue to maintain) accreditation under the Code or seek another buyer for their products.

84. However, the ACCC notes that the requirement to hold or be seeking accreditation under the Code is limited to contracts relating to uniforms and PPE in Victoria and the compliance obligations imposed by the Code are not particularly onerous (requiring businesses to provide conditions that, in most cases, they still would have been required to provide under legislation). The Victorian Government

[14] ACCC final determination authorisation A91354-91357 at paragraph 290.

is a relatively smaller buyer of TCF goods. The ACCC remains of the view set out in Authorisations A91354-A91357 in relation to this issue that businesses seeking accreditation in order to qualify for a tender or contract will do so on the basis that they expect it to be commercially beneficial to the business.

85. Overall, the ACCC considers that any anticompetitive detriment arising from the Proposed Conduct is likely to be limited because:

    a) The Code is voluntary.

    b) Only businesses which are noncompliant with their legal obligations are potentially subject to boycott (which the Code Committee has not implemented to date).

    c) There are safeguards against misuse of the Code, such as clearly defined roles for the Code Committee and the Union, and the inclusion of a dispute resolution mechanism in the Code.

Increased costs and administrative burdens imposed by the Code

The Code Committee's submissions

86. The Code Committee submits that, in relation to any costs imposed by the Code:

    a) The operation of the Code and of the Code Committee, its compliance work and its staff is supported by government funding.

    b) The Code Committee has sought to keep accreditation fees as low as possible.

    c) The Code Committee represents good value to businesses seeking accreditation, given the assistance provided in the accreditation process and reduced risk of legal non-compliance.

    d) The Code Committee has sought to reduce the administrative burden on businesses by proposing the removal of schedules 1 to 5 (statutory declarations) from Part 1 of the Code.

    e) The majority of the records accessed under the Code for audit purposes are records which businesses are required to keep in any event.

Interested party submissions

87. The Australian Fashion Council welcomes the proposed removal of the statutory declarations at schedules 1-5 of the Code as these changes will make the application and renewal processes less intrusive and costly for businesses, making accreditation more accessible.

88. The interested party opposing the re-authorisation submits that:

    a) The cost to administer the giving of work to homeworkers is huge and outweighs the cost of the homeworkers in many cases.

    b) The obligations to keep extensive records in time-costing each job and having to provide a minimum amount of work to casual workers, far in excess of any other casual worker in Australia, have led manufacturers to cease their operations in Australia.

    c) Manufacturers who would have ordinarily operated in Australia but do not want to be a party to the Code for a range of reasons (including reasons unrelated to homeworker pay requirements) do not appear when quantifying the damage caused by the Code as they are likely to have established

themselves outside Australia and no longer have reason to provide feedback in Australia.

89. In response, the Code Committee notes:

a) The Code only seeks to ensure compliance with existing laws.

b) Any obligations to keep records and to provide a minimum amount of work is based on the relevant award and workplace laws.

c) The Code Committee rejects that the existence of the Code, which is voluntary, has somehow impacted on the number of businesses which have moved their manufacturing offshore.

d) Changes in the size and scale of the TCF industry in Australia are the result of shifts in tariffs and changes to trade-policies that have resulted in increased imports and off-shoring.

ACCC consideration

90. In its 2013 determination, the ACCC identified that the requirement to obtain multiple statutory declarations was likely to be the most costly of the obligations that businesses would have to comply with in the accreditation process. The removal of schedules 1-5 of the Code is a significant step by the Code Committee in reducing the burden imposed by its accreditation process.

91. The ACCC acknowledges that the completion of work records and remuneration calculations imposes a cost on businesses. However, the legal obligation (and therefore any additional costs to business) is imposed by Schedule F of the TCF Award rather than the Code. To the extent that businesses have complied with Schedule F, the only cost imposed by the Code in relation to work records and remuneration calculations is the cost of providing a physical copy of the work record and remuneration records to Ethical Clothing Australia and the Union.

92. The ACCC recognises the Code imposes a number of different costs upon businesses from increased paperwork, compliance auditing and fees. However, the ACCC notes that accreditation under the Code is not a requirement under the Commonwealth Procurement Rules (when previously it was). Accordingly, the ACCC considers accreditation under the Code to be a voluntary process and that it is a matter for each business to assess the costs and benefits of becoming accredited or a retail signatory or supplying such a business.

Adverse consequences resulting from the Union as acting as auditor under the Code

The Code Committee's submissions

93. The Code Committee submits that:

a) The choice of the Union as the auditor under the Code is due to the Code's reliance upon the existing powers and operations of the Union under workplace laws. In particular, the Fair Work Act and the TCF Award grants the Union wide powers to enter workplaces and inspect and copy documents.

b) Prior records from initial audits indicate a business's outsourced supply chain will rarely be compliant with the Award and relevant legislation.

c) Poor occupational health and safety is also very common in factories as well as amongst outworkers.

d) In relation to outworker specific requirements, it is common for suppliers not to be registered with the relevant Fair Work Commission Board of Reference

and not record the details of their outsourcing contracts. The prescribed minimum safety net of terms and conditions for outworkers are almost uniformly not adhered to.

94. The Code Committee submits that the auditing undertaken by the Union does not just involve checking compliance but involves education and training of principal businesses and their supply chains of their obligations under the TCF Award and relevant legislation. This element of compliance auditing under the Code is critical in ensuring systems and structures are in place to ensure ongoing compliance.

95. In particular, the Code Committee considers that an alternative commercial auditor would be unable to effectively replace the Union because:

    a) Audits would be significantly more costly because the Union currently subsidises audits, a new auditor would require costly training and may not operate as efficiently as the Union.

    b) Audits may not be as effective or fast due to a replacement auditor's likely lack of familiarity with the TCF industry and a lack of an existing relationship of trust between the auditor and businesses being audited, which in turn may lead to less forthcoming interviews.

    c) Legal issues are likely to arise from the use of a private auditor as the Union relies on its existing legal powers in order to access workplaces in order to conduct audits.

    d) Credibility and national consistency issues may arise if a commercial auditor (or auditors) are used, which in turn may require the Code Committee to audit the commercial auditors, adding complexity and expense.

96. The Code Committee submits that since the ACCC granted reauthorisation in 2013, it has not received any complaints (formal or informal) about the Union acting as auditor, or in relation to the accreditation process. Nor has the dispute resolution process been utilised since its introduction.

Interested party submissions

97. The interested party opposing re-authorisation submits that auditing should be kept separate from administration of the Code and should be undertaken by an independent body. By performing audits, the Code Committee is effectively subsidising the unions.

98. In reply, the Code Committee submits that the auditing and compliance process is kept separate from the administration of the Code. The administration of the Code is undertaken by staff employed by the Code Committee who carry out their work and duties under the Code independently from the compliance and auditing work undertaken by the Union. The staff employed by the Code Committee are not privy to a range of information that is ascertained during the independent compliance process.

ACCC consideration

99. The ACCC considers that competition between auditors of various ethical assurance schemes can promote efficiencies in the delivery of such schemes, which may potentially lead to reduced costs and higher quality service. The use of the Union as the sole auditor under the Code removes the potential for such competition. However, the ACCC notes that the majority of the auditing costs are subsidised through government grants and that the business being audited does not pay auditing fees. The cost of engaging the auditor in this instance is effectively paid by government grants, through the Code Committee.

100. The ACCC also notes that complaints regarding the auditing process may be submitted to the Code Committee for resolution in accordance with the dispute resolution provisions of the Code. The ACCC notes that the Code Committee has not received any complaints since 2013 about the Union's involvement as auditor.

Balance of public benefit and detriment

101. Broadly, the ACCC may not re-authorise the Proposed Conduct unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.

102. The information available to the ACCC indicates that the Code has resulted in public benefits in the form of increased compliance by businesses with legal obligations relating to workers; efficiencies in the management of supply chains; and efficiencies in businesses' signalling their compliance with legal obligations which provides better information to customers. The ACCC considers that the Code is likely to continue to result in these public benefits during the next ten years.

103. The ACCC notes that accreditation under the Code is a voluntary process, and therefore businesses will only go through the process if they consider the costs are worthwhile. The ACCC does not consider that there are any significant competitive detriments from the operation of the Code.

104. For the reasons outlined in this determination, the ACCC is satisfied that the Proposed Conduct is likely result in a public benefit that would outweigh any likely public detriment from the Proposed Conduct. Accordingly, the ACCC has decided to grant authorisation.

Length of authorisation

105. The CCA allows the ACCC to grant authorisation for a limited period of time.[15] This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

106. In this instance, the Code Committee seeks authorisation for five years.

107. There were no interested party submissions on the appropriate length of authorisation.

108. In light of the assessment of public benefits and detriments set out above, the ACCC has decided to re-authorise the Proposed Conduct for ten years, until 21 September 2028.

5. Determination

The application

109. On 26 April 2018, the Code Committee lodged an application under section 91C(1) of the CCA to revoke authorisations A91354-A91357 and substitute them with authorisation AA1000418 (re-authorisation).

110. The Code Committee seeks re-authorisation for the Code Parties to give effect to a revised version of the Homeworkers Code of Practice, which is to be renamed

[15] Subsection 91(1) of the CCA.

'Ethical Clothing Australia's Code of Practice incorporating Homeworkers', (attached at Annexure A) (defined as the Proposed Conduct in paragraph 3).

The net public benefit test

111. For the reasons outlined in this determination, the ACCC is satisfied, pursuant to subsections 91C(7), 90(7) and 90(8) of the CCA, that in all the circumstances the Proposed Conduct for which authorisation is sought would result or be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct.

Conduct which the ACCC has decided to authorise

112. The ACCC has decided to grant authorisation to the Code Committee for the Code Parties to give effect to the Proposed Conduct described at paragraph 110, which may substantially lessen competition within the meaning of section 45 of the CCA, hinder or prevent the supply or acquisition of goods or services by a third person within the meaning of sections 45D, 45DA, or 45DB of the CCA or constitute a cartel provision within the meaning of Division 1 of Part IV of the CCA.

113. Any changes to the Code during the term of the proposed authorisation would not be covered by the authorisation.

114. The ACCC has decided to grant authorisation AA1000418 until 21 September 2028.

Date authorisation comes into effect

115. This determination is made on 30 August 2018 If no application for review of the determination is made to the Australian Competition Tribunal it will come into force on 21 September 2018.

Annexure A: The Code

ethical clothing AUSTRALIA

Ethical Clothing Australia's Code of Practice, incorporating Homeworkers ~~Homeworkers Code of Practice~~

Application for Accreditation

Part 1
(Manufacturers)

For further information & assistance contact
Ethical Clothing Australia
Postal address: PO Box 2087, Fitzroy VIC 3065
Phone: 03 9419 0222 / Fax: 03 8415 0818
Email: info@ethicalclothingaustralia.org.au
www.ethicalclothingaustralia.org.au

Ethical Clothing Australia's Code of Practice, incorporating Homeworkers
~~HOMEWORKERS CODE OF PRACTICE~~

Ethical Clothing Australia (ECA®) Privacy Policy

We collect, use and disclose information according to the ECA Privacy Policy which can be found at our website: **www.ethicalclothingaustralia.org.au/privacy-policy**. By signing this application, you acknowledge and agree that you have read and understood our Privacy Policy, and agree to your information being handled in accordance with it. Amendments to the Privacy Policy will come into effect immediately when posted on our website. Because of this, you should access the Website and read the latest Privacy Policy prior to disclosing personal information to us. Important Note: If you do not consent to the ECA Privacy Policy please be aware that ECA will be unable to process your application for accreditation or any subsequent re-accreditations.

Company Name _____

ABN _____

Address _____

_____

Phone _____

Fax _____

Email _____

Website _____

Signature _____

Name _____

Position _____

Date _____

Ethical Clothing Australia's Code of Practice, incorporating Homeworkers ~~The Homeworkers Code of Practice~~ ('the Code of Practice') is a voluntary Code established to ensure textile, clothing and footwear workers and homeworkers receive appropriate legal award entitlements and legislative protection.

Accreditation is only available to businesses who manufacture textile, clothing and footwear products in Australia.

A business is complying with the Code of Practice when its workers and its suppliers' workers (including outworkers) are receiving their lawful pay and entitlements under the TCF Award 2010 and relevant legislation.

[Insert Company Name]

Acknowledges that compliance with the requirements below is necessary to become accredited and maintain accreditation under the Code of Practice

a) Copy of the signed Code of Practice agreement (Part 2 – Signatories)
b) Completed ~~fees form~~Accreditation Application and Renewal Form, to be provided annually
c) Payment of ~~the~~ Accreditation ~~Application~~ fees ~~and ongoing annual fees~~
d) Ongoing cooperation regarding compliance checks and the facilitation of legal compliance, internally and regarding applicant company's suppliers
e) Provision of documentation for initial accreditation, annually and whenever a supply chain changes
~~f) Statutory declaration/s of company seeking accreditation (Schedule 1-5 depending on manufacturing circumstances)~~
~~g) Contractors list (Schedule 2 Attachment 1) or homeworkers list (Schedule 4, Attachment 1)~~
~~h) Completed Schedule/s with each contractor listed in Schedule 2, Attachment 1~~
~~i)~~f) Example of a work record for each contractor used
~~j) Statutory declarations from all contractors) (Schedules 3, 4 or 5)~~
~~k)~~g) Copies of outworker wage records, work arrangements and work records and satisfactory evidence of superannuation and Workcover payments.

~~HOMEWORKERS CODE OF PRACTICE~~ Ethical Clothing Australia's Code of Practice, incorporating Homeworkers.

PART 1 – MANUFACTURER'S AGREEMENT

CLAUSE 1 – AGREEMENT

between

The Textile, Clothing~~, and~~ Footwear Sector of the Manufacturing Division of the Construction, Forestry, Maritime, Mining and Energy Union (the Union)~~Union of Australia (TCFUA)~~, and

The Australian Industry Group (Ai Group), and

The New South Wales Business Chamber (NSW BC)

CLAUSE 2 – PARTIES

The Union~~TCFUA~~

The Ai Group

The NSW BC

Individual companies who are signatories to this Agreement

CLAUSE 3 – OBJECTIVES

The objectives of this Agreement include:

- To end exploitation of workers and homeworkers in the textile, clothing and footwear industry
- To enable workers and homeworkers to clearly understand their employment entitlements
- To ensure workers and homeworkers receive their appropriate award entitlements and legislative protection
- To establish a system of accreditation for Manufacturers who comply with this Agreement,
- To educate workers, manufacturers, contractors, fashion labels and the wider community about the purposes and operation of this Agreement
- To assist homeworkers by supporting, consistent with this Agreement, community and industry education securing compliance with this Agreement and promoting its purpose.
- To facilitate for an accredited business, a transparent, ethical and more sustainable supply chain
- To provide a mechanism to an accredited business to achieve, and ensure ongoing compliance with the TCF Award and relevant legislation
- To provide opportunities to accredited business, to promote their products as ethically produced, Australian products and enabling them through a licence agreement to use Ethical Clothing Australia trade marks.

CLAUSE 4 – DEFINITIONS

4.1 **"Accreditation"** means a system of accreditation whereby a Manufacturer may indicate that it complies with the terms of this Agreement.

4.2 **"Accreditation Register"** means the register of accredited manufacturers held and maintained by Ethical Clothing Australia.

4.3 **"Code of Practice"** or **"Agreement"** means Ethical Clothing Australia's Code of Practice, incorporating Homeworkersthe ~~Homeworkers Code of Practice~~.

4.4 **"Committee"** means the management committee of the Homeworkers Code of Practice.

4.5 **"Contractor"** means a business engaged to produce or arrange the manufacture of products in the textile, clothing and footwear industry.

4.6 **"ECA"** or **"Ethical Clothing Australia"** means the organisation responsible for the accreditation of manufacturers and the administration and promotion of the Code of Practice.

4.7 **"Manufacturer"** means a business that manufacturers or arranges the manufacture of TCF products in Australia (including the value adding onto Australian made product), and may include a supplier, fashion house or wholesaler.

4.8 **"Outworker"** or **"homeworker"** means a person who performs work on, or in relation to, products in the textile, clothing and footwear industry, at residential premises or at other premises that would not conventionally be regarded as business premises.

4.9 **"Products"** means the whole, or part of:
any garment; or
any article of wearing apparel; or
any article of footwear; or
any textile product.

4.10 **"Rate per product"** means the rate calculated in accordance with the TCF Award (outworker provisions). This is determined by reference to the skill level classification, and the 'Time Standards and payment' outworker provisions in the TCF Award.

4.11 **"Relevant award"** or **"TCF Award"** or **"award"** means the Textile, Clothing Footwear and Associated Industries Award 2010, and as amended from time to time to provide increases in wages and/or conditions as determined by the Fair Work Commission (or any successor body).

4.12 **"Relevant superannuation fund"** means in relation to a worker or homeworker, a superannuation fund into which superannuation contributions are to be paid on behalf of the worker or homeworker in accordance with the TCF Award and federal superannuation legislation.

~~4.13 **"Standard Statutory Declaration"** means a statutory declaration as set out in Schedules 1,2, 4 and 5, of this Agreement. Completion of relevant standard statutory declarations is necessary for an applicant business to acquire accreditation.~~

~~4.14~~4.13 **"Supplier/Fashion house/wholesaler"** means an entity that agrees to manufacture or arrange to manufacture products and /or components thereof.

~~4.15~~4.14 **"Supply Chain"** in relation to a manufacturer (whether accredited or seeking accreditation under this Code), means one or more arrangements entered into by the manufacturer, with any legal or natural person, to have work performed for them (directly or indirectly) as the principal.

Workers in a manufacturer's supply chain include workers directly engaged by the manufacturer (including homeworkers) and/or those workers engaged by any of their suppliers or contractors (including homeworkers).'

~~4.16~~4.15 **"The Union~~CFUA~~"** means the Textile, Clothing, ~~and~~ Footwear Sector of the Manufacturing Division of the Construction, Forestry, Maritime, Mining and Energy Union ~~of Australia~~.

~~4.17~~4.16 **"Worker"** means a person who performs work on, or in relation to products in the textile, clothing and footwear industry.

~~4.18~~4.17 **"Workers compensation"** means workers' compensation as prescribed by the relevant state or federal legislation.

~~4.19~~4.18 **"Work records"** means a 'work record' as defined under the TCF Award (formerly known as a garment specification sheet).

~~4.20~~4.19 **"Work agreement"** means a 'work agreement' as defined under the TCF Award (outworker provisions) applicable to homeworkers and all contractors (regardless of whether that contractor employs homeworkers)

CLAUSE 5 – COMMITTEE

The Committee is responsible for the overall administration, implementation and promotion of the Code of Practice.

The Committee comprises an equal number of representatives from the ~~TCFUA~~ Union and a combined group of employer parties to the Agreement, and has a minimum of six members. Decisions of the Committee are made by a majority vote.

The duties of the Committee shall be to take whatever steps may be necessary to ensure promotion of, and compliance with this Agreement, including:

- Accreditation of applicant businesses and re-accreditation of accredited businesses
- Withdrawing a manufacturer's accreditation
- Holding and maintaining the accreditation register of accredited manufacturers
- Licensing Accredited Manufacturers and Registered Manufacturers to use the Accreditation Marks
- Allocating monies from the education, publicity and compliance fund
- Settling any disputes that may arise in relation to the operation of this agreement, which may include the participation of an independent mediator, where agreed (where the committee cannot resolve a dispute the matter will be referred to the agreed independent mediator for resolution) and
- Establishing processes and procedures to rapidly and efficiently deal with issues which come before it, in particular those which require mediation.

CLAUSE 6 – ROLE OF THE ~~TCFUA~~UNION

The Union~~TCFUA~~ will have the responsibility for enforcing compliance with the labour standards under this Agreement. Compliance activities, consistent with this Agreement, shall include:

- Undertaking compliance audits as part of the accreditation process;
- Identifying incidents of non-compliance with the TCF Award and relevant legislation and/or this Agreement;
- Securing compliance through the promotion of this Agreement;
- Ensuring compliance with the TCF Award and relevant legislation by non – accredited businesses;
- Ensuring ongoing compliance with this Agreement by accredited businesses.

CLAUSE 7 – ROLE OF ETHICAL CLOTHING AUSTRALIA

Ethical Clothing Australia (ECA) is established by the Committee to promote ethical behaviour in the textile, clothing and footwear industry, administer the Code of Practice and assist applicant and accredited businesses.

CLAUSE 8 – ACCREDITATION

8.1 Accreditation

The Committee shall confer accreditation on a manufacturer which establishes it is in compliance with all obligations under this Agreement, including:

- Timely completion of required documentation and payment of a new accreditation fee to Ethical Clothing Australia (ECA)
- Ensuring all workers and homeworkers (if any) in its supply chain involved in the performance of work in relation to its products, are receiving wages and conditions as provided for in the TCF Award and under all relevant legislation;
- Co-operating with the ~~TCFUA~~ Union regarding compliance checks; and
- ~~By the provision of standard statutory declarations and other required documentation to ECA as required under the Agreement.~~

The period of time required to become ECA accredited is dependent on the co-operation of the applicant business and the fulfilment of obligations by the applicant and its supply chain. In addition, the specific nature of the applicant's manufacturing circumstances will impact on the time for accreditation; for example, whether the company gives work out or does all of its work in-house, and the number of participants in the supply chain.

Where accreditation is conferred on a manufacturer, that manufacturer will be entitled to be known as an Accredited Manufacturer and licensed accordingly. In addition all Accredited Manufacturers will be provided with an 'Accreditation Certificate' renewed annually.

An Accredited Manufacturer shall be entitled to attach to its products a label indicating (in a form of words decided by the Committee), that they have been made by an Accredited Manufacturer.

8.2 **Re-accreditation**

Re-accreditation for an accredited business is required annually and does not occur automatically.

To be re-accredited, a business is required to fulfil a number of obligations under this Agreement. These obligations include, for example:

- Timely completion of required ECA documentation and payment of an annual accreditation fee to Ethical Clothing Australia;
- Co-operation with the ~~TCFUA~~ Union regarding updated compliance checks;
- Ongoing compliance with the TCF Award and related legislation by the business' supply chain; and
- ~~the provision of accurate statutory declarations and other required documentation to Ethical Clothing Australia as required under this Agreement.~~

8.3 **De-accreditation**

De-accreditation can occur if:

- the accredited business or its supply chain becomes non-compliant with the requirements of this Agreement; and/or
- the manufacturing circumstances of the accredited business change (for example, the business ceases to be eligible under the Code of Practice because it stops manufacturing in Australia; or the business ceases trading and/or becomes insolvent).

If the Committee considers that an Accredited Manufacturer has failed to comply with this Agreement, it may give the Accredited Manufacturer notice stating:

- the grounds on which it considers that the Accredited Manufacturer has failed to comply with this Agreement; and
- that the Committee may cancel the accreditation of the Accredited Manufacturer unless the Accredited Manufacturer provides, within twenty-eight (28) days of delivery of the notice, material which satisfies the Committee that the Accredited Manufacturer has complied with this Agreement.

CLAUSE 9 – OBLIGATIONS OF ACCREDITED MANUFACTURERS

A manufacturer is entitled to accreditation only if it complies with this Agreement.

9.1 General obligations of an applicant or accredited business

The responsibilities of an applicant or accredited business include:

- Advising ECA within 7 days of any changes to its manufacturing circumstances, including for example, the removal or addition of suppliers from their supply chain; taking manufacturing off shore; moving location, changing contact or entity details; corporate restructure which impacts on the accreditation of individual brands within the accredited business.
- Co-operating with the ~~TCFUA~~ Union regarding ongoing legal compliance and auditing. This includes responding to requests in a timely manner and facilitating the cooperation of all contractors and sub contractors within their supply chain.
- Co-operating and providing ECA with requested ~~schedules and other~~ documentation and the payment of fees within the requested timeframe.
- Keeping and maintaining the following records in connection to arrangements made with other contractors or homeworkers:
    - Work Agreements
    - Work Records
    - Wages Records
    - Superannuation fund and payments
    - Workers compensation fund and payments.

9.2 Obligations regarding in-house workers

The applicant, or accredited business must ensure that their in-house manufacturing workers are receiving, at a minimum, the legal wages and conditions as provided for under the TCF Award and relevant legislation (for example, National Employment Standards under the Fair Work Act 2009, superannuation and Work Cover entitlements, OH&S).

~~Once legally compliant as confirmed by the TCFUA, the applicant or accredited business is required to provide to ECA, a signed statutory declaration (Schedule 1 and Schedule 2), attesting they are and will remain compliant with this Agreement.~~

9.3 Obligations in relation to supply chain

The applicant or accredited business must ensure that their entire supply chain is compliant with the obligations of the TCF Award and relevant legislation. This includes registration with the Board of Reference of the Fair Work Commission if giving work out. Compliance extends from first and second tier suppliers through to all subsequent tiers.

~~Once legally compliant as confirmed by the TCFUA, the applicant or accredited business is required to provide to the ECA, a signed statutory declaration (Schedule 2), and a Schedule 3, attesting they are and will remain compliant with this Agreement.~~

9.4 Obligations to homeworkers

If an accredited business or any of its supply chain is giving work out to be performed by homeworkers, they must comply with the (Outworker and related provisions) of the TCF Award and requirements under this Agreement. Many of these obligations are cascading, and as such, apply to each business within a supply chain that gives work out to homeworkers.

~~Once legally compliant as confirmed by the TCFUA, the applicant or accredited business is required to provide to the ECA, a signed statutory declaration (Schedule 4 or Schedule 5), attesting they are and will remain compliant with this Agreement.~~

a) Requirements to be registered and provided lists

An accredited business and any of its supply chain must, prior to arranging for homeworkers to perform work on its behalf, be registered with the Board of Reference of the Fair Work Commission ('BOR'). They must also provide a quarterly list containing the details of each homeworker they have engaged to both the BOR and to the ~~TCFUA~~Union. On the request of the Union~~TCFUA~~, the accredited business must provide to the ~~TCFUA~~ Union within 7 days, details of the name and address of any homeworker which the accredited business is using in the manufacture of its products.

b) Requirements to provide written agreement and work records

Each accredited business and any of its supply chain who arranges for a homeworker to perform work must first make and retain both a Written Agreement with the homeworker and a Work Record in relation to the work, which is the subject of the arrangement. The TCF Award (outworker and related provisions) sets out the details of the information which must be included in the Work Agreement and the Work Record.

c) Minimum conditions for outworkers

Each accredited business and each entity within its supply chain who arranges for a homeworker to perform work must ensure that the homeworker is receiving the following conditions:

- The appropriate time standard rate for work performed by the homeworker based on the TCF Award hourly rate (minimum skill level 3);
- At least the minimum number of hours per fortnight– as defined by Schedule F of the TCF Award and a maximum workload per fortnight (76 hours);
- The homeworker is not being required to work on a Saturday, Sunday or public holidays, or beyond 7.6 hours in one day, unless they agree to do so and the homeworker receives the appropriate rate of pay under the TCF Award;
- Appropriate workers compensation protection as per the relevant state or federal legislation;
- Appropriate notice and redundancy entitlements as per the TCF Award;

- Appropriate superannuation contributions are being made on the homeworker's behalf in accordance with the TCF Award and federal legislation;
- Appropriate pay slip records containing specified information as per the Fair Work legislation; and
- The standard letter as provided for in Appendix 1~~in Schedule 6~~.

d) **Non payment of money to outworkers**

If it is shown to the reasonable satisfaction of the accredited business that a homeworker has not been paid by a contractor in accordance with this Agreement, the accredited business must pay the homeworker the amount due, and deduct the payment otherwise due to the contractor, where such payment to the contractor is still outstanding.

e) **Records**

Each accredited business which arranges for a homeworker to perform work on products must satisfy itself that all required records are maintained and are capable of being provided as required by Ethical Clothing Australia.

An~~–~~ accredited business~~–~~ shall, on the request of the ~~TCFUA~~ Union within 7 days provide the ~~TCFUA~~ Union all details of the name and address of any homeworker which the accredited manufacturer is using in manufacturing the products.

Where an accredited business uses a contractor to make products the accredited business shall, on the request of the ~~TCFUA~~ Union within 7 days provide to the ~~TCFUA~~ Union all details of the name and address of any contractor which the accredited business is using in manufacturing the products.

An accredited business shall, within 7 days of engaging a contractor to arrange for the making of products, ensure that the contractor compiles a list of names and addresses of all homeworkers that the contractor proposes to engage in the making of the products. Upon receiving a request from the ~~TCFUA~~ Union the accredited business shall ensure that the list is provided to the Union~~TCFUA~~ within 7 days.

9.5 **Breach of Agreement**

Where the Union~~TCFUA~~ gives notice to an accredited business that a contractor is in breach of this Agreement, the accredited business shall, within 14 days of the notification, investigate the alleged breach and report its findings to the Union~~TCFUA~~ and the Committee.

If the accredited business's report confirms a breach of this Agreement by a contractor, the accredited business shall cease further commercial dealings with that contractor unless and until the contractor has remedied its breach of the Agreement within 14 days.

9.6 **Precedence of Federal Award**

With the exception of clause 9.4(d) of Part 1 of the Code, the Code is intended to reflect requirements of the Award and relevant workplace laws. A party who complies with the Award or workplace law will also have complied with a provision of the Code that is intended to reflect the relevant requirement of the Award or workplace law as in force from time to time.

CLAUSE 10 – LICENSING AND USE OF TRADE MARKS

An accredited business is able to display and use the ECA trademark subject to strict licensing conditions. All successful accredited manufacturers wishing to use the ECA trade mark, license mark or certification marks are required to sign a Licensing Agreement that covers the use and promotion of ~~Ethical Clothing Australia, Ethical Footwear Australia and Ethical Textiles Australia~~ trade marks. The licensing agreement is also supported by Trademark Usage Guidelines for accredited brands. The guidelines cover both the products the Ethical Clothing Australia trade mark can be used on, and how the trade mark can be displayed.

The Committee shall register and maintain whatever trademarks, ~~logos~~ license marks, or other identification items (**"Accreditation Marks or Certification Marks"**) it deems appropriate to promote compliance with the Award and this Agreement (see examples below).

Trade Mark

ethical clothing AUSTRALIA

ethical textiles AUSTRALIA

ethical footwear AUSTRALIA

CLAUSE 11 – ACCREDITATION FEES

A business seeking accreditation or re-accreditation under this Agreement is required to pay an annual accreditation fee as determined by the Committee.

CLAUSE 12 – CODE~~EDUCATION, PUBLICITY AND COMPLIANCE~~ FUNDS

Funding C~~c~~ontributions shall be made ~~to this Fund~~ by the parties to this Agreement on the following basis:

- Contributions in kind by the Union~~TCFUA~~, NSW Business Chamber ~~&~~ and Ai Group~~AIG~~
- Contributions in kind from accredited manufacturers and retailers which participate as members of the Homeworker Code Committee
- Contributions from retailers and manufacturers, through payment ~~for~~ of accreditation and license fees
- Financial assistance from Local, State and Commonwealth Governments

All parties agree that they will make representations to Local, State and~~&~~ Federal Government for funds to be provided to assist in activities associated with this Agreement.

Any direct funds shall be allocated on the following priority basis:

- To the Union~~TCFUA~~ for compliance activities;

- Towards education and publicity activities (education and publicity activities for the purposes of this involves educating homeworkers, contractors, manufacturers, retailers and the wider community about the operation and purposes of the Agreement);
- Towards the development of accreditation tools and resources; and
- other Homeworker Code Committee Inc. costs

~~Education and Publicity activities supported by this Fund will be for the purposes of educating homeworkers, contractors, manufacturers, retailers and the wider community about the operation and purposes of this Agreement.~~

Formatted: Font: Gotham Light, 10.5 pt, Not Highlight

Formatted: Font: Gotham Light, 10.5 pt

Formatted: Font: Gotham Light, 10.5 pt

Formatted: Font: Gotham Light, 10.5 pt

Formatted: Font: Gotham Light, 10.5 pt

CLAUSE 13 – RECORDS TO BE KEPT

a) Any records required to be kept under this Agreement shall be preserved, by accredited manufacturers and their contractors, for a period of 6 years.

b) The Union~~TCFUA~~ may inspect any records required to be maintained under this Agreement.

c) The Union~~TCFUA~~ shall be given copies, if requested, of any records required to be kept under this Agreement.

d) ECA retains all records required to be kept under this Agreement

CLAUSE 14 – DISPUTE RESOLUTION

14.1 It is the intention of the parties to co-operate in good faith to resolve any grievance in relation to a matter arising under this Code of Practice. However, this dispute resolution procedure does not include any matter or grievance relating to the statutory interpretation of the TCF Award or relevant legislation.

14.2 As a demonstration of good faith, it is a requirement of raising a grievance in accordance with this clause that the complainant party is complying with the Code and its processes.

14.3 In the first instance, a complainant party should first raise and attempt to resolve the grievance directly with the other party.

14.4 If the grievance cannot be resolved directly between the parties in dispute pursuant to 14.3, within 3 months, the complainant party may write to the ECA National Manager specifically outlining their concerns. The National Manager will acknowledge receipt of the correspondence and will attempt to resolve the matter with the parties in dispute as soon as reasonably practicable.

14.5 If the ECA National Manager considers it appropriate, the National Manager may establish a sub- committee of the Committee ('Dispute Resolution subcommittee) as required to assist in the resolution of the matter. The Dispute Resolution subcommittee will comprise of the National Manager, one Union~~TCFUA~~ and one employer representative.

14.6 At the conclusion of the process pursuant to 14.4 or 14.5, the National Manager will communicate the outcome in writing to the complainant party.

14.7 If the complainant party is dissatisfied with the outcome they may write to the ECA National Manager requesting that the matter be considered by the Committee, including the grounds as to why they are seeking such a referral.

14.8 If the matter is referred to the Committee pursuant to 14.7, the Committee will consider the grounds detailed by the complainant party as soon as is practicable, including at its discretion, convening a special meeting of the Committee for such a purpose.

14.9 The Committee, after reviewing the matter, will communicate to the complainant party in writing as to the outcome of its consideration.

14.10 If the matter still remains unresolved, the matter may be referred to mediation to be conducted by an independent mediator as agreed between the parties.

14.11 Where the parties have entered into mediation pursuant to 14.10, the parties agree that:

(a) they must each pay half the costs of the mediation;
(b) they will participate in the mediation process in good faith and in a timely manner;
(c) they agree to be bound to any agreement reached arising from the mediation process.

14.12 If the parties can't agree then the Committee will appoint an independent mediator

CLAUSE 15 – AMENDMENT

This Agreement may be amended by agreement of all the parties to it.

SIGNATORIES

The Union~~TCFUA~~
Ai Group
NSW BC
Individual Companies

SIGNATORIES

The individual company that has agreed to be a signatory to this Agreement.

SIGNATORIES

Signed by

_____

on behalf of the ~~Textile, Clothing and Footwear Union of Australia~~applicant business

Name _____

Position _____

Company Name _____

Date _____

Signed by

_____

on behalf of the Textile, Clothing and Footwear Union of Australia

Name _____

Position _____

Date _____

~~Signed by~~

_____

~~Name~~ _____

~~Company Name~~ _____

Position _____

Date _____

~~SCHEDULES~~

~~Schedules attached to Part 1 of the Code of Practice include the statutory declarations, contract between accredited businesses and contractors and letter to homeworkers as all requirements to be fulfilled by signatories as part of becoming accredited to the Code of Practice. The schedules are integral to the content and workings of Part 1 of the Code of Practice.~~

Formatted: Heading 1

Formatted: Heading 1, Justified

SCHEDULE 1

Statutory Declaration for Manufacturers Who Do Not Give Out Work to Contractors or Homeworkers

STATUTORY DECLARATION

I _____
[full name]

of _____
[address]

do solemnly and sincerely declare as follows:

I am the _____ of _____
[position] [name of company or business]

_____
[address of company or business]

_____ _____
[ABN of company or business] [ACN of company or business, if applicable]

I do not give any work outside my premises to contractors and or homeworkers. This company exclusively engages employees based at our factory premises to perform work or arrange the performance of work

Should I begin to contract any work out to contractors or homeworkers:

- I will complete the Statutory Declaration as set out in *Schedule 2* and/or *Schedule 4* from the Code of Practice and notify Ethical Clothing Australia of this change within 7 days.
- I will require the Statutory Declaration forms provided to me to be completed by each contractor and notify Ethical Clothing Australia of this change within 7 days.
- I will co-sign the *Schedule 3* Contract between Accredited Business and Contractor of the Code of Practice.
- I will make the Statutory Declaration completed by each contractor available for inspection on written request by the TCFUA.

- All new contractors from this day on will be supplied with and asked to fill in a relevant Statutory Declaration (*Schedule 1, 2*, or *Schedule 5*), and co-sign the Schedule 3 Contract between Accredited Business and Contractor. Copies of these will be forwarded to Ethical Clothing Australia and made available for inspection on written request by the TCFUA.
- I will have Work Agreements and Work Records completed and co-signed with each Contractor and Homeworker

And I make this solemn declaration by virtue of the Statutory Declarations Act 1959 (Cth) and subject to the penalties provided by that Act for making of false statements in Statutory Declarations, conscientiously believing the statements made in this declaration to be true in every particular.

_____
[Signature of person making the Declaration]

Declared at _____ in the State of _____
[name of city or town]

on this _____ day of _____ in the year 20 _____
[numeric date] [month]

Before me

_____
[Signature of Witness]

_____
[Name of Witness]

_____
[Title of Witness]

SCHEDULE 2

Statutory Declaration for Manufacturers Who Give Work Out to Contractors

STATUTORY DECLARATION

I _____
[full name]

of _____
[address]

do solemnly and sincerely declare as follows:

I am the _____ of _____
[position] [name of company or business]

_____
[address of company or business]

_____ _____
[ABN of company or business] [ACN of company or business, if applicable]

I have put in place with every contractor this company engages either to perform work or arrange the performance of work, a Work Agreement and Work Record, and have co-signed the Schedule 3 Contract between Accredited Business and Contractor.

Each of the contractors who supply our company with goods has completed a relevant Statutory Declaration (*Schedule 1, Schedule 2* or *Schedule 5)* of the Code of Practice

The Statutory Declaration completed by each contractor has been provided to me and are available for inspection on written request by the TCFUA within 7 days.

All new contractors from this day on will be supplied with and asked to fill in a relevant Statutory Declaration (*Schedule 1, Schedule 2* or *Schedule 5)* of the Code of Practice and a copy will be forwarded to Ethical Clothing Australia and made available for inspection on written request by the TCFUA.

And I make this solemn declaration by virtue of the Statutory Declarations Act 1959 (Cth) and subject to the penalties provided by that Act for making of false statements

~~in Statutory Declarations, conscientiously believing the statements made in this declaration to be true in every particular.~~

~~[Signature of person making the Declaration]~~

~~Declared at~~ _____ ~~in the State of~~ _____
~~[name of city or town]~~

~~on this~~ _____ ~~day of~~ _____ ~~in the year 20~~ _____
~~[numeric date]~~ ~~[month]~~

~~Before me~~

_____
~~[Signature of Witness]~~

_____
~~[Name of Witness]~~

_____
~~[Title of Witness]~~

~~SCHEDULE 2~~ / ~~Attachment 1~~

~~(List all of the contractors that your business gives work out to)~~

~~Name~~	~~Address~~	~~Date of Contract~~	~~Contact Person~~	~~Phone Number~~

~~(If there is insufficient space to list all makers please photocopy this sheet)~~

SCHEDULE 3

Contract Between an Accredited Business and Contractor

(Insert name of applicant business on dotted line throughout Contract)

- It is a term of this Contract that any contractor must act in accordance with, observe and do nothing to undermine the Code of Practice Agreement between the TCFUA, and

  _____

- It is a term of this Contract that any textile, clothing and footwear workers employed to perform work referred to in this Agreement shall be covered by the provisions of the agreement between the TCFUA and

  _____

- The Contractor must, in addition to their obligations under the Agreement, make and retain for not less than 6 years and make available for inspection by the TCFUA and/or

  _____

  at times reasonably required by the TCFUA and/or a person authorised by

  .

  _____

  the records specified in the Attachment of the Agreement.

- If a Contractor breaches any provisions of the Agreement,

  .

  _____

  shall cease further commercial dealings with the Contractor unless and until the Contractor has fully remedied the breach of the Agreement within 14 days.

- If it is shown to the reasonable satisfaction of

  .

  _____

  that a worker has not been paid in accordance with this Contract,

  .

  _____

  must pay that worker the amount due and deduct that amount from the payment otherwise due to the Contractor where such payment to the Contractor is still outstanding.

- In observing its obligations under the Contract, the Contractor must observe the relevant provisions of relevant state or federal legislation and the TCF Award.

Name	_____	Name	_____
Company	_____	Company	_____
	_____ [Accredited Business]		_____ [Contractor]
Signature	_____	Signature	_____
Date	_____	Date	_____

SCHEDULE 4

Statutory Declaration for Accredited Business Who Give Work Directly to Homeworkers

STATUTORY DECLARATION

I _____
[full name]

of _____
[address]

do solemnly and sincerely declare as follows:

I am the _____ of _____
[position] [name of company or business]

_____
[address of company or business]

_____ _____
[ABN of company or business] [ACN of company or business, if applicable]

I supply work directly to homeworkers.

I have read and understood the contents of the "Code of Practice" Agreement between the Textile Clothing and Footwear Union and my business

_____ dated _____

I have completed and co-signed a Work Agreement and Work Record with each homeworker.

I have paid all homeworkers I employ (doing the work referred to above) their legal wages and provided their legal entitlements according to the TCF Award and relevant legislation.

I will hereafter provide to each of these homeworkers, (referred to above) the minimum fortnightly workload defined in Clause 9 of the 'Code of Practice' and in the TCF Award.

I have ensured that each of these homeworkers is fully insured for workers compensation insurance in accordance with the requirements of the relevant Workers Compensation Act.

I have paid to the relevant superannuation fund superannuation contributions on behalf of each of these homeworkers with the requirements of the TCF Award and federal superannuation legislation.

I have kept the following (in regard to each of these outworkers) records in accordance with the TCF Award and the "Code of Practice": Work records, Work Agreements, Wages records, Workers Compensation and Superannuation fund evidence. I will provide these records to the TCFUA in accordance with Clause 9 of the "TCF Code of Practice."

I have only terminated the services of any of these homeworkers after providing to them the appropriate written notice upon termination in accordance with the requirements of the TCF Award and the Fairwork Act (2009).

And I make this solemn declaration by virtue of the Statutory Declarations Act 1959 (Cth) and subject to the penalties provided by that Act for the making of false statements in Statutory Declarations, conscientiously believing the statements contained in this declaration to be true in every particular.

_____
[Signature of person making the Declaration]

Declared at _____ in the State of _____
[name of city or town]

on this _____ day of _____ in the year 20 _____
[numeric date] [month]

Before me

_____
[Signature of Witness]

_____
[Name of Witness]

_____
[Title of Witness]

~~SCHEDULE 4~~ / Attachment 1

~~(List all of the homeworkers that your business gives work out to)~~

~~Name~~	~~Address~~	~~Date of Contract~~	~~Contact Person~~	~~Phone Number~~

~~(If there is insufficient space to list all makers please photocopy this sheet)~~

SCHEDULE 5

Statutory Declaration for Contractors Who Receive Work from another Business and then Supplies Work to Homeworkers

STATUTORY DECLARATION

I _____
[full name]

of _____
[address]

do solemnly and sincerely declare as follows:

I am the _____ of _____
[position] [name of company or business]

_____
[address of company or business]

_____ _____
[ABN of company or business] [ACN of company or business, if applicable]

I have received work from _____
[insert accredited businesses name]

These Orders will be given to homeworkers to complete.

I have read and examined the contents of the "Code of Practice" Agreement between the Textile Clothing and Footwear Union of Australia and

_____ dated _____

I will hereafter pay each of these homeworkers (doing the work referred to above) their legal wages and entitlements according to the TCF Award and the "Code of Practice",

~~I will hereafter provide to each of these homeworkers, (referred to above) the minimum fortnightly workload defined in Clause 9 of the 'Code of Practice' and in the TCF Award.~~

~~I will hereafter ensure that each of these homeworkers is fully insured for workers compensation insurance in accordance with the requirements of the relevant workers compensation legislation.~~

~~I will hereafter pay to the relevant superannuation fund superannuation contributions on behalf of each of these homeworkers with the requirements of the TCF Award and federal superannuation legislation.~~

~~I will hereafter keep (in regard to each of these homeworkers) records in accordance with the TCF Award and Clause 9 of the "Code of Practice": Work Records, Work Agreements, Wages Records, Workers Compensation and Superannuation fund evidence. I will provide these records to the TCFUA when requested.~~

~~I have only terminated the services of any of these homeworkers after providing to them the appropriate written notice upon termination in accordance with the requirements of the TCF Award, or appropriate award.~~

~~And I make this solemn declaration by virtue of the Statutory Declarations Act 1959 (Cth) and subject to the penalties provided by that Act for the making of false statements in Statutory Declarations, conscientiously believing the statements contained in this declaration to be true in every particular.~~

_____

~~[Signature of person making the Declaration]~~

~~Declared at~~ _____ ~~in the State of~~ _____

~~[name of city or town]~~

~~on this~~ _____ ~~day of~~ _____ ~~in the year 20~~ _____

~~[numeric date]~~ ~~[month]~~

~~Before me~~

_____

~~[Signature of Witness]~~

_____

~~[Name of Witness]~~

_____

~~[Title of Witness]~~

SCHEDULE 5 / Attachment 1

(List all of the homeworkers that your business gives work out to)

Name	Address	Date of Contract	Contact Person	Phone Number

(If there is insufficient space to list all makers please photocopy this sheet)

APPENDIX A~~SCHEDULE 6~~

Letter to Homeworker

Dear Homeworker

A landmark Agreement has been reached between the Textile, Clothing ~~and,~~ Footwear Sector of the Manufacturing Division of the Construction, Forestry, Maritime, Mining and Energy Union ~~of Australia (TCFUA)~~ (the Union) and your employer that is designed to eliminate the exploitation of homeworkers in the fashion industry.

This Agreement was achieved through your employer working cooperatively with the union to develop a framework that will ensure you receive your appropriate award entitlements and enjoy the legislative protection of workers compensation coverage and superannuation contributions.

Your employer considers that the Agreement is an important initiative and welcomes the Union's positive approach in working towards a lasting solution to end exploitation.

The Textile, Clothing, Footwear Sector of the Manufacturing Division of the Construction, Forestry, Maritime, Mining and Energy Union~~Textile Clothing and Footwear Union of Australia (TCFUA)~~ is the union which represents homeworkers in this industry.

Should you wish to join the ~~TCFUA~~Union, an application form for membership is attached for your convenience.

As your employer, I support the ~~TCFUA~~Union and you joining th~~eat~~ U~~u~~nion and you will not be discriminated against if you do so.

The Agreement is presently being implemented. You will soon receive information on how its operation will benefit you.

Yours sincerely

Ethical Clothing Australia's Code of Practice incorporating Homeworkers

Part 2
(Retailers)

AGREEMENT between

The Textile, Clothing, Footwear Sector of the Manufacturing Division of the Construction, Forestry, Maritime, Mining and Energy Union (the Union), and

The Australian Chamber of Manufacturers Industry Group (Ai Group), and

The New South Wales Business Chamber, and

The Australian Retailers Association (ARA)

PARTIES

The Union

The Ai Group

The NSW Business Chamber

The ARA

Individual companies who are signatories to this Agreement

For further information & assistance contact
Ethical Clothing Australia
Postal address: PO Box 2087, Fitzroy VIC 3065
Phone: 03 9419 0222 / Fax: 03 8415 0818
Email: info@ethicalclothingaustralia.org.au
www.ethicalclothingaustralia.org.au

Ethical Clothing Australia's Code of Practice, incorporating Homeworkers

PART 2 – RETAILERS

AGREEMENT

Between **TEXTILE, CLOTHING, FOOTWEAR SECTOR OF THE MANUFACTURING DIVISION OF THE CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION ("the Union")**

and **THE AUSTRALIAN RETAILERS ASSOCIATION ("the ARA")**

RETAILER SIGNEE _____

RECITALS

A. For the benefit of its members and other workers in the textile, clothing & footwear industry, the Union wishes to ensure that employees and contractors to Suppliers are engaged upon terms and conditions no less favourable than those contained in either the Federal Award or the relevant State Award.

B. The ARA endorses the objective of the Union set out in Recital A and has agreed to assist the Union to achieve this objective by undertaking the obligations contained in this Agreement.

C. The Union has agreed to assist the ARA by providing it regularly with information and advice relating to the Federal Award and the relevant State Award and their operation.

D. The Union has agreed to publicly acknowledge that while the ARA observes the conditions of this Agreement it will be acknowledged by the Union as an Outwork Best Practice Organisation.

AGREEMENT

CLAUSE 1 – DEFINITIONS

In this Agreement including the Recitals:

"Contract" means a contract between the Retailer and a Supplier as defined under this Clause.

"Code of Practice" or **"Agreement"** means the Ethical Clothing Australia's Code of Practice, incorporating Homeworkers - Part 2 (Retailers).

"Legal breach " occurs where a Supplier breaches the Federal Award or State Award or an award of an industrial tribunal or legislation in respect of the engagement of its employees and/or contractors, and such breach involves either a failure by the Supplier to comply with award obligations binding upon the Supplier to register or provide lists for notification of contracts or keep records or else (in relation to any

other type of breach by the Supplier) such breach is, in all the circumstances, detrimental to those employees and contractors.

"Federal Award" means the Textile, Clothing, Footwear and Associated Industries Award 2010 as amended from time to time, or any award replacing that Award.

"Goods" means the whole, or part of:

any garment; or
any article of wearing apparel; or
any article of footwear; or
any textile product.

"Records" means the documents referred to in clause 3.1.

"Retailer" *means a business which is:*

a) carrying on a retail business in Australia (including an online business); and is

b) lawfully entitled to do so; and which has

c) at least one Supplier (as defined in this agreement) which is accredited under the Homeworkers Code of Practice Part 1 (Manufacturers) and

d) in the instance where the retailer is also a manufacturer, as defined under the Code Part 1, the business must be an accredited manufacturer under the Code.

"State Award" means the relevant state industrial instrument eg. Clothing Trades (State) Consolidated Award (New South Wales) or equivalent in a state jurisdiction.

"Supplier" means a person, company or organisation which agrees with the Retailer to supply or manufacture or arrange the manufacture within Australia of Goods or part of Goods for resale by the Retailer under a Contract. This includes, but is not limited to any sublease, concessional, instore or online display or like, contractual arrangements.

"Ethical Clothing Australia or ECA**"** means the organisation responsible for the accreditation of manufacturers and the administration and promotion of the Code of Practice.

CLAUSE 2 – TERM

This agreement shall operate from the date of the Agreement and continue until terminated under clause 9.

CLAUSE 3 – RECORDS

3.1 a) Each Retailer must retain for not less than 12 months full details of all Contracts entered into with Suppliers.

b) Each Retailer must make available to the Union for up to six years after they were created, those records which the Retailer is required to keep pursuant to legislation such as taxation law and corporations law and which pertain to the manufacture or supply of Goods to the Retailer by a Supplier.

c) In order to ensure that employees and contractors involved in the supply or manufacture of Goods are engaged upon terms and conditions no less favourable than those contained in either the Federal Award or the relevant State Award:

i) the Union may reasonably request each Retailer to obtain any of the records or other information held by each Supplier of that Retailer in accordance with subclauses 4.3(c) or 4.3(d) of this Agreement, and

ii) within seven (7) days of such request, the Retailer will require the Supplier to make available to the Retailer such records and other information which have been requested by the Union, and

iii) the Retailer will make available to the Union any such records and other information as soon as they have been provided by the supplier to the Retailer.

3.2 The Records required to be kept under Clause 3.1(a) must contain the following:

a) the name of the Supplier

b) the address of the Supplier

c) the date of the Contract

d) the date for the delivery of the goods to be made under the Contract

e) the number of Goods to be made

f) the relevant standard product specification for that garment contained in sub-clauses (f) (i), (ii) and (iii) of this clause:

(i) the wholesale price or cost paid by the Retailer for each item of Goods to be made, and

(ii) the total wholesale price or cost paid by the Retailer for the Goods under the Contract, and

(iii) a description, including size, style, image or sketch drawing and any other relevant information in order to identify the Goods to be made.

3.3 Each Retailer must:

a) make the Records immediately available to a person properly authorised in writing by the Union, after that person has given reasonable notice to the Retailer of a request for access to the Records, and

b) allow the Union to make appropriate copies of the Records as reasonably required by the Union.

CLAUSE 4 – OBLIGATIONS OF EACH RETAILER

4.1 Each Retailer must send to Ethical Clothing Australia and a copy to the Union (National Office) the name and address of each Supplier contained in the Records as follows –

(a) a full list of the Retailer's current Suppliers within 14 days of the signing of this Agreement, as per Attachment A of this agreement.

(b) The Retailer must advise ECA within 7 days of any changes to suppliers such as the removal or addition of suppliers, and/or any changes to the Retailers contact details, as per Attachment A of this agreement,

4.2 Each Retailer agrees to inform all its Suppliers of the existence of this Agreement by taking the following action:

(a) The Retailer will provide a copy of this Agreement to all its existing Suppliers immediately following signing, and commit to working with its direct suppliers to promote and encourage accreditation under Part 1 of the Homeworker's Code of Practice: Manufacturers, and

(b) The Retailer will provide a copy of this Agreement to any new Suppliers with whom it contracts following the signing of this Agreement, and commit to working with its direct suppliers to promote and encourage accreditation under Part 1 of the Homeworker's Code of Practice: Manufacturers, and

c) The Retailer will provide six monthly written updates (from date of execution of this agreement) to the Committee detailing of the status of accredited and non-accredited suppliers and outlining how it has promoted and encouraged accreditation to its direct suppliers, as per Attachment B of this agreement.

(d) The Retailer agrees to advise all Suppliers that, as part of the implementation of this Agreement, the Union will be making regular visits to those establishments operated by the Supplier.

4.3 The Retailer agrees to use its best endeavours to amend the standard terms and conditions of trading entered into with its Suppliers so that each Contract already entered into with a Supplier prior to the signing of this Agreement contains the further following obligations on the Supplier:

(a) the Supplier must undertake to comply with all applicable laws and regulations relating to the manufacture of the Goods, and

(b) the Supplier must warrant that it is registered pursuant to the Federal Award and the State Award for the purposes of sub-contracting out any work associated with the manufacture of the Goods, and

(c) the Supplier undertakes to keep appropriate records of where and with whom the Supplier has further contracted the work to be performed under the Contract between the Retailer and the Supplier, and

(d) the Supplier must retain for at least 12 months after the Contract is entered into the Supplier's product specification for each garment supplied or manufactured by the Supplier for the Retailer pursuant to that Contract, and

(e) the Supplier must make available to the Retailer those records and product specifications referred to in subclauses (c) and (d) above, within five days of such a request being made by the Retailer, and

(f) the Supplier must acknowledge the existence of this Agreement and further acknowledge that the Retailer has entered into this Agreement which provides that the Retailer may either terminate a Contract with that Supplier (where legally possible) or refuse to enter into any future Contract with that Supplier in the event that a legal breach has been proved to exist during the course of the supply or manufacture of the Goods by that Supplier.

4.4 Each Retailer agrees to amend the standard terms and conditions of trading entered into with its Suppliers so that each future contract entered into with a Supplier on or after the date of the signing of this Agreement contains each of the obligations listed above in Clause 4.3(a) to (f) inclusive of this Agreement.

4.5 Each Retailer agrees to appoint a liaison officer for the purpose of handling all enquiries or allegations validly raised by the Union for the purposes of this Agreement.

4.6 The name of the liaison officer (or officers if more than one) appointed by each Retailer must be provided by the Retailer to the Union on the signing of this Agreement. Any changes to the liaison officer must be advised to the Union by the Retailer.

4.7 If any Retailer becomes aware that a Supplier has been or may be, or is using the services of sub-suppliers or contractors or sub-contractors who have or may have committed a legal breach, then the Retailer agrees to immediately inform the Union of this fact.

4.8 Each Retailer will enter into a separate Deed of Agreement with the Union whereby the provisions of that separate Deed of Agreement will mirror the obligations upon each Retailer contained in Clause 1 to Clause 10.2 of this agreement.

CLAUSE 5 – OBLIGATIONS OF THE UNION

The Union must:

a) provide reasonable assistance to each Retailer in interpreting the provisions of the Federal Award or the relevant State Award, and

b) promptly inform each Retailer in writing of any legal breach or suspected breaches of which the Union becomes aware and provide the Retailer with any material it has which supports the allegation, and

c) upon request promptly meet with the Retailer concerned to consider any matter arising out of this Agreement, and

d) keep confidential the copy Records made available to it by any Retailer and not disclose their contents to any other person, company or organisation except to the Supplier specified in the Records or as required by law or in enforcement proceedings in a court or in industrial dispute resolution proceedings in an industrial tribunal without the written consent of the Retailer.

CLAUSE 6 – CONDUCT IN THE EVENT OF AN ALLEGED LEGAL BREACH

6.1 If the Union has notified any Retailer that it believes a Supplier to that Retailer has committed a legal breach then the Retailer agrees to immediately investigate the claims made by the Union and further agrees that it will within 14 days (or such other period of time as is mutually agreed) of receipt of the notice either advise the Union as follows:

(a) that the Retailer believes that a legal breach has occurred, or

(b) that the Retailer believes that a legal breach has not occurred, or

(c) that the Retailer has not been provided with sufficient information to formulate a belief as to whether or not either a legal breach has occurred, and in such event, the Retailer must request such further evidence as is reasonable from the Union to enable a belief to be formulated.

6.2 If any Retailer believes that a legal breach has occurred, the Retailer agrees that it will take all action reasonably required by the Union to remedy the legal breach or achieve such other outcome acceptable to both parties ("Agreed Outcome") within not more than 14 days (or such other period of time as is mutually agreed) of that requirement by the Union.

6.3 If a Supplier fails to comply with a requirement of any Retailer to remedy the legal breach or submit to an Agreed Outcome, the Retailer must:

(a) in relation to any Contract already entered into before the signing of this Agreement, if legally possible and without the Retailer incurring any legal liability, terminate the relevant Contract consistent with its terms and conditions, and

(b) in relation to any future Contract entered into on or after the date of the signing of this Agreement, terminate the relevant Contract consistent with its terms and conditions (if reasonably required by the Union), and

(c) not enter into any further Contract with that Supplier until the Retailer and the Union agree that the legal breach has been remedied.

6.4 If any Retailer advises the Union that it does not believe that a legal breach by a Supplier has occurred and the Union continues to assert that a legal breach has in fact occurred, then this issue must be mediated pursuant to clause 7 of this Agreement.

CLAUSE 7 – DISPUTE RESOLUTION

7.1. It is the intention of the parties that they should co-operate with the other in good faith to resolve any differences arising under this Agreement. However, this dispute resolution procedure does not include any matter or grievance relating to the statutory interpretation of the TCF Award or relevant legislation. In order to achieve this objective the dispute settlement procedure under this clause 7 is agreed to.

7.2 The parties must meet to consider any issue if:

(i) either party considers the obligations of the other party under this Agreement are not being performed, and the other party disagrees,

(ii) the Union considers that a legal breach is occurring and any Retailer disagrees, or

iii) the Union believes that any Retailer has not acted reasonably in continuing to contract with the Supplier pursuant to Clause 6.3(b) of this Agreement.

7.3 In the first instance, a complainant party should first raise and attempt to resolve the grievance directly with the other party.

7.4 If the grievance cannot be resolved directly between the parties in dispute pursuant to 7.2, within 3 months, the complainant party may write to the ECA National Manager specifically outlining their concerns. The National Manager will acknowledge receipt of the correspondence and will attempt to resolve the matter with the parties in dispute as soon as reasonably practicable.

7.5 If the ECA National Manager considers it appropriate, the National Manager may establish a sub- committee of the Committee ('Dispute Resolution subcommittee) as required to assist in the resolution of the matter. The Dispute Resolution subcommittee will comprise of the National Manager, one Union and one employer representative.

7.6 At the conclusion of the process, the National Manager will communicate the outcome in writing to the complainant party.

7.7 If the complainant party is dissatisfied with the outcome they may write to the ECA National Manager requesting that the matter be considered by the Committee, including the grounds as to why they are seeking such a referral.

7.8 If the matter is referred to the Committee pursuant to 7.7, the Committee will consider the grounds detailed by the complainant party as soon as is practicable, including at its discretion, convening a special meeting of the Committee for such a purpose.

7.9 The Committee, after reviewing the matter, will communicate to the complainant party in writing as to the outcome of its consideration.

7.10 If the matter still remains unresolved, the matter may be referred to mediation to be conducted by an independent mediator as agreed between the parties.

7.11 Where the parties have entered into mediation pursuant to 7.10, the parties agree that:

(a) they must each pay half the costs of the mediation;
(b) they will participate in the mediation process in good faith and in a timely manner;
(c) they agree to be bound to any agreement reached arising from the mediation process.

7.12 If the parties can't agree then the Committee will appoint an independent mediator

CLAUSE 8 – TRADE MARKS AND LICENSING

The Committee registers and maintains trade marks, license marks, certification marks, and other labels, to promote compliance. A licensing agreement must be signed before any marks can be used. The licensing agreement is also supported by Trade Mark Usage Guidelines. The guidelines cover both the products the marks can be used on, and how the marks can be displayed.

Where any Goods have been provided to any Retailer pursuant to a Contract between the Retailer and a Supplier, the Retailer will not discourage that Supplier from attaching a label or a swing ticket to those Goods which incorporates any of the license marks, trade marks, certification marks or other labels.

CLAUSE 9 – RETAILER FEES

Retailers who are signatory under this agreement are required to pay an annual fee as determined by the Committee.

CLAUSE 10 – TERMINATION

10.1 Either party may terminate this Agreement:

(a) upon no less than 3 months written notice to the other, or

(b) upon the giving of 28 days notice where the other party has committed a breach of this Agreement and that breach has not been rectified within the 28 day notice period as detailed in clauses 3 and 4. and 6.

(c) immediately if the other party refuses to mediate in good faith as detailed in Clause 7, or

(d) upon giving of 28 days notice where the Retailer has failed to meet the requirements under the definition of a Retailer.

CLAUSE 11 – ENTIRE AGREEMENT / FUTURE VARIATION

11.1 This represents the entire agreement between the parties on the matters referred to in the Recitals.

11.2 The parties agree that should this Agreement prove incapable of achieving its objective, then the parties will negotiate in good faith to effect an appropriate variation to its terms.

11.3 Within twelve (12) months of the signing of this Agreement, the parties will review the operation of this Agreement.

Signed for and on behalf of the Union)
By an authorised officer in the Presence of)

Signature of authorised officer

Signature of witness	Name of authorised officer
Name of witness (print)	Office held

Signed for and on behalf of the)
Australian Retailers Association)
By an authorised officer in the)
Presence of)

Signature of authorised officer

Signature of witness	Name of authorised officer
Name of witness (print)	Office held

Signed for and on behalf of)
The Retailer)
By an authorised officer in the)
Presence of)

Signature of authorised officer

Signature of witness	Name of authorised officer
Name of witness (print)	Office held

Attachment A

LIST OF SUPPLIERS TO BE COMPLETED BY RETAIL SIGNATORIES TO THE
ETHICAL CLOTHING AUSTRALIA'S CODE OF PRACTICE, INCORPORATNG HOMEWOKERS- PART 2 RETAILERS

The Retailer must send to Ethical Clothing Australia and the Union a full list of the Retailer's current Suppliers within 14 days of the signing of this Agreement. The Retailer must advise ECA within 7 days of any changes to suppliers such as the removal or addition of suppliers and/or changes in the Retailer's contact details.

Name of Retail Signatory _____ Date _____

Name of person who completed this form _____ Position/title within company _____

Addresss _____

ABN or ACN _____ Phone _____ Email _____

Name of Supplier	**Address**	**Contact person/s**	**Phone and email address**		Is the supplier accredited with ECA? (Y/N)	Does the supplier have a pending accreditation with ECA? (Y/N)

(If there is insufficient space to list all makers please photocopy this sheet)

Email completed list to**Ethical Clothing Australia** info@ethicalclothingaustralia.org.au

Attachment B

PROGRESS REPORT TO BE COMPLETED BY RETAIL SIGNATORIES TO THE
ETHICAL CLOTHING AUSTRALIA'S CODE OF PRACTICE, INCORPORATNG HOMEWOKERS- PART 2 RETAILERS

The Retailer will provide six monthly written updates (from date of execution of this agreement) to the Committee detailing the status of accredited and non-accredited suppliers and outlining how it has promoted and encouraged accreditation to its direct suppliers. The Retailer must advise ECA within 7 days of any changes to suppliers such as the removal or addition of suppliers, and/or changes in the Retailer's contact details.

Name of Retail Signatory and ABN or ACN _____ Date _____

Name of person who completed this form _____ Position/title within company _____

Address _____ Phone _____ Email _____

Name of Supplier	**Address**	**Contact person/s**	**Phone and email address**	Is the supplier accredited with ECA? (Y/N)	Does the supplier have a pending accreditation with ECA? (Y/N)

(If there is insufficient space to list all makers please photocopy this sheet)

Attachment B (cont.)

PROGRESS REPORT TO BE COMPLETED BY RETAIL SIGNATORIES TO THE
ETHICAL CLOTHING AUSTRALIA'S CODE OF PRACTICE, INCORPORATNG HOMEWOKERS- PART 2 RETAILERS

Please provide details of activities the Retailer has undertaken to promote and encourage suppliers to become ECA accredited in the previous six months: E.g.

- ☐ Has the retailer provided ECA promotional materials to non-accredited suppliers
- ☐ Has the retailer provided non-accredited suppliers with the contact details of ECA's accreditation advisors
- ☐ Has the retailer undertaken any educational/promotional activities promoting ECA accreditation to its suppliers (please provide more info below)
- ☐ Has the retailer encouraged suppliers to attend ECA workshops/events (please provide more info below)
- ☐ How has the retailer amended the standard terms and conditions of trading with its Suppliers as per the agreement (please provide copies of any relevant documents)
- ☐ Other (please provide more info below

Email completed form to **Ethical Clothing Australia** info@ethicalclothingaustralia.org.au

APPENDIX 6

SPORTS AND CORPORATE WEAR ETHICAL CLOTHING DEED

PARTIES

TEXTILE, CLOTHING AND FOOTWEAR UNION OF AUSTRALIA
of 28 Anglo Road Campsie, New South Wales, 2194

("TCFUA")

AND

NIKE AUSTRALIA PTY LTD (ABN 99 055 141 743) of 28 Victoria Crescent, Abbotsford, Victoria, 3067

("Principal")

RECITALS

A For the benefit of its members and other workers in the clothing industry, the TCFUA wishes to ensure that Employees of and Contractors to Suppliers are engaged upon terms and conditions no less favourable than those contained in either the Federal Award or the State Award.

B The Principal endorses the objective of the TCFUA set out in Recital A and has agreed to assist the TCFUA to achieve this objective by undertaking the obligations contained in this Deed.

C The TCFUA has agreed to assist the Principal by providing it regularly with information and advice relating to the Federal Award and the State Award and their operation.

D The TCFUA has agreed to publicly acknowledge the Principal as a signatory to this Deed.

E The parties recognise and respect the right of all Contractors, Employees and Outworkers to join a union and to also organise and bargain collectively. The parties also state that the use of any form of forced or child labour will not be tolerated and that employees have a right to work in an environment free of discrimination, harassment and victimisation.

F The parties note that the matters set out in Recital E flow from the ILO Standards and Fundamental principles and rights at work. These principles and rights refer to how these standards are applied under Australian law.

G The parties acknowledge that Australian standards are intended to provide for fair minimum standards for employees in the context of living standards generally prevailing in the Australian community. The parties also acknowledge that employees must be paid at least the minimum applicable wage set out in the applicable Federal Award or State Award. Employees must also receive all entitlements due to them under the applicable Federal Award or State Award or under any relevant legislation.

H The parties make an in-principle commitment that purchasing practices should enable and not hinder the ability of Suppliers to meet the standards set out in this Deed.

I The parties agree that any mechanism in this Deed will not be used in any way as a punitive measure against an individual or group of workers who may raise issues of concern about their wages or work conditions.

OPERATIVE PROVISIONS

1 DEFINITIONS

In this Deed including the Recitals:

"Contract" means a contract between the Principal and a Supplier for the supply or manufacture of Goods which have been manufactured in Australia and includes the manufacture of all of the Principal's products in Australia for resale by the Principal.

"Contractor" means a person, company or organisation directly or indirectly engaged by the Supplier to assist the Supplier to manufacture Goods or part of Goods for resale by the Principal.

"Employee" means a person employed by a Supplier and includes any person whose usual occupation is that of an employee.

"Exploitation" occurs where a Supplier breaches the Federal Award or State Award or an applicable award or industrial instrument of an industrial tribunal or legislation in respect of the engagement in Australia of Outworkers or Contractors who perform work outside a factory or workshop.

"Federal Award" means the Clothing Trades Award 1999 as amended from time to time, or any award replacing that Award.

"Goods" means:

(a) the whole or any part of any male or female garment or of any article of wearing apparel including articles of neckwear and headwear;

(b) handkerchief, serviette, pillowslip, pillowsham, sheets, tablecloth, towel, quilt, apron, mosquito net, bed valance, or bed curtain;

(c) ornamentations made of textiles, felts or similar fabrics, and artificial flowers; and

(d) footwear items,

(e) but does not include imported component parts of the Goods referred to in (a) to (c) of this definition which include, but are not limited to, buttons, zips, tags and like items.

"Manufacture in Australia" means the process of manufacturing products in Australia or the process of altering or working on products in Australia (whether such products are imported into Australia or produced in Australia) by way of any process currently covered by either the Federal Award or the State Award or any other applicable industrial instrument.

"Non-compliance" occurs where a Supplier breaches the Federal Award or State Award or an applicable award or industrial instrument of an industrial tribunal or legislation in respect of the engagement of Contractors who perform work in a factory of workshop or the employment of its Employees or the engagement of Outworkers.

"Outworker" means a person who performs work (including making, constructing or finishing) in relation to the supply or manufacture of Goods or part of Goods ultimately on behalf of the Supplier outside the Supplier's workshop or factory under a contract or arrangement between that person and the Supplier or that person and any other party involved in the supply or manufacture of Goods or part of Goods.

"Persons properly authorised in writing by the TCFUA" means those persons employed by the TCFUA who have been nominated by the Secretary of the TCFUA in each State for the purposes of clauses 3.3 and 4.7 of this Deed.

"Records" means the contracts referred to in clause 3.1 and the records required to be made under clause 3.2.

"State Award" means a Clothing Trades award or equivalent legislation that applies in each State.

"Supplier" means a person, company or organisation in Australia which agrees with the Principal under a Contract to manufacture or arrange for the manufacture in Australia of Goods or part of Goods for resale by the Principal.

"TCFUA" means the Textile, Clothing and Footwear Union of Australia.

2 TERM

2.1 This Deed shall operate from the date it is signed by the parties and continue to operate for a period of three years from the date of signing unless the term of this Deed is extended by mutual agreement of the parties or unless this Deed is terminated under clause 8.

2.2 The parties agree to commence negotiations about a successor to this Deed no later than three months prior to the expiry term of this Deed.

3 RECORDS

3.1 The Principal must make and retain for not less than 6 years records of all Contracts entered into with Suppliers except the sample garment referred to in clause 3.2(e) which must be kept for 12 months. The obligation on the Principal under this clause operates from the date this Deed is signed by the parties. In relation to such Records as have been maintained prior to the signing of this Deed, the Principal must retain those prior existing Records for a period of three years from the date this Deed is signed by the parties and make these Records available to the TCFUA in accordance with clause 3.3 of this Deed. This clause does not diminish any existing or future Federal Award and/or State Award and/or legislative requirements and/or other obligations to keep and maintain Records.

3.2 The Records must contain at least the following:

(a) the name of the Supplier;

(b) the address of the Supplier;

(c) the date of the Contract;

(d) the date for the delivery of the Goods to be made under the Contract;

(e) either the minute sewing time for that garment in accordance with the operation of the Homeworkers Code of Practice or both a sample of the garment and a description of the nature of the work to be performed and the minute sewing time allowed for each item of Goods to be made;

(f) a drawing and size specification of the Goods to be made;

(g) the number of Goods to be made;

(h) the price to be paid for each item of Goods to be made;

(i) the total price to be paid for the Goods under the Contract; and

(j) a copy of the standard clause in the Contract requiring disclosure by each succeeding party (as required by Clause 6.5 of this Deed).

3.3 The Principal must:

(a) make the Records available to a person properly authorised in writing by the TCFUA, after that person has given reasonable notice to the Principal of a request for access to the Records;

(b) allow the person properly authorised in writing by the TCFUA to make appropriate copies of the Records as reasonably required by the TCFUA and provide copies of the Records copied to the relevant State Secretary and the National Secretary of the TCFUA; and

(c) give a copy of the Records to the Supplier upon entering into a Contract or purchase order.

4 OBLIGATIONS OF THE PRINCIPAL

4.1 The Principal must send to the relevant State Secretary and the National Secretary of the TCFUA, the name and address of each Supplier contained in the Record in the following manner:

(a) a full list of the Principal's current Suppliers within 10 business days of the date on which this Deed is signed by the parties; and

(b) a full list of the Principal's Suppliers for the preceding six month period within 10 business days of the last working day of February and August in each year.

4.2 The Principal agrees to inform all Suppliers of the existence of this Deed by taking the following action:

(a) the Principal will forward a copy of this Deed and a document setting out a brief explanation of the terms of this Deed to all Suppliers immediately following the Principal signing this Deed;

(b) the Principal will include a copy of this Deed and a document setting out a brief explanation of the terms of this Deed in its "Information For New Suppliers" package which is provided to all new Suppliers to the Principal; and

(c) the Principal agrees to advise all Suppliers that, as part of the implementation of this Deed, persons properly authorised in writing by the TCFUA will be making regular visits to those establishments operated by the Supplier.

4.3 The Principal shall require each Supplier with whom it enters into a Contract to:

(a) keep appropriate records of where and with whom the Supplier may further contract to perform the work under the Contract between the Principal and the Supplier;

(b) retain a copy of the Records provided to it by the Principal under clause 3.3(c) of this Deed for a period of not less than six years. The obligation on the Supplier under this clause operates from the date this Deed is signed by the parties;

(c) make a copy of the Records available to the TCFUA within 5 business days of a request by the TCFUA to the Supplier for production being made;

(d) allow the TCFUA to make copies of the Records retained by the Supplier;

(e) inform the TCFUA about the address of each location where Goods are being manufactured and the identity of the parties responsible for the manufacture of the Goods at each of those locations; and

(f) require the Supplier to be registered under the provisions of clause 48 of the Federal Award or the relevant clause under the State Award where the Contract between the Principal and the Supplier does not prohibit the Supplier from further contracting the performance of the work under the Contract to another person, company or organisation.

4.4 The Principal agrees to appoint a liaison officer for the purpose of handling all enquiries or allegations validly raised by the TCFUA for the purposes of this Deed.

4.5 The name of the liaison officer (or officers if more than one) appointed by the Principal shall be notified to the TCFUA on the signing of this Deed. Any changes to the liaison officer must be advised to the TCFUA by the Principal.

4.6 If the Principal becomes aware that a Supplier has been or may be, or is using the services of Contractors or Outworkers for the manufacture of the Principal's Goods in Australia who have been or may be engaging in conduct that amounts to Exploitation or Non-compliance, then the Principal agrees to immediately inform the TCFUA of this fact.

4.7

(a) The Principal shall not enter into any Contract with a Supplier unless the Supplier agrees in writing to permit persons properly authorised in writing by the TCFUA to:

(i) after providing not less than 24 hours notice to the Supplier (or less if agreed with the Principal and the Supplier), visit any establishment operated by the Supplier (or any other establishment where Goods are being manufactured or otherwise worked on) at any time during normal working hours. Persons properly authorised by the TCFUA may visit a Supplier's premises without notice if the TCFUA reasonably considers that the requirement to give notice would defeat the purpose of the visit. If a person properly authorised by the TCFUA visits a Supplier's premises without notice, he or she must immediately notify the Supplier of his or her presence as soon as reasonably practicable after entering the premises;

(ii) inspect any Records between the Supplier and the Principal, together with any records at those establishments that are relevant to the manufacture (or supply or sale) under a Contract of Goods or part of Goods for resale by the Principal. Persons properly authorised by the TCFUA may also inspect at those establishments time and wage records and work records (as defined in clause 46.2 of the Federal Award) and the relevant documents that evidence superannuation contributions being made on behalf of an employee and also the currency of workers' compensation insurance (including, but not restricted to, certificates of currency for workers compensation insurance);

(iii) undertake an inspection at those establishments in order to determine compliance with the Federal Award, the relevant State Award and any other applicable industrial instrument and compliance with any relevant occupational health and safety legislation;

(iv) interview, without causing unreasonable interruption to the production process, personnel who are present at those establishments in relation to the manufacture (or supply or sale) of any such Goods; and

(v) interview personnel (not present at those establishments) who are in any way involved in the manufacture (or supply

or sale) of any such Goods, whether such personnel are described as Outworkers or Contractors or otherwise.

(b) The Principal will forward to the TCFUA a clear photocopy of the agreement in writing by the Supplier.

(c) The Principal will forward any such photocopy to the TCFUA as soon as possible after the Principal has received the original agreement in writing (or at least a clear photocopy of that agreement) from the Supplier.

(d) Notwithstanding the provisions of clause 4.7(a)(iii) of this Deed, the Principal will continue to monitor its Suppliers, which monitoring will be conducted by the Principal's internal and independent external monitors on a periodic basis.

(e) The Principal will not publish or otherwise distribute to any third party any copy of any pro-forma inspection sheets provided to the Principal by the TCFUA in accordance with clause 5(h) of this Deed.

4.8 The Principal will comply with all applicable provisions of the Federal Award and any relevant State Award and any other applicable industrial instruments as long as the Principal remains directly involved in the manufacture or supply of Goods (or part of Goods).

5 OBLIGATIONS OF THE TCFUA

The TCFUA must:

(a) provide the Principal with a current copy of the Federal Award and any relevant State Award and promptly provide the Principal with any variations to both Awards;

(b) provide reasonable assistance to the Principal in interpreting the provisions of the Federal Award or any relevant State Award;

(c) promptly inform the Principal in writing of any Exploitation or suspected Exploitation or of any Non-compliance or suspected Non-compliance of which it becomes aware and provide the Principal with any material it has which supports the allegation;

(d) upon request promptly meet with the Principal to consider any matter arising out of this Deed;

(e) keep confidential the copy Records made available to it by the Principal and/or the Supplier and not disclose their contents to any other person, company or organisation except to the Supplier specified in the Records or

as required by law or in enforcement proceedings in a court or in industrial dispute resolution proceedings in an industrial tribunal;

(f) promptly inform the Principal of any issues or concerns the TCFUA has concerning the Principal's or Supplier's compliance with this Deed or any related matter or any issues or concerns the TCFUA has concerning the Principal's or a Supplier's conduct (or alleged conduct) that may amount to Exploitation or Non-compliance and afford the Principal and/or Supplier an opportunity to address the issue or concern raised by the TCFUA prior to the TCFUA informing or discussing the issue with a third party. The Principal and/or Supplier has 10 business days (or a longer period as agreed between the parties) from the date it receives notice of the TCFUA's issues and concerns to address these issues or concerns. The obligation under this clause does not apply where the issue or concern relates to a bona fide occupational health and safety issue or other legal obligation, the discovery of which requires immediate rectification or notification;

(g) report any concerns the TCFUA may have relating to a Supplier's compliance with obligations under relevant occupational health and safety legislation to the proper authorities in each State if the TCFUA is not satisfied that its concerns have been addressed after the issue has been raised with the Principal under clause 5(f) of this Deed;

(h) as part of the inspection procedures set out in clause 10 of this Deed and in Schedule A to this Deed, record in writing on an agreed pro-forma inspection sheet (that sets out the Supplier's compliance obligations under the relevant Federal Award, State Award, other applicable award or industrial instrument of an industrial tribunal or legislation) any concerns the TCFUA have after conducting an inspection of a Supplier's premises and promptly provide a copy of the completed pro-forma inspection sheet to the Principal; and

(i) publicly acknowledge the Principal as a signatory to this Deed when the Principal becomes a signatory and for the period while the Principal observes the terms and conditions of this Deed.

6 CONDUCT BETWEEN PRINCIPAL AND SUPPLIER/S

6.1 If the TCFUA has notified the Principal that it believes a Supplier is engaging in Exploitation or Non-compliance, then the Principal agrees to immediately investigate the claims made by the TCFUA and further agrees that it will within 10 business days (or such other period of time as is mutually agreed) of receipt of the notice advise the TCFUA as follows:

(a) that the Principal believes that Exploitation or Non-compliance has occurred;

(b) that the Principal believes that neither Exploitation nor Non-compliance has occurred; or

(c) that the Principal has not been provided with sufficient information to formulate a belief as to whether or not Exploitation or Non-compliance has occurred, and in such event, the Principal must request such further evidence as is reasonable from the TCFUA to enable a belief to be formulated.

6.2 If the Principal believes that Exploitation or Non-compliance by a Supplier has occurred, the Principal agrees that it will take all action reasonably required by the TCFUA to remedy the Exploitation or Non-compliance or achieve such other outcome acceptable to both parties ("Agreed Outcome") within not more than 10 business days (or such other period of time as is mutually agreed) of that requirement by the TCFUA.

6.3 If a Supplier fails to:

(a) comply with a requirement of the Principal to remedy the Exploitation or Non-compliance or submit to an Agreed Outcome; or

(b) retain a copy of the Records for not less than six years (which obligation operates from the date this Deed is signed by the parties); or

(c) make a copy of the Records available to the TCFUA within 5 business days of a request (to the Supplier) for production being made by the TCFUA; or

(d) allow the TCFUA to make copies of the Records retained by the Supplier; or

(e) inform the TCFUA about the address of each location where Goods are being manufactured and the identity of the parties responsible for the manufacture of the Goods at each of those locations; or

(f) allow persons properly authorised in writing by the TCFUA to enter and inspect premises and records and to interview personnel in accordance with the agreement in writing between the Principal and the Supplier under clause 4.7 of this Deed,

the Principal must:

(g) if the Principal becomes aware that a Supplier has not complied with the matters set out in clause 4.3(b), (c), (d), (e) or (f) of this Deed immediately inform the TCFUA about the specific nature and dates of the failure to comply and the identity of the Supplier concerned and what action the Principal will be taking in light of the Supplier's failure to comply (including whether the Principal will elect to terminate the Contract with the Supplier concerned and, if so, the specific date of any such termination);

(h) terminate the relevant Contract in a manner consistent with its terms and conditions or implement an alternative remedy following discussions with the TCFUA; or

(i) not enter into any further Contracts with that Supplier or extend the period of operation of an existing Contract with that Supplier until the Principal and the TCFUA agree that the Exploitation or Non-compliance has been remedied unless, following discussions between the parties to this Deed, it is reasonable for the Principal to enter into further Contracts with the Supplier.

6.4 The Principal will ensure that the ability of the Principal to terminate the relevant Contract in circumstances where a Supplier has not complied with the matters set out in clauses 4.3(b), (c), (d), (e) or (f) of this Deed is included as a term in any new Contract entered into between the Principal and a Supplier. The Principal will also request Suppliers with current Contracts entered into before the signing of this Deed to agree to such an amendment and, if the Supplier agrees, the Principal will amend the Contract to include such a clause.

6.5 The Principal will ensure that no current Contract entered into before the signing of this Deed continues to operate or is extended to operate beyond twelve months after the signing of this Deed without the Principal and the Supplier entering into a separate agreement or arrangement to comply with the requirements of new Contracts in accordance with clause 6.4 of this Deed.

6.6 Any action to be taken by the Principal in relation to the conduct of the Supplier under clause 6.3 of this Deed shall be reasonable and appropriate, taking into consideration the seriousness of the conduct of the Supplier.

6.7 If the Principal advises the TCFUA that it does not believe that Exploitation or Non-compliance by a Supplier has occurred and the TCFUA continues to assert that Exploitation or Non-compliance has in fact occurred, then this issue must be mediated pursuant to clause 7 of this Deed.

6.8

(a) Every Contract between the Principal and a Supplier for the supply or manufacture of Goods for resale by the Principal must contain an enforceable (and effective) standard clause which obliges each succeeding party who is involved in the manufacture or purchase of the Goods (or who is involved in giving out orders for the manufacture or purchase of the Goods) to inform the Principal about the number and type of articles (and the wholesale price per article) to be supplied by each succeeding party.

(b) The Principal will send to the TCFUA a copy of the standard clause referred to in clause 6.8(a) of this Deed.

7 DISPUTE RESOLUTION

It is the intention of the parties that they should co-operate with the other in good faith to resolve any differences arising under this Deed. In order to achieve this objective the following disputes settlement procedure is agreed:

(a) the parties must meet to consider any issue if:

(i) either party considers the obligations of the other party under this Deed are not being performed, and the other party disagrees;

(ii) the TCFUA considers that Exploitation or Non-compliance is occurring and the Principal disagrees; or

(iii) the TCFUA believes that the Principal has not acted reasonably in continuing to contract with the Supplier as it may under clauses 6.3, (g), (h) and (i) of this Deed.

(b) If agreement on the issue referred to in clause 7(a) of this Deed cannot be reached or a party refuses to observe its obligations under this Deed, the parties must enter into mediation with a mediator who has experience in the clothing industry and is agreed by the parties, or failing agreement, as appointed by LEADR;

(c) the parties must each pay half the costs of the mediator; and

(d) the mediation must be held and completed promptly.

8 TERMINATION

Either party may terminate this Deed:

(a) upon no less than 3 months written notice to the other;

(b) forthwith if the other party refuses to mediate in good faith as detailed in clause 7;

(c) upon the giving of 5 business days notice where the other party has committed a breach of this Deed and that breach has not been rectified within the 5 business days notice period;

(d) immediately by the Principal if the TCFUA breaches clause 5(f) of this Deed; or

(e) immediately by the TCFUA if the Principal breaches either clauses 4.3 or 4.7(a) of this Deed.

9 ENTIRE DEED / FUTURE VARIATION

9.1 This Deed represents the entire agreement between the parties on the matters referred to in the Recitals.

9.2 The parties agree that should this Deed prove incapable of achieving its objective, then the parties will negotiate in good faith to effect an appropriate variation to its terms.

9.3 This Deed forms Part 3 of the Homeworkers Code of Practice and this Deed is intended to cover Principals who manufacture or arrange for the manufacture of Goods in the sports and corporate wear industry.

9.4 The parties agree to review and, if necessary, amend (by mutual agreement only) this Deed after the first year of this Deed's operation. The parties also agree to review the operation of this Deed when and if a mandatory code of practice for outworkers is introduced by the Ethical Clothing Trades Council under the *Industrial Relations (Ethical Clothing Trades) Act* 2001 (NSW), or by the Ethical Clothing Trades Council of Victoria under the *Outworkers (Improved Protection) Act* 2003 (Vic) or similar legislation that may be introduced in any other state.

10 INSPECTION PROCEDURES

10.1 The agreed principles that will govern the procedures in relation to the conduct of inspections under this Deed are set out in Schedule A to this Deed.

11 NIKE LICENSEE ARRANGEMENTS

11.1 The parties acknowledge and agree that licensees of the Principal have a relationship distinct and different to that between the Principal and a Supplier.

11.2 Notwithstanding clause 11.1 above, the parties agree that licensees of the Principal will be treated as Suppliers, except in relation to the obligations specified in Clause 11.3 below, and acknowledge that the records of and between both the Principal and the licensee of the Principal will not be the same type or as great in number as the Records between the Principal and its Suppliers.

11.3 Accordingly, clauses 3.1, 3.2 3.3, 4.3 and 6.3(b), (c), (d), (e) and (f) will not apply to licensee arrangements between the Principal and the licencee of the Principal unless and until such time as the licensee's relationship with the Principal changes to one under which the licensee of the Principal manufactures or arranges the manufacture or supply of Goods on behalf of the Principal within Australia under a Contract. At this time the licensee of the Principal will no longer be recognised by the parties as such, but will be recognised as a Supplier in which event clauses 3.1, 3.2, 3.3, 4.3 and 6.3(b), (c), (d), (e) and (f) will apply.

11.4 The Principal agrees to make it a contractual prerequisite to all future licensee arrangements, including any renegotiation of existing licencee arrangements between the Principal and the licensee of the Principal, that a licensee of the Principal is a current signatory to this Deed (with the exception of this Clause 11) as a Principal in its own right and in the case of a manufacturer, become accredited under Part 2 of the Homeworkers Code of Practice.

11.5 The Principal will use its best endeavours to have an existing licensee of the Principal sign up to this Deed as a Principal in its own right.

11.6 Should an existing licensee of the Principal not agree to become a Principal in its own right, then save for those clauses relating to the type of record keeping set out in clause 11.3 above, the licensee of the Principal will be treated and viewed by the parties as a Supplier for all other purposes of this Deed.

Execution

Executed as a deed on the 24 day of JUNE 2003.

Executed by **NIKE Australia Pty Ltd** (ABN 99 055 141 743) in accordance with section 127(1) of the Corporations Act by being signed by:

The common seal of the **Textile Clothing and Footwear Union of Australia** is affixed in accordance with its Rules in the presence of:

SCHEDULE A

The procedures in relation to the conduct of inspections under this Deed are divided into three areas, being:

1 the development of a pro-forma inspection sheet;

2 the training of TCFUA personnel to conduct inspections under this Deed; and

3 the evaluation of completed inspection sheets.

The principles that will govern these matters are set out below.

Pro-forma inspection sheet

The pro-forma inspection sheet to be developed by the TCFUA shall be divided into two parts with each part subdivided to maintain the distinction between Employee workforces and Contractor/Outworker workforces.

Part A of the inspection sheet will relate to employment law compliance, compliance with the Federal Award or State Award and compliance with this Deed for an Employee workforce and for a Contractor/Outworker workforce.

Part B of the inspection sheet will relate to compliance with relevant state occupational health and safety legislation for an Employee workforce and for a Contractor/Outworker workforce.

The parties recognise that some Principals/Suppliers may have a mixed workforce of Employees, Contractors and Outworkers and any issue that relates specifically to a particular category of worker can be overcome by being dealt with in the section relevant to the worker's category.

The State branches of the TCFUA should agree on a common pro-forma inspection sheet to then be provided to the Principal and following that, the pro-forma inspection sheet would be the standardised inspection sheet for the sports and corporate wear industry.

Training of TCFUA officials

The objective of a training program is to ensure commonality and consistency of inspections and evaluation in all States in the sports and corporate wear industry under this Deed. The TCFUA shall undertake a training program aimed at delivering the consistent application of this Deed by union officials.

Inspection of a Supplier's and/or a Principal's workplace on occupational health and safety issues would be by TCFUA accredited officials.

Such accreditation would be consistent with that offered by WorkCover New South Wales for union officials.

Evaluation of pro-forma inspection sheets

The TCFUA will nominate a person in each State who has received union accreditation to evaluate the pro-forma inspection sheets in relation to suspected occupational health and safety breaches.

The TCFUA will also nominate a person in each State to evaluate the pro-forma inspection sheets to ensure consistency of inspections and reporting of potential breaches of the Deed, employment law and the Federal Award or State Award.

APPENDIX 8

Workers' rights throughout supply chains Symposium 20th April 2016

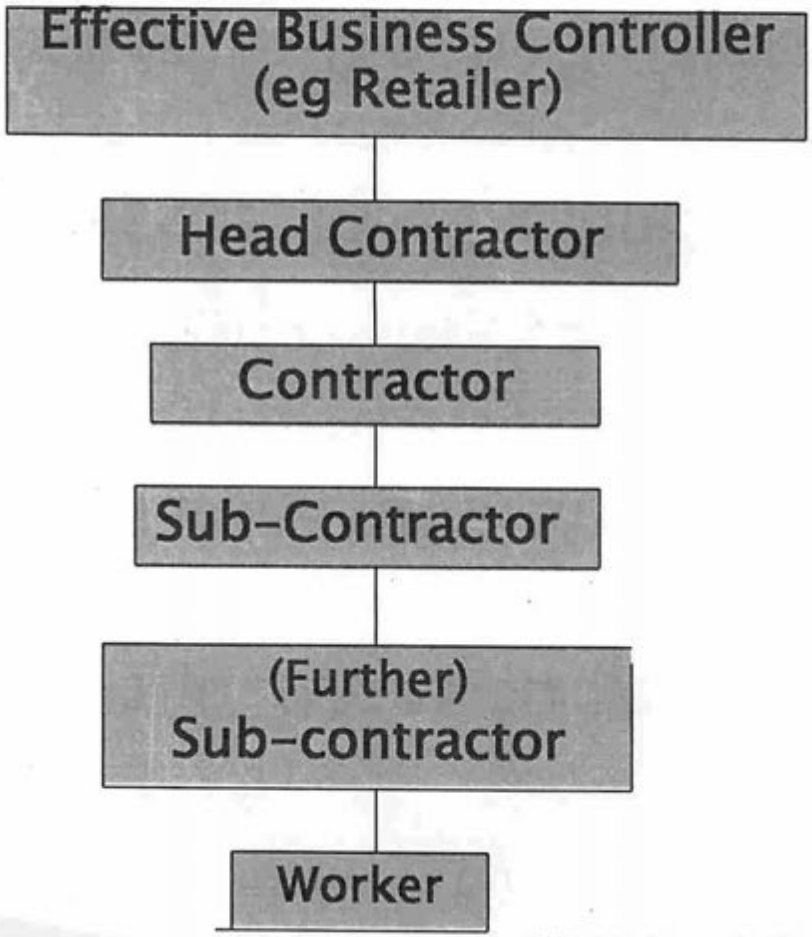
Regulating supply chains to protect vulnerable textile clothing and footwear workers – recent innovations in Australia and their broader implications

Igor Nossar

(Adjunct Professor, Queensland University of Technology)

(Co-Chief Investigator for the Australian Research Council project: *Australian Supply Chain Regulation: Practical Operation and Regulatory Effectiveness*, DP120103162).

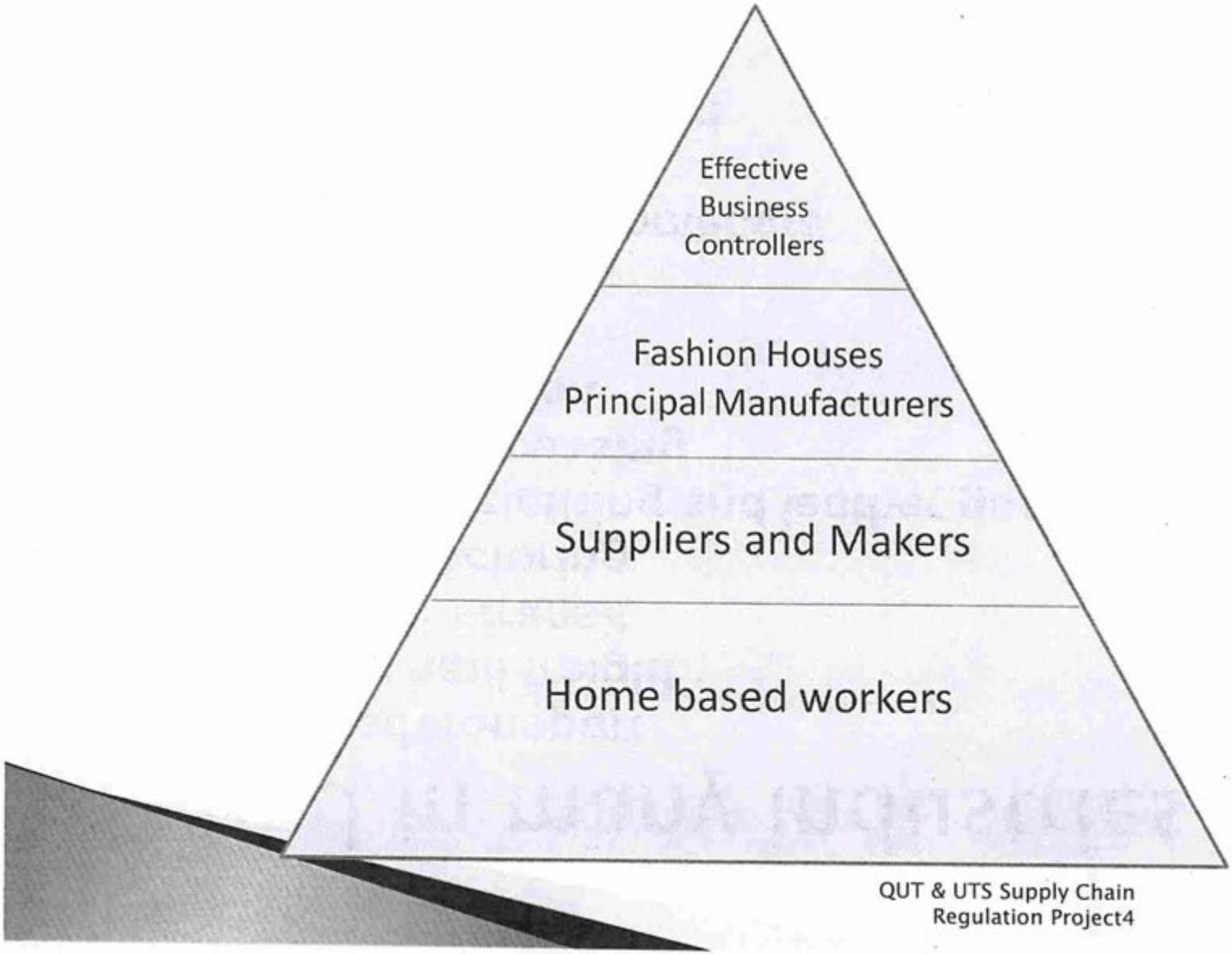
Supply Chain – an interconnected series of contracts organised for supplying goods or services to organisations at the apex of contractual chains



Found in many industries

- Road transport
  - long haul freight
  - cash-in-transit
- Manufacturing
  - textile, clothing and leather goods
  - food processing
- Construction
- Agriculture
- Off-shore oil
- Nursing and homecare
- Rail transport
- Maritime transport
- Cleaning
- Waste disposal
- etc

Eg: Textile Clothing and Footwear



QUT & UTS Supply Chain
Regulation Project4

Eg Long haul transport

Effective Business controller

Transport Operator

Contractor

Owner Driver

Walters and James (2009) 8-9

- ... the research reviewed suggested that the precise effects of supply chains can vary, even within the same sector of activity, as a result of differences in such factors as the attitudes and objectives of both buyers/clients and suppliers, the balance of power that exists within the relations of supply, and the degree to which these relations are based on trust and mutual co-operation.

TCF (Mayhew & Quinlan, 1999).

- Cost, quality and time pressure from major retailers/fashion-houses cascaded through a series of subcontracting arrangements resulting in the mainly immigrant workforce experiencing low pay, long hours and pressure from 'middlemen' (including harassment).
- Compared to a similar group of factory-based workers, outworkers reported three times as many work-related injuries and were also subjected to more threats and abuse (from middlemen).

In other industries: Eg:

- **Road transport** (Quinlan 2011, 5-6): strong link between low pay and reduced safety
- Link between client demands for tight time schedules, long hours (and poor queuing practices that reduced opportunities for drivers to rest) and low returns (as elaborate pyramid subcontracting is used to reduce freight rates/returns to drivers) (Mayhew & Quinlan 2006; Saltzman & Belzer, 2007).
- Intensification of these pressures in an already competitive industry has resulted in unsafe and unhealthy work practices such as excessive hours of work, increased use of kilometre or trip-based payment systems, speeding, drug use (to combat fatigue) and cuts to maintenance.

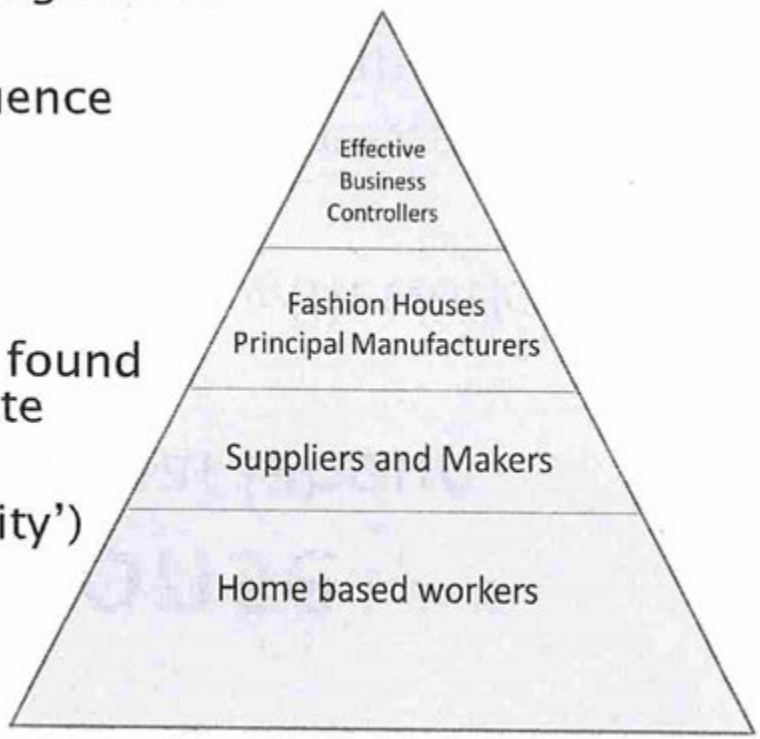
Challenge and Response

- Traditional problems in conventional labour regulation
  - the focus on employers contracting directly with workers, particularly employees
  - regulatory tradition of three separate legal frameworks for (i) WHS, (ii) pay, working hours and conditions, and (iii) workers' compensation.

- TCF Supply Chain Regulation – key elements
  - legislated mandatory contractual tracking mechanisms
    - follows the allocation of work, ties in liability and legal responsibility and integrates minimum labour standards

Context

- Australian TCF production historically involved fabric manufacture and subsequent garment processing.
- Significant component of labour force were home-based clothing workers ('homeworkers' or 'outdoor workers' or 'outworkers').
- Most were female machinists, often recent migrants with limited English.
- End of 20th century – industry characterised by chain of interlocking pyramidal contracting arrangements
- Each step down is characterised by increasing numbers of commercial players, each exerting lesser degrees of commercial influence
- Outworkers at the base have little or no influence over their working conditions
- Difficulties for regulation
  - Entitlement gap
  - Even workers who were formally protected found the mechanisms for enforcement inadequate
  - Difficulty locating isolated, easily mobile home-based workers (i.e. relative 'invisibility')



History of TCF Regulation

- From the late 1980s, new provisions in various state and federal awards:
  - tracked contracting down through the pyramid from principal suppliers downwards;
  - empowered regulators to access records of work orders (i.e. volume);
  - empowered regulators to cross check assigned sewing time;
  - gave regulators access to contract details of pricing for each of the goods ordered (value) from level of principal suppliers downwards.
- Continuing drawbacks in regulation models up to early 2000s
  - New award provisions failed to impose any enforceable obligations upon the most significant players in the supply chains: the major *retailers;*
  - Retailer and manufacturing employer voluntary codes (*Homeworkers Code of Practice*) exhibited inherent regulatory flaws, with only a handful of effective business controllers adopting such codes;
  - Lack of proactive requirement for provision of lists of suppliers (along with reactive obligations for disclosure of all supply contracts) to the union regulator.

New Regulatory Model

- June 1999: new model originated within NSW
  - major retailers bound to give regulators full access to all details of TCF supply contract arrangements;
  - Compulsory standard contractual provisions in retailer arrangements (i.e. assisting cross-jurisdictional regulator auditing of supply chains throughout Australia) (CEFOR);
  - corresponding 'bottom up' rights for all outworkers, not just outworkers in TCF (i.e. entrenching employee status of outworkers and creating new statutory recovery mechanisms);
  - Outworkers can claim for unpaid entitlements against any party in supply chain up to level of principal supplier (with reversed onus of proof).
- NSW (2001); VIC (2003); QLD (2005) and SA (*generic model regulating contract networks more generally, not just TCF)* 2005.
- Mandatory Codes - NSW (2004); SA (2006); QLD (2010).
- Federal system implemented 2012 *(mainly parallel to NSW but as yet no federal mandatory retailer code).*

Legislative Scheme

- State and Federal legislation concurrent.
- Key tool 'value and volume' method provides:
  - Ability to track real flow of TCF work orders to all locations;
  - Can access price paid (including piece rates paid) and volume ordered for each contract at each level of supply chain;
  - Regulators can aggregate this information to estimate total minimum labour time required for production at any level in supply chain;
  - Regulator can also estimate equivalent minimum number of full time employees required to complete any particular production order;
  - Can also inspect without notice all production sites and workplace records and locate entire workforce.

References

- M Mayhew & M Quinlan, (1999) The effects of outsourcing on OHS: A comparative study of factory-based and outworkers in the garment industry, *International Journal of Health Services* 29(1):83-107.
- C Mayhew and M Quinlan (2006) 'Economic Pressures, Multi-Tiered Subcontracting and OHS in Australian Long haul Trucking' (2006) 28 Employee Relations 212
- Quinlan M (2011), *Supply Chains and Networks*, Safe Work Australia, Canberra
- Saltzman, G. and Belzer, M. (2007), *Truck Driver Safety and Health: A Conference Report and Literature Review*, National Institute of Occupational Safety and Health, Cincinnati.
- Walters, D. & James, P. (2009), *Understanding the role of supply chains in influencing health and safety at work*, IOSH, Leicester

APPENDIX 9

Article

Journal of Industrial Relations
0(0) 1–19

SAGE Publications Ltd, Los Angeles, London, New Delhi, Singapore and Washington DC
DOI: 10.1177/0022185615582236
jir.sagepub.com

Protective legal regulation for home-based workers in Australian textile, clothing and footwear supply chains

Igor Nossar
Queensland University of Technology, Brisbane, Australia

Richard Johnstone
Queensland University of Technology, Brisbane, Australia

Anna Macklin
Griffith University, Brisbane, Australia

Michael Rawling
University of Technology, Sydney, Australia

Abstract
Supply chain outsourcing has posed problems for conventional labour regulation, which focuses on employers contracting directly with workers, particularly employees. These difficulties have been exacerbated by the traditional trifurcated approach to regulation of pay and conditions, work health and safety and workers' compensation. This paper analyses the parallel interaction of two legal developments within the Australian textile, clothing and footwear industry. The first is mandatory contractual tracking mechanisms within state and federal labour laws and the second is the duties imposed by the harmonised Work Health and Safety Acts. Their combined effect has created an innovative, fully enforceable and integrated regulatory framework for the textile, clothing and footwear industry and, it is argued, other supply chains in different industry contexts. This paper highlights how regulatory solutions can address adverse issues for workers at the bottom of contractual networks, such as fissured workplaces and capital

Corresponding author:
Richard Johnstone, Faculty of Law, Queensland University of Technology, GPO Box 2434, Brisbane, Queensland 4001, Australia.
Email: richard.johnstone@qut.edu.au

fragmentation, by enabling regulators to harness the commercial power of business controllers at the apex to ensure compliance throughout the entire chain.

Keywords
Contracting, regulation, supply chain, work health and safety

Introduction

There is now a growing body of evidence that workers within, and especially at the bottom of, supply chains experience a range of adverse working conditions, including inferior pay and work health and safety (WHS), linked to the commercial dynamics of outsourcing arrangements (James et al., 2007: 166–170; Mayhew and Quinlan, 2006; Nossar et al., 2004: 145–147; Quinlan and Wright, 2008; Rawling and Kaine, 2012: 238; Walters and James, 2011: 989). This paper examines the position of home-based workers in the textile, clothing and footwear (TCF) industry, where major retailers routinely exercise commercial influence throughout their supply chains to control the parameters under which work is performed, even by workers who have no direct dealings with them.

Supply chain outsourcing of this type has posed problems for conventional labour regulation, which focuses on employers contracting directly with workers, particularly employees (Johnstone et al., 2012; Nossar et al., 2004: 137; Rawling and Kaine, 2012: 238). These difficulties have been exacerbated by the regulatory tradition of three separate legal frameworks for (i) WHS, (ii) pay, working hours and conditions and (iii) workers' compensation.

This paper develops existing scholarship on Australian supply chain regulation (SCR) by analysing the parallel interaction of two legal developments that address working conditions in Australian TCF supply chains. The first is the legislative establishment of mandatory contractual tracking mechanisms within state and federal labor law systems. These mechanisms follow the allocation of TCF work, tie in liability and legal responsibility for fair working conditions throughout entire supply chains and integrate minimum standards for pay, hours and working conditions, WHS and access to workers' compensation for supply chain workers.

The second development is in the newly harmonised Work Health and Safety Acts (WHS Acts), which no longer impose duties on 'employers' to 'employees' and 'others' (see Johnstone, 1999, 2006), but rather introduce general duties to ensure WHS and duties to consult, co-operate and co-ordinate on each 'person conducting a business or undertaking' (PCBU) in relation to all 'workers' who carry out work for the PCBU.

This article argues that the combined effect of these developments is to require retailers and their clothing suppliers to track exactly which workers, including outworkers, are performing the work, and to ensure their health, safety, correct pay and other labour law entitlements. It also argues that a broad range of supply chains in industries beyond the TCF sector might also be regulated effectively by

similar mandatory schemes, which adapt and apply the essential features of the TCF industry-specific model to other industry contexts. This paper highlights that, if governments are willing, appropriate regulatory solutions can be used to satisfactorily address the problems identified in the employment relations scholarship regarding the significant adverse effects for precarious workers of supply chain outsourcing, fissured workplaces and capital fragmentation.

This article draws on interviews conducted for a project on the operation and effectiveness of SCR in the TCF and road transport industries funded by an Australian Research Council Discovery Grant (DP120103162). The project methodology includes a rigorous legal and policy analysis of the statutory provisions regulating working conditions in supply chains, at least 50 qualitative interviews (20 of state regulators, 20 of trade union regulators, 10 of retailers, contractors and workers), participant observation of union and state regulators, qualitative analysis of documents generated by regulators, retailers and contractors, and quantitative analysis of measurable statistical data or records about working conditions within the industries (e.g., the number of workers, number of workplaces, working conditions, regulator's workplace visits, etc.).

The context: TCF supply chains

Historically, Australian TCF production involved principal clothing suppliers, such as fashion houses, handing out manufacturing work to multiple factories, many of them engaging substantial onsite workforces. Traditional responses to seasonal peaks in retail demand were met by engaging home-based clothing workers (also known in Australia as 'homeworkers' or 'outdoor workers' or 'outworkers'), a reserve labour force in the TCF industry.

Forty years ago, the Australian government's removal of tariff barriers against overseas imports resulted in a change from factory-based manufacturing to an industry of interlocking pyramidal contracting arrangements and workforces heavily composed of outworkers. At the apex of these contractual chains, the 'effective business controllers' of these supply chains – a small number of commercially dominant retailers – typically entered into arrangements for the supply of clothing products with principal manufacturers and/or fashion houses. These principal manufacturers and fashion houses then contracted production from multiple smaller manufacturers or offsite contractors. In some instances, these production orders were successively handed down through a sequence of intervening parties until the goods were finally constructed by an outworker. The finished goods were then delivered back up the contractual chain to the original principal manufacturer or fashion house.

Each step down the pyramid involved an increasing number of commercial players, each of which exerted a lesser degree of commercial influence over the supply chain than those on the step above them. At the base were clothing outworkers, with little influence over their working conditions. The commercial power of major retailers enabled them to secure favourable terms (price, quality control

and turnaround time), proactive rights of inspection for quality control and exacting indemnity provisions in their contractual arrangements with principal manufacturers, whether domestic or international. These arrangements gave the retailers considerable legal authority to intervene actively into key aspects of the operation of their supply chains, so that in the past major retailers have presided over contractual arrangements providing them with quickly produced, quality clothing and high profit margins derived at the expense of outworkers sufficiently distant, in a legal sense, from the retailers to minimise the retailers' legal liability for workers' pay and conditions (Nossar et al., 2004: 143–146, 151). In the absence of government intervention, however, contractual 'governance structures' (Nossar, 2008: 1, 8) of this kind have rarely, if ever, provided effective protections for outworkers.

Historical legal regulation of TCF supply chains in Australia

During the 20th century, TCF outworkers' working conditions were predominantly regulated by federal and state industry-specific industrial award provisions, established by industrial tribunals, usually for employees. This traditional labour law framework suffered from three systematic deficiencies limiting the effective regulation of TCF labour, and clothing outworkers in particular. First, the regulatory framework displayed an 'entitlement gap', because it generally only covered 'employees' directly employed by an 'employer' under a 'contract of employment' (Nossar et al., 2004: 147). Clothing work providers sought to minimise their exposure by formally characterising outworkers as 'independent contractors', or even sometimes as 'trust unit holders', rather than as 'employees'. Such corporate structuring arrangements also enabled employers to avoid or minimise insurance premiums or manipulate claims.

State and territory parliaments responded to these issues by inserting deeming provisions in workers' compensation and some state industrial relations and WHS statutes. These provisions assigned legal responsibilities and obligations of an 'employer' to parties that immediately and directly dealt with outworkers, who then became the 'deemed employees' of those work providers (Rawling, 2006). In the TCF industry, however, the majority of the direct work providers to outworkers were small entities with limited commercial power and resources to meet their labour law obligations. These entities tended to be transient and outworkers were frequently unable to initiate and complete legal proceedings to enforce obligations or recover debts before these providers exited the industry. In addition, the use of strategies such as falsified business records, shelf companies and complex group company structures protected these entities from traditional enforcement proceedings (Nossar et al., 2004: 147).

The use of these strategies for evading the operation of awards and deeming provisions reveals the second deficiency of traditional regulatory frameworks – even workers who were formally protected found the mechanisms for enforcement to be inadequate. WHS regimes were traditionally designed for permanent employees, usually located at large workplaces (Johnstone, 1999, 2006; Johnstone et al.,

2001; Maxwell, 2004: chapters 3 and 13). Employers were often confused about their responsibilities to subcontractors and other precarious workers under WHS general duty provisions, a problem exacerbated by inadequate resourcing of WHS inspectorates (Australian Senate Committee Inquiry, 1996, 1998). Where there were complex subcontracting arrangements, employers and inspectors struggled to identify the relevant employer, or otherwise determine the employment status of particular parties, and inspectors had difficulty locating isolated, easily mobile home-based workers. Regulatory oversight was inhibited by workers' relative 'invisibility'. Effective enforcement of supply chains requires regulators to be able to locate all work sites in a chain, so that they can physically inspect premises, check documentary records and determine the conditions under which each individual worker labours (Nossar et al., 2004: 148).

The final systemic regulatory deficiency arose from the absence of any formal legal obligation upon the major retailers at the apex of the supply chains. Traditionally, retail sale activity fell outside the jurisdictional scope of clothing industry manufacture, and thus outside the scope of clothing trades awards, especially in the Commonwealth system. This deficiency provided an economic context in which parties further down the supply chain could only survive commercial pressures by reducing their costs, often through non-compliance with their labour law or WHS obligations.

Regulatory development beyond the traditional framework

Following campaigns by trade unions and community groups highlighting these issues, the federal industrial tribunal inserted innovative provisions into the federal clothing award in 1987/1988, enabling union and government regulatory agencies to track the contracting process from the level of principal manufacturers down, through each level, to the outworkers themselves. The award required each employer who gave out clothing work to proactively provide a list of the destinations (both identity and location) of their garment manufacture work. Each employer was to provide the required list every six months and was also required to keep a record of the sewing time for each clothing product. The award provisions empowered regulatory agencies to access records of work orders (most importantly, the number of goods ordered – known as 'volume') and to cross-check the validity of the assigned sewing time (by conducting time tests in comparable factory contexts). Any failure to provide this information was automatically a breach of industrial law. These award provisions were supplemented in 1995 by a federal industrial tribunal decision giving regulatory agencies access to contract details of pricing (for each of the goods ordered) at each level of the contracting process (Australian Industrial Relations Commission, 1995) (known as 'value') from the level of principal manufacturers downwards.

These new award provisions were soon incorporated into the counterpart state clothing awards in a number of state jurisdictions, but the provisions were confined to the realm of 'industrial relations law' – with no immediate application to either

WHS regulation or workers' compensation coverage for outworkers. The award provisions also failed to impose any enforceable obligations upon the most significant players in the clothing supply chains: the major *retailers*. Further, trade union and community campaigning induced the industry bodies representing retailers and manufacturing employers to adopt voluntary codes of practice aimed at securing these entitlements for outworkers. The retailer and manufacturing employer voluntary codes were united under the single umbrella of the *Homeworkers Code of Practice* (HWCP), but both exhibited inherent regulatory flaws. The manufacturing employer code, for example, relied upon documentary assertions by the manufacturers themselves (in the form of statutory declarations). The various versions of voluntary codes (Homeworkers Code of Practice 1996, 1997, 1998) adopted by the retailer representative body were even weaker.

In contrast, one major retailer, Target, adopted a voluntary code that included provisions resembling those in the federal award obliging it to proactively provide regular lists of suppliers (along with reactive obligations for disclosure of all supply contracts) and to consider disciplining any supplier, by terminating their supply contract and by refusing to enter into any further contracts, if the supplier failed to remedy any breaches of outworker legal provisions that had been brought to the retailer's attention by the regulator (Nossar, 2007: 13–14). This kind of Target Deed was subsequently adopted by a handful of other effective business controllers, including Country Road, Ken Done and Australia Post (Nossar et al., 2004: 149–150).

The emergence and export of supply chain regulation

From June 1999 a new regulatory model emerged in New South Wales (Nossar, 1999), designed to integrate traditional regulatory mechanisms with proposals that harnessed the contractual power of the major retailers in TCF supply chains and created a general model available for export to other Australian jurisdictions (Nossar et al., 2004: 137, 156–158; Rawling, 2006). The new model proposed that major retailers be bound by legal obligations giving regulatory agencies full access, at regular intervals, to details of contracting arrangements across the entire supply chain. The proposed model also adapted the commercial disciplinary mechanism introduced in the Target Deed in 1995. Suppliers faced legislatively prescribed discipline by the effective business controllers of their supply chain, the retailer, for the persistent breach of any legal provision protecting outworkers, whether imposed by industrial law, WHS or workers' compensation legislation (Nossar, 1999: 24–27).

Rather than simply adopting the existing legal mechanisms from the awards and the voluntary codes discussed above, the new regulatory model proposed that legislation import carefully designed standard contractual provisions into retailer contracting arrangements (Nossar, 1999: 24–27). These standardised provisions enabled retailers themselves (under the active oversight of regulators) to regulate working conditions wherever TCF outworkers carried out work. The model provides effective cross-jurisdictional reach to regulate supply chains across Australian

jurisdictions, potentially providing an effective solution to geographical jurisdictional limits which have traditionally posed problems for enforcement. These developments open the way for the establishment of new contractual mechanisms requiring effective business controllers to regulate working conditions wherever work is performed – even at overseas locations outside the regulating state altogether (Johnstone, 2012: 79–80; Nossar, 2007: 9, 16, 20; Nossar, 2008: paras 14–21).

In addition to the 'top down' obligations imposed on the retailers, the new model included two corresponding 'bottom up' components. The first centred on entrenching the 'employee' status of all (not just TCF) outworkers by proposing that the statutory deeming provisions for outworkers be extended to jurisdictions where no such deeming provisions yet existed (Nossar, 1999: 1–23). The second created a new statutory recovery mechanism entitling outworkers to serve a claim for unpaid industrial entitlements upon any entity in the supply chain up to (and including) the level of the principal supplier. Once served with such a claim, the onus of proof for civil law recovery would be reversed onto the principal supplier, who would then be obliged to pay that claim within a relatively short fixed period of time – regardless of how many commercial parties there were between the principal supplier and the outworker – unless the principal supplier could prove that the outworker serving the claim had not done the work or that the claim calculation was erroneous (Nossar, 1999: 1–23). Together, these key features of the new regulatory model came to be labelled 'supply chain regulation' (SCR) (Rawling, 2006).

To date, five state jurisdictions have implemented aspects of the supply chain regulatory model: New South Wales in 2001, Victoria in 2003, both Queensland and South Australia in 2005 followed by the Commonwealth in March 2012 (Johnstone et al., 2012: 68–69, 103–106, 160–161; Rawling, 2006). Although the NSW provisions were confined to the TCF industry, the 'deemed employer' status was extended to virtually all parties further up the supply chain by inserting the phrase 'directly or indirectly' into the existing NSW industrial deeming provision for clothing outworkers (see in particular Schedule 1(f) Industrial Relations Act 1996 (NSW)). This created a framework for a statutory right of recovery by outworkers that could be developed around the concept of the 'apparent employer' – a legal concept extended to any party in the contracting chain, aside from the retailer (Rawling, 2006: 530). As part of these reforms the NSW state parliament also amended the Workers Compensation Act 1987 (NSW) to oblige all suppliers within supply chains to fully and accurately disclose details of their subcontracting or else bear the liability for any unpaid workers' compensation insurance premiums within that chain (Nossar et al., 2004: 156–158).

Subsequent enactments of the SCR statutory package around various jurisdictions became progressively less industry-specific. In 2005, South Australia enacted legislation that provided a legal foundation for model provisions that do not rely on the concept of direct employment, delivering labour law protections via commercial contractual arrangements (Rawling, 2006: 532–533). Under these South Australian statutory provisions, a contractual pyramid in any industry may be regulated despite the absence of any common law contract of employment

within that pyramid, establishing the basis for a generic legislative model regulating contract networks more generally (Rawling, 2006: 538–541).

Three of the four states that enacted the statutory package – NSW in 2004, South Australia in 2006 and Queensland in 2010 – also created broadly similar mandatory apparel retail codes that impose upon TCF retailers' and suppliers' record-keeping and reactive and proactive obligations to disclose full supply chain contract details to regulators. These mandatory codes import standardised, enforceable provisions into retailer supply contracts, requiring suppliers further down the chain to inform retailers about all locations where domestic apparel production is conducted, on pain of loss of their contracts with the retailer (Johnstone, 2012: 79). The Queensland mandatory code was repealed in 2012.

The state legislative developments described here stimulated negotiation of a new voluntary retailer code of practice in NSW (NSW Ethical Clothing Code of Practice 2002) and a later mirror national voluntary retailer code (National TCFUA/Retailer Ethical Clothing Code of Practice 2002). Both of these codes incorporate all of the key features of the 1995 Target Deed and have been adopted by all major retailers in Australia. In October 2003, as the issue gained public attention, high-profile transnational effective business controllers such as Reebok also entered into new improved voluntary Deed arrangements, which now authorise regulators to access and inspect sites of production outside Australia (Johnstone, 2012: 79–80; Nossar, 2007: 5–16, 19–36; Nossar, 2008: paras 14–21).

The two remaining state mandatory codes explicitly refrain from applying their mandatory provisions to any retailer or manufacturing supplier that is signatory to – and compliant with – the voluntary codes and current provisions of the HWCP (NSW Mandatory Code 2005: cl 8(1)(e); South Australian Mandatory Code 2006: cl 8(1)(e)). These provisions exempting the application of the two mandatory codes for retailers have completely transformed the practical enforceability of the HWCP provisions. Failure, by either retailers or suppliers, to comply with the 'voluntary' HWCP provisions now incurs the full application of the entire mandatory code regime, which is tougher in the scope – and severity – of the obligations imposed and is also enforceable in court with substantial financial penalties upon conviction (NSW Mandatory Code 2005: cl 20(8); South Australian Mandatory Code 2006: cl 20(8)). Thus, by one instrument or the other, all national Australian retailers are now compelled to provide details of their TCF supply contracts to regulators.

Recent federal developments

Each of these state SCR legislative provisions has survived a succession of Commonwealth statutory encroachments up to, and including, the enactment of the federal Fair Work Act 2009 (Rawling, 2007; Rawling, 2009) and the latest referral of most state industrial relations powers to the Commonwealth (Creighton and Stewart, 2010: 118–121). The federal TCF award, made under the Fair Work Act 2009 (Cth) (FWA), has the same key features as the original clothing award provisions created in the late 1980s.

In March 2012, amendments to the FWA (Part 6 – 4A) enacted a new regulatory model by largely adopting the earlier NSW state SCR legislative formula, with the same TCF industry-specific limitations, the extension of the deeming provisions and statutory right of recovery to work given out 'directly or indirectly' (Part 604A, Division 2), and by adapting the definition of 'principal' (section 17A) from the current federal TCF award. The federal provisions also adapted certain features from the South Australian state SCR legislative approach, including the reference to 'a chain or series of two or more arrangements' in the definition of 'principal' (FWA: s17A; see also Rawling, 2006: 533) and in the definition of a retailer as being a retailer that does not have 'any right to supervise or otherwise control the performance of the work before the goods are delivered to' that retailer (FWA: Part 6 – 4A, Divisions 3, s789 CA(5)(b); see also South Australian Mandatory Code 2006: cls 5 and 28). The FWA provisions also create a statutory right of recovery that includes a reversal of the onus of proof (onto the party served with the claim for recovery) and scope for recovery against almost any party in the supply chain apart from retailers without rights to supervise or otherwise control production prior to delivery of goods (FWA: Part 6 – 4A, Division 3; Potter, 2012: 42–43).

Although these amendments to the FWA confer the capacity to create mandatory legal obligations that can bind all parties in TCF supply chains, up to and including the ultimate retailers (Part 6 – 4A, Division 4), there are currently no practically enforceable SCR legal obligations imposed on major retailers by Commonwealth legislative instruments. The only effective provisions regulating retailers on a national level throughout Australia are the NSW and South Australian mandatory codes, operating with their cross-jurisdictional reach, together with the new and improved national 'voluntary' retailers' code.

Since this type of information could be accessed and cross-checked from the level of the retailers down throughout the entire contract chain, the combination of these 'value and volume' measures has become a key tool in the practical operation of TCF regulation. Regulators can track the real flow of TCF work orders to all locations and access all relevant information, especially price paid and volumes ordered (the numerical output of garments and assigned working times for each particular product) for each of the contracts between all the commercial parties in the contracting chain. Regulators can then aggregate this information (along with the piece rate paid) to estimate the total labour time required for production at any level in the supply chain. At this point, the regulator may be able to estimate the equivalent number of full time employees required to complete a particular production order. Regulators can then utilise their legislative and contractually based powers to inspect all production sites without notice to check the accuracy of workplace records and locate the entire workforce.

The significance of this was explained by the union regulator as follows:

> So probably the most significant thing I think is the method in being able to determine how many employees are within any one operation. And that's brought about by an

> award requirement where each company . . . is to provide us with a list of each of the contractors they give work to, [and] an array of other information on name, address, and contact details. But in particular they have to provide us with the sewing time that's required to be provided for each garment that's produced. So as a garment is issued to a contractor there has to be a sewing time provided . . . . a payment that's made for each minute's worth of work. And in the case of our industry, it's currently on 53 cents a minute. That rate, with the minutes, lets us determine the number of hours that are required, the number of days that are required in terms of work, and the number of full time employees that are required to produce the work. That in itself creates massive transparency within the industry. So for me, that's the critical tool that's different I think from a lot of other supply chains maybe in other industries. (Interview with union regulator, 2013)

Extending the reach of work health and safety regulation

Beginning in 2008, and culminating in the adoption by 2011 of a Model Work Health and Safety Act (Model Act) in the form of WHS Acts in each Australian jurisdiction apart from Victoria and Western Australia, Australian WHS legislation has been largely harmonised. Four features of the WHS Acts substantially complement the labour law provisions discussed previously by requiring TCF retailers, fashion houses, makers and contractors to identify the location of outworkers and to consult, co-operate and co-ordinate their WHS activities.

The first significant provision is the 'primary duty' of care (section 19) owed, not by employers to employees as was the dominant pre-harmonisation approach, but by 'a person conducting a business or undertaking' (PCBU) to 'workers'. The National Review into Model Occupational Health and Safety Laws in its First Report (2008: 46) argued that the pre-harmonisation approach was 'too limited, as it maintain[ed] the link to the employment relationship as a determinant of the duty of care' and 'the changing nature of work arrangements and relationships make this link no longer sufficient to protect all persons engaged in work activities'. Consequently, the primary duty (section 19(1)) provides that the PCBU must, as far as is reasonably practicable, ensure the WHS of all workers engaged or caused to be engaged, or whose activities are influenced or directed, by the PCBU 'while the workers are at work in the business or undertaking'. The *Explanatory Memorandum* (at [23]) to the Model Act makes it clear that the phrase 'business or undertaking' is 'intended to be read broadly and covers businesses and undertakings conducted by persons including employers, principal contractors, head contractors, franchisors and the Crown'. The case law on 'business or undertaking' in the pre-harmonisation WHS statutes does indeed take a broad approach (see *Whittaker v Delmina Pty Ltd* (1998) 87 IR 268) and has held that the extent of the undertaking is a question of fact (*Victorian WorkCover Authority v Horsham Rural City Council* [2008] VSC 404: [36]). More than one person may be conducting an undertaking in any one situation.

The WHS Acts (section 7) define 'workers' very broadly to include any person who carries out '*work in any capacity for*' a PCBU, and specifically includes 'outworkers'. It is clear that the primary duty applies to the TCF supply chains described earlier in this paper, at least from the fashion house downward, so that outworkers at the bottom of TCF supply chains will be owed the primary duty by the fashion house which designs the clothing and draws up the specification sheets, and all head contractors, contractors and subcontractors further down the chain. For example, the fashion house will owe the primary duty to its direct employees, employees of the maker or contractor, or any subcontractors or outworkers engaged by any of those parties, because the fashion house has caused each of those workers to be engaged, and/or directs and/or influences the work of each worker, and the outworkers are 'at work' in the fashion house's business of designing and making clothes.

Whether *all* retailers owe the primary duty to outworkers is a little more complex. Where the PCBU fashion house is also the retailer, then the PCBU would owe the duty as both fashion house and retailer. If the retailer is not also the fashion house, but, for example, a department store, and plays some part in the design and/or specifications of the clothes, then the outworker is most likely part of the department store's business, and the department store will be engaging, influencing and directing the outworker. If, however, the department store simply provides retail space for the fashion house/retailer to sell its clothes, it might be argued that the outworkers are not 'at work in' the department store's business, and may not be engaged, influenced or directed by the department store. In this instance, however, the department store will owe the PCBU's section 19(2) duty to 'ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from the work carried out as part of the conduct of the business or undertaking.' This duty might be breached by, for example, the department store putting pressure on the supply chain to reduce the price of the clothes, although it might be argued that this is not 'a risk from work carried out as part of the business'.

The primary duties of retailers, fashion houses, makers, contractors and subcontractors are overlapping and non-delegable: each party owes the duty to workers below it, even though others owe a similar duty (see sections 14–16 of the WHS Acts). Clearly, this requires each party owing the primary duty to know of the existence and location of each worker in the chain in order to exercise the requisite care. As one clothing company manager observed, once the SCR statutory package and the primary duty came into force:

> We basically picked up 350 extra people who we were responsible for . . . because we tell them that whilst we have always had a duty of care and I guess, wanted to support whatever issues they are experiencing, we now have a legal responsibility to do that. I think the OHS legislative changes have really opened up dialogue beyond what was normally happening. (Interview with Australian clothing company, 2013)

The duty owed to outworkers will include psychosocial issues (section 4, definition of 'health'), including stress induced by the way outworkers' work is organised, including excessive working hours.

The second significant provision is the 'officer's' duty (WHS Acts, s 27). Unlike the officer's duty in the pre-harmonisation statutes, which relied on *attributed liability* (i.e. imputed or accessorial liability), the officer's duty is a positive and proactive duty to 'exercise due diligence to ensure that' the PCBU 'complies with' a duty or obligation that the PCBU owes under the Act (section 27(1)). It is a positive duty in the sense that an officer who does not exercise the required due diligence can be in breach of the duty even if the PCBU is not breaching its duties (section 27(4)). Thus, each company secretary, director and senior manager of each PCBU in a TCF supply chain must (section 27(5)) 'take reasonable steps' to

a. acquire and keep up-to-date knowledge of WHS matters;
b. gain an understanding of the nature of the PCBU's operations and generally of the hazards and risks associated with those operations;
c. ensure that the PCBU has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to WHS from work carried out as part of the conduct of the business or undertaking;
d. ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information;
e. ensure that the PCBU has, and implements, processes for complying with any duty or obligation under the Act; and
f. verify the provision and use of the resources and processes referred to above.

These are far-reaching duties, and require each officer to have extensive knowledge of the supply chain and the WHS risks faced by all workers in the supply chain. Managers who are not 'officers' owe the worker's duty (section 28) to take 'reasonable care' that their acts or omissions do not adversely affect the health and safety of other persons, which would include outworkers.

The third significant provision is section 46 of the WHS Acts, which provides that

> if more than one person has the same duty concurrently under this Act, each person with the duty must, so far as is reasonably practicable, consult, co-operate and co-ordinate activities with all other persons who have a duty in relation to the same matter.

This provision seeks to prevent WHS issues arising from fractured work arrangements or from a lack of co-ordination between duty holders. The *Code of Practice: Work Health and Safety Consultation, Cooperation and Coordination* ensures that the PCBUs in TCF supply chains cannot assume that other PCBUs will take care of a health and safety matter, and requires each PCBU to find out who else is carrying out work and to work together with other PCBUs in a

co-operative and coordinated way to eliminate or minimise risks so far as is reasonably practicable.

The combined effect of these provisions (sections 7, 19, 27 and 46) is that not only does each PCBU influencing the work carried out in the supply chain owe a duty to each worker below it in the chain, but that the PCBUs must work together to ensure that their duties are discharged in a coordinated manner. Officers have a proactive duty to exercise due diligence to ensure compliance by their PCBU, and this will include fulfilling the duty to consult, co-operate and coordinate with other officers owing the same duty (section 46). The impact of these provisions on clothing companies was described as follows:

> . . . . with the new changes that came in a couple of years ago with effectively making all of those makers part of our responsibility . . . . we had a legal obligation to do the right thing. . . . we had meetings, we brought them in, we had sessions to educate them on the new legislation and what it means. We do warehouse audits, site visits, inspections, we give them feedback. We've helped them engage contractors . . . If we didn't do that we'd be exposed.

> . . . . because of our relationship with [Retailer] and their . . . ensuring that everyone in their supply chain is compliant, that really forced [us] to have a long hard look at our strategy. It's made us rethink everything. . . . Under the current regime, the retailers will effectively audit us and have the right to audit us and that auditing relates primarily to: Do we have an OHS management system? . . . they don't necessarily need anything figures wise from our makers but they need to see that we are auditing the makers. They need to see that we are cascading that back down . . . [a]nd it cuts the other way too, I mean we, again under the OHS legislation, we would also have the opportunity to audit should we require or request the OHS management system from [Retailer] because we have got our employees working in their stores. (Interview with Australian clothing company, 2013)

Even though Victoria has not enacted the Model Act, the general duties owed by an employer to employees and to 'others' in the Occupational Health and Safety Act 2004 (Vic) (OHSA) (sections 21 and 23, respectively), and the duty owed by a self-employed persons to persons other than employees (section 24), together have a similar effect to the primary duty in the WHS Acts, in that they impose a hierarchy of overlapping and complementary responsibilities on all the contracting parties in the supply chain to all workers below them in the chain. Further, the Outworker (Improved Protection) Act 2003 (Vic) provides that 'employee' in a number of statutes (including the OHSA) includes an outworker. There is, however, in the OHSA no equivalent to section 46 of the WHS Acts.

The fourth key set of provisions are to be found in the worker consultation, representation and participation provisions in the WHS Acts (Part 5, Divisions 2 and 3), which are all couched in terms of 'workers' and the PCBU rather than 'employer' and 'employee'. Thus, a PCBU must, so far as is reasonably practicable, consult with workers (or their health and safety representative (HSR)) who carry

out work for the business or undertaking who are, or are likely to be, directly affected by a matter relating to WHS (section 47(1)). The matters over which consultation must take place include all measures to identify, assess and control risks, all proposed changes to the business or undertaking that might affect WHS, and decisions about consultation, monitoring worker health, resolving WHS issues and so on (section 48(1)). It would be difficult to contest the proposition that TCF employees, subcontractors and outworkers are 'directly affected' by the operations of the PCBU fashion houses, makers and contractors above them in a typical TCF supply chain, and that, consequently, each PCBU must consult all the workers below them in the supply chain to the extent that consultation can be suitably accomplished in the circumstances. Again, this is a significant and profound duty, particularly in the context of the section 46 duty, and all PCBUs in the supply chain must therefore consult each other and co-ordinate their activities in consulting with workers, including all outworkers, below them in the supply chain.

Further, any worker, including an outworker, who carries out work for a business or undertaking, can request a PCBU to facilitate the election of an HSR (Part 5, Division 3, Subdivision 1). Workers and the PCBU are to negotiate to determine one or more 'work groups' at one or more workplaces (Part 5, Division 3, subdivisions 1 and 2, ss 50–59). Work groups may be determined for workers carrying out work for two or more PCBUs (Division 3, sub-division 3). All workers in a work group can elect the HSR. Elected HSRs have broad functions and powers (Part 5, Division 3, sub-divisions 5 and 6) including representation, inspection, consultation and information rights and the right to assistance. All 'workers' have the right to refuse to carry out work if the worker has a reasonable concern that the work would expose the worker to a serious risk to the worker's health or safety, emanating from an immediate or imminent exposure to a hazard (section 84).

Further, elected HSRs have extensive powers to monitor PCBU compliance with sections 19, 27, 46 and 47, in particular, and could issue provisional improvement notices in the event that they were of the reasonable belief that a PCBU is not complying with those provisions. HSRs can also participate with PCBUs in processes to resolve WHS 'issues' and can make a direction to stop work that poses an immediate and serious risk to any worker (section 85). The WHS Acts also contain provisions enabling authorised union officials to enter workplaces to investigate suspected contraventions of the WHS Acts and to consult with workers over WHS issues (Part 7).

The net effect of these provisions is to require all PCBUs and their officers to consult with all other PCBUs and all workers in the supply chain over WHS issues and to ensure the WHS of all workers in the chain. Officers and PCBUs cannot plead ignorance of the existence of workers in the supply chain because they owe duties to them, and they cannot provide evidence of compliance with their section 27 and 19, 46 and 47 duties if they are ignorant of the identity of other PCBUs or any workers. These provisions mirror those in the regulation of pay and conditions discussed earlier and can effectively be used by regulators to uncover the hidden workforces in TCF supply chains.

Application of the SCR model to other supply chains

There is now significant scholarship examining supply chain types and business networks (Gereffi et al., 2005; Marchington et al., 2005; Weil, 2009, 2014). This scholarship provides valuable insights into variances in the exercise of power in different types of supply chains and the different types of inter-organisational relations in business networks. It does not, however, follow that, because there is variance in supply chains, only some are amenable to an effective form of mandatory, top-down regulation, such as the legislative scheme described in this article.

This article is not advocating that the entire TCF legislative scheme be applied to other industries in its current form. Rather, it argues that key elements can be adapted to different industry contexts and applied on a case-by-case basis (James et al., 2007: 187; Rawling and Howe, 2013: 246), for example, the current industry-specific legislative scheme in the road transport industry (Rawling and Kaine, 2012).

To suggest that SCR should be confined to particular product markets or industries ignores the fact that supply chain arrangements are not static or monolithic (Gereffi et al., 2005: 96). Individual supply chains change over time and supply chains vary considerably from firm to firm as well as among different industries (Rawling and Howe, 2013: 241). Further, most supply chains have certain basic elements which make them amenable to regulation. While certain effective business controllers may have a lower capacity to exercise commercial power (Gereffi et al., 2005; Nossar, 2006), most firms at or near the apex of supply chains exhibit, or have the capacity for, *a requisite degree* of commercial influence. This influence need not be demonstrated by explicit coordination of other supply chain actors; rather, firms can exercise market power via their strategic position at the apex of the chain (Gereffi et al., 2005: 98; Rawling and Howe, 2013: 241).

Effective business controllers at the apex of supply chains will frequently argue against the imposition of mandatory SCR on the basis that they only have knowledge of their direct suppliers and no knowledge of, or control over, working conditions further down the chain (Nimbalker et al., 2013: 18; Wright and Brown, 2013: 26). However, in particular cases, unions have disproved these claims by providing evidence of significant knowledge and control (Nossar et al., 2004: 151). For example, after publicity, business controllers are able to relatively quickly ascertain the conditions under which their supply chain workers labour (Wright and Brown, 2013: 27) and the regulatory scheme itself further empowers firms at the apex to gather information about dealings further down the supply chain, and to exercise control over working conditions, as our study of TCF regulation demonstrates.

Thus, it is consistent with the literature to suggest that the supply chains amenable to regulation might include those operating in a variety of private industry sectors other than the TCF sector, those in sectors where the supplier delivers not only goods but services, and those in domains where government agencies rather than private firms are the effective business controllers (Rawling and Howe, 2013: 242). Indeed, as

we have shown, the WHS Acts *already regulate* supply chains throughout the Australian economy. An effective business controller at the apex of any Australian supply chain owes a duty to any worker (i) who carries out work for the business controller, and (ii) who is engaged (including through sub-contracting arrangements), caused to be engaged, influenced or directed by the PCBU.

Our argument for further regulation is restricted to the regulation of other supply chains, rather than all business networks or 'production networks' (Rainnie et al., 2011). From a legal perspective, we distinguish between supply chains, made up of a vertical series of contracts or dealings between parties in the chain, and other types of business network such as the franchise (Weil, 2009: 419), the corporate group or the triangular labour hire arrangement, which are likely to give rise to different regulatory issues and solutions (Johnstone et al., 2012: 47–76).

Finally, there is no obvious impediment (other than a lack of political will) preventing the regulation of transnational supply chains extending into the jurisdiction of a domestic government. In principle, an effective business controller selling goods within a developed world economy could be required to insert contractual provisions into contracts with overseas suppliers and disclose information about the overseas location of production of goods and the conditions under which those goods are produced (Johnstone, 2012: 80; Nossar, 2007, 2008).

Conclusion

Innovative responses to the problems posed by supply chain outsourcing have been a feature of labour regulation across the TCF industry in Australia since the late 1980s. This paper has shown some of the historical ways in which labour laws regulating employer–employee relationships have been circumvented in the past. These problems have been exacerbated by the traditional trifurcated approach to regulating TCF working life through industrial statutes and awards, WHS legislation and workers' compensation legislation.

This article has described how developments in labour law regulation, particularly in awards, industrial statutes, mandatory and voluntary codes, and the newly harmonised WHS statutes, have created an innovative, fully enforceable and integrated regulatory framework for the TCF industry. The provisions discussed in this paper enable hidden workforces to be made visible and enable monitoring and enforcement of legal liability and responsibility for fair working conditions, correct pay and WHS in the industry. Importantly, these statutory schemes enable regulators to work in partnership with effective business controllers by harnessing their commercial power to ensure compliance.

The article argues that WHS provisions and the features of the supply chain regulatory model in industrial statutes, mandatory codes and voluntary codes outlined here can apply to all kinds of supply chain arrangements. The challenge is for government regulators, trade unions and other civil society institutions concerned with the labour conditions of workers engaged at the bottom of contractual

networks to push for the extension of the SCR model into other industries. The developments examined in this article are an example of a mandatory regulation scheme, which addresses problems identified for precarious workers well documented in academic and policy literature. The debate regarding the effectiveness of such mandatory legislative schemes is an essential contribution to the knowledge base on supply chains, human resource management practices and labour standards both in Australia and internationally.

Authors' note

This paper reports on research undertaken for an Australian Research Council funded project, *Australian Supply Chain Regulation: Practical Operation and Regulatory Effectiveness*, DP120103162.

Declaration of conflicting interests

The authors declare that there is no conflict of interest.

Funding

This research received no specific grant from any funding agency in the public, commercial or not-for-profit sectors.

References

Australian Industrial Relations Commission (1995, June) *Order and Decision per D P Williams Clothing Industry* (contract work-outwork) [C0037 CRA V171 M (Print M 35 75)]. Melbourne: Author.

Australian Senate Economics References Committee (1996, December) *Inquiry into Garment Industry Outworking*. Canberra: Author.

Australian Senate Economics References Committee (1998, July) *Inquiry into Garment Industry Outworking Review*. Canberra: Author.

Creighton B and Stewart A (2010) *Labour Law*, 5th edn. Sydney: Federation Press.

Gereffi G, Humphrey J and Sturgeon T (2005) The governance of global value chains. *Review of International Political Economy* 12(1): 78–104.

James P, Johnstone R, Quinlan M, et al. (2007) Regulating supply chains to improve health and safety. *Industrial Law Journal* 36(2): 163–187.

Johnstone R (1999) Paradigm crossed? The statutory occupational health and safety obligations of the business undertaking. *Australian Journal of Labour Law* 12(2): 73–112.

Johnstone R (2006) Regulating occupational health and safety in a changing labour market. In: Arup C, et al. (eds) *Labour Law and Labour Market Regulation*. Sydney: Federation Press, pp. 617–636.

Johnstone R (2012) Informal sectors and new industries: The complexities of regulating occupational health and safety in developing countries. In: Fudge J, McCrystal S and Sankaran K (2012) *Challenging the Legal Boundaries of Work Regulation*. Oxford: Hart, pp. 67–80.

Johnstone R, McCrystal S, Nossar I, et al. (2012) *Beyond Employment: The Legal Regulation of Work Relationships*. Sydney: Federation Press.

Johnstone R, Mayhew C and Quinlan M (2001) Outsourcing risk? The regulation of occupational health and safety where subcontractors are employed. *Comparative Labor Law and Policy Journal* 22: 351–394.

Marchington M, Grimshaw D, Rubery J, et al. (2005) *Fragmenting Work: Blurring Organizational Boundaries and Disordering Hierarchies*. Oxford: Oxford University Press.

Maxwell C (2004) *Occupational Health and Safety Act Review*. Melbourne: State of Victoria.

Mayhew C and Quinlan M (2006) Economic pressure, multi-tiered subcontracting and safety in long haul trucking. *Employee Relations* 28(3): 212–229.

National Review into Model Occupational Health and Safety Laws (2008, October) *First Report*. Australia: Commonwealth of Australia.

Nimbalker G, Cremen C and Wrinkle H (19 August 2013) *The Truth Behind the Barcode: The Australian Fashion Report [Baptist World Aid Australia]*. Sydney: Baptist World Aid Australia.

Nossar I (1999, June) *Proposals for the Protection of Outworkers from Exploitation*. Clothing and Footwear Union of Australia Sydney: Textile Clothing and Footwear Union of Australia.

Nossar I (2006) Cross-jurisdictional regulation of commercial contracts for work beyond the traditional relationship. In: Arup C, Gahan P, Howe J, et al. (eds) *Labour Law and Labour Market Regulation*. Sydney: Federation Press, pp. 202–222.

Nossar I (2007) The scope for appropriate cross-jurisdictional regulation of international contract networks (such as supply chains): Recent developments in Australia and their supra-national implications, business outsourcing and restructuring regulatory research network working paper No. 1. Available at: www.borrrn.org/index.php?option=com_content&view=article&id=3:first-working-paper&catid=1:working-paper-series&Itemid=8.

Nossar I (2008) Submission for the national review into the model occupational health and safety laws in relation to occupational health and safety within the context of contract networks (such as supply chains). Available at: https://submissions.employment.gov.au/empforms/archive/ohsreview/pages/ohsreviewsubmissions_1_50.

Nossar I, Johnstone R and Quinlan M (2004) Regulating supply-chains to address the occupational health and safety problems associated with precarious employment: The case of home-based clothing workers in Australia. *Australian Journal of Labour Law* 17(2): 137–160.

Potter A (2012) *Creating a national system for the protection of outworkers in the textiles, clothing and footwear industry: A Critique of the Fair Work Amendment (Textile, Clothing and Footwear Industry) Bill 2011 and the Fair Work Amendment (Textile, Clothing and Footwear Industry) Act 2012* (Cth). Honours Thesis, University of Technology Sydney, Australia.

Quinlan M and Wright L (2008) Remuneration and Safety in the Australian Heavy Vehicle Industry: A Review Undertaken for the National Transport Commission.

Rainnie A, Herod A and McGrath-Champ S (2011) Review and positions: Global production networks and labour. *Competition and Change* 15(2): 155–169.

Rawling M (2006) A generic model of regulating supply chain outsourcing. In: Arup C, Gahan P, Howe J, et al. (eds) *Labour Law and Labour Market Regulation*. Sydney: Federation Press, pp. 520–541.

Rawling M (2007) The regulation of outwork and the federal takeover of labour law. *Australian Journal of Labour Law* 20(2): 189–208.

Rawling M (2009) The impact of federal legislation upon the scope of state jurisdictions to regulate outwork. *Australian Journal of Labour Law* 22(2): 147–160.
Rawling M and Howe J (2013) The regulation of supply chains: An Australian contribution to cross-national legal learning. In: Stone K and Arthurs H (eds) *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment*. New York: Russell Sage Foundation, pp. 233–252.
Rawling M and Kaine S (2012) Regulating supply chains to provide a safe rate for road transport workers. *Australian Journal of Labour Law* 25(3): 237–257.
Walters D and James P (2011) What motivates employers to establish preventative management arrangements within supply chains? *Safety Science* 49(7): 988–994.
Weil D (2009) Rethinking the regulation of vulnerable work in the USA: A sector-based approach. *Journal of Industrial Relations* 51(3): 411–430.
Wright CF and Brown W (2013) The effectiveness of socially sustainable sourcing mechanisms: Assessing the prospects of a new form of joint regulation. *Industrial Relations Journal* 44(1): 20–37.

Biographical notes

Igor Nossar is an adjunct professor in the School of Law, Faculty of Law, Queensland University of Technology. Until the end of 2008 he was the Chief Advocate of the Textile, Clothing and Footwear Union of Australia, and in that role he designed, and negotiated the implementation of, the supply chain regulation model outlined in this article.

Richard Johnstone is a professor and the Director of Research in the School of Law, Faculty of Law, Queensland University of Technology, Brisbane, Australia. He has published widely on work health and safety regulation, and has a particular interest in precarious work, including in supply chains.

Anna Macklin completed her PhD in Criminology with the Key Centre for Ethics, Law, Justice and Governance at Griffith University. She is currently working as Manager, Education and Re-entry with Queensland Corrective Services and is an adjunct research fellow with the Key Centre. She has a history of research work in ethics and governance, including as the senior research assistant for the project from which this article is drawn.

Michael Rawling is a lecturer in the Faculty of Law, University of Technology Sydney. He completed his PhD on regulating supply chains for employment policy purposes in 2010. His research expertise is in regulating supply chains to protect workers and regulating precarious work.

APPENDIX 10

TCFUA NSW CLOTHING SUPPLY CHAIN STRATEGY 2009

THE AGE OLD PROBLEM

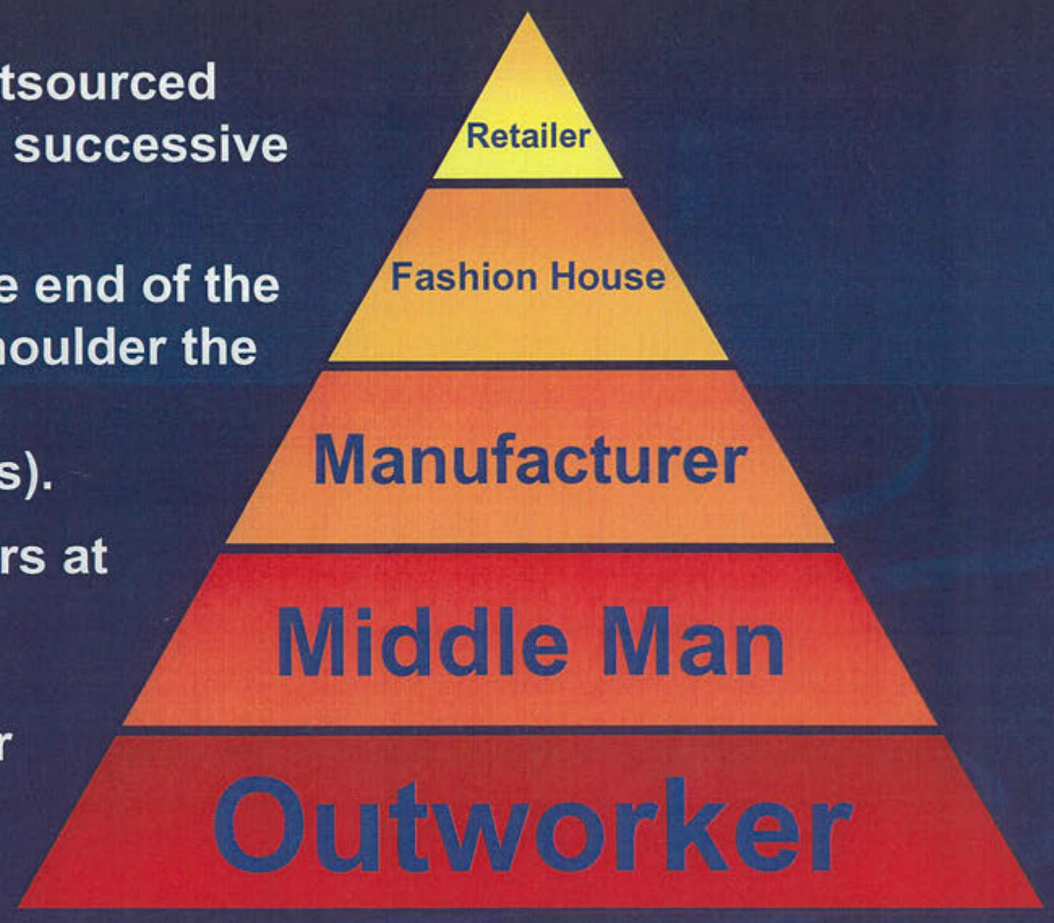
- Commercial pressure on prices applied from the top by retailers.
- Pressure ratchets down the chain and suppresses wages, increases risks to health and safety.
- Effective business controllers reaping all the benefits and bearing none of the legal responsibility.

Clothing Supply Chain Dynamics:

Production is outsourced through multiple successive contracts.

Outworkers at the end of the contract chain shoulder the greatest burdens (exploitation/risks).

Inversely, retailers at the top bear the LEAST legal responsibility for hours worked, wages and conditions.

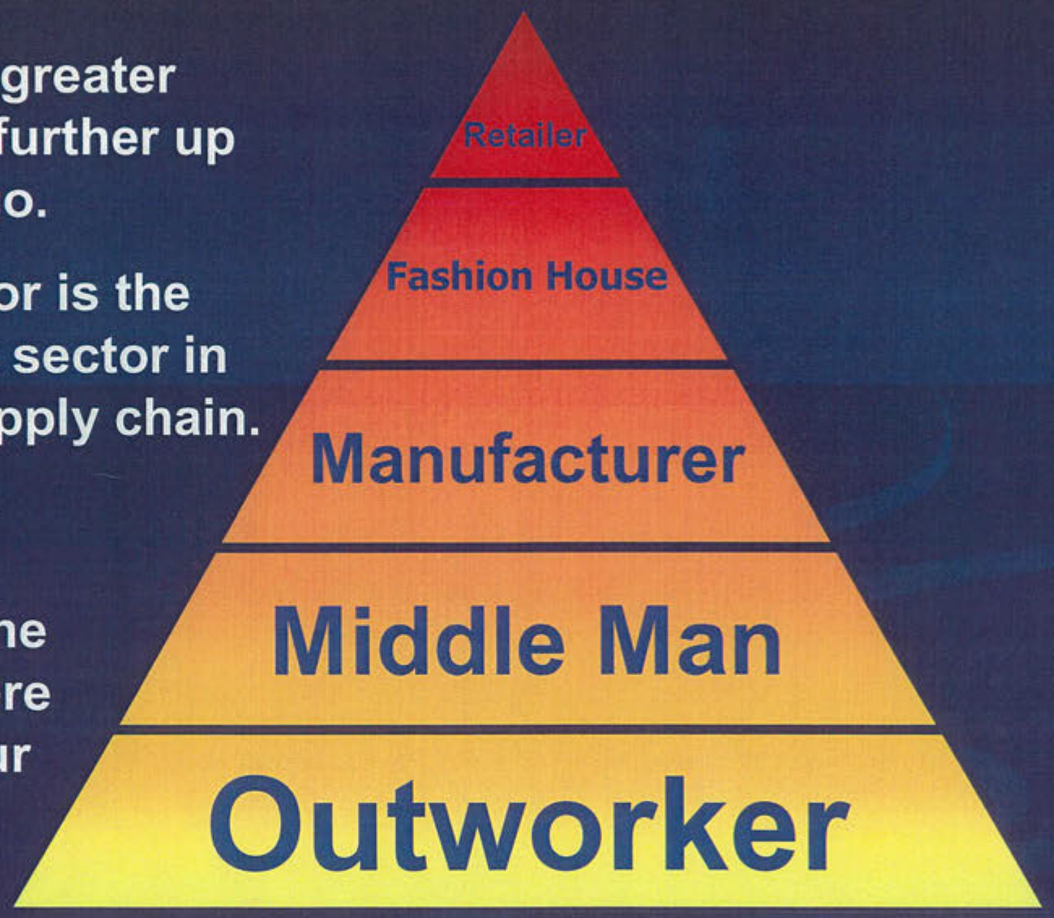


Clothing Supply Chain Dynamics:

Profits grow in greater proportion the further up the chain you go.

The Retail sector is the most profitable sector in the clothing supply chain.

In contrast, the further down a supply chain, the less reward there is for every hour worked.



LET'S LOOK AT A TYPICAL "PROBLEM" CLOTHING SUPPLY CHAIN IN AUSTRALIA.

All OF THESE HOUSE FACTORIES CLAIMED TO BE SUBCONTRACTING THE WORK OUT FURTHER.

RETAILER

FASHION HOUSE X

CONTRACTOR 1	CONTRACTOR 2	CONTRACTOR 3	CONTRACTOR 4
SUB-CONTRACTOR	SUB-CONTRACTOR	SUB-CONTRACTOR	SUB-CONTRACTOR
SUB-CONTRACTOR	SUB-CONTRACTOR	SUB-CONTRACTOR	SUB-CONTRACTOR
SUB-CONTRACTOR	SUB-CONTRACTOR	SUB-CONTRACTOR	SUB-CONTRACTOR
	SUB-CONTRACTOR	SUB-CONTRACTOR	SUB-CONTRACTOR
	SUB-CONTRACTOR	SUB-CONTRACTOR	SUB-CONTRACTOR
	SUB-CONTRACTOR	SUB-CONTRACTOR	SUB-CONTRACTOR
	SUB-CONTRACTOR	SUB-CONTRACTOR	SUB-CONTRACTOR
	SUB-CONTRACTOR	SUB-CONTRACTOR	
		SUB-CONTRACTOR	

SUBCONTRACTOR

RETAILER

FASHION HOUSE X

SO: ALL THE "HOUSE FACTORIES" CLAIMED THEY WERE "FAMILY BUSINESSES WITH NO EMPLOYEES.

AND NONE OF THE SUBCONTRACTORS TURNED UP A SINGLE LIVING HUMAN BEING ON A SEWING MACHINE!

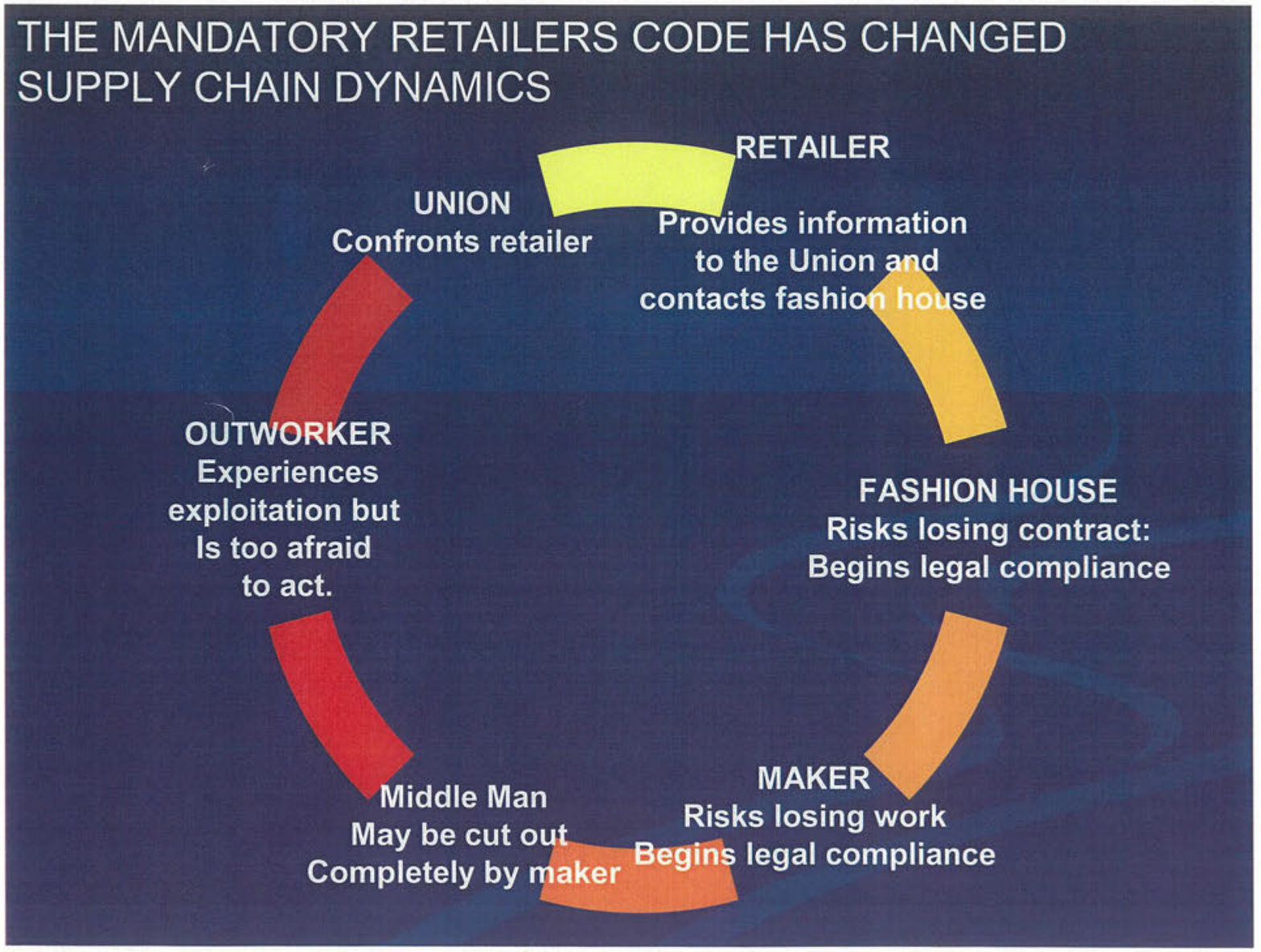
CONTRACTOR	CONTRACTOR	CONTRACTOR	CONTRACTOR
DODGY COMPANY	DODGY COMPANY	DODGY COMPANY	DODGY COMPANY
DODGY COMPANY	DODGY COMPANY	DODGY COMPANY	DODGY COMPANY
DODGY COMPANY	DODGY COMPANY	DODGY COMPANY	DODGY COMPANY
DODGY COMPANY	DODGY COMPANY	DODGY COMPANY	DODGY COMPANY
	DODGY COMPANY	DODGY COMPANY	DODGY COMPANY
	DODGY COMPANY	DODGY COMPANY	
	DODGY COMPANY	DODGY COMPANY	
	DODGY COMPANY		

QUESTION:

WHAT DO YOU DO WHEN THE MANUFACTURERS ARE HIDING WORKERS IN ORDER TO EXPLOIT THEM AND THE FASHION HOUSE JUST DOESN'T WANT TO KNOW ABOUT THE PROBLEM?

ANSWER:

YOU HAVE A WORD TO THE RETAILER OR FASHION HOUSE


THE MANDATORY RETAILERS CODE HAS CHANGED SUPPLY CHAIN DYNAMICS
RETAILER
Provides information to the Union and contacts fashion house
UNION
Confronts retailer
OUTWORKER
Experiences exploitation but Is too afraid to act.
FASHION HOUSE
Risks losing contract:
Begins legal compliance
MAKER
Risks losing work
Begins legal compliance
Middle Man
May be cut out
Completely by maker

STAGES OF SUPPLY CHAIN IMPROVEMENT

1)Trigger:

outworkers receiving less than their entitlements.

Under the Mandatory Retailers Extended Responsibility Scheme, the Retailers at the very top of the chain can face penalties if exploitation is found in the supply chain and they ignore this information.

By making the Retailer at the top of the Supply Chain aware of the exploitation happening at the lowest rung, the Retailer becomes a part of the solution, rather than a part of the problem.

2) INFORMATION:

- The Retailer can be required by the Union to produce information relating to the volume of production being sourced from the fashion house. The Fashion House is then no longer in a position to conceal the amount and whereabouts of the entirety of their production.
- As a result, pressure is applied by the Retailer to the Fashion House to clean up their production.

3) RESPONSE:

Negotiation between the Union & Fashion House– the Union evaluates Fashion House's systems e.g.: checks that a sewing time is being recorded.

4) Information:

The Fashion House provides information to the Union for the previous twelve months on the value and volume of work going to each manufacturer.

CRUCIAL CALCULATIONS:

THE FASHION HOUSE PROVIDED THE UNION WITH DETAILS OF THE AMOUNT OF WORK SENT OUT TO CONTRACTORS: (Value & Volume)

The total value of the supply chain:
$1,824,484.00

The total number of garments issued:
137,555

This gave us an average make price of:
$13.26 per garment

Each garment took approx. 1 hour to complete

To legally cover wages, workers comp and super, it costs a boss $21.00 per hour for every worker. Based on 35cents per minute.

This is without profit and factory overheads.

At $13.26 the outworker gets a cut of 50% of the making price: this turns out at about $6.63 p/h.

RETAILER

FASHION HOUSE X

$632,127.13 35 PEOPLE	$124,279.95 6 PEOPLE	$361,537.82 15 PEOPLE	$218,344.10 10 PEOPLE
CONTRACTOR 1	CONTRACTOR 2	CONTRACTOR 3	CONTRACTOR 4
SUB-CONTRACTOR	SUB-CONTRACTOR	SUB-CONTRACTOR	SUB-CONTRACTOR
SUB-CONTRACTOR	SUB-CONTRACTOR	SUB-CONTRACTOR	SUB-CONTRACTOR
SUB-CONTRACTOR	SUB-CONTRACTOR	SUB-CONTRACTOR	SUB-CONTRACTOR
	SUB-CONTRACTOR	SUB-CONTRACTOR	SUB-CONTRACTOR
	SUB-CONTRACTOR	SUB-CONTRACTOR	SUB-CONTRACTOR
	SUB-CONTRACTOR	SUB-CONTRACTOR	SUB-CONTRACTOR
		SUB-CONTRACTOR	

66 PEOPLE...

SOMEWHERE?

5) Confrontation:

The Union confronts the manufacturers with the question: *where are all the workers necessary to complete this volume of work*?

6) Offer:

Union offers the manufacturers a “once only" reprieve: a period of time in which to account for every missing worker and to integrate those workers into legal production: i.e.: wages books, outworker registration…

7) Sign off:

The manufacturers sign a "Memorandum of Understanding" with staged improvements in record keeping and observance of legal conditions built into a checking and report back system.

RETAILER

FASHION HOUSE X

A RESPECTABLE CLOTHING SUPPLY CHAIN!

CONTRACTOR 1	CONTRACTOR 2	CONTRACTOR 3	CONTRACTOR 4
EMPLOYEE	EMPLOYEE	EMPLOYEE	EMPLOYEE
OUTWORKER	OUTWORKER	OUTWORKER	OUTWORKER
EMPLOYEE	EMPLOYEE	EMPLOYEE	EMPLOYEE
OUTWORKER	OUTWORKER	OUTWORKER	OUTWORKER
	OUTWORKER	EMPLOYEE	EMPLOYEE
		OUTWORKER	OUTWORKER
		EMPLOYEE	
		OUTWORKER	

SUPPLY CHAIN STRATEGY AT A GLANCE

PROSECUTION STRATEGY

IMPROVEMENT STRATEGY

STEP 1: PICK TARGET & SEND LETTER OF INVITATION TO COMPLY WITH LEGAL MINIMA

IF NO RESPONSE OR HOSTILE

IF POSITIVE RESPONSE

LAUNCH PROSECUTION PROCESS:

- Inspect records of Fashion House to determine full extent of contracting

- Inspect OH&S and records of manufacturers

CONVICTION:
COURT: COSTS: MOIETY

SETTLEMENT:
COSTS: PENALTY:
+ IMPROVEMENT

- Obtain most recent list + value and volume report from Fashion House

-Fashion House improves internal system

- Union locates manufacturers

- Union confronts manufacturers with production evidence

- Union offers manufacturers MOU to facilitate legal compliance

IMPORTANT ELEMENTS

- Calculation of dollars/minutes: into approx workers
- Math Process with Fashion House: re the calculation of price going to manufacturers
- Calculation of hours – people – averages
- Memorandum of Understanding

TWO EXAMPLES AFTER S.C.S

- Company 1

Before SCS – 86 Full time employees

After SCS – 353 Full time employees

- Company 2

Before SCS – 50 Full time employees

After SCS – 549 Full time employees

APPENDIX 11

MEMORANDUM OF UNDERSTANDING

Principals Checklist: 12 Month Schedule for Improvement

Deadline Quarter 1 Ends: / / 201

1. Send the Union an updated electronic report on Value and Volume for the previous 12 months, via the union standard Excel spreadsheet,
2. Principal to ensure that they are recording the Sewing Time for their styles (if not, to begin to do so),
3. Principal to seek registration for the contracting out of work,
4. Principal to create a file for their contractors and provide copies of these contracting records to the Union:
    i) Update contractor lists for previous 3 months
    ii) Worker's Comp Certificates for contractors
    iii) Factory registration (or proof that it has been sought) from each contractor.
5. Principal to become a signatory to Ethical Clothing Australia.

Deadline Quarter 2 Ends: / / 201

1. Send the Union an updated electronic report on Value, Volume AND Sewing Times for the previous 3 months,
2. Principal must show outworker and subcontractor records are kept as per the legal requirements,
3. Principal must be able to demonstrate to the Union that a costing methodology which fully complies with award obligations has been put in place for all outsourced clothing manufacturing,
4. From contractors file, provide copies of these contracting records to the Union:
    i) Factory Registration (for contractors)
    ii) Update contractor lists for previous 3 months
    iii) Any completed S.175.B forms from contractors
    iv) PRINCIPAL must obtain from MAKERS their subcontracting lists

Deadline Quarter 3 Ends: / / 201

1. Send the Union an updated electronic report on Value, Volume AND Sewing Times for the previous 3 months,
2. Develop standard supplier contract conditions designed to ensure award compliance for all outsourced clothing manufacturing,
3. From contractors file, provide copies of these contracting records to the Union:
    i) OH&S Risk Assessment (from each contractor)
    ii) Update contractor lists for previous 3 months

Deadline Quarter 4 Ends: / / 201

1. Send the Union an updated electronic report on Value, Volume AND Sewing Times for the previous 3 months,
2. Ensure that all contractors have had a chance to evaluate and agree to the standard supplier contract conditions (referred to above),
3. Implementation of this MOU will be checked by the Union conducting an evaluation of the worksites and records of the Principal and Contractors,
4. At this point, the entire required workforce for the volumes of work provided by the Principal to the Makers, must be accounted for under legal conditions.

Signed for and on behalf of:	Signed for and on behalf of Textile Clothing & Footwear Union of Australia (NSW Branch)
Company:	
Signature:	Signature:
Name:	Name:
Position:	Position:

Nothing in this document is intended to suggest that either the Union or the company does – or will ever – condone illegal behaviour by employers.

Date: _____ Date: _____

NOTES:

The Objectives of this Improvement Process are:

1) **A legally compliant supply chain of production with as few subcontracting levels as possible. This ensures greater efficiency and transparency of conditions.**

2) **All employees, factory workers and homeworkers, engaged in accordance with their entitlements to:**

    a. **appropriate Award wages and other entitlements,**
    b. **workers compensation coverage,**
    c. **superannuation,**
    d. **annual and long service leave,**
    e. **work in a safe and healthy environment.**

3) **Legally compliant records maintained for the sub-contracting of work up and down the supply chain**

4) **Reporting requirements regarding transparency in the supply chain fulfilled factually and accurately**

In working towards these objectives, any company that commits to this MOU will be able to request access to the following Union resources:

1) **Advice about development (or adoption) of a system to assist with Award required record keeping in relation to outworkers and subcontractors,**
2) **Advice about forms and applications (such as factory registration, outsourcing registration, OH&S checklists etc),**
3) **Advice about consultation guidelines for employees and employers as per the NSW OH&S Act and Regs.**

In relation to the recording of a sewing time standard for fashion houses outsourcing their manufacturing, a company can achieve this by one of the following:

i. **Employing a trained industrial sewing time engineer,**
ii. **Engaging TAFE to train one or more of your staff to calculate these times,**
iii. **Utilising the garment sewing data (where practical) available to the industry through Accreditation to Part.2 of the Homeworkers Code of Practice.**

If a situation arises where the company is experiencing difficulty in meeting any of the deadlines within the MOU, an extension can be arranged in consultation with the Union. An extension will only be agreed to if the company can show extenuating circumstances preventing their progress towards any deadline. An extension must be sought BEFORE any deadline is missed due to said circumstances.

Whilst employers continue to honour the commitment undertaken when signing this MOU, the Union will acknowledge them as an employer committed to ethical production in clothing manufacture (a "Committed Employer").

In such cases the Union is prepared to resolve any outstanding situations which may arise, co-operatively, as a first step.

However, the Union is only prepared to co-operate in accordance with this MOU with those employers who remain compliant with this arrangement.

<u>If you do not agree with the inherent objectives of this Memorandum DO NOT SIGN IT.</u>

The notes attached to this document do not constitute part of this document and are solely for the purposes of explanation and clarification.

This document is without prejudice and not for general distribution.

APPENDIX 12

MEMORANDUM OF UNDERSTANDING

Makers Checklist: 12 Month Schedule for Improvement

Deadline Quarter 1 Ends: / / 201

1. Increase numbers of workers recorded on the books by 25% (as outworkers or factory workers) as per actual volumes of work reported by principal
2. Factory premises obtained, factory registration obtained or sought
3. Makers to provide accurate Workers Comp Certificates to Union for their own business
4. Makers to seek registration for the contracting out of work
5. Makers to create a file for their subcontractors and provide copies of these subcontracting records to the Union
    - i) Subcontracting Invoices for previous 3 months
    - ii) New subcontractor lists
    - iii) Worker's Comp Certificates for subcontractors

Deadline Quarter 2 Ends: / / 201

1. Increase numbers of workers on the books by 25% (outworkers or factory workers) as above
2. Maker to provide OH&S Risk Assessment for their factory to the Union.
3. Maker must show outworker and subcontractor records are kept properly
6. From subcontractors file, provide copies of these subcontracting records to the Union
    - i) Factory Registration (for subcontractors)
    - ii) Invoices for previous 3 months
    - iii) New subcontractor lists
    - iv) Any completed S.175.B forms from contractors

Deadline Quarter 3 Ends: / / 201

1. Increase numbers of workers on the books by 25% (outworkers or factory workers) as above
2. Makers to work with the Union on safety in the workplace (eg: nomination and training of a Safety Rep)
3. From subcontractors file, provide copies of these subcontracting records to the Union
    - i. OH&S Risk Assessment (from each subcontractor)
    - ii. Invoices for previous 3 months
    - iii. New subcontractor lists

Deadline Quarter 4 Ends: / / 201

1. Increase numbers of workers on the books by 25% (outworkers or factory workers) as above
2. Send each outworker a letter as per Schedule C of the State (or B of the Federal) Award.
3. The full number of workers and the full number of hours of work provided by the fashion house for which the maker is responsible will be accounted for.
4. This work will be done under legal conditions.
5. Implementation of this MOU will be checked by the Union conducting an evaluation of the worksites and records of the maker, including all employment and subcontracting records.

Signed for and on behalf of:	Signed for and on behalf of Textile Clothing & Footwear Union of Australia (NSW Branch)
Company:	
Signature:	Signature:
Name:	Name:
Position:	Position:
Date:	Date:

Nothing in this document is intended to suggest that either the Union or the company does – or will ever – condone illegal behavior by employers.

NOTES:

The Objectives of this Improvement Process are:

1) **A legally compliant supply chain of production with as few subcontracting levels as possible. This ensures greater efficiency and transparency of conditions.**

2) **All employees, factory workers and homeworkers, engaged in accordance with their entitlements to:**

    a. **appropriate Award wages and other entitlements,**
    b. **workers compensation coverage,**
    c. **superannuation,**
    d. **annual and long service leave,**
    e. **work in a safe and healthy environment.**

3) **Legally compliant records maintained for the sub-contracting of work up and down the supply chain**

4) **Reporting requirements regarding transparency in the supply chain fulfilled factually and accurately**

In working towards these objectives, any company that commits to this MOU will be able to request access to the following Union resources:

1) **Advice about development (or adoption) of a system to assist with Award required record keeping in relation to outworkers and subcontractors,**
2) **Advice about forms and applications (such as factory registration, outsourcing registration, OH&S checklists etc),**
3) **Advice about consultation guidelines for employees and employers as per the NSW OH&S Act and Regs.**

In relation to the recording of a sewing time standard for fashion houses outsourcing their manufacturing, a company can achieve this by one of the following:

i) **Employing a trained industrial sewing time engineer,**
ii) **Engaging TAFE to train one or more of your staff to calculate these times,**
iii) **Utilising the garment sewing data (where practical) available to the industry through Accreditation to Part.2 of the Homeworkers Code of Practice.**

If a situation arises where the company is experiencing difficulty in meeting any of the deadlines within the MOU, an extension can be arranged in consultation with the Union. An extension will only be agreed to if the company can show extenuating circumstances preventing their progress towards any deadline. An extension must be sought BEFORE any deadline is missed due to said circumstances.

Whilst employers continue to honour the commitment undertaken when signing this MOU, the Union will acknowledge them as an employer committed to ethical production in clothing manufacture (a "Committed Employer").

In such cases the Union is prepared to resolve any outstanding situations which may arise, co-operatively, as a first step.

However, the Union is only prepared to co-operate in accordance with this MOU with those employers who remain compliant with this arrangement.

<u>If you do not agree with the inherent objectives of this Memorandum DO NOT SIGN IT.</u>

The notes attached to this document do not constitute part of this document and are solely for the purposes of explanation and clarification.

This document is without prejudice and not for general distribution.

APPENDIX 13

Articles

Cross-jurisdictional and other implications of mandatory clothing retailer obligations

*Michael Rawling**

This article is about the imposition of mandatory obligations upon effective business controllers of supply chains for the protection of workers. Specifically, the article analyses the genesis, design and operation of New South Wales, South Australian and Queensland mandatory clothing retailer codes and their broader implications, including for the cross-jurisdictional regulation of international supply chains. The extent to which those state mandatory codes already operate cross-jurisdictionally to regulate supply chains spanning across jurisdictions throughout Australia is analysed. It is argued that imposing mandatory obligations upon effective business controllers of supply chains is necessary to adequately address the exploitation of domestic and overseas supply chain labour. In an analogous fashion to the operation of the mandatory clothing retailer codes, domestic legislative regulation of international supply chains can be achieved by piggybacking mandatory requirements onto the intrinsically cross-jurisdictional agreement between an effective business controller and its outside supplier.

Introduction

There is now a body of research on the adverse outcomes of supply chain outsourcing for vulnerable workers labouring within supply chains.[1] This includes the impact of domestic supply chain outsourcing on vulnerable workers in the textile clothing and footwear (TCF) industries who are labouring in developed countries[2] and exploitation of workers in developing countries.[3] Increasingly, a preferred response to exploitation of 'supply chain labour' is legislative imposition of mandatory schemes regulating supply

* Lecturer, Faculty of Law, University of Technology, Sydney. This paper reports on research undertaken for an Australian Research Council funded project, *Australian Supply Chain Regulation: Practical Operation and Regulatory Effectiveness*, DP120103162. Thanks to Terry Carney, Shaunnagh Dorsett and the anonymous referees for their comments. Any errors are my own.

1 See, eg, C Wright and J Lund, 'Supply Chain Rationalization: Retailer Dominance and Labour Flexibility in the Australian Food and Grocery Industry' (2003) 17 *Work, Employment and Society* 137; P James et al, 'Regulating Supply Chains to Improve Health and Safety' (2007) 36 *ILJ* 163; P James and D Walters, 'What Motivates Employers to Establish Preventative Arrangements? An Examination of the Case of Supply Chains' (2011) 49 *Safety Science* 988.

2 See, eg, I Nossar, R Johnstone and M Quinlan, 'Regulating Supply-Chains to Address the Occupational Health and Safety Problems Associated with Precarious Employment: The Case of Home-Based Clothing Workers in Australia' (2012) 17 *AJLL* 137.

3 See, eg, G Gereffi et al, 'Introduction: Globalisation, Value Chains and Development' (2001) 32 *Institute of Development Studies Bulletin* 1; S Cooney, 'A Broader Role for the Commonwealth in Eradicating Foreign Sweatshops?' (2004) 28 *MULR* 290; M Anner, J Bair

chains, such as the industry-specific schemes in Australia.[4] One key lesson is the importance of changing the commercial dynamics of the supply chain by imposing mandatory obligations on participants exercising the greatest commercial influence over other participants — a category of entrepreneurial entities variously described as 'effective business controllers'[5] or 'lead firms'.[6] This harnesses their influence to ensure that all other commercial parties in the chain meet their legal obligations towards supply chain labour.

This article breaks from established literature (which examines systems of supply chain regulation generally) by focusing solely on mandatory legal obligations (applying to a category of effective business controllers) at the top of the chain. This regulation exists in Australia under a world-leading form of 'top down' regulation contained within mandatory clothing retailer codes made under state legislation. This article is the first to analyse the codes in detail and identify their significant implications. The article argues that the imposition of mandatory obligations at the apex of domestic TCF supply chains can instil discipline throughout the chain to achieve improvements in the pay, conditions and work health and safety of vulnerable TCF outworkers at the base of those particular supply chains. It therefore concludes that imposing obligations on business controllers of supply chains is a crucial component of any scheme to improve the working conditions of supply chain labour, and on that basis suggests adapting and extending this regulatory model beyond the domestic TCF sector. In particular, it contends that the TCF industry legislative model could be adapted to apply to domestic supply chains in other industries. Moreover, the pre-existing cross-jurisdictional state regulation of domestic supply chains (which currently spans different Australian state jurisdictions) indicates that domestic legislation could be used to cross-jurisdictionally regulate the international supply chains of effective business controllers (operating within that domestic jurisdiction) to improve the conditions of workers engaged by their overseas suppliers.

The article proceeds as follows. First, it explains the research methodology of partly completed empirical research drawn upon in this article. Next, it explains the widespread emergence of supply chains. It then considers the necessity for regulating the effective business controllers of supply chains by examining their influence over whole supply chains. This includes both a generic analysis of the influence of effective business controllers within both domestic and international supply chains in any industry, as well as a more specific analysis of effective business controllers in the domestic TCF industry. Second, the article traces the development of, and analyses, legal obligations applying to clothing retailers under mandatory retailer codes in three Australian jurisdictions (New South Wales, South Australia and

---

and J Blasi, 'Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks' (2013) 35 *Comp Lab L & Pol'y J* 1.

4 Nossar, Johnstone and Quinlan, above n 2; James et al, above n 1; R Johnstone et al, *Beyond Employment: The Legal Regulation of Work Relationships*, Federation Press, Sydney, 2012, pp 68–9; M Rawling and S Kaine, 'Regulating Supply Chains to Provide a Safe Rate for Road Transport Workers' (2012) 25 *AJLL* 237.

5 Nossar, Johnstone and Quinlan, above n 2.

6 Gereffi et al, above n 3.

Queensland).[7] This section considers the extent to which these mandatory retailer obligations are triggered by the (frequently cross-jurisdictional) deal between a retailer and its supplier so that they may achieve consequences for all TCF supply chain workers including consequences outside the geographical boundaries of the regulating state. Compared to the NSW and SA mandatory codes (which, upon a preliminary assessment, may have been implemented as intended), the initially proclaimed form of the Queensland code is shown to have had the broadest potential application but that this was weakened by amendment, poor implementation (and its ultimate repeal). The final section considers the significance and broader implications of these developments for the regulation of domestic and international supply chains within and beyond the TCF sector.

Research project and methodology

This article is part of an Australian Research Council funded project[8] investigating the operation in practice of industry-specific legislative schemes regulating the TCF supply chains in three jurisdictions (New South Wales, Queensland and South Australia) and the road transport supply chains in two (New South Wales and Queensland) along with the impact on supply chains of Work Health and Safety (WHS) legislation in those states. Although the study will ultimately compare and contrast the implementation of legislation in the TCF industry to the implementation of legislation in the road transport industry, this article concentrates on industry-specific legislative initiatives in the TCF industry.

The larger study utlilises a range of research methods including interviewing key informants and workplace observations.[9] The project will involve at least 50 qualitative interviews overall including 20 with governmental regulators, 20 with union regulators and at least 10 with businesses (or business representatives) and workers. At the time of writing, 30 interviews and five workplace inspections had been completed.[10] Twenty-six of the interviews completed were with governmental and union regulators from both the TCF and road transport industries. Four of the interviews completed were with businesses involved in TCF and road

7 Ethical Clothing Trades Extended Responsibility Scheme 2004 (NSW) (NSW Mandatory Retailer Code); Fair Work (Clothing Outworker Code of Practice) Regulations 2007 (SA) Sch 1 – South Australian Clothing Outworker Code of Practice (SA Mandatory Retailer Code); Mandatory Code of Practice for Outworkers in the Clothing Industry (Qld) (Qld Mandatory Retailer Code). Those mandatory retailer obligations remain in place in New South Wales and South Australia, but were abolished in Queensland in November 2012. See further analysis below in this article.

8 *Australian Supply Chain Regulation: Practical Operation and Effectiveness*, DP120103162.

9 In addition to legal and documentary analysis, the project fieldwork includes semi-structured interviews principally to capture the experience of regulators (namely, government officials and relevant union officials) but also regulated businesses. Participant observation of regulators is also being undertaken by accompanying them to workplace inspections. Finally quantitative analysis will be undertaken of measurable statistical data or records about working conditions within the industries.

10 Additionally, around seven follow-up interviews were conducted with particularly informative interviewees (from the initial 30) in order to gain a deeper understanding of their experience.

transport supply chains or employer associations who represent such businesses. Interview protocols were utilised (and refined in light of experience) to provide some common structure, but semi-structured interviews were deliberately chosen so interviewers could be guided by the conversation rather than a rigid set of questions. Issues raised by one interviewee were able to be discussed with later interviewees.

While the empirical research is incomplete, this article draws on five interviews completed in the TCF industry, and reports some preliminary indications about the implementation of the TCF model of regulation, to be fully tested and refined once the field work and data analysis is finished.

The widespread emergence of supply chains

Australian labour law, at least from the mid-twentieth century, predominately assumed that labour law's scope was regulation of the direct relationship between employees and a single entity known as the employer.[11] However, the assumed standard employment arrangement has declined. This has involved the demise of the unifying category of 'employee'[12] and the emergence of a spectrum of worker types (including a range of 'precarious workers').[13] In addition, following widespread outsourcing of work, the unitary employer has been replaced[14] with more complex business network structures (involving a number of interconnected organisations) such as the vertical supply chain. This type of supply chain is an interconnected series of contracts organised to produce and sell goods and/or services at a profit for the effective business controllers of the chain. Supply chains reach from the commercial party who sells goods or services to consumers through a number of interposed commercial parties, right down to the workers who perform the work.

The role of the effective business controller in the supply chain

A study of the role of effective business controllers who wield the most commercial influence in supply chains clearly demonstrates the need to regulate them in order for schemes of supply chain regulation to improve working conditions of workers at the base of the chain.

Powers of effective business controllers generally

Just as the commercial power of the large, unitary employer (common in the twentieth century) enabled all relevant aspects of the business to be shaped or governed — crucially including all aspects of labour relations — so too the contemporary effective business controller of a supply chain retains the same

11 Johnstone et al, above n 4, at p 1.

12 J Howe and R Mitchell, 'The Evolution of the Contract of Employment in Australia: A Discussion' (1999) 12 *AJLL* 113.

13 See M Quinlan, C Mayhew and P Bohle, 'The Global Expansion of Precarious Employment, Work Disorganisation and Occupational Health: Placing the Debate in a Comparative Historical Context' (2001) 31 *International Journal of Health Services* 507.

14 See J Fudge, 'Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation' (2006) 44 *Osgoode Hall LJ* 609.

potential,[15] even if it is sometimes wrongly asserted that their activities do not shape the labour relations of other commercial parties in the supply chain, or that they are too small to do so.

Effective business controllers can coordinate multiple-level, vertical, international and domestic supply chains made up of direct suppliers, contractors to those suppliers, distributors and other businesses who can indirectly and cost-effectively provide them with labour. The goods or services produced by that indirect labour and supplied up through the chain of businesses can then be sold to consumers more profitably than if they were produced by an integrated firm.[16]

Direct access to consumer markets and/or control over intangibles such as brands and product design allow effective business controllers to outsource production to suppliers, severing any direct relationship with supply chain workers, but, at the same time, maintaining the key role in specifying who produces what and how it is produced.[17] Typically, the effective business controller sets, in contracts with its direct suppliers, the size and frequency of orders, delivery schedules, time allowed for production and price and quality of goods or services. These parameters (which are passed down the chain to all further participants) practically determine matters such as supply chain workers' pay and work time.[18] In some circumstances, effective business controllers may also directly monitor or intervene into the work practices of their indirect labour force.[19] The effective business controller is frequently not even physically located within the same geographical jurisdiction as the supply chain workers whose working conditions they influence.[20] As part of the power inherent of a client who can provide (or cease to provide) another commercial party with work, effective business controllers can get suppliers to

15 See H Collins, *Regulating Contracts*, Oxford University Press, Oxford, 1999, p 24; A Rainnie, 'The Reorganisation of Large Firm Subcontracting: Myth and Reality' (1993) 49 *Capital and Class* 53 at 68.

16 M Rawling and J Howe, 'The Regulation of Supply Chains: An Australian Contribution to Cross-National Legal Learning' in *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment*, K V W Stone and H Arthurs (Eds), Russell Sage Foundation, New York, 2013, p 233 at p 235.

17 J Bair, 'Global Capitalism and Commodity Chains: Looking Back, Going Forward' (2005) 9 *Competition and Change* 153 at 165; Gereffi et al, above n 3, at 1.

18 C Wright and W Brown, 'The Effectiveness of Socially Sustainable Sourcing Mechanisms: Assessing the Prospects of a New Form of Joint Regulation' (2013) 44 *Industrial Relations Journal* 20 at 22; D Grimshaw, H Willmott and J Rubery, 'Inter-Organizational Networks: Trust, Power, and the Employment Relationship' in *Fragmenting Work: Blurring Organizational Boundaries and Disordering Hierarchies*, M Marchington et al (Eds), Oxford University Press, Oxford, 2005, p 39 at p 40; I Nossar, 'The Scope for Appropriate Cross-Jurisdictional Regulation of International Contract Networks (Such as Supply Chains): Recent Developments in Australia and Their Supra-National Implications', Business Outsourcing and Restructuring Regulatory Research Network Working Paper No 1, 2007, p 9, at <http://www.borrrn.org/index.php?option=com_content&view=article&id=3:first-working-paper&catid=1:working-paper-series&Itemid=8> (accessed 3 November 2014).

19 J Rubery, J Earnshaw and M Marchington, 'Blurring the Boundaries to the Employment Relationship: From Single to Multi-Employer Relationships' in *Fragmenting Work: Blurring Organizational Boundaries and Disordering Hierarchies*, M Marchington et al (Eds), Oxford University Press, Oxford, 2005, p 63 at p 76.

20 Nossar, above n 18, p 9.

accept their terms as well as manipulate competition among potential suppliers to achieve the right price and quality for goods or services.[21] This influence comes from the strategic position as clients at or near the apex of the supply chain, allowing smaller, astute controllers (as well as those with significant market share) to decide who participates in a particular supply chain and on what terms they participate.[22] Despite the controls maintained by the business controller, it is other parties to the supply chain who bear the risks of the supply process.[23] There is now substantial evidence that dictation of aspects of production and services delivery (notably time and costing) by effective business controllers has significantly contributed to poor work and health and safety outcomes for workers engaged within their supply chains.[24]

Despite their extensive influence, a key commercial tactic of many effective business controllers is to deny they have any control beyond their dealings with direct suppliers.[25] Certainly part of the initial attraction of the supply chain structure is the creation of legal distance between effective business controllers and workers down the chain. But this has been an increasingly risky strategy given the reputational damage that might result from a failure of business controllers to enforce adequate labour conditions throughout their supply chains. There is also increasing expectations of investors to safeguard the business's reputation by satisfactorily addressing labour conditions within their supply chains.[26] The discussion below in this article demonstrates that the mandatory clothing retailer codes have effectively addressed this kind of tactic.

Clothing retailers operate as effective business controllers

In the Australian TCF industry an oligopoly of major retailers are effective business controllers of TCF supply chains.[27] In contracts for the supply of TCF goods these retailers impose on manufacturers or suppliers onerous contractual terms to secure the price and quality of goods and the turnaround times that the retailers require.[28] Principal manufacturers in Australia who enter into supply contracts with retailers either manufacture TCF products in their own factories or enter into arrangements with smaller manufacturers

21 I Nossar, 'Cross-Jurisdictional Regulation of Commercial Contracts for Work beyond the Traditional Relationship' in *Labour Law and Labour Market Regulation: Essays in the Construction, Constitution and Regulation of Labour Markets and Work Relationships*, C Arup et al (Eds), Federation Press, Sydney, 2006, p 202 at p 209; Grimshaw, Willmott and Rubery, above n 18, p 57; James et al, above n 1, at 166.

22 Rawling and Howe, above n 16, p 241.

23 Nossar, above n 18, p 10.

24 M Quinlan, *Supply Chains and Networks Report*, Safe Work Australia, July 2011, p 4.

25 See Wright and Brown, above n 18, at 26; Australian Council of Superannuation Investors, *Labour and Human Rights Risks in Supply Chain Sourcing: Investment Risks in S&P/ASX200 Consumer Discretionary and Consumer Staple Companies Research Paper*, Australian Council of Superannuation Investors, June 2013, p 11.

26 Australian Council of Superannuation Investors, above n 25, p 3; Walter and James, above n 1, at 992.

27 M Islam and A Jain, 'Workplace Human Rights Reporting: A Study of Australian Garment and Retail Companies' (2013) 23 *Australian Accounting Review* 102 at 103.

28 I Nossar, *'Behind the Label': The New South Wales Government Outworker Strategy — The Importance of the Strategy and Prerequisites for Its Success*, Briefing Paper, TCFUA, Sydney, 2000, p 3.

(popularly known as 'makers') for the supply of these products. When this occurs, principal manufacturers pass on the stringent requirements of the retailers to the makers so that they can meet their own obligations to retailers. These smaller Australian makers will engage onsite manufacturing workers but will also often further contract out the clothing orders through varying stages of intervening entrepreneurial parties until the actual production work is finally given out to 'outworkers'. These outworkers typically work at home[29] and make up approximately 40% of the workers in the TCF industry.[30]

In the journey down the supply chain each successive party takes it share of financial return but passes on the contractual demands originally determined by the retailer. By the time the orders reach the smaller operators who directly engage workers, those direct work providers (who frequently have insufficient resources to carry out their labour law obligations) have an incentive to evade any legal obligations owed to their workers so as to survive in an environment where competitors undercut each other by offering the lowest price for manufacturing work.[31] Therefore, the structuring of the supply chain primarily by effective business controllers (as well as principal manufacturers) creates an environment that is conducive to outworker exploitation.[32] Prior to the introduction of mandatory retailer obligations, major retailers were content to preside over supply chains which provided them with quickly produced, high quality clothing and large profit margins, but which also led to the exploitation of outworkers (who were sufficiently distant from the retailers to ensure that retailers could escape legal liability for this exploitation).[33] As a result of cost, quality and time pressures from major retailers and fashion houses which are passed down the entire chain, many clothing outworkers experience pay as low as the equivalent of between $2 and $5 an hour,[34] long hours, a high incidence of work-related injuries and high levels of threats and abuse from work providers.[35] Because outwork is frequently carried out at residential premises in the largely 'invisible' economy, it is difficult for regulators to locate workplaces to enforce industrial laws.

Implications of the effective business controller's role for public regulation

The above analysis of effective business controllers demonstrates that they already regulate supply chains for their own commercial interests. This also

29 Nossar, Johnstone and Quinlan, above n 2, at 145.

30 E Diviney and S Lillywhite, *Ethical Threads: Corporate Social Responsibility in the Australian Garment Industry*, Brotherhood of St Laurence, Melbourne, 2007, p 5.

31 C Mayhew and M Quinlan, 'The Effects of Outsourcing on Occupational Health and Safety: A Comparative Study of Factory-Based Workers and Outworkers in the Australian Clothing Industry' (1999) 29 *International Journal of Health Services* 83 at 88.

32 M Rawling, 'A Generic Model of Regulating Supply Chain Outsourcing' in Labour Law and *Labour Market Regulation; Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships*, C Arup et al (Eds), Federation Press, Sydney, 2006, p 520 at p 525.

33 I Nossar, *Proposals for the Protection of Outworkers from Exploitation*, TCFUA, Sydney, June 1999, p 2.

34 Mayhew and Quinlan, above n 31, at 98; Diviney and Lillywhite, above n 30, p 4.

35 Mayhew and Quinlan, above n 31, at 98; Quinlan, above n 24, p 7.

suggests that they might regulate supply chains to enhance rather than undermine the pay, conditions and safety of supply chain labour. This foreshadows opportunities for public regulation to harness the existing powers of the business controller. Such public regulation could, for example, require effective business controllers to set down work standards for supply chain labour and to monitor and enforce compliance with these requirements throughout their supply chains.[36] Despite these opportunities for public regulation, prior to the introduction of mandatory clothing retailer codes, few (if any) existing legislative provisions in Australia imposed any mandatory obligations regarding working conditions at the base of supply chains upon retailers.

The evolution of mandatory clothing retailer obligations

This section examines the evolution of effective business controller obligations under mandatory clothing retailer codes which came into force in New South Wales in 2005, in South Australia in 2008 and in Queensland in 2011 (until its repeal in Queensland in November 2012). Although these are industry-specific codes applying to clothing retailers, their design could be adapted to apply to effective business controllers in other industries. Moreover, although these codes regulate domestic supply chains, their cross-jurisdictional application spanning different Australian states indicates that the regulation's conceptual basis could inform cross-jurisdictional regulation of supply chains spanning national borders.

The mandatory retailer codes are part of a package of federal and state mandatory rules that regulate supply chains to protect vulnerable TCF workers in Australia. Under state legislation there are also deeming provisions and rights of recovery for outworkers.[37] At the federal level the Fair Work Act 2009 (Cth) contains Pt 6-4A — special provisions about TCF outworkers which also provide deeming provisions, an outworker right of recovery and provisions for the making of a mandatory code (at some future time). In addition, special provisions regulating outwork exist within the federal Textile Clothing, Footwear and Associated Industries Award 2010.[38] These other parts of the package contain important provisions which allow regulators to protect vulnerable TCF outworkers. However, the mandatory retailer codes are a crucial component of the scheme because, as is discussed further below, these codes interlock with the Homeworkers Code of Practice to specifically regulate powerful retailers at the top of the chain.

---

36 Nossar, above n 18, p 9; Walter and James, above n 1, at 989.

37 See S Marshall, 'An Exploration of Control in the Context of Vertical Disintegration' in *Labour Law and Labour Market Regulation*; *Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships*, C Arup et al (Eds), Federation Press, Sydney, 2006, p 542 at pp 553–4; Rawling, above n 32, pp 528–36.

38 For the history of TCF industry awards, see S Marshall, 'Australian Textile Clothing and Footwear Supply Chain Regulation' in *Human Rights at Work: Perspectives on Law and Regulation*, C Fenwick and T Novitz (Eds), Hart, Oxford, 2010, p 555 at pp 566–9.

New South Wales

Mandatory clothing retailer obligations originated in New South Wales. The process by which these mandatory obligations were achieved in New South Wales involved complex interactions between the development of voluntary and mandatory retailer obligations and lengthy negotiations and consultations between government, unions and, at times, disunited, subsets of capital. The genesis of this mandatory retailer regulation was a sustained campaign to address outworker exploitation led by the Textile Clothing and Footwear Union of Australia (TCFUA) along with community organisations including Fair Wear and Asian Women at Work. This was a ground-breaking campaign in New South Wales given that, at that point in time, no other mandatory clothing retailer code existed in anywhere in Australia.

The NSW inquiry into pay equity released in 1998 found that there was 'widespread and endemic failure' to comply with pre-existing award clothing outwork provisions.[39] Justice Glynn stated that:

> it is important that all retailers, fashion houses, governments and government agencies become party to appropriate codes of practice/conduct . . . If all relevant participants do not sign then consideration should be given to making the code mandatory.[40]

In June 1999 Igor Nossar, the then Chief Advocate of the TCFUA (NSW) also identified the importance of regulating retailers in order to effectively address outworker exploitation:

> garments in NSW will often not be made under NSW state award conditions unless the parties at the apex of the contracting pyramid — the major retailers — are subjected to a NSW state legislative regime which compels those commercially powerful parties to utilise that very commercial power in favour of the protection of outworkers (rather than against that purpose of protection) . . . the commercial behaviour of those retailers — especially their behaviour in relation to the giving out of work — must be rendered transparent and visible to all authorised policing agencies.[41]

Due to the link between commercial pressures emanating from the top of the supply chain and adverse work outcomes for supply chain labour, the accountability of retailers was a prerequisite to effective enforcement of outworker protections. To this end, in 1996, the TCFUA had negotiated a 'Deed of Cooperation' with at least one major retailer, which obliged the retailer to inform the TCFUA about the number, type and price of products supplied to the retailer, obliged the retailer to compel all of its suppliers to keep records about further giving out of work to further parties down the chain, and impelled the retailer to inform the TCFUA if the retailer became aware of any instances of outworker exploitation by any party at any level in that retailer's supply chain.[42]

Also, in 1997, the Homeworkers Code of Practice, a self-regulatory

39 Industrial Relations Commission of NSW, *Pay Equity Inquiry Report to the Minister*, Matter No IRC6320 of 1997, 14 December 1998, p 641 (Glynn J).
40 Ibid, p 643.
41 Nossar, above n 33.
42 Ibid, p 3.

industry scheme, was negotiated between the TCFUA and major employer bodies representing TCF manufacturers and retailers.[43] Part 2 of that code provided for the accreditation and regulation of TCF manufacturers. The (original) Pt 1 of the Homeworkers Code of Practice committed TCF retailer signatories to obtain TCF products from manufacturers accredited under Pt 2 of the code. But it failed to set more rigorous retailer obligations which might have addressed outworker exploitation such as an obligation which would require retailers to find out where their work orders were going and under what conditions their work was performed. In any case, voluntary, self-regulatory schemes tend to commercially disadvantage more ethical retailers because they had agreed not to profit from outworker exploitation, while less ethical retailers not covered by the voluntary scheme continue to profit from such exploitation.[44]

In June 1999, legislative outworker protections in New South Wales were proposed by Nossar.[45] In December 1999 the NSW government released an issues paper on the NSW government's outwork strategy.[46] While the NSW Labor government was in power (from 1995 to 2005), the Industrial Relations (Ethical Clothing Trades) Act 2001 (NSW) (the Ethical Clothing Act (NSW)) was enacted.[47] Part 2 of that Act established a tripartite industry council known as the Ethical Clothing Trades Council of New South Wales[48] which had the ability to recommend the making of a mandatory clothing retailer code for New South Wales. Such a council consisting of a chairperson and representatives from the Australian Retailers Association, Australian Business Ltd, the Australian Industry Group (NSW), Unions NSW and the TCFUA (NSW) was formed after the Ethical Clothing Act (NSW) commenced in February 2002. This council had a fixed timetable to consult and report to the relevant Minister, who (upon considering the council's report) could then proclaim mandatory clothing retailer obligations.[49] Before the expiry of the timetable for this tripartite process, the dynamic created by the impending possibility of mandatory retailer obligations allowed the TCFUA to negotiate first a new self-regulatory code for NSW retailers,[50] and then a new Pt 1 to the Homeworkers Code of Practice.[51] Following this the TCFUA finalised individual code agreements with three major clothing retailers binding them to identical terms to the National Retailers/TCFUA Ethical Clothing Code of

43 See Homeworkers Code Committee Inc, *Application for Revocation of A91252-55 and Substitution of Authorisations A91354-57 in respect of Homeworkers Code of Practice*, Australian Competition and Consumer Commission, 21 February 2013, p 1.

44 Nossar, above n 28, pp 2, 4–5, 12; see also Marshall, above n 38, p 572.

45 Nossar, above n 33.

46 NSW Department of Industrial Relations, *Behind the Label — The NSW Government Clothing Outwork Strategy Issues Paper*, NSW Department of Industrial Relations, December 1999.

47 This Act contained stand-alone provisions as well as amendments to the Industrial Relations Act 1996 (NSW). Previous literature has examined the crucial 'bottom up' rights of outworkers contained with this NSW legislative scheme: Nossar, Johnstone and Quinlan, above n 2; Marshall, above n 37; Rawling, above n 32.

48 Industrial Relations (Ethical Clothing Trades) Act 2001 (NSW) s 5 (NSW Ethical Clothing Trades Act).

49 NSW Ethical Clothing Trades Act ss 11, 12.

50 NSW Retailers/TCFUA Ethical Clothing Code of Practice, 18 September 2002.

51 National Retailers/TCFUA Ethical Clothing Code of Practice, 9 October 2002.

Practice.[52] However, at this point, many less ethical retailers did not become signatories to this self-regulatory scheme.

The first version of the Ethical Clothing Council's recommendation drafted by Nossar recommended the making of a mandatory clothing retailer code for New South Wales.[53] This draft was reflected in the NSW Ethical Clothing Trades Council's first recommendation in its 2003 report.[54] The council's recommendation to make a mandatory code was supported by five out of the total six stakeholder organisations sitting on the council including the Australian Retailers Association (representing retailers) and the Australian Industry Group (representing a portion of clothing manufacturer employers).[55] The relevant NSW Ministers then adopted the council's recommendation. By order in Gazette on the 15 December 2004, mandatory retailer obligations were proclaimed in the form of a delegated legislative instrument entitled the Ethical Clothing Trades Extended Responsibility Scheme (the NSW mandatory code). This mandatory retailer code took effect on 1 July 2005[56] and is still currently in operation at the time this article was written.

Coverage of NSW mandatory code

The NSW mandatory retailer code applies to all retailers, wherever domiciled, who sell clothing products within New South Wales (NSW retailers) where those products are manufactured or altered in Australia (except those retailers who are signatories to and are operating in compliance with the National Retailers/TCFUA Ethical Clothing Code of Practice (formerly known as Pt One of the Homeworkers Code of Practice).[57] It also applies to all suppliers, wherever domiciled, including locations outside of New South Wales, who enter into any agreement with a NSW retailer for the supply of such clothing products; and those supplier's contractors (including subcontractors to contractors).[58] Therefore, the only limits on the cross-jurisdictional application of the code are that clothing is manufactured in Australia and sold in New South Wales. Otherwise, it appears that retailers and suppliers can be domiciled in any location. Many direct suppliers will also be manufacturers such that the cross-jurisdictional application of the code would be confined within Australian borders. However, the scope of the code is, in theory, broad enough to apply to a supplier domiciled overseas who arranges for goods manufactured in Australia for a NSW retailer. It is also sufficiently broad enough to regulate a retailer domiciled overseas who sells Australian-made clothes in New South Wales. Therefore the definition of retailer appears to have foreshadowed the era of arms-length internet retailing. This aspect of the code signals the development of a model for obligations upon effective

52 These individual agreements ensured that code terms would still apply to those major retailers even if they ceased membership of the Australian Retailers Association.

53 I Nossar, *Mandatory Code Recommendations — First Draft*, 26 May 2003.

54 NSW Ethical Clothing Trades Council, *Twelve Monthly Report*, NSW Ethical Clothing Trades Council, 2003, p 36.

55 Ibid; Nossar above n 18, p 15.

56 Order under the NSW Ethical Clothing Trades Act s 12, New South Wales Government Gazette No 200, Official Notes, 17 December 2004.

57 NSW Mandatory Retailer Code, definitions of 'retailer' and 'manufacture', cll 5, 8.

58 NSW Mandatory Retailer Code, definitions of 'supplier', 'retailer', 'manufacture' and 'contractor', cl 5.

business controllers which could be adapted to regulate any kind of domestic or international supply chain including those where goods are sold over the internet.

The National Retailers/TCFUA Ethical Clothing Code of Practice imposes disclosure obligations parallel to the mandatory code obligations upon each affected retailer. This ensures that no domestic retailer of (domestically worked on) clothing products can escape from the obligation to proactively provide the governmental and union regulators[59] with the necessary information required to track down all locations where clothing work is performed within Australia, as long as the finished product is sold by clothing retailers which are subject to a state mandatory code or the National Retailers/TCFUA Ethical Clothing Code of Practice.

Obligations under NSW mandatory code

Both retailers and suppliers are subject to two main types of obligations under the NSW mandatory code. First, the commercial parties in the TCF supply chain are required to contract in a particular way due to requirements to include certain contractual terms. Second, there are more traditional statutory obligations which require regulated parties to record and disclose relevant information.

Under the NSW code, when retailers enter into an agreement with a supplier (for the supply of domestically-produced Australian clothing), these retailers are required to obtain a range of outcomes from their suppliers which extend to mandatory contractual terms (in the form of an undertaking). In those circumstances, the retailer must obtain an *undertaking* from the supplier that (a) all addresses where work is performed on the clothing products (whether at a factory or at the residential address of an outworker) will be disclosed to the retailer; and (b) the engagement of outworkers by the supplier (or its contractors) will be under conditions no less favourable than the prescribed industrial award conditions.[60] The retailer must also inform the supplier that a *breach of* the supplier's *undertaking* (by the supplier, or the contractor, or both) will be *taken to be* a breach of the agreement and grounds *for termination of the agreement* (between the retailer and the supplier).[61] Therefore the undertaking becomes an essential term of the agreement between the retailer and the supplier. A NSW retailer must not enter into an agreement with a supplier in those circumstances if the retailer has not obtained the undertaking from that supplier.[62]

This first type of obligation whereby the state intervenes into the contracting practices of commercial parties has ample precedent. Modern welfarist principles have modified freedom of contract[63] such that, under general contract law and consumer law, parties are being required to include

59 The term 'regulators' is used in this article to describe both parties charged with responsibilities for enforcing retailer obligations — governmental inspectorates and unions. See further T Hardy and J Howe, 'Partners in Enforcement? The New Balance between Government and Trade Union Enforcement of Employment Standards in Australia' (2009) 22 *AJLL* 306.

60 NSW Mandatory Retailer Code cl 10(2), Sch 2 Pt B.

61 Ibid.

62 NSW Mandatory Retailer Code cl 10(3).

63 See Collins, above n 15.

or exclude particular contractual terms. For example, under consumer protection laws, the state requires the parties to read particular terms into contracts with consumers.[64] In addition, the contract law doctrine of illegality prohibits parties from including certain terms in a contract.[65] This form of regulation has the inherent capacity to apply cross-jurisdictionally because the regulation attaches to the contract or agreement between parties which has always been able to span jurisdictional boundaries. In any case, under the mandatory codes, the agreement between the retailer and its supplier forms the principal basis for most of the regulatory intervention including traditional and contracting obligations. As is argued more fully below, the extent to which the mandatory code obligations are solely triggered by the existence of a deal between a retailer and its supplier is significant, given that this deal (if not accompanied by other jurisdictional restrictions) could form the basis of domestic state regulation of international supply chains.

Retailers also have information-gathering and record-keeping obligations under the NSW mandatory code. Under the NSW code, if a retailer enters into an agreement with a supplier (for the supply of domestically-produced Australian clothing), that retailer must request from the supplier (and the supplier must thereupon provide to that retailer) all addresses where work is performed, whether outworkers are used, the name and address of each outworker (and of each employer of the outworkers), the name and address of each contractor engaged by the supplier, and the number and type of clothing products made under the agreement (between the retailer and that supplier).[66] Where the retailer enters into such an agreement with a supplier, the retailer must also keep *records of all locations* where work is performed.[67] The only requirement for these obligations to apply is the retailer/supplier agreement (and not the engagement of a particular type of worker).

Furthermore, these obligations mean retailers have a 'need to know' important information about outworkers performing work within their own supply chains. It is no longer possible for clothing retailers to comply with their legal obligations under the mandatory code and deny any knowledge of what happens beyond their direct contract with suppliers. The 'need to know' obligation operates so that the clothing retailer cannot pretend to not know information about who is performing their clothing manufacture work. This 'need to know' obligation is analogous to the well-known commercial concept of 'due diligence.' Like due diligence, the 'need to know' obligation allows the retailer to gain important information about other commercial entities they deal with, allowing them to make decisions about future dealings with those other entities. In many cases, the retailer would have already acquired the required information by way of pre-existing commercial activities. For example, in one contract imposed by a retailer on a manufacturer, the retailer was allowed to inspect (and even substantially control) the manufacturing of

64 See discussion of consumer guarantees regime in A Bruce, *Consumer Protection Law in Australia*, 2nd ed, LexisNexis Butterworths, 2014, Sydney, Ch 10.

65 See discussion in J W Carter, *Contract Law in Australia*, 6th ed, LexisNexis Butterworths, Sydney, 2013, pp 624–34.

66 NSW Mandatory Retailer Code cl 10(1)(b), Sch 2 Pt B cl 15.

67 NSW Mandatory Retailer Code cl 12(1)(f).

clothing.[68] And it appears that clothing retailers are acting upon such contractual rights. Recent factory inspections of some makers undertaken as part of fieldwork by the author and research colleagues revealed that the quality control representative of the retailer and principal manufacturer was present at or had recently visited maker sites when inspections occurred.[69]

In addition, a NSW retailer has important disclosure obligations. A NSW retailer must proactively (and regularly) disclose to the governmental and union regulators (at least every 6 months) records of all suppliers' names and addresses (and whether outworkers are engaged).[70] Hence, regulators have a 'right to know' corresponding to the retailers 'need to know'. The retailer obligations to obtain information and to keep and disclose records arise when a retailer enters into an agreement with a supplier but are not tied to the engagement of an outworker.[71] Therefore, the retailer must keep records of all clothing supply chains and provide details of all locations where work is performed for a contractor or subcontractor, whether the work is performed by a factory worker or an outworker or by any kind of worker who performs clothing manufacturing work.

Further, if a NSW retailer enters into an agreement with a supplier (for the supply of domestically-produced Australian clothing), a retailer must ascertain (from the supplier) whether an outworker is to be engaged (to perform work under the agreement between the retailer and that supplier).[72] Where a NSW retailer becomes aware that an outworker was (or would be) engaged (by a supplier, contractor, transferee, or supplier's continuing entity) on less favourable terms or conditions than those prescribed under a relevant award (or relevant industrial instrument), then the retailer must report the matter to the relevant union or government officer.[73] If a NSW retailer enters into an agreement with a supplier (for the supply of domestically-produced Australian clothing), the retailer must provide (to the supplier) a specified standard form (itemising all relevant information about that agreement) to be completed (and returned to the retailer) by the supplier — and the retailer must then retain that completed standard form (and provide an extract of that standard form to the relevant regulators).[74] Finally, under the currently applicable codes, a retailer must not enter into an agreement with a supplier (for the supply of domestically-produced Australian clothing) or accept clothing products (from a supplier or contractor) unless the supplier (and each contractor used by the supplier) is registered to give out work under the relevant industrial instrument.[75]

Intervention into commercial contracting practices under the NSW mandatory code's provisions also imposes requirements on suppliers who provide clothing goods to retailers. Specifically, a supplier must include with the invoice to the retailer (for the supply of domestically-produced clothing

68 Nossar, above n 28, p 3.
69 See also Diviney and Lillywhite, above n 30, p 5.
70 NSW Mandatory Retailer Code cl 12(3), Sch 1.
71 NSW Mandatory Retailer Code cl 12, definition of 'agreement' cl 5.
72 NSW Mandatory Retailer Code cl 10(1)(a).
73 NSW Mandatory Retailer Code cl 11(1), definition of 'relevant person' cl 5.
74 NSW Mandatory Retailer Code cl 13(1), Sch 2 Pt A, cl 15, cl 12.
75 NSW Mandatory Retailer Code cl 21.

products) a completed copy of the undertaking from the supplier to the retailer. Additionally, with such an invoice, suppliers are required to disclose information to retailers about *all locations where work is performed* on that clothing.[76] This obligation to provide work locations is not dependent on the type of worker performing the work (although it includes the situation where an outworker is engaged). Under the NSW mandatory code, a supplier must also provide the retailer with sufficient information to enable the retailer to keep (and disclose) accurate records. A supplier must further provide the retailer with sufficient information to enable the retailer to take reasonable steps to ascertain compliance with the NSW mandatory code throughout the retailer's supply chain.[77] In particular, a supplier must, 'when showing samples of clothing or offering for sale ready-made items of clothing to a retailer, indicate to the retailer whether any or all of the clothing items will be, or have been manufactured in Australia'.[78] A supplier must keep records about *all locations of where work is to be performed*, details of the originating agreement between the retailer and the supplier, and details about each of the supplier's contractors.[79]

The NSW mandatory code also imposes obligations upon each supplier in regard to that supplier's dealings with its own contractors. In particular, at the time of engaging a contractor, the supplier must provide that contractor with full details of the originating agreement between the retailer and the supplier (including the undertaking from the supplier to the retailer and all locations where work is to be performed).[80] Finally, a contractor to a supplier (which includes a subcontractor to a supplier's contractor)[81] has obligations under the NSW mandatory code. Such a contractor must provide the contractor's own subcontractor with details about the contract between the retailer and supplier, including the undertaking from the supplier to the retailer.[82] A supplier's contractor must also keep records of the originating agreement (between the supplier and the retailer), including the undertaking from the supplier to the retailer.[83] These obligations ensure that parties below the supplier in the TCF supply chain have explicitly been made aware that the retailer has required its principal supplier (and the supplier has undertaken to the retailer) that the principal supplier and all of its contractors in the supply chain will engage outworkers under conditions no less favourable than those under the relevant award or industrial instrument. Under the NSW mandatory code, a retailer, supplier, contractor or subcontractor covered by the code who fails without reasonable excuse to adopt any code standard or practice is guilty of an offence.[84]

The mandatory code capitalises on retailers' commercial influence in the clothing supply chain to ensure the transparency of the contracting process in

76 NSW Mandatory Retailer Code cl 15 (3), Sch 2 Pt B.
77 NSW Mandatory Retailer Code cl 14.
78 NSW Mandatory Retailer Code cl 15(1).
79 NSW Mandatory Retailer Code cl 16(1)(b), Sch 2.
80 NSW Mandatory Retailer Code cl 16(1)(a), Sch 2.
81 NSW Mandatory Retailer Code, definition of 'contractor' cl 4.
82 NSW Mandatory Retailer Code cl 16(2)(a).
83 NSW Mandatory Retailer Code cl 16(2)(b).
84 NSW Mandatory Retailer Code cll 7(2), 10(3); NSW Ethical Clothing Trades Act s 13.

the supply chain and to efficiently capture crucial information about where production work is taking place and who is undertaking that work. Some preliminary evidence suggests that the system of 'top down' obligations imposed on NSW retailers is taking effect. In at least one instance unearthed in the course of fieldwork interviews, a NSW retailer, with the assistance of a regulator, reportedly used knowledge gained by the imposition of retailer obligations to compel other commercial entities to comply with industrial obligations owed to workers within their supply chain.[85] In another instance raised during fieldwork, a major retailer, working with a regulator, found that a particular supplier was not in compliance with industrial obligations owed to workers within their chain. The retailer reportedly cancelled clothing supply orders from that supplier for a number of weeks, until the retailer was contacted by the regulator to say that the supplier was working with the regulator to address those non-compliance issues. The retailer apparently wanted to send a message to the rest of their suppliers that, if a supplier was not compliant with industrial obligations owed to relevant workers, the retailer was prepared to suspend their clothing orders.[86] These practical examples appear to substantiate previous comments made by James et al that regulating a few large commercial parties with the greatest commercial influence in the chain can achieve a 'multiplier' effect of compliance throughout many smaller commercial operations in the chain.[87] These examples demonstrate that, as a result of mandatory retailer obligations, certain retailers have been encouraged to act ethically and police supply chains.

Moreover, it appears that regulators have initiated the cross-jurisdictional regulation of supply chains spanning the borders of various Australian states. In a further instance revealed during the course of interviews, regulators have reportedly followed a cross-jurisdictional supply chain involving a retailer with retail stores in a number of states, a large factory in one state and smaller makers located in a number of other states.[88] Indeed NSW regulators have used information disclosed by businesses at or near the top of the supply chain to track down many sites of clothing production performed for retailers throughout Australia, making the hidden workforce visible.[89] In one reasonably large clothing supply chain, the original number of workers (identified by traditional means by a NSW regulator visiting workplaces) grew to four times the original amount of workers (as a result of top down tracking mechanisms by that NSW regulator). In another large supply chain the number of workers known to regulators increased by seven times the original number of identified workers. And finally in a third, smaller, supply chain the number of identified workers grew by approximately three times the number originally identified.[90] This type of data presented by Nossar in 2011[91] was also

85 Regulator Interview A.
86 Regulator Interview B.
87 James et al, above n 1, at 176.
88 Regulator Interview C.
89 Nossar, above n 18, p 16.
90 I Nossar, 'Supply Chain Regulation in the US and Australia: A Comparative Perspective of the Effectiveness of Regulating OHS', presentation delivered at International Symposium on Regulating OHS for Precarious Workers, Deakin University, Melbourne, 17 June 2011.
91 Ibid.

discussed by an interviewee who stated, 'that's the sort of information the [mandatory] code delivers'.[92] This indicates the importance of harnessing retailer power in order to successfully implement regulation and produce increased workforce visibility. Moreover, in each of these three cases of dramatically increased visibility, regulators were able to secure compliance for most or all of these workforces with pay and conditions standards, work health and safety standards as well as workers compensation legal requirements.[93]

However, these preliminary findings need to be fully tested and confirmed after collecting and analysing all of the project data. Furthermore, it appears that some retailers are attempting to get around the domestic system by sourcing a tiny amount of ethically-produced clothes from Australian producers so that they can say they are operating ethically, but then sourcing the rest of their clothing from overseas.[94] This reinforces the need for domestic regulation of international supply chains which is discussed further below.

Regulators play a critical role in implementing the NSW mandatory code. Although there have been few if any prosecutions of the NSW mandatory code, it appears that the threat of prosecution is frequently deployed by regulators,[95] and retailers act to avoid prosecution and negative media exposure.

The mandatory code has been used by regulators specifically in relation to retailers. But the NSW mandatory code is also used in conjunction with the whole TCF industry legislative scheme including the federal modern award to successfully regulate the entire TCF supply chain.

South Australia

In South Australia, outworker provisions were inserted into the (renamed) Fair Work Act 1994 (SA) by the Industrial Relations (Fair Work) Act 2005 (SA).[96] One of those inserted provisions allows the SA government to make a mandatory clothing retailer code 'by regulation'.[97] The making of a code by executive regulation drastically simplified the process compared to the parallel method required in New South Wales described above (involving the formation of a tripartite industry council). The relevant SA governmental agency then conducted consultations with key stakeholders[98] including those with the TCFUA (NSW/SA/Tas branch). In 2006, during the term of the Rann Labor government, the SA government released for public consultation a draft

92 Regulator Interview B.
93 Nossar, above n 90.
94 Business interview A.
95 Regulator interview A.
96 The amending legislation renamed the Industrial and Employee Relations Act 1994 (SA) as the Fair Work Act 1994 (SA) (SA Fair Work Act). Previous literature has examined the resulting, 'bottom up' rights of SA outworkers: see Marshall, above n 37; Rawling, above n 32. For a proposal for legislative protections for outworkers in South Australia, see I Nossar, *Proposals for Protection of Outworkers in South Australia*, TCFUA, Sydney, 2002.
97 SA Fair Work Act s 99C.
98 Safe Work Australia, 'Clothing Outworker Code', explanation available at SafeWork SA, *Clothing Outworker*, at <http://www.safework.sa.gov.au/show_page.jsp?id=5052> (accessed 3 November 2014).

mandatory clothing retailer code.[99] In 2007, regulations called the Fair Work (Clothing Outworker Code of Practice) Regulations 2007 (SA) were made. Those regulations, which contain the South Australian Clothing Outworker Code of Practice (SA mandatory code) in Sch 1, commenced on 1 March 2008[100] and are still currently in operation at the time this article was written.

The SA mandatory retailer code has a parallel scope of application to the NSW mandatory retailer code. It applies to all retailers (wherever domiciled) who sell clothing products within South Australia (SA retailers) as long as those clothing products are manufactured (or altered) in Australia (except for those retailers who are signatories to — and are operating in compliance with the National Retailers/TCFUA Ethical Clothing Code of Practice).[101] It also applies to each supplier, wherever domiciled, who enters into any agreement with a SA retailer for the supply of such clothing products (including 'a supplier who carries on business outside' South Australia); and also applies to those supplier's contractors (including subcontractors to contractors).[102] Those retailers, suppliers, contractors and subcontractors are then subject to almost identical (if not identical) obligations under the SA mandatory code to those which exist under the original NSW mandatory retailer code.[103]

Queensland

During the term of the previous Queensland Labor government, additional outworker protections were inserted into the Industrial Relations Act 1999 (Qld) by the Industrial Relations and Other Acts Amendment Act 2005 (Qld).[104] These amendments included the insertion of a provision which allowed the Queensland government to make a mandatory clothing retailer code by giving notice of such a code which constitutes subordinate legislation.[105] Hence, this Queensland process of making a mandatory code closely parallels the simplified SA method of executive regulation. A mandatory retailer code called the 'Mandatory Code of Practice for Outworkers in the Clothing Industry' (Qld mandatory code) was made and commenced on 1 January 2011.[106] At the time the code was made a Labor government still retained office in Queensland. In March 2012, the Newman coalition government was elected to the Queensland Parliament. In November 2012, after a concerted campaign by the Council of Textile and Fashion

99 Draft Outworker (Clothing Industry) Protection Code (SA).

100 Fair Work (Clothing Outworker Code of Practice) Regulations 2007 (SA) s 2.

101 SA Mandatory Retailer Code, definitions of 'retailer' and 'manufacture' cll 5, 8.

102 SA Mandatory Retailer Code definitions of 'supplier', 'retailer', 'manufacture' and 'contractor', cl 5.

103 The SA Mandatory Retailer Code has an additional cl 28 (which concerns the application of SA award protections) and an additional cl 8(2). The maximum penalty for a breach of the SA Mandatory Retailer Code differs from the maximum penalty for a breach of the NSW Mandatory Retailer code: see SA Mandatory Retailer Code cl 7(2).

104 For a proposal for legislative outwork provisions for Queensland see I Nossar, *Proposals for the Protection of Outworkers in Queensland*, TCFUA, Sydney, 2002.

105 Industrial Relations Act 1999 (Qld) s 400I.

106 Qld Mandatory Retailer Code cl 2.

Industries of Australia mainly representing small clothing manufacturers, the Queensland mandatory code was repealed.[107]

Although there are certain generic features common to all three mandatory retailer codes, obligations under the Queensland code were not identical to the obligations under the other two codes. Despite its repeal, the initially proclaimed form of the Queensland mandatory code is of continued interest, given that it contained a number of regulatory innovations beyond the previous extent of retailer obligations under mandatory codes in New South Wales and South Australia. Specifically, the Queensland code contained a broader set of obligations which intervened into the contracting practices of the parties compared to the NSW and SA codes.

The Queensland mandatory code had a similar scope of application to the NSW and SA mandatory codes. It applied to all retailers who sold clothing products in Queensland, suppliers, wherever domiciled, who supplied to those retailers, supplier's contractors and subcontractors to those contractors.[108] Under the initially proclaimed form of the former Queensland code, when a retailer entered into an agreement with a supplier (for the supply of domestically-produced Australian clothing) the retailer previously had to obtain an *undertaking* from the supplier that (a) *all addresses where work is performed* on the clothing products (*whether at a factory or residential address*) will be *disclosed to the retailer*; and (b) the engagement of outworkers by the supplier (or its contractors) would be under conditions no less favourable than the prescribed industrial award conditions.[109] Under that former Queensland code, like the other state mandatory codes, the retailer also had to inform the supplier that a *breach of* the supplier's *undertaking* (by the supplier, or the contractor, or both) would be *taken to be* a breach of the agreement and *grounds for termination of the agreement* (between the retailer and the supplier).[110]

In an innovation beyond the operation of the NSW and SA codes, under that Queensland code suppliers previously had to obtain an undertaking and work locations from their contractors.[111] A supplier also had to inform the contractor that a breach of the undertaking allowed the supplier to terminate the agreement with the contractor.[112] Therefore, under the former Queensland code, the intervention into contracting practices applied to contracts between suppliers and their contractors (as well as the contract between retailers and their suppliers). In addition, contractors to suppliers had similar obligations to suppliers. That is, previously in Queensland, a contractor would have had to provide an undertaking and work locations to the supplier.[113] In this way, under the former Queensland code, there was an unbroken chain of

107 Repeal Notice [Subordinate Legislation 2012 No 193 made under the Industrial Relations Act 1999 (Qld)] as of 9 November 2012.

108 Qld Mandatory Retailer Code, definitions of 'retailer', 'supplier', 'manufacture' and 'contractor' cl 4.

109 Qld Mandatory Retailer Code cl 10(1).

110 Qld Mandatory Retailer Code cl 10(1)(b), (c), Form 3A; NSW Mandatory Retailer Code cl 10(2), Sch 2 Pt B; SA Mandatory Retailer Code cl 10(2), Sch 2 Pt B.

111 Qld Mandatory Retailer Code cl 15(c), Form 4A.

112 Qld Mandatory Retailer Code cl 15(d), Form 4A.

113 Qld Mandatory Retailer Code cl 15(c), Form 4A.

intervention into contracting practices throughout the supply chain.

The former Queensland code contained similar retailer obligations to the other state codes to keep records of work locations and proactively and regularly disclose supplier and work location records to government and union regulators.[114] The Queensland code also contained similar obligations to have ascertained whether an outworker was to be engaged;[115] to have reported when an outworker was engaged under less favourable than award conditions; to have provided to the supplier and then collect from the supplier and report to regulators a form itemising agreement information;[116] and to not have entered into an agreement with a supplier unless the supplier and its contractors had registered to give out work.[117]

Under the former Queensland mandatory code, suppliers faced similar obligations to the NSW and SA code obligations to provide the retailer with sufficient information for that retailer to maintain records and ascertain compliance.[118] Furthermore, under that mandatory code, a supplier's invoice to the retailer (for the supply of domestically-produced clothing products to that retailer) had to be accompanied by the supplier's provision of full details of any contracts between that supplier and the supplier's contractors.[119]

According to fieldwork interviews, a regulator visited workplaces to give out copies of the Queensland mandatory code to TCF businesses in an effort to educate regulated parties about their obligations under the code.[120] However, after these workplace visits, many regulated parties were reportedly confused about who had what obligations and, as a result, in certain instances, outworkers were reportedly incorrectly led to believe that they had to comply with (non-existent) code obligations to receive work. Unlike regulator activity in at least one other state, it appears from the fieldwork data gathered so far, that there may have been less effort by regulators to work with TCF businesses so that those businesses could work towards full compliance over a period of time.[121] This unsuccessful attempt to explain the Queensland mandatory code may have fuelled business opposition to the code, which became a crucial factor which led to the code's abolition. Nevertheless, some features of the design of the initially proclaimed form of the Queensland mandatory code remain the best template for adaptation to other contexts.

Implications of regulating the effective business controller

Preliminary findings about the successful implementation of currently applicable mandatory clothing retailer codes indicate that governments can regulate the contracting practices of effective business controllers.

114 Queensland Mandatory Retailer Code cll 16(2)(a), 14, Form 3, Form 1.
115 Qld Mandatory Retailer Code cl 10(1)(a).
116 Qld Mandatory Retailer Code cl 11(1), Form 2, cl 12.
117 Qld Mandatory Retailer Code cl 12.
118 Qld Mandatory Retailer Code cl 16(1), cl 16(2), Form 3, Form 3A.
119 Qld Mandatory Retailer Code cl 16(2)(b).
120 Regulator interview C.
121 Regulator Interview D. See also 'Shock at Steps to Repeal Queensland Code Protecting Outworkers', Fairwear Latest News, 30 November 2012, at <http://fairwear.org.au/resources/latest-news/> (accessed 3 November 2014).

Governments can dictate to commercial parties with the greatest influence in the chain how to contract in order to successfully regulate supply chain outsourcing for employment policy purposes. It is appropriate for governments to so dictate contracting practices to business controllers where those business controllers set the parameters of work performed within their chain. It is especially important for governments to intervene into contracting practices of effective business controllers where commercial pressures coming from those business controllers lead to low pay, poor working conditions and poor work health and safety outcomes. By regulating entire supply chains, including the activities of commercial parties with the most commercial influence in the chain, the root causes of poor outcomes for supply chain labour can be addressed. Moreover, by harnessing the power of business controllers, mandatory regulation can operate to empower those business controllers to police their supply chains for ethical as well as commercial reasons; if mandatory regulation can encourage business controllers to become the most ethical or responsible parties in the supply chain, the role of addressing supply chain labour issues might be partially assumed by the business controllers themselves. Therefore the imperatives of regulators and business controllers can be aligned to compel the rest of the parties in the supply chain to comply with their legal obligations towards supply chain labour.

Domestic implications

The lessons of prior experiences in implementing mandatory retailer codes need to be heeded, especially the crucial importance of having a regulator with sufficient incentive and resources to work with business controllers over time to achieve business compliance. Although this point is important it would be broadly applicable to implementing a variety of legislation in the commercial sphere and beyond. Provided that sufficient attention is given to implementing the regulation, and, in light of preliminary indications that business controllers may be successfully regulated under the currently applicable mandatory codes, it is appropriate to consider extending mandatory regulation of TCF retailers to other jurisdictions around Australia. One possible avenue for such an extension of the scope of mandatory retailer obligations is under federal legislation. Indeed, under the Fair Work Act 2009 (Cth), a TCF industry mandatory retailer[122] code can be made by executive regulation.[123] Such a federal code may make provisions for retailer obligations by applying, adopting or incorporating any matter contained in one of the mandatory codes made under state law.[124] Currently a federal mandatory code has not been made. Such a federal code is unlikely to be made during the term of the current Abbott coalition government. In this context, the currently applicable state mandatory codes demonstrate that there is a continuing role for state jurisdictions to regulate TCF business controllers even in the era of transfer of industrial relations powers to the Commonwealth. If Labor regains government in an Australian state, a campaign for extending the scope of

122 See especially Fair Work Act 2009 (Cth) (FW Act) s 789DC(5).
123 FW Act ss 789DA–789DD.
124 FW Act ss 789DE(3), (4).

mandatory clothing retailer obligations under that state jurisdiction might simply use the implementation of the NSW and SA mandatory codes (and the initially proclaimed form of the Queensland code prior to amendment) as a regulatory model for TCF retailers.

The regulation of TCF retailers under mandatory codes also has cross-industry application. That is, the regulation of TCF retailers might be used as an illustrative, currently-existing model of regulation which could be adapted and applied to other industries such as the road transport, construction,[125] cleaning[126] and aged care industries,[127] within which effective business controllers also affect the work parameters of supply chain labour. Indeed, in somewhat uncertain political circumstances[128] the road safety remuneration tribunal considered the application of mandatory obligations to another subset of business controllers — consignors and consignees of road freight. The existing state mandatory clothing retailer codes were raised in the tribunal proceedings as existing examples of laws already regulating a category of effective business controllers.[129]

Implications for regulating international supply chains

The current geographical scope of the mandatory clothing retailer codes also has potentially far-reaching implications for the regulation of transnational or international supply chains which are used by effective business controllers to source goods or services from overseas jurisdictions and sell those goods or services in a home, developed-world jurisdiction. The NSW, SA (and formerly Queensland) mandatory retailer codes applied (or formerly applied) legislative obligations to any 'supplier who carries on business outside' the respective state as long as the supplier was supplying TCF products to a retailer regulated (by the respective mandatory code).[130] The mandatory codes currently require (or required) retailers to gather and keep records about contracts for the supply of clothing products manufactured *anywhere in Australia*.[131] Therefore, these codes already have or had consequences beyond the geographical borders of the relevant state jurisdiction. There seems no obvious legal impediment

125 See H Collins, 'Ascriptions of Legal Responsibility to Groups in Complex Patterns of Economic Integration' (1990) 53 *MLR* 731 at 732.

126 See United Voice, 'Clean Start: Fair Deal for Cleaners — Subcontracting and Illegal Practices Fact Sheet', United Voice, 17 October 2009, at <http://www.unitedvoice.org.au/tender/fact-sheets/subcontracting-and-illegal-practices> (accessed 3 November 2014).

127 See S Kaine, 'Collective Regulation of Wages and Conditions in Aged Care — Beyond Labour Law' (2012) 54 *JIR* 100.

128 Eric Abetz, the federal Minister for Employment, announced a review of the operation of the Road Safety Remuneration Tribunal: E Abetz, 'Review of the Road Safety Remuneration System', Media Release, 30 November 2013. At the time of writing a review of the road safety remuneration tribunal was being conducted, see Commonwealth Department of Education, 'Review of Road Safety Remuneration System', at <https://employment.gov.au/review-road-safety-remuneration-system> (accessed 3 November 2014).

129 Transcript of Proceedings, *Re Transport Workers' Union of Australia*, Road Safety Remuneration Tribunal (RTO2013/1), 29 October 2013.

130 NSW Mandatory Retailer Code cl 19, definition of 'supplier', 'retailer' and 'manufacture' cl 5.

131 NSW Mandatory Retailer Code, definition of 'clothing products' cl 5.

preventing domestic jurisdictions from exercising these same regulatory powers to span national borders and achieve outcomes abroad.[132]

The form of international supply chain regulation being proposed here would *not* rely on an extra-territorial application of state powers.[133] Rather, it would involve the exercise of intra-territorial legislative jurisdiction. From the beginnings of commercial activities, commercial parties have conducted business deals which stretch across national boundaries. This is how international supply chains are formed. Commercial parties within one jurisdiction contract with commercial parties in another, overseas jurisdiction. It is these commercial contracting practices which enable intra-territorial regulation of international supply chains.[134] Specifically, the exercise of intra-territorial powers to extend regulation beyond national borders rests upon the business dealings between a regulated retailer (with sufficient geographical nexus to the relevant state in order to invoke the exercise of intra-territorial legislative jurisdiction) and a supplier having commercial dealings with such a regulated retailer. That is, the intra-territorial basis for this form of regulating international supply chains arises from the fact that the regulated retailer who contracts with an outside supplier must conduct retail business within the geographical borders of the relevant home-state jurisdiction. Therefore intra-territorial legislative jurisdiction could be used to regulate the actual contracts or arrangements between such a regulated retailer and its suppliers located around the globe. In particular, like the mandatory codes, this legislative jurisdiction could be used to dictate additional terms of (prime) supply contracts between a regulated retailer and its overseas suppliers and harness the influence of the regulated retailer conducting within-jurisdiction commercial activities to achieve outcomes throughout an international supply chain even where *most* of that relevant commercial behaviour and *all* of the *work actually performed* (ultimately for the retailer) physically occurs outside the geographical borders of the regulating state.[135]

For example, in the TCF sector, an Australian clothing retailer might have obligations to obtain information from suppliers about all overseas locations of production and the conditions under which clothing products are produced at those locations. The retailer could then be obliged to report this information to regulators and use commercial sanctions against a supplier where working conditions are unsatisfactory. Governments at all levels possess this intra-jurisdictional power to regulate international supply contracts of business entities which in any way operate within or through the respective geographical jurisdictions of those governments.[136]

It has been suggested that domestic regulation of international supply

132 Nossar, above n 18; R Johnstone, 'Informal Sectors and New Industries: The Complexities of Regulating Occupational Health and Safety in Developing Countries' in *Challenging the Legal Boundaries of Work Regulation*, J Fudge, S McCrystal and K Sankaran (Eds), Hart, Oxford, 2012, p 67 at p 80.

133 For a proposal to use extra-territorial powers to regulate supply chains to achieve outcomes abroad see Cooney, above n 3.

134 M Rawling, 'Supply Chain Regulation: Work and Regulation beyond the Employment Relationship', PhD Thesis, University of Sydney, 2010, p 322.

135 Nossar, above n 18.

136 Ibid; Johnstone, above n 132.

chains should focus on the eradication of 'egregious labour abuses'[137] such as forced labour and child labour. This would have considerable support amongst non-government organisations. Yet it is unclear whether an 'egregious labour abuse' scheme would secure the necessary support from business. In this regard the recent experience the Ethical Clothing Australia organisation changing the name of its clothing label from 'No Sweatshop' to 'Ethical Clothing Australia' is instructive. The name change occurred because business didn't want to be associated with the negative term 'sweatshops'. A system simply requiring a retailer to report information on where the work is done and under what conditions may be preferable to some businesses, as it would allow reporting of any satisfactory working conditions as well as any unsatisfactory conditions or egregious labour abuses.

However, if the past is anything to go by, the conditions for adapting and extending supply chain regulation to protect further categories of workers would require a concerted union and community campaign akin to the previously successful campaigns led by the TCFUA, which preceded legislative regulation of TCF supply chains under Labor governments. Given the current political climate that is hostile to unions, a weakened union movement and a less active public campaign, it remains uncertain as to when the necessary conditions would arise.

Conclusion

This article has evaluated the mandatory clothing retailer codes made under state legislation in Australia. The article, by reference to examples, argued that retailer obligations have contributed to the improvement of pay, working conditions and the work health and safety of hitherto invisible clothing outworkers. Mandatory obligations on clothing retailers with the greatest influence in the supply chain were pivotal to particular instances of successful implementation of the NSW legislative scheme regulating supply chains in the TCF sector. This indicates the entire supply chain needs to be regulated to improve the working conditions of supply chain labour. However, these findings are preliminary because the empirical research for the project described in this article is incomplete. The field work and data analysis for this project need to be finished to gain a fuller understanding of the implementation and effectiveness of the legislative schemes in Australia which regulate supply chains.

The article argued that the effective implementation of clothing retailer obligations indicates that imposing obligations on effective business controllers of domestic supply chains in other industries in Australia ought to be considered as a measure to address the exploitation of supply chain labour in those industries. Moreover, it was argued that the current cross-jurisdictional application of the state mandatory codes beyond the boundaries of the state within which those respective codes were made, demonstrates there is an existing legislative capacity for intra-jurisdictional regulation of international supply chains to protect workers abroad. Just as the (sometimes cross-jurisdictional) deals between retailers operating in New

137 Cooney, above n 3, at 329.

South Wales, South Australia and Queensland and their suppliers formed the basis of regulatory intervention under the mandatory codes, so too the deal between retailers (active in the domestic jurisdiction) and their overseas suppliers could form the basis of domestic regulation of international supply chains. Imposing obligations upon the effective business controller of the supply chain is an essential element of the mandatory schemes required to adequately address the exploitation of domestic and overseas supply chain labour.

APPENDIX 14

Legislative regulation of global value chains to protect workers: A preliminary assessment

Michael Rawling

Economic and Labour Relations Review

ABSTRACT

This article argues for domestic legislative regulation of global value chains (GVCs) to protect offshore workers. Firstly, the article outlines the policy reasons necessitating such legislation. Empirical evidence confirms that GVCs are a dominant feature of the global economy. It is contended that lead firms wield influence in GVCs in a manner which leads to poor outcomes for offshore workers. Secondly, the article sets out the minimum steps necessary for a domestic state to attribute the responsibility for transparency of GVCs to lead firms. Then the article proceeds to explore the possibilities and limits of the proposed scheme of regulation. Despite some complexities with implementing the scheme, it is argued that, if domestic legislative regulation of GVCs strengthens even to a small extent the monitoring of global labour issues, it is worth pursuing.

Introduction

Although much of the literature on GVCs is focussed on the global competitiveness of countries, there is increasing interest from governments, investors, consumers and activists on regulating GVCs to promote better outcomes for workers (see OECD, WTO and UNCTAD 2013: 21; ABC News Online 2013).

Recent empirical evidence reveals that more than half the value of all world exports involves products traded using GVCs (Backer and Miroudot 2013: 16), but despite the vast scale of such chains, most developed countries including Australia have not legislated to protect workers within these chains, even though, as this article argues, it is feasible to do so. Consequently, powerful, multi-national lead firms continue to co-ordinate many such chains mainly for their own private interest in sourcing quality goods and services at the lowest cost, leading to exploitation of workers at the base of those value chains (see Gereffi and Luo 2014). The analysis of GVCs and global production networks (GPNs) in this article indicates that a improved public regulation of value chains is needed to protect and empower value chain labour.

This article suggests that one method of improved public regulation is by way of a pro-active system of domestic legislative regulation which harnesses the power of lead firms to render GVCs transparent and ultimately improve the conditions of offshore workers. However, this article, rather than suggesting that the implementation of this type of regulation would be unproblematic, explores the possibilities and limits of domestic legislative regulation of GVCs. Although some shortcomings and complexities with implementing the scheme are identified it is argued that the influence of 'lead firms'(Gereffi 1994) or 'effective business controllers'(Nossar 2007) — typically exercised for their own benefit — could also be used to make GVCs transparent, thus enabling improvements in the working conditions of value chain labour. The first part of this article outlines the policy reasons for the introduction of domestic legislative regulation of GVCs, with a special focus on recent empirical evidence on GVCs, the specifics of how multi-national lead firms co-ordinate many of these chains and the role of labour in GVCs/GPNs. The next section then sets out the key features of the proposed domestic regulation namely, obligations to obtain, and disclosure of, information about working conditions, publication of information and oversight of commercial sanctions. The final section of the paper explores the possibilities and limitations of domestic legislative regulation of GVCs.

The rise of GVCs/GPNs

A value chain describes an interconnected series of business transactions organised to produce and sell goods and/or services at a profit for lead firms (see Quinlan 2011: 1). A value chain consists of all of the activities that firms undertake to bring a product or service from its conception to its end use by consumers (Backer and Miroudot 2013: 5). The GPN framework incorporates the concept of a value chain but emphasises all of the social actors that influence value chains including public institutions such as governments, private actors such as firms and labour as the ultimate source of 'value' in the chain. Although major international organisations including the World Bank, the World Trade Organisation (WTO) and the Organisation for Economic Cooperation and Development (OECD) have adopted the term 'value chains', in the literature there is still no agreement as to whether the GVC framework or the GPN framework is the most appropriate (Taylor, Newsome and Rainnie 2013: 5). However Selwyn (2013: 79) suggests that the two may be compatible with the narrower analysis of vertical, inter-firm relations in the GVC framework fitting into the broader, GPN framework.

There is now widespread outsourcing of work to other businesses that indirectly and cost-effectively provide labour to profitable firms. To a substantial degree manufacturing is carried out in developing or emerging economies (Coe and Hess 2013: 4) as lead firms progressively outsource their peripheral and frequently

low-value productive functions while maintaining control over core business functions, creating value to be retained in their home countries (Neilson, Pritchard and Wai-chung Yeung 2014: 2). Thus many powerful, profit-making entities now effectively control a value chain of suppliers, distributors and other businesses providing indirect labour.

A principal reason value chains are used is to relieve the parties up the chain from some costs of production of goods and services, including such matters as factory ownership and responsibilities for workers at the base of the chain (Wise 2013: 442). This is unacceptable given that GVCs frequently involve the production of goods and services in poor host states who are least able to protect their workers and where costs are low due to weak labour regulation. Yet, the geographic distance between home and host country provides a basis for lead firms to deny responsibility for working conditions at the bottom of their international value chains (Robinson and Rainbird 2013: 103).

Clearly value chains have emerged because of the pursuit of lower labour costs and international risk outsourcing (Robinson and Rainbird 2013: 103). However, the favourable conditions allowing multinational companies to outsource their production to developing countries was also facilitated by structural adjustment policies in many developing countries which reduced state programmes, established incentives for foreign direct investment and liberalized factor markets including winding back labour market regulation (Barrientos et al 2011 p301-302). In turn, these policies were driven by the dominant neo-liberal agenda of international governmental bodies focussed on removing trade and investment protectionism (see OECD, WTO, UNCTAD 2013: 3).

Empirical Evidence of GVCs

Until recently international value chains were largely discussed from a theoretical or isolated case study viewpoint (De Backer and Yamano 2012; Backer and Miroudot 2013: 5). Now, aggregate empirical data on trade and output confirms the widespread existence and overall scale of GVCs (Backer and Miroudot 2013: 5).

The OECD has a relatively new database (the TiVA database) which records "trade flow in value-added terms based on a global model of international production and trade networks." (Backer and Miroudot 2013: 10 — see http://oe.cd/tiva). The 'trade in value added' approach traces the value by each industry in each country in the production chain and apportions the value added to the relevant source industries and countries (OECD, WTO, UNCTAD 2013: 11). The OECD's Inter-Country Input-Output (ICIO) model then links internationally input-output tables from 58 countries (one of these countries being the "rest of the world")

accounting for more than 95% of world output. The OECD ICIO model provides a truly global analysis of value chains by capturing all transactions between industries and countries across 37 industries (Backer and Miroudot 2013: 11). The "Bilateral Trade Database by Industry and End-Use Category (BTDIxE)", also developed by the OECD, measures flows of intermediate inputs across countries and industries (Backer and Miroudot 2013: 10-11).

The first aspect measured by this OECD data is the extent of vertically fragmented production. The OECD data calculates this by determining what it terms the vertical specialisation share (the input content of exports of a country) and the VS1 share (the percentage of exported goods and services used as imported inputs to produce other countries' exports). By combining the VS and VS1 shares, a comprehensive assessment of the participation of a country in value chains can be ascertained, "both as a user of foreign inputs (upstream links i.e. backward participation) and supplier of intermediate goods and services used in other countries' exports (downstream links i.e. forward participation)" (Backer and Miroudot 2013: 11). From this data Backer and Miroudot (2013: 12) have developed a GVC Participation Index in OECD countries for 2009. This index indicates that, for all OECD countries, the combined percentage of foreign inputs in a country's exports and domestically-produced inputs used in other countries' exports is between 30% and over 60% of gross exports (OECD, WTO and UNCTAD 2013: p7). This means that "on average more than half of the value of exports is made up of products traded in the context of GVCs" (Backer and Miroudot 2013: 16). Furthermore, ". . . the income from trade flows within GVCs, measured as the domestic value added embodied in foreign final demand (that is, 'exports of value added') has increased by 106% between 1995 and 2009 (in real terms)" (OECD, WTO and UNCTAD 2013: 14).

GVCs are now clearly an "empirical phenomena" (WTO 2008: 81) with the TiVA database providing "clear evidence of the increasing international fragmentation of production" (OECD, WTO, UNCTAD 2013: 11). GVCs are not limited to manufacturing industries. They also apply to the agri-food industry (Backer and Miroudot 2013: 16-17) and the energy industry (Gereffi 2014: 10). GVCs also increasingly encompass all kinds of services (OECD 2010: 220; see also WTO 2008: 89) with the WTO reporting that the outsourcing of services has "been widespread across sectors and type of inputs" (WTO 2008: xx). GVCs apply to financial services and the business services sector which covers computer services, legal, accounting, management consulting and public relations services (Backer and Miroudot 2013: 31). An example of the rapid increase in services outsourcing is that in 2006 over 75% of major financial institutions had offshore activities compared with less than 10% in 2001 (WTO 2008: 114).

Lead Firm Influence over GVCs

In a value chain the lead firm is the most commercially influential party in the chain; usually, but not always, located at its apex. For some time the literature has asserted that lead firms regulate or co-ordinate international value chains (see Gereffi 1994). More recent research drawing on aggregated empirical data now refers to ''firms . . . that control . . . activities in production networks" (Backer and Miroudot 2013: 7). The OECD also states that multinational firms play a "prominent role" within transnational value chains that allows them to "co-ordinate production and distribution across many countries" (OECD 2007: 15). Moreover, empirical evidence confirms the close connection between GVCs and multinational enterprises. De Backer and Yamano (2012: 17) state that "the results of the VS1 measure suggest that the import content of exports is closely related to the presence of MNEs. The increase in vertical specialisation comes most clear in countries with a high multinational presence." In their view, "multinational enterprises (MNEs) play a prominent role in global value chains . . ." (De Backer and Yamano 2012 p7). The OECD, WTO and UNCTAD (2013: 9-10) have also been able to ascertain the involvement of multinational enterprises in GVCs by finding a close correlation between foreign direct investment stocks in countries and their GVC participation. According to the OECD, WTO and UNCTAD (2013: 7) "Multinational Enterprise (MNE) coordinated GVCs account for 80% of global trade." These striking empirical findings — which indicate that multinational enterprises coordinate value chains on a vast scale — simultaneously identify these enterprises as the appropriate subject of public regulation precisely because of their coordination capabilities.

Private governance analysis (which was originally used by Gereffi (1994) but later applied to GVCs in general)(see Barrientos et al 2011:32; Quinlan 2011: 10) provides information about the precise manner in which lead firms control GVCs that is also useful when considering what form of public regulation would be effective. Lead firms 'govern' other value chain participants by dictating the terms of trade and parameters of value chain participation (Neilson, Pritchard and Wai-chang Yeung 2014: 1-2; Mayer and Milberg 2013: 4; Bair 2005: 164-165). In particular, lead firms specify to suppliers matters such as the price and quality of products and services, delivery time and volume of orders (Nathan 2013: 30; Johnstone et al 2012 : 66; Barrientos et al 2011: 302). In so doing, lead firms influence the production process, working conditions and quality control of their affiliates or suppliers (Bair 2005: 164-165; see also Nathan 2013: 30-31). In some circumstances, lead firms may also directly monitor, or intervene into, the work practices of their indirect labour force (Rubery Earnshaw and Marchington 2005: 76). This is especially the case today because rapid advances in information and communications technology have dramatically reduced the cost of coordinating complex activities over long distances,

allowing widespread co-ordination of distant activities (De Backer and Yamano 2012: 6; Backer and Miroudot 2013: 8).

The private governance activities of lead firms not only results in influence over supplier's labour practices, it also sets economic limits to what suppliers earn (Nathan 2013: 30-31). The distribution of the value produced depends on power relationships within GVCs and so is unequally captured at the various levels (Mayer and Milberg 2013: 5). Competition between numerous, sometimes hundreds or thousands of manufacturing suppliers near the bottom of GVCs, induces intense competition between suppliers. A standard strategy for lead firms has become working with multiple suppliers, playing one supplier off another and creating new suppliers as a major method of keeping prices low. At the same time, lead firms typically attempt to reduce the competition they face by using branding to create barriers to market entry (Mayer and Milberg 2013: 6). As a result, in many GVCs including those in the apparel sector, lead firms capture most of the surplus profits (Mayer and Milberg 2013: 5) whilst manufacturing suppliers just get competitive profits (Nathan 2013: 30).

GVCs, GPNs and labour

At first blush this type of GVC framework analysis immediately above in this article would appear to lead to some obvious conclusions for value chain labour. The net revenue of suppliers who are under significant pressure from lead firms mean that the horizontal bargain between the suppliers and their workers is constrained by the vertical relations between the lead firms and suppliers. That is, the lead firms' business practices and monopolisation of GVC rents "affect the possible labour market outcomes in supplier firms." (Nathan 2013: p31) Whilst inter-firm linkages in the GVC are crucial in determining outcomes for value chain labour (Coe and Hess 2013: 6), the GPN frameworks demonstrates in two key ways that the situation in reality is more complex than simply outcomes arising from the relationship between lead firms and their suppliers.

Firstly, the GPN framework highlights that governance modes within a value chain are shaped by meta-governance structures which include the power and authority of private actors such as firms *and* public actors such as governments (Coe and Hess 2013:6). GPNs are conceived of as embedded within broader multi-scalar structures and institutions (Selwyn 2013: 78). Thus the GPN framework goes beyond analysis of linkages in the GVC by examining how lead firms are locked into organisations, institutions and governance structures at the regional, national and local level. Highlighting that the nodes of value chains are geographically located within distinct national territories (Selwyn 2013: 83) has enabled GPN scholars to reveal more of the "multiple modalities of governance" (Coe and Hess 2013: 5) including

the significance of governance structures such as local labour regimes (Taylor, Newsome and Rainnie 2013: 2). So GVCs are mediated by local or national labour regimes rather than solely determined by lead firm requirements (Selwyn 2013: 83; Coe and Hess 2013: 7).

Secondly, the GVC framework has focussed on inter-firm linkages mainly between lead firms and suppliers, leaving the intra-firm relations between capital and labour (as the ultimate source of value) concealed (Taylor Newsome and Rainnie 2013: 1; Selwyn 2013: 78). Instead of neglecting to consider the position of workers or depicting them as passive victims at the bottom of the chain, the GPN approach explicitly argues that workers, their collective organisations and their civil society partners are an integral part of GPNs (Selwyn 2013: 75, 76, 77; Taylor Newsome and Rainnie 2013: 2; Coe and Hess 2013; see also Rainnie et al 2011). In particular, this allows for the *agency* of workers and their organisations to be accounted for, and for the possibility that worker action can rework and sometimes resist prevailing governance regimes within GPNs (Coe 2015: 172; Coe and Hess 2013: 5). A key point is how workers transform their pivotal position in the production process and their ability to disrupt it – or their structural power – into associational power, which is based on collective organisation (Coe and Hess 2013: 5; Selwyn 2013: 78). If workers are able to organize to combat capitalist management systems designed to increase productivity (i.e. the rate of exploitation) this can lead to improvements in workers' pay and conditions (Selwyn 2013: 84, 86). This associational power is able to achieve concessions from the state and/or capital (Coe and Hess 2013: 5; Selwyn 2013: 83). However, the focus on labour agency does not necessarily lead to naïve conclusions about its transformative power. It may be able to identify solidarity between different groups of workers at different locations in GPNs but also lead to realistic conclusions about the limits of worker action in the contemporary global system (Coe 2015: 178; Coe and Hess 2013: 6). Also built into the GPN framework is transnational labour formations such as international union confederations as well as the concept of the multiple scales of worker campaigns. Worker agency is seen in terms of its vertical dimensions up and down GPN structures and also in its horizontal dimension; as embedded in local places and institutional settings (Coe 2015: 181; Coe and Hess 2013:6). So whilst inter-firm linkages in the GVC are crucial in setting the scene for labour, they are always mediated by capital-labour relations and local or national labour regimes (Coe and Hess 2013: 7).

What have the outcomes of GVCs/GPNs been for workers? A range of GPN/GVCs scholars have pointed out that economic upgrading (i.e. firm level competitiveness and profitability) does not necessarily lead to social upgrading (i.e. improvements in working conditions) (Bair and Werner 2015: 124: Taylor Newsome and Rainnie 2013: 2: Selwyn 2013: 76, 79; Coe and Hess 2013: 5). Economic upgrading in the value

chain may be linked to worsening work conditions (Gereffi and Luo 2014: 18; UNCTAD 2014: 105; Barrientos et al 2011: 305). Despite some successful cases of worker collectives improving pay and conditions (see Anner 2015: 164-166; Miller and Williams 2009: 100) many workers in developing countries, who produce goods and services for rich consumers, experience poor — in many cases appalling — working conditions. Research has reported that the conditions of value chain labour in developing countries can be insecure and unprotected, and labor safety regulations can be non-existent (Gereffi and Luo 2014: 16). Many supply chain workers do not earn a wage sufficient to meet their basic living needs especially in host countries where the minimum wage rate is so low that it won't cover basic needs (Baptist World Australia 2015: 5). There is also evidence of continuation of acceptance of child labour, forced labour, enforced overtime and over-long normal working days, high intensity work and an absence of freedom of association and the right to collective bargaining (Baptist World Australia 2015: 10-14; Anner 2015: 160-164; Klein 2000: 195-229). Even where they are permitted to collectively bargain, workers are almost invariably denied access to the real decision-makers further up the value chain – the lead firms (Justice 2002: 93). Furthermore, UNCTAD (2014: 105) reports there is strong pressure from lead firms to keep wages low. Yet the GPN framework shows how outcomes for labour are not inevitable but contestable and able to be resisted and reworked through countervailing worker power and national regulatory regimes and institutional structures.

The Need for Better Regulation

In relation to GVCs there is regulatory failure or a regulatory deficit (Quinlan 2011: 1; Barrientos et al 2011: 306; Miller Turner and Grinter 2011: 5). Labour standards are almost always excluded from trade and commercial agreements (Quinlan 2011: 11) and, although there are some exceptions, such as the California Transparency in Supply Chains Act 2010 designed to address slavery and human trafficking, most national governments have not established mandatory schemes of regulating GVCs for employment policy purposes. Neither is there a binding international treaty or International Labour Organisation (ILO) Convention which might regulate international value chains for the protection of workers. There is an initiative under the UN Guiding Principles on Business and Human Rights (2011) which involves the responsibility of business to respect human rights including labour rights. The reference to the linking of business relationships in guiding principle 13b refers to value chains. But these UN guiding principles leave out the question of home state responsibility and have problems with enforceability against corporations.

There is also a growing body of evidence on the limitations of voluntary regulation by corporations. At least among social scientists, there is almost consensus that voluntary codes of conduct have failed to eliminate or reduce labour

violations in GVCs (Anner et al 2013: 5). Voluntary codes of conduct only cover a particular firm and do not have broader coverage; monitoring, auditing and enforcement is often inadequate (Quinlan 2011: 10). Moreover, voluntary codes of conduct rely on the "fickle sympathies" (Estlund 2005: 369-370) of consumers rather than on state regulation. Therefore, voluntary codes of conduct are "temporary and contingent"(Cooney 2004: 311) regulation which can be easily abandoned.

A Proposal for Domestic Legislative Regulation of GVCs

There needs to be a much better system of making lead firms accountable for what happens at their affiliates or suppliers around the globe even when those firms have no equity relation to the companies supplying them (Bair 2005: 161). Research has shown that the best instances of value chains being used to positively influence health and safety involved external pressures from wider social, political and regulatory sources (Quinlan 2011: 3-4). It is becoming much more broadly accepted that strengthened regulation of GVCs is needed (see for example, OECD, WTO and UNCTAD 2013: 7; Barrientos et al 2011: 306.), especially considering that protection of workers is currently left to poor home states which have been chosen as production locations precisely because they have the weakest labour regulation.

The above analysis of lead firms demonstrates that they already regulate value chains for their own commercial interests. At the same time, these very observations also imply that the governance structures created by lead firms in their value chains may equally be capable of being used for public purposes as well. Specifically, effective public regulation could harness the contracting practices of lead firms for employment policy purposes (Nossar 2007: 9; see also OECD, WTO and UNCTAD 2013: 21).

How might a domestic legislature exercise jurisdiction over GVCs? From the beginnings of commercial activities, commercial parties have conducted business deals which stretch across national boundaries. This is how GVCs are formed. Commercial parties within one jurisdiction have arrangements with commercial parties in another, overseas jurisdiction. It is these very commercial arrangements which enable a national government to regulate GVCs. Specifically, the exercise of national government powers to extend regulation beyond national borders rests upon the business dealings between a regulated lead firm (with sufficient geographical nexus to the relevant state in order to invoke the exercise of legislative jurisdiction) and an affiliate or supplier having commercial dealings with such a regulated firm. That is, the jurisdictional basis for this form of regulating GVCs arises from the fact that the regulated firm which contracts with an outside affiliate or supplier must conduct retail or other business within the geographical borders of the relevant home-state jurisdiction. Therefore domestic legislation could be used to

regulate the actual arrangements between such a regulated firm and its suppliers or affiliates located around the globe (Rawling 2014: 213).

A prior example of a national regulator extending their reach in this way is when European competition regulators blocked the merger of Honeywell and General Electric (two putatively U.S. firms) even though U.S. regulators said they could merge. This shows that global firms can be governed by any of the countries or regions in which they do business.

The Three Components of the Reform Proposal

What is needed is a pro-active regime which systematically makes *all* value chains travelling through a domestic jurisdiction transparent (rather than a reactive, complaint based model of regulation which is dependent on a litigant undertaking legal proceedings for any transparency or other outcome to occur). Based on this preliminary assessment of the issues, the type of pro-active model of legislative regulation being proposed here would have three main components: (i) pro-active collection and disclosure of information by lead firms; (ii) publication of that information; and (iii) targeted, triggering of commercial sanctions.

Under the proposal, lead firms located in the developed world such as retailers of products and services should be required to obtain information from their overseas affiliates or suppliers. The information they should obtain would include the location of all workers in their GVCs and conditions of work in those chains.

An integral element of this reform proposal is disclosure of information to an industrial inspectorate (such as the Fair Work Ombudsman). A regulated business would fill out a form produced by the relevant governmental regulator and provide a completed form to the regulator on a periodic but ongoing basis. Each form would provide a list of the overseas affiliates and suppliers of the business. For each overseas supplier and affiliate the regulated business would list the: name of workplace; location of the workplace; number of workers in foreign locations who are engaged to produce goods or services supplied to the regulated business; age range of those workers (for child labour transparency); wage rate profiles for workers; what the occupational health and safety measures at the workplace are; whether or not worker representatives can access the workplace (see Anner et al 2013: 28) and a list of locations of supplier's contractors and sub-contractors etc where all of the work is undertaken to produce goods or services ultimately supplied to the regulated business. This is a tentative initial list for inclusion in a guideline that the regulator can regularly revise. The information garnered should be specific enough to enable mapping of GVCs and working conditions but not so loose that it would produce vague and meaningless company statements (Cooney

2004: 335). The legislation should also include penalties for either failing to report in accordance with the legislative guidelines or engaging in false, misleading or deceptive reporting (Cooney 2004: 336).

It is proposed that the regulator should publish *a summary* of *all* of the information that has been disclosed to it by a regulated business on the regulators website.

Previous activist campaigns regarding affiliates' or suppliers' non-compliance with corporate codes focussed on pressuring lead firms to threaten to terminate or not renew those arrangements. Building upon these campaigns, the third limb of the proposal is that *mandatory* laws provide for controls over the use of commercial sanctions by lead firms in instances where labour abuses at the base of value chains controlled by those businesses are verified. The mechanism would involve mandatory additions to arrangements between lead firms and their affiliates or suppliers, detailing action that the lead firm will take if they become aware of exploitation. This would include termination of contract. The lead firm could then be requested to use commercial sanctions against a supplier or affiliate where working conditions are unsatisfactory (Nossar 2007: Johnstone 2012: 80; Anner et al 2013: 28).

The legislative scheme might be trialled in the apparel industry where almost all of the published research has found that there are buyer-driven chains within which retailers and brand names exert influence (see, for example Gereffi 1994; Bair 2005: 160; Anner et al 2013). Another alternative would be to limit the application of the scheme on a trial basis to stock exchange listed companies mainly consisting of multi-national enterprises with significant power and influence in the market.

The possibilities and limits of domestic legislative regulation

In this section of the article the possibilities and limits of implementing domestic legislative regulation of GVCs are discussed.

Lead firms resist demands to disclose the identity and location of their suppliers, let alone the conditions and wages of workers who produce the good and services ultimately supplied to the lead firm. Accordingly, transparency of transnational value chains is a key concern (Rodriguez-Garavito 2005: 70-71). Therefore, the proposed regulatory scheme is designed to make GVCs ending at a particular domestic jurisdiction transparent. The obligation of lead firms to obtain information from overseas suppliers is a requirement for lead firms to know their own value chains and, because it would be a legislative requirement, regulators and unions would have confidence that those lead firms did know their own chain. That, combined with publication of information discussed above, would be a powerful

regulatory measure decreasing the prospects of business ignoring inadequate labour conditions in their own value chains.

Lead firms would have a clear incentive to undertake audits to verify labour conditions in their own value chains before disclosing information about them in case the information is found to be incorrect. Thus mandatory regulation might operate to empower those business controllers to police their value chains for ethical as well as commercial reasons; if mandatory regulation can encourage business controllers to become the most ethical or responsible parties in the value chain, the role of addressing value chain labour issues might be partially assumed by the business controllers themselves (Rawling 2014: 211).

On the other hand, it is unclear in practice whether the increase in auditing will increase the involvement of unions. Little is known about the extent of union involvement in factory audits (Miller Turner and Grinter 2011:10). Auditing could be a disenfranchising process where corrective points are raised by workers without any union involvement. Or it could ultimately lead to a system whereby the audit is endorsed by worker collectives so that this can be used by lead firms to legitimize the use of a particular supplier (see Miller Turner and Grinter 2011:11).

An objection to the proposed information disclosure mechanism may be that it would be too onerous and costly to require lead firms to disclose detailed information about their suppliers and affiliates around the globe. But, the first point in response to such an objection is that the legislative scheme being proposed here is 'light touch' regulation given that it merely involves transparency or process obligations. Process obligations are less costly than substantive, external liabilities (such as wage recovery claims). Secondly, many lead firms would already keep records about the GVCs which they effectively control. Many lead firms employ dedicated 'supply chain managers' who are already charged with responsibilities which require knowledge about suppliers. Therefore, gathering information about suppliers' working conditions would be an extension of business systems already in place. Thirdly, lead firms usually have the bargaining power to require suppliers or affiliates to provide this information (Doorey, 2005b: 385).

Like information disclosure, publication would provide a strong incentive for lead firms to verify the accuracy of the information before it is disclosed. The information made available to the public would also allow consumers to make informed purchases as well as let unions go to overseas locations and verify the published working conditions within a particular business's GVCs. In this way the legislative scheme would not abandon enforcement. Informal enforcement measures would operate in the 'shadow' of the legislative scheme.

Some time ago now, David Doorey (2005b: 394-404) argued that the information published should be limited to the names and addresses of suppliers, contractors and subcontractors in order to avoid unintended consequences. However, a number of changes in the context have occurred since then. Much more information on the labour practices within GVCs has already become available, including information about wages rates and child labour (for example, Baptist World Australia 2015) without Doorey's unintended consequences being realised. There has also been a considerable uplifting in expectations for robust regulation needed to address labour abuses in GVCs since the Rana Plaza factory collapse in Bangladesh (which killed 1,100 factory workers) and the subsequent establishment of the Bangladeshi accord (see Anner et al 2013).

Previously Doorey (2005b) expressed fears that the role of value chain labour might be overlooked in a domestic scheme regulating GVCs. The proposed scheme could be seen as a 'top down' form of social upgrading where workers are secondary and elite bodies including firms, states and international organisations are seen to be the method of improving worker's conditions. Thus there is a danger that the agenda to improve working conditions is co-opted by elites. As Selwyn (2013: 80) states 'by . . . prioritizing institutional arrangements over workers' self-activity, advocates of social upgrading risk demobilizing the very actors that can bring about the kinds of improvements that they wish to see." For these reasons some GPN analysts prefer 'bottom up' forms of social upgrading where changes to workers conditions are determined by "the balance of power between labour and capital and how this balance is institutionalized by states" (Selwyn 2013: 76).

Yet, Coe and Hess (2013: 7) state transnational worker campaigns may be "facilitated or mandated by governments". In addition, persistent low levels of union organization and collective bargaining at manufacturing suppliers in developing countries (see Miller 2008: 161-162) has led to persistent calls from civil society to involve lead firms in determining workplace outcomes (Miller Turner and Grinter 2011:14). The proposed scheme could be seen as a public mechanism which regulates lead firms in a manner which could boost transnational worker campaigns. The publication of information in the proposed scheme would not reduce the need for unions to be active on labour rights; they could collaborate with the government regulator by interviewing workers who produce the relevant goods or services to test the accuracy of the information disclosed by the lead firm (see Doorey 2005b: 394). The regulator could then receive information from unions about working conditions at the overseas location. If the information received from unions is reliable and contradicts the information received from the regulated business, the governmental regulator could then contact the regulated business and, at first, provide them with the time and opportunity to provide more accurate information.

If this information was not forthcoming, the governmental regulator could remind the regulated business that they are required to disclose accurate information and that there are penalties for providing misleading information, to persuade the regulated business to provide more accurate information. The threat of prosecution for providing misleading information to the regulator could be used to pressure businesses to disclose accurate information or to change labour practices in their GVCs so that the business can then disclose more acceptable information about working conditions.

Moreover, worker struggles can influence the form and content of national governance structures and labour must work towards securing the legal, social and political conditions to assist workers and their organisations to improve working conditions (Selwyn 2013: 82, 87). What would be crucial for this to occur is that the labour movement take ownership of measures such as the proposed scheme so that it becomes "labour led social upgrading" (Selwyn 2013: 88). In any case, without a major union-led campaign, there is little prospect that the proposed scheme will be introduced.

Objections may be raised by businesses to be covered by the regulation that the information required to be disclosed is confidential. Moreover, suppliers might argue that they will be sued for breach of contractual arrangements they have entered into with other commercial operations to ensure the secrecy of the very information that suppliers are required to disclose under the proposed scheme. Yet, a range of major retailers and brands in the Australian apparel industry have already disclosed exactly the same sort of information about their suppliers that would be required under the proposed scheme (See Baptist World Australia 2015). This disclosure was voluntary so these retailers apparently encountered nothing such as secrecy laws which prevented suppliers disclosing to them the requisite information. Furthermore, we live in a surveillance society where large businesses compile significant amounts of information about consumers. In comparison to the level of private business surveillance of the public, this reform proposal only involves a relatively small amount of information about GVCs to be made public. In any case, mandatory transparency would apply equally to all lead firms in a given category (such as retailers of a particular good or service) operating in the relevant domestic market. This would neutralize corporate resistance to disclosure based on assertions that disclosure would result in a competitive disadvantage. Indeed many lead firms have indicated that they would be willing to disclose information about GVCs which they control, as long as competing firms are also required to disclose similar information (Doorey 2005a: 8). Moreover, this transparency would perform a crucial function of informing consumers about working arrangements used to make the products or services they purchase.

In relation to the proposed commercial sanctions, the decision to cancel or not renew an arrangement (rather than merely threatening to do so) must be carefully considered before it is actually implemented. The loss of a business arrangement may lead to the loss of jobs. In other words, workers' interests may be jeopardised by the very measures which are ostensibly aimed at improving those workers' plight (Jenkins 2002: 17). An important component of strategies to improve labour practices at the base of GVCs is to encourage corporations to establish long-term investments (Doorey 2005a: 8). However, state regulators could judiciously influence the exercise of commercial sanctions, so that they are only triggered in certain rare, 'symbolic' circumstances. In other circumstances, commercial contractual sanctions could be threatened (rather than actually invoked). Disclosure requirements might also assist to track 'cut and run' strategies by lead firms. Regulators might ascertain precisely what role labour practices played in decisions to terminate business arrangements and to grant replacement arrangements (Doorey 2005b: 403). The information could then be used to negotiate with lead firms to remain in a particular jurisdiction or to reinstate a contractor.

The California Transparency in Supply Chains Act 2010 has been in force since 2012 and the experience of the implementation of this scheme will be instructive for those interested in domestic legislative regulation of GVCs. The Californian scheme, like the proposed scheme, was designed to ensure that companies operate with caution when selecting suppliers and making sourcing decisions (Pickles and Zhu 2013: 1). This Act is an important initiative because sustainable improvements in workers' pay and conditions at overseas suppliers will only come when lead firms direct orders towards suppliers with better working conditions (Miller and Williams 2009:118). In requiring disclosure of a practice already common among big retailers and manufacturers, the Californian government has taken advantage of existing corporate knowledge, structures and personnel. However, it has been argued that the required disclosure increases the costs of new entrants to the market (Pickles and Zhu 2013: 5).

The success of the Act also relies on consumer awareness of egregious labour abuses. It is difficult to imagine this initiative working in places such as Brazil, Russia, India, China and South Africa (BRICs) where that consumer awareness does not exist or is still developing. (Pickles and Zhu 2013: 5). This is a salient point because GPNs are now evolving to include more South- South and regional trade patterns, giving rise to a new set of questions about whether Southern governments and lead firms from BRICs countries will have the same attitudes about the necessity to govern GVCs. (Barrientos et al 2011: 310-311.) The rise of BRICS countries provides local economic regions in BRICS countries for firms from those regions to sell their products and services locally instead of to Western consumers. If firms in those countries are not

satisfied with the terms of trade offered by Western multinationals they have greater scope to sell their products domestically, regionally or globally to buyers who are less concerned or unconcerned about the conditions under which their products are produced (Lund-Thomsen and Wad 2014: 282).

The focus on firms at the top of the chain in the proposed scheme might be questioned especially given that some manufacturers have emerged as highly profitable major players in their own right controlling production plants in several countries (Miller Turner and Grinter 2011: 13). These manufacturers would already be subject to existing labour laws in the countries where they are located and so an alternative avenue would be to pursue strengthened local labour laws applying to the direct work provider. But this strategy and the proposed scheme would not be mutually exclusive and, as was argued above, lead firms influence the parameters within which capital-labour relations take place at suppliers. Therefore, there is still a case for regulating lead firms especially given that there is evidence that those firms co-ordinate GVCs and that "[t]he emergence of large contract manufacturers, who produce multiple brands within the same plant has not cut significantly into the power of branding." (Mayer and Milberg 2013: 7)

A related limitation of the proposed scheme is that lead firms may have the ability to influence some suppliers but not others. For example, Miller (2008: 167) states that outsourced apparel production results in multiple brands sourcing from the same supplier. In this situation the ability of lead firms to gain compliance with transparency requirements by suppliers depends on the volume of production that lead firm orders from the supplier. As the order gets smaller the ability of the lead firm to demand transparency diminishes.

Another problem for the proposed scheme is that first tier suppliers outsource work to large numbers of subcontractors. It may be very difficult to obtain full disclosure of these subcontracting arrangements. For example, complex contracting chains in the Indian garment industry make it very difficult to trace the whole value chain (Lund-Thomsen and Wad 2014: 285). In the apparel sector generally outsourcing occurs below the level of the first tier supplier to such an extent that there is a "vast informal underbelly" of subcontracted manufacturing and outwork (Miller 2008:167). Despite this potentially significant problem, Miller (2008:168) states that the transparency in the apparel sector is a "key prerequisite" for serious efforts by global unions to organise in the apparel sector. Organising efforts in that sector have been hampered by an absence of disclosure of factory locations and the potential for organizing workers can improve if it is preceded by disclosure of locations (Miller 2008:175). By providing a mechanism for obtaining factory locations the proposed scheme could significantly assist with the attainment of what Miller (2008:184) describes as a "major policy objective" of the international apparel sector union.

Ultimately, domestic legislative regulation is a precursory measure. In the longer term, the exploitation of value chain labour needs to be addressed by strengthening regulation at the international level. If capital's power is transnational, workers' rights should also be transnational (Garcia-Munoz Alhambra, ter Haar and Kun 2014: 15). However, this presents a very significant challenge. Currently there are major limitations in the ability of international organisations to regulate and monitor transnational activities (Garcia-Munoz Alhambra, ter Haar and Kun 2014: 3). In particular, the ILO is seen fundamentally weak as it has no powers of enforcement apart from naming and shaming those in breach of conventions (Selwyn 2013: 81). A prior effort in the 1990s to expand the ILO's powers in the form of a global social label backed up by ILO inspections in the 1990s was criticized by developing countries as a protectionist measure (Miller Turner and Grinter 2011: 5-6). Therefore, whilst there is considerable logic in strengthening global institutions to better regulate GVCs, "the geopolitical reality is that progress on this front is likely to be very slow." (Barrientos et al 2011: 313).

Conclusion

OECD and other research now provide proof of the existence of GVCs and lead firm influence over chains. In light of this, it is unacceptable for lead firms to preside over GVCs involving the exploitation of workers. National governments can respond by introducing mandatory transparency schemes. This paper has outlined the components of a legislative scheme which harnesses the existing governance capabilities of lead firms to make GVCs transparent. A preliminary assessment has identified some complexities and limitiations with the scheme. Yet as Garcia-Munoz Alhambra, ter Haar and Kun (2014: 24) argue no regulatory system monitoring GVCs can be perfect. If domestic legislative regulation of GVCs strengthens even to a small extent the monitoring of global labour issues it is worth examining and pursuing. Although, the issues to be addressed are complex and this proposal may need to be refined and reworked (see Cooney 2004: 342), the tentative nature of the proposal within this article should not be an excuse for inaction. Given that GVCs are no longer merely a theoretical construct but empirically-validated as a dominant feature of the world economy, national governments should implement mandatory regulation of GVCs for labour policy purposes.

References

Anner M (2015) Social Downgrading and Worker Resistance in Apparel Global Value Chains. In Newsome K et al (eds) *Putting Labour in its Place: Labour Process Analysis and Global Value Chains* Basingstoke: Palgrave.152-170

Anner M, Bair J and Blasi J (2013) Toward Joint Liability in Global Value chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks. *Comparative Labor Law and Policy Journal* 35(1): 1-44.

Australian Broadcasting Corporation News Online 'Report Calls for More Transparency on Rights of Offshore Workers' 24 June 2013 available at http://www.abc.net.au/news/2013-06-24/report-questions-offshore-supply-chains/4774318

Baptist World Australia (2015) *The Truth Behind the Barcode: Australian Fashion Report 2015*, Baptist World Australia, April.

Backer, K D and Miroudot S. (2013) Mapping Global Value Chains. *OECD Trade Policy Papers*, No.159, OECD Publishing: 1-46

Bair J (2005) Global Capitalism and Commodity Chains: Looking Back, Going Forward. *Competition and Change* 9(2): 153-180.

Bair J and Werner M (2015) Global Production and Uneven Development: When Bringing Labour in isn't Enough. In Newsome K et al (eds) *Putting Labour in its Place: Labour Process Analysis and Global Value Chains* Basingstoke: Palgrave.pp119-134.

Barrientos S et al (2011) Decent Work in Global Production Networks. *International Labour Review* 150(3-4): 299-317.

Coe N (2015) Labour and Global Production Networks: Mapping Variegated Landscapes of Agency. In Newsome K et al (eds) *Putting Labour in its Place: Labour Process Analysis and Global Value Chains* Basingstoke: Palgrave.pp171-192.

Coe N and Hess M (2013) Global Production Networks, Labour and Development. *Geoforum* 44: 4-9.

Cooney S, (2004) A Broader Role for the Commonwealth in Eradicating Foreign Sweatshops?. *Melbourne University Law Review* 28(2):290-342.

De Backer K and Yamano N (2012) International Comparative Evidence on Global Value Chains. *OECD Science, Technology and Industry Working Papers, 2012/03*, OECD Publishing, April.

Doorey D, (2005a) Codes of Conduct and Disclosure *International Union Rights Journal* 12(1):7-8

Doorey D (2005b) Who Made That? Influencing Foreign Labour Practices Through Reflexive Domestic Disclosure Regulation. *Osgoode Hall Law Journal* 43(4):353-405.

Estlund C (2005) Rebuilding the Law of the Workplace in an Era of Self-Regulation. 105 *Columbia Law Review* 105(2):319-404.

García-Muñoz Alhambra M ter Haar B and Kun A (2014) Independent Monitoring of Private Transnational Regulation of Labour Standards: A Proposal for a "Transnational Labour Inspectorate" System. Labour Law Research Network Working Paper. August.

Gereffi G (1994) "The organisation of buyer-driven global commodity chains: how US retailers shape overseas production networks" in G Gereffi and M Korzeniewicz (eds) *Commodity Chains and Global Capitalism* Westport: Praeger, pp95-122.

Gereffi G (2014) Global Value Chains in a Post-Washington Consensus World. *Review of International Political Economy* 21(1): 9-37.

Gereffi G and Luo X. (2014) Risks and Opportunities of Participation in Global Value Chains – Background Paper to the 2014 World Development Report. *World Bank Policy Research Working Paper 6847*, World Bank, April.

Jenkins R, (2002) The Political Economy of Codes of Conduct. In Jenkins R, Pearson R and Seyfang G (eds) *Corporate Responsibility and Labour Rights* London: Earthscan, pp13-30.

Johnstone R (2012) Informal Sectors and New Industries: The Complexities of Regulating Occupational Health and Safety in Developing Countries. In Fudge J, McCrystal S and Sankaran K (eds) *Challenging the Legal Boundaries of Work Regulation*. Oxford: Hart, pp67-80.

Johnstone R et al (2012) *Beyond Employment: The Legal Regulation of Work Relationships* Sydney: Federation Press.

Justice D (2002) The International Trade Union Movement and the New Codes of Conduct. In Jenkins R, Pearson R and Seyfang G (eds) *Corporate Responsibility and Labour Rights: Codes of Conduct in the Global Economy* London: Earthscan, pp90-100.

Klein N (2000) *No Logo* London: Harper Collins.

Lund-Thomsen P and Wad P (2014) Global Value Chains, Local Economic Organization and Corporate Social Responsibility in the BRICS Countries. *Competition and Change.* 18(4): 281-290.

Mayer F and Milberg W (2013) Aid for Trade in a World of Global Value Chains. Capturing the Gains Working Paper 34. June.

Miller D (2008) The ITGLWF's Policy on Cross-Border Dialogue in the Textiles, Clothing and Footwear Sector. In Papadakis K (ed) *Cross-Border Social Dialogue and Agreements*. Geneva, International Institute for Labour Studies, pp161-189.

Miller D Turner S and Grinter T (2011) Back to the Future? A Critical Reflection on Neil Kearney's Mature Systems of Industrial Relations Perspective on the Governance of Outsourced Apparel Supply Chains. Capturing the Gains Working Paper 2011/08. November.

Miller D and Williams P (2009) What Price a Living Wage? *Global Social Policy* 9(1): 99-125.

Nathan D (2013) Industrial Relations in a Global Production Network: What Can Be Done. *Economic & Political Weekly,* 27 July, 29-33.

Neilson J, Pritchard B and Wai-Chung Yeung H (2014) Global Value Chains and Global Production Networks in the Changing International Political Economy: An Introduction. *Review of International Political Economy* 21(1): 1-8.

Nossar I (2007) 'The Scope for Appropriate Cross-Jurisdictional Regulation of International Contract Networks (Such as Value chains): Recent Developments in Australia and Their Supra-National Implications', Business Outsourcing and Restructuring Regulatory Research Network Working Paper No 1, available at http://www.borrrn.org/index.php?option=com_content&view=article&id=3:first-working-paper&catid=1:working-paper-series&Itemid=8 (accessed 13 February 2015).

The Organisation for Economic Co-operation and Development (OECD) (2007) *Staying Competitive in the Global Economy: Moving up the Value Chain*. OECD 2007.

The Organisation for Economic Co-operation and Development (OECD) (2010) *OECD Economic Globalisation Indicators 2010*.

The Organisation for Economic Co-operation and Development (OECD), the World Trade Organisation (WTO) and the United Nations Conference on Trade and Development (UNCTAD) (2013) *Implications of Global Value Chains for Trade, Investment, Development and Jobs*, 6 August 2013 prepared for the G-20 Leaders Summit Saint Petersburg, Russia September 2013.

Pickles J and Zhu S (2013) The California Transparency in Supply Chains Act. Capturing the Gains Working Paper 15. February.

Quinlan M (2011) Value chains and Networks. Report, Safe Work Australia, Canberra, July.

Rainnie A Herod A and McGrath-Champ S (2011) Review and Positions: Global Production Networks and Labour. *Competition and Change* 15(2): 155-169

Rawling M (2014) Cross-Jurisdictional and Other Implications of Mandatory Clothing Retailer Obligations. *Australian Journal of Labour Law* 27(3): 191-215.

Robinson P and Rainbird H (2013) International Value chains and the Labour Process. *Competition and Change* 17(1): 91-107.

Rodriguez-Garavito C (2005) Nike's Law: The Anti-Sweatshop Movement, Transnational Corporations, and the Struggle over International Labour Rights in the Americas. In de Sousa Santos B and Cesar Rodriguez-Garavito C (eds) *Law and Globalization from Below: Towards a Cosmopolitan Legality,* New York: Cambridge University Press, pp64-91.

Rubery J, Earnshaw J and Marchington M (2005) Blurring the Boundaries to the Employment Relationship: From Single to Multi-Employer Relationships. In Marchington M et al (Eds), *Fragmenting Work: Blurring Organizational Boundaries and Disordering Hierarchies*, Oxford: Oxford University Press, pp63-87.United Nations Conference on Trade and Development (UNCTAD) (2014) *Trade and Development Report 2014.* Geneva: United Nations.

Wise A (2013) Pyramid Subcontracting and Moral Detachment: Downsourcing Risk and Responsibility in the Management of Transnational Labour in Asia. *Economic and Labour Relations Review* 24(3): 433-455.

World Trade Organization (WTO) (2008) *World Trade Report 2008: Trade in a Globalizing World,* World Trade Organization.

APPENDIX 15

ABSTRACT

TITLE: THE SCOPE FOR APPROPRIATE CROSS – JURISDICTIONAL REGULATION OF INTERNATIONAL CONTRACT NETWORKS (SUCH AS SUPPLY CHAINS): Recent Developments in Australia and their Supranational Implications

AUTHOR: Igor Mstislavovitch Nossar

POSITION: Chief Advocate
Textile Clothing and Footwear Union of Australia
(NSW / SA / Tas)

EMAIL: tcfua@tcfua.org.au

ABSTRACT: Extensive contract networks (such as supply chains) are already regulated by modern business practice. However, the existing type of modern business supply chain regulation takes the form of contractual 'governance structures' imposed throughout supply chains by the effective business controllers of those supply chains. This existing form of private supply chain regulation by means of contract differs from the more recognisable traditional form of public regulation by way of legislation.

The paper examines the scope for appropriately harnessing these private contractual 'governance structures' in order to achieve public regulatory outcomes, such as improved occupational health and safety.

NOTE: This paper is an edited version of the author's keynote presentation at the ILO Workshop *"Better Health and Safety for Suppliers"* held in Toronto (Canada) on Tuesday 17th April 2007.

This keynote presentation was based upon an extensively revised adaptation of the author's earlier contribution to the *"Labour Law, Equity and Efficiency: Structuring and Regulating the Labour Market for the 21st Century"* Conference delivered in Melbourne (Australia) on 8th July 2005.

THE SCOPE FOR APPROPRIATE CROSS-JURISDICTIONAL REGULATION OF INTERNATIONAL CONTRACT NETWORKS (SUCH AS SUPPLY CHAINS): Recent Developments in Australia and their Supranational Implications

Igor Nossar

1. INTRODUCTION

In recent decades, modern industrial market economies have experienced "[T]he growth of precarious or insecure employment". Within these economies, "[T]he growth of elaborate supply chains and flexible work arrangements (along with changes to regulatory protection) has been linked to the emergence or expansion of low-wage sectors/working poor (with substantial hidden costs to the community) and more intensive work regimes"[1]. This trend is increasingly evident in Australia today.

These developments have been coterminous with other long term trends manifested in such economies during the preceding quarter century – notably, the reduction of direct state intervention into private sector economic activity, in conjunction with the parallel development of a body of scholarly inquiry into "regulation theory" (especially within the USA and the UK). The pronounced scepticism towards active state regulatory intervention which characterises much of this developing academic literature has been iconically embodied in the emerging "[T]ruism that 'regulatory failure' will flow from the traditional 'command and control' mode of government: that unintended adverse consequences will arise when inflexible, centralised, rule-obsessed government agencies try to intervene in market relations …" [2]

This observed tendency for modern regulation theory to focus upon the perceived intrinsic limitations inherent in traditional public regulatory endeavour has perhaps been most notably embodied in the theoretical construct of the " regulatory trilemma", with its implicit suggestion of an inevitably problematic outcome for any regulatory attempt to simultaneously achieve the three goals of regulatory effectiveness, social responsiveness and legal doctrinal coherence – at least in relation to "command and control" regulation mandated by the state. [3]

The focus upon regulatory deficiencies in any analysis of active state intervention has also characterised much of the increasingly common application of modern regulation theoretical analysis to the more specific subject of the state's particular regulation of the labour market. Such "encroachment" by scholars of modern regulation theory upon what had earlier been the traditional preserve of labour law scholarship has disclosed an apparent potential for productive interaction between these disciplines

---

1. Quinlan, M. "Contextual Factors Shaping the Purpose of Labour Law: A Comparative Historical Perspective" 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 Press Sydney, 2006 at 33.
2. Murray, J. "The Sound of One Hand Clapping? The 'Ratcheting Labour Standards' Proposal and International Law" (2001) 14 *Australian Journal of Labour Law* 306 at 307 to 310.
3. Teubner, G. "Juridification: Concepts, Aspects, Limits, Solutions", in G. Teubner, editor, *Juridifiction of Social Spheres: A Comparative Analysis in the Areas of Labour, Corporate, Antitrust and Social Welfare Law,* Walter de Gruyter, Berlin , 1987 at 3 to 48.

(as demonstrated in relation to the specific field of occupational health and safety law)[4] . It has been suggested that the increasing convergence of these formerly disparate academic disciplines potentially poses significant challenges "[F]or the conceptualisation of labour law in terms of both practice and scholarship. For example, what becomes of the traditional Anglo-Saxon view of labour law as a system designed to create a countervailing labour power to that of the employer?"[5]

By contrast, however, this paper argues that the same converging combination of theoretical and policy frameworks relating to the issue of labour market regulation can just as readily be utilised to reverse the direction of this implicit theoretical challenge. More specifically, it is contended that a close critical analysis of modern regulation theory – and its application to the study of existing legal regulatory systems other than traditional state regulatory modes – can serve to successfully subvert the general underlying antipathy displayed by much modern regulatory discourse towards any type of "command and control" regulation mandated by the state.

In this respect, attention is drawn to Hugh Collins' seminal study of the private law of contract as a system of regulation.[6] This paper will explore the implications of Collins' study for the potential theoretical validation – within the framework of modern regulation theory – of innovative "command and control" regulatory mechanisms based upon a somewhat novel integration of existing (state and non-state) regulatory approaches. This exploration of innovative regulatory mechanisms will focus upon the development of innovative regulatory roles for trade unions (and other NGOs) as well as for governmental regulatory authorities (such as labour and health and safety inspectorates).

In particular, this paper examines the role available to be played by trade unions in the labour market regulation of commercial contractual arrangements which can in no way be characterised as traditional employment relationships.

The first part of the paper analyses the theoretical context for development of this role in the form of an extended notional dialogue with certain important insights offered by scholars of regulation theory in relation to the private law of regulating contracts.

The latter portion of this paper examines some more concrete manifestations of the potential practical application of these insights, as an illustration of the scope available for appropriate and effective active public regulatory intervention into increasingly predominant forms of business organisation.

---

4. Collins, H. "Review of Gunningham and Johnstone, *Regulating Workplace Safety: Systems and Sanctions"* (2000) *Comparative Labor Law and Policy Jnl* 523.
5. Murray, above n.2.
6. Collins, H., *Regulating Contracts (* Oxford University Press, Oxford, 1999).

2. THE THEORETICAL CONTEXT: APPLYING REGULATION THEORY TO THE PRIVATE LAW OF CONTRACT WITHIN THE FRAMEWORK OF MODERN BUSINESS PRACTICE

Collins has surveyed the performance of the private law of contract in regard to each of the "[T]hree horns of the regulatory trilemma"[7] and he particularly concludes that it is only in relation to just one of these three goals – namely, the goal of regulatory effectiveness (which he terms "implementation") - that the private law of contract "[P]oses for itself major structural weaknesses".[8]

Deficiencies in the Regulatory Efficacy of Private Contract Law:

Not only does Collins repeatedly identify the failure of the private law of contract to achieve effective public regulatory outcomes from a social, "welfarist" perspective, but he also draws attention to the often inadequate private regulatory outcomes obtained under private law resulting from (inter alia) the relative "poverty of sanctions" available even to the aggrieved contracting parties themselves.[9]

In the course of describing this preponderance of efficacy inadequacies, Collins probes further into the "deeper" structural factors which together so frequently render the private law of contract "ineffective" as a "regulatory technique", pinpointing "[T]he difficulties for private law in establishing an effective mechanism for the monitoring of compliance with standards and the enforcement of standards" – observations which themselves raise the more fundamental issue of "[T]he formulation of standards for guiding participants in markets". Collins addresses this more fundamental issue in greater detail by explicitly identifying "several structural weaknesses" from which "[T]he private law of contract suffers … [including] the difficulties of incorporating externalities in setting standards, the problems of setting standards with an adequate degree of specificity in order to provide effective guidance" through to "[T]he lack of expertise in choosing between standards".[10] (In regard to problems concerning adequacy of "specificity", Collins more generally suggests inter alia that the "[P]roblem of insufficient specificity for the purposes of regulatory efficacy can be tackled most fruitfully by the development of default rules to supplement self-regulation … The solution at this point for private law is to develop the idea that some supplementary rules can not be waived at all"[11] as one particularly promising direction for development amongst a number of potential alternatives.)

These specific constraints upon effective "standard setting" are accompanied by parallel problems in the "[M]onitoring of compliance with standards" that have been successfully set, not least being the "[P]roblems of proof [which] do occur frequently in contractual contexts" in relation to the intention of parties.

---

7. Gahan, P. and Brosnan, P. "The Repertoires of Labour Market Regulation" in Arup et al. (op. cit.) at 137.
8. Collins , above n.6 at 67 to 69.
9. EG. Collins (1999), ibid at 90 to 93 and at 117 to 123 and at 284 and at 299 to 301.
10. Collins (1999), ibid at 69.
11. Collins (1999), ibid at 78 to 79.

(At this point of his exposition, Collins offers the intriguing insight that one "[S]olution to the problem of detection is to transfer the burden of proving compliance onto the alleged violator … The capacity of private law to detect failures of regulatory compliance turns crucially on … techniques for the reversal of the burden of proof.")[12] While private contract law arguably establishes an "inexpensive monitoring system" by allocating to "[P]urchasers … the task of inspecting their purchases", difficult problems still arise in relation to "[T]he kinds of latent defects which might only be detected as a result of inspection by persons with technical expertise. The inexpensive monitoring system of private law can only achieve blunt determinations of whether the goods [or services purchased] achieve satisfactory or acceptable standards, because either it lacks the sophistication to police detailed technical standards or the monitoring costs for complex standards are prohibitive."[13]

The comparative lack of regulatory effectiveness so often demonstrated by the private law of contract not only stems from such evident "[D]ifficulties with respect to setting standards" and the consequent "monitoring" of these standards (once set), but is also further exacerbated by a host of "difficulties" in securing the "enforcement" of these (set) standards.[14] Some of these enforcement "difficulties" are linked to key longstanding principles of private contract law as developed within Anglo-Saxon jurisdictions, according to which "[N]o damages may be awarded" in the absence of "[S]ome identifiable loss to a particular individual … As a limitation upon the scope for regulation, however, this emphasis upon the need for harm precludes private law from tackling certain kinds of sharp practice in dealings…"[15] In addition, "[A] fundamental weakness of the private law regulation of contracts consists in the subordinate role played by third parties whose interests may be affected by the self-regulated transaction …"[16] owing to the operation of the doctrine of privity of contract. Other enforcement "difficulties" are essentially variations of the (previously mentioned) relative "poverty of sanctions" available under private contract law, not least being the "[Lack of] a mechanism for the escalation of [legal] sanctions that is designed to provide a credible threat against systematic or persistent deviation from its standards … Again this represents a substantial structural weakness in the remedies available in private law to provide incentive for regulatory compliance."[17]

By contrast with this multitude of efficacy deficiencies, Collins clearly implies that the private law of contract can successfully - in a "productive" manner - achieve the two regulatory goals of social responsiveness and the maintenance of doctrinal coherence.[18] More specifically, he clearly points to the potential for retaining doctrinal coherence by means of integrating the pre-existing scheme of private law principles with aspects of the newer discourse of welfarist regulation to produce

---

12. Collins (1999), ibid at 89 to 90.
13. Collins (1999), ibid at 93.
14. Collins (1999), ibid at 75.
15. Collins (1999), ibid at 75.
16. Collins (1999), ibid at 70.
17. Collins (1999), ibid at 90 to 91.
18. Collins (1999), above n.12.

doctrinally coherent "hybrid forms of legal discourse".[19]

Exploring The Regulatory Terrain Of "Hybridity" in the Context of Private Contract Law:

Within his overall study of private contract law, Collins' attention to the concept of "hybrid forms of legal discourse" represents just one facet of a more broadly interesting subsidiary project which he pursues, in the shape of his general exploration of (what may be termed as) the regulatory terrain of "hybridity" – a terrain located at the interface between different regulatory systems where a host of diverse hybrid regulatory phenomena has emerged from the novel integration of previously disparate conceptual frameworks, organizational arrangements and regulatory approaches.

In addition to his discussion about "hybrid forms of legal discourse"[20] , Collins also explores hybrid forms of regulatory practice – together with hybrid forms of business organisation – as both being possibly fruitful sites for the elucidation of a range of potential specific solutions to what he identifies as the key regulatory deficiency of private contract law – namely, the many sided failure of the private law of contract to achieve the goal of regulatory effectiveness.

The many ongoing weaknesses of private law in relation to regulatory efficacy have cumulatively set the stage for "[T]he creation of modern styles of public regulation."[21] In turn, the coexistence (upon varying terms) of the pre-existing private law of contract with its public "welfarist" regulatory successors has effected a hybridisation of regulatory forms of practice. Collins has surveyed the range of differing interactions between public regulatory measures (operating through the activity of state agencies) and the private legal system for regulating contracts. In the course of this survey, he has distinguished between a number of different hybrid forms of regulatory practice differentiated according to their respectively varying degrees of direct state involvement into private contracting processes.

On the one hand, Collins has described less direct forms of state intervention into the otherwise wholly private sector operation of contractual arrangements. Such hybrid forms of regulatory practice often originate with the problematic operation of a distinctly private contractual process between private sector parties. Where the private law of contract fails to produce an effective regulatory outcome in this situation, "a public regulatory agency" external to that contracting process may intervene – as a regulatory deus ex machina – in order to secure just such an effective outcome by means of persuasion and negotiation.

---

19. For a fuller exposition of Collins' analysis concerning the potential problems and prospects for the private law of contract in relation to retention of its doctrinal coherence, see Nossar, I. (2005) "The Role of Trade Unions in Labour Market Regulation of Commercial Contractual Arrangements Beyond the Traditional Employment Relationship", in "*Labour Law, Equity and Efficiency: Structuring and Regulating the Labour Market for the 21st Century"Conference Proceedings:* Melbourne (8 July 2005).
20. Also see Collins, above n.6, ibid at 271 to 274.
21. Collins (1999), above n.8.

By contrast, Collins also considers the hybrid forms of regulatory practice which emerge from direct economic involvement by the state as a party to a private contracting process. When the state contracts directly with other parties, it need no longer rely only upon its persuasive capacity as an agency external to the contracting process, but rather it can seek to achieve the multiplicity of its regulatory objectives by direct exercise of its commercial power – as an immediate participant in the contracting process – by its willingness to forego any contractual relations except on the basis of contract conditions which it can effectively prescribe by virtue of the substantial commercial consequences of the state's budgetary clout.[22]

In this latter context of direct contractual dealings between the state (or its agencies) and private contractors, the previously discussed deficiencies of private contract law in relation to "standard setting" and enforcement threaten to become particularly acute since, "[I]n the absence of direct hierarchical control over performance by the contractor, the contract has to achieve quality by setting detailed standards in the terms of the contract and establishing appropriate incentive systems."[23] Consequently, in its role as a direct contracting party, the state has a clear interest in minimising the difficulties arising from "standard setting" (and enforcement) by means of maximising its degree of "[D]irect hierarchical control over performance by the contractor". Thus, by invoking its substantial commercial power during the course of contracting out its services, the state ends up by creating a supply chain arrangement within which it can potentially exercise a decisive (private) regulatory role as the "effective business controller" of that supply chain.[24]

The increasing prevalence of such "government by contract" is the immediate consequence of the trend towards privatisation of government services.[25] It can readily be observed that the resultant trend towards government contracting out of services is merely one particular manifestation of a broader economic phenomenon encompassing the range of diverse arrangements for outsourcing, subcontracting, linked transfer or franchising which Collins has (elsewhere in his study) collectively characterised as "hybrid business organisations" composed of "[I]maginative combinations of contractual obligations … creat[ing] business associations which straddle the divide between market and hierarchy … Hybrids mimic the supervisory and monitoring powers of principal and agency relations, and achieve equivalent powers of unilateral regulation to those found [with]in formal organisations."[26]

---

22. Collins (1999), ibid at 305.
23. Collins (1999), ibid at 311.
24. Nossar, I., Johnstone R. and Quinlan, M. "Regulating Supply Chains To Address the Occupational Health and Safety Problems Associated with Precarious Employment: The Case of Home-Based Clothing Workers in Australia" (2004) 17 *Australian Journal of Labour Law* 137 at 145 to 146 and at 151.
25. Collins, above n.6 at Chapter 13.
26. Collins (1999), ibid at 250 to 252.

The Scope of Existing Regulatory Practice within Hybrid Forms of Business Organisations:

Such hybrid business organisations constitute an illustration of "[R]egulation … by private commercial [contractual] means, in the commercial interests of the [effective business controllers], rather than in the more recognisably traditional form of public regulation through legislation …"[27] This type of private contractual regulation is exercised by effective business controllers "[P]repared to use their market power to secure exactly what they want (in the form of price, quality control and turnaround time)" by means of standardised contractual arrangements which entrench the right (of these controllers) to substantially control the supply process (by which services are to be provided or goods manufactured) and their complementary right to inspect premises where work is to be performed under the relevant contracts[28] . Effective business controllers impose such standardised contractual conditions throughout their respective hybrid business organisations within the context of broader contractual arrangements which provide a potent combination of legal indemnities and non-legal sanctions calculated to effect the will of these effective business controllers. In this context, formal contractual provisions regularly delineate "precise, onerous … indemnities" designed to inspire contracting parties to ensure the fulfilment of the commercial objectives of the effective business controllers.[29]

Yet even such apparently daunting formal contractual indemnities frequently pale into relative insignificance in comparison with the potential commercial impact of non-legal sanctions available to be deployed within hybrid business organisations. "The effectiveness of non-legal sanctions depends upon their potential to impose economic loss on a party to a contract who causes disappointment or betrayal. The sanction of a refusal to do business with a person in breach of contract in the future will be very powerful, for instance, where the deceiver [or the party otherwise in breach] derives much of its business or income from the other contractor … Perhaps the key incentive to perform contracts faithfully, particularly with regard to quality, derives from the greater benefits to be achieved from the income from a stream of future sales rather than one-off benefits from defaults."[30]

Effective business controllers operating at the apex of hierarchically organised modern supply chain arrangements are therefore well placed to wield such potent non-legal sanctions over the other contracting parties involved in these types of hybrid business organisations. Thus, for instance, in Australia today the "[M]ajor retailers [sector] is characterised by a highly oligopolistic concentration of market share (and market power)" which ensures that a wide range of supplier businesses are keen to secure the custom of these major retailers on a continuing long term basis. This observation applies equally to the supply chain structures responsible for the provision of clothing manufactured in Australia[31] and also to those responsible for the

---

27. Nossar, Johnstone and Quinlan, above n.24.
28. Nossar, I. (2000) *Briefing Paper: 'Behind the Label': the New South Wales Government Outworker Strategy – the Importance of the Strategy and Prerequisites for its Success,* Textile, Clothing and Footwear Union of Australia: Sydney at 3.
29. Ibid.
30. Collins, above n.6 at 114.
31. Nossar, I. *Proposals for the Protection of Outworkers from Exploitation,* Textile, Clothing and Footwear Union of Australia: Sydney, June 1999, at 2.

provision in Australia of long haul road freight transportation services (given that "[M]ajor retailer consignors occupy a position of predominant commercial power in this supply chain structure" as well).[32]

In the case of long haul freight transportation, for example, major retailers operating in Australia are in a position to wield just such powerful non-legal sanctions so as "[T]o effectively control at least two separate aspects of freight transportation in Australia" – namely, the "[M]aximum payment available for each kilometre of required transport" of the retailer consignor's freight (since "[T]he price paid by the major retailer consignor to the transport operator will impose a transport cost discipline throughout the remainder of the [relevant] supply chain structure") and also the "[M]aximum time available" for such required transport (since "[T]he entire subsequent supply chain arrangement is necessarily bound by those directed delivery time constraints" laid down in each major retailer's contract with each major transport operator).[33] "These specific aspects of control by major retailer consignors (over [the ultimately performed] individual truck journeys) are simply particular examples of the general contractual power – and legal authority – exercised by consignors to determine precisely under what conditions their freight is to be transported … In other words, any consignor is free to nominate – by way of contractual conditions – the specific terms and arrangements which must apply to the transportation of that consignor's goods … In the abstract, any major transport operator is free to decline acceptance of any contract [offer] subject to such conditions. However, the overwhelming commercial power (and the existing legal authority) of major retailer consignors ensures that the contractual conditions specified by these consignors will in effect be imposed throughout long haul transportation supply chains".[34]

In this way, the phenomenon of hybrid business organisations dramatically illustrates the validity of the more general observation that "[C]ontractualization permits the formation of a particular type of power relation. Although the imagery of freedom of contract presents an egalitarian picture of two people negotiating the terms of their agreement, in practice many contracts constitute the opportunity for one party to create unilaterally a system of rules and governance structures for the relation … The standard form of consumer contract imposed on a 'take it or leave it' basis by businesses represents only the tip of an iceberg of these governance structures. Contracts can incorporate whole regulatory systems … [so that these contracts] simulate the form of an agreement, but they really represent the exercise of **discretionary economic power** by one party to the contract over the other backed up by a system of economic sanctions specific to that relation, such as … the disqualification of a contractor. **Contracts therefore create 'governance' structures, which are private in the sense that they are only indirectly supported by state power. Markets and hierarchies are therefore not opposites, as they are sometimes presented, but rather markets create their own hierarchies through contracts."**[35]

---

32. Nossar, I. *Briefing Paper: Consequential Amendments to Occupational Health and Safety Amendment (Long Distance Road Freight Transport) Regulation Draft,* Textile, Clothing and Footwear Union of Australia: Sydney, November 2004, at 2.
33. Ibid.
34. Nossar (November 2004), ibid at 4.
35. Collins, above n.6 at 24. (Emphasis added).

Within each hybrid business organisation, these governance structures are entrenched by the effective business controllers through the exercise of their commercial power and legal authority. **These governance structures can empower effective business controllers to potentially shape many aspects of commercial activity throughout their respective hybrid business organisations – regardless as to whether or not the effective business controller directly contracts with the "distinct units of capital"[36] (actively involved within the hybrid business organisation) which engage in that particular commercial activity (for the joint purposes of that hybrid "network"[37]).** Thus, the effective business controller of such a hybrid "network" may have no *direct* dealings of any kind with any actual worker who ends up ultimately performing some of the work which is required to be undertaken in fulfilment of the commercial objective of that controller. Yet the very same effective business controller may still be in a position to practically determine key parameters of that actual worker's occupational situation, such as payment levels or working time, by means of the 'governance' structures contractually entrenched throughout the respective hybrid "network" contractual arrangements.

Indeed, the effective business controller of a particular "network" may not even be physically located within the same geographical jurisdiction as the ultimate workers over whose working conditions the controller can wield such decisive influence. In summary, therefore, the contractually entrenched 'governance' structures characteristic of such business "hybrids" constitute powerful instruments for effectively regulating a wide range of economic determinants – including working conditions – throughout hybrid business organisations, potentially irrespective of geographical jurisdictional boundaries.[38]

Implications for Developing Effective Public Regulation of Business "Hybrids":
The immediately preceding observations describe the current scope for *private* regulation of business "hybrids" in the commercial interests of their effective business controllers. At the same time, these very observations also imply that adaptations of these "network" governance structures may equally be capable of being utilised to regulate business "hybrids" for *public* purposes as well. More specifically, this latter implication foreshadows opportunities for the successful development of effective public regulation of the contracting practices within business "hybrids", whereby the relevant (contractually entrenched) "network" governance structures can be harnessed by means of public legislative regulatory prescription to create "contractually entrenched forms of regulation" (C.E.F.O.R.) in furtherance of public regulatory purposes.[39]

---

36. Collins (1999), above n.26.
37. Collins (1999), ibid at 248.
38. Nossar, Johnstone and Quinlan (2004), above n.24 at 153. The accuracy (and relevance) of these observations about the scope for feasible private transnational contractual regulation (even in furtherance of public purposes) has now been explicitly confirmed by one of the world's largest effective business controllers operating as a major retailer, when Wal-Mart Stores announced that the corporation operated "[T]he world's largest overseas monitoring program" whereby (during last year alone) "Wal-Mart cut off 1,200 factories for at least 90 days" as an interim incentive for non-complying suppliers while " Another 108 factories were permanently banned, primarily because of child-labor violations." See Steven Greenhouse 'Suit Says Wal-Mart is Lax on Labor Abuses Overseas' *New York Times* Wednesday 14 September 2005.
39. Nossar, I. (2005) "THE NEXT STEP FORWARD – 'REGIME CHANGE' BY WAY OF C.E.F.O.R.: Regulatory Intervention into the Contractual Links which Constitute Chains of Production, Supply and Outsourcing", in "*Supply Chain Strategies: At the Frontiers of Regulatory and Labour Organising Initiatives" Conference Proceedings:* Sydney (10 February 2005).

After all, these "network" governance structures are simply particular expressions of one specific form of private regulation secured by means of effectively compulsory standardised terms entrenched in formal contractual provisions. Accordingly, these "network" governance structures represent merely one facet of the phenomenon of private regulation by means of standard form contracts which are (more or less) "[I]ssued on a take it or leave it" basis by the relevant controlling contracting party (such as the effective business controller of a hybrid "network"). This phenomenon of private regulation by means of standard form contracts encompasses a broad range of contractual scenarios, extending also to "[M]ass [c]ontracts" – between a single controlling business and the (relatively atomised) mass of consumers of its products (or services). These business contracts with consumers are of the type commonly referred to as 'adhesion contracts'[40] which share key features with "network" governance structures. In particular, "network" governance structures of the types already discussed and mass 'adhesion' contracts are both characterised within their formal provisions by "[A] pattern in which the risks are allocated routinely onto the [other parties contracting with the controlling business, such as the] consumer", with this (essentially unidirectional) allocation of risks contractually secured "[B]y extensive use of disclaimers and exclusion clauses" which are supplemented (in the case of the previously discussed hybrid "network" governance structures) by extensive supply process control (and auditing) powers underpinned by means of "precise, onerous … indemnities"[41]. **"The effect of such clauses is that the [controlling] business retains a discretion to perform the contract and to determine how it should be performed**, whereas the consumer [in the case of mass 'adhesion' contracts] is bound to make payment, except perhaps in the event of complete failure of performance by the [controlling] business"[42] while – in the case of hybrid "network" governance structure provisions – the other parties contracting with the effective business controller are bound to shoulder the overwhelming burden of any risks associated with the supply process. These diverse – yet parallel – examples of the use of standard form contracts are, in turn, simply part of a broader continuum of "[C]ontracts [which] often establish power relations" – a continuum also encompassing "principal and agent relations" - which together represent various manifestations of private regulation by entrenchment in contractual provisions of (what are effectively) "compulsory terms". Collins considers as appropriate the adoption of such private regulatory "[M]easures designed to enhance the efficiency of the governance structure of the contract by means of inserting additional default rules or compulsory terms".[43]

The earlier discussion of the regulatory efficacy deficiencies of private contract law focussed upon the structural weaknesses of private law in relation to setting standards, monitoring compliance with the (set) standards and enforcing them. In light of this earlier analysis, it would seem that one vital prerequisite for "[E]nhanc[ing] the efficiency of the governance structure" of hybrid "networks" must surely be the adoption of effective measures to audit contractual performance and standards compliance throughout these "networks", especially if the auditing agency adopted

---

40. Collins (1999), above n.6 at 228 to 229.
41. Nossar (2000), above n.28.
42. Collins (1999), above n.40. (Emphasis added.)
43. Collins (1999), above n.40.

has a strong vested interest in securing such compliance. In the particular subsidiary subset of supply chain arrangements wherein retailers play the role of effective business controllers, the specific desirability of an "[I]ncentive for the manufacturer [or provider of services] to produce an efficient level of quality … may be addressed by the possibility of liability rules along the chain of production", which render the retailer liable for the product (or service) sold and also empower "[T]he retailer [to] pass on this cost by a claim against the manufacturer [or provider of services]" – thereby both assisting in the establishment of more precisely defined common compliance standards (inter alia for quality) throughout "the chain of production" and simultaneously offsetting any additional "administrative costs of private law liability" by substantially enhancing the potential for effective enforcement of those standards throughout that supply chain since "[T]he retailer may be in a more powerful position than [any other party in the supply chain] to threaten to use non-legal sanctions, such as an unwillingness to stock a particular product in future, so that the liability rule [throughout the supply chain] has a powerful supplement".[44]

In regard to the precise configuration of such supply chain liability rules, attention is drawn to Collins' (previously discussed) insightful observation that the "[C]apacity of private law to detect failures of regulatory compliance turns crucially on … techniques for the reversal of the burden of proof", since the "[T]ransfer [of] the burden of proving compliance onto the alleged violator" offers an important "[S]olution to the problem of detection".

In addition to this foreshadowed combination of such appropriately designed "[L]iability rules along the chain of production" in conjunction with auditing by those parties with strong vested interests in effecting compliance, attention is also drawn to the previously discussed critique by Collins of "[T]he subordinate role played by third parties whose interests may be affected by the self-regulated transaction" – an aspect of contract law which Collins has quite acutely characterised as a "[F]undamental weakness of the private law regulation of contracts". Collins has expanded on these concerns by focussing on "[T]he power constructed by contracts that affect the interests of third parties, but who can not mount an action in contract to redress or to challenge a decision", as well as the impact of "[C]ontractual relations [which] can restrict legal responsibilities to third parties or other members of the network, thereby creating a position of power to act unimpeded by social responsibilities …. These issues mirror the discussion of the social responsibility of corporations, that is the requirement of collective groups to respect the objectives of democratic legislative institutions. These considerations apply to contracts which create looser kinds of organization without vertical integration. The legal problem of regulating power in such instances has to be addressed by granting third parties derivative rights under contracts and by attributing legal responsibilities to [business] hybrids and other multi-party associations …."[45]

In light of the preceding analysis, it is clearly arguable that effective regulation of supply chain arrangements could be substantially promoted by attributing legal responsibilities to the effective business controllers within the overall framework of liability rules throughout each supply chain. Further more, the regulatory

---

44. Collins (1999), ibid at 301.
45. Collins (1999), ibid at 255.

effectiveness of such a measure could only be enhanced by identifying third parties which have interests that are affected by those supply chain arrangements and then focussing upon the relevant third parties with a strong vested interest in standards compliance by the supply chain participants. Once identified, these third parties would seem to be obviously potential candidates for the grant of derivative rights as third party auditors of the supply chains – a development which would result in third party monitoring of supply chain behaviour by institutions external to the supply chain, thus effectively creating "[A] countervailing … power to that of the" effective business controllers in a manner simultaneously "[D]esigned to enhance the efficiency of the governance structure of the" relevant business "hybrid", if one is to accept at face value the oft repeated public pronouncements of high profile effective business controllers about (what they claim to be) their own conceptions concerning the "efficiency" and "best practice" orientations of their respective hybrid "networks".

The adoption simultaneously of such supply chain liability rules – along with the proposed countervailing third party auditing arrangements – could proceed within the confines of the private law of contract "[B]y means of inserting additional default rules or compulsory terms", as in the form of compulsory *standardised* terms of the type already utilised (for private commercial interest) in mass 'adhesion' contracts and in the standard form contracts currently imposed by effective business controllers. "Public regulation also has the potential to impose compulsory standardised terms in market sectors, or to provide pre-contractual clearance of standard forms"[46] – including those sectors already characterised by the current active involvement of the effective business controllers of hybrid "networks" and their active utilisation of precisely such standard forms. The public regulatory imposition of this type of compulsory standardised terms could also accrue the additional benefit of further enhancing regulatory effectiveness by virtue of the recognized comparative advantage of public regulation (when compared with private contractual regulation simpliciter) in relation to the formulation of sufficiently specific contractual performance standards.[47]

Indeed, in regard to the specific issue of occupational conditions for those labouring in connection with business "hybrids", the existence of relatively well developed labour law minimum entitlements would seem to comprehensively solve most outstanding concerns about the prospects for "standard setting". This latter observation also points to the associated advisability of granting trade unions derivative rights to act as third party monitors of supply chains in relation to their compliance with labour law minima, given the obvious strong vested interest of trade unions in resisting any attempts to evade compliance with those minimum labour legal entitlements.

The following portion of this paper will set out some very recent public regulatory interventions – within three quite different industries – designed precisely to implement the latter recommendations for innovative trade union regulatory roles, and thereby "[C]reate a countervailing labour power to that of the employer" by regulating contracts which are *not* traditional employment relationships through an innovative integration of existing (state and non-state) regulatory approaches within a somewhat novel development of "command and control" regulation mandated by the state.

---

46. Collins (1999), above n.17.
47. Collins (1999), ibid at 93.

3. OPPORTUNITIES FOR INNOVATION IN THE SCOPE OF THE ROLE PLAYED BY TRADE UNIONS AS REGULATORS OF HYBRID BUSINESS ORGANISATIONS (IN RELATION TO THE SUPPLY OF GOODS AND SERVICES)

Innovative Historical Developments in Trade Union Approaches to the Regulatory Oversight of Retail Business Practices Within Australia:(The Supply of Goods):

Australia has a federal system of government, characterised by a division of legislative powers between the (national) "federal" jurisdiction and the respective (provincial level) "state" jurisdictions. Until very recently, the minimum pay and industrial working conditions for almost all workers in Australia have been set down – by a range of (various federal and state) industrial tribunals – in the form of (respectively federal and state jurisdiction) industrial awards.

Since the mid-1980s trade union and community groups have campaigned for legal mechanisms that establish minimum hours and rates of pay – in addition to reasonable working conditions and OHS and workers' compensation entitlements – for clothing outworkers. (The term "outworkers" refers to those workers labouring in their own homes to perform work for others.) This pressure led the federal industrial tribunal, in 1987 and 1988, to adopt novel award provisions designed, inter alia, to permit regulatory agencies, including the relevant trade union, to *track the contracting process* from the level of principal manufacturers, and fashion houses, down to the industrial outworkers themselves. In addition, this package of award provisions established the legal right of clothing outworkers to receive pay rates and, in general, conditions no less than the legal minimum entitlements of factory-based clothing workers. These important provisions were supplemented by an equally significant federal industrial tribunal decision in 1995 giving regulatory agencies full legal access to contract details of *pricing* at each level of the contracting process. However, unavoidable issues of industrial legal jurisdiction enabled the most significant players in the contracting process – the major retailers – to escape the scope of these new award provisions. Further, these new award developments were isolated to the realm of 'industrial relations law', so that the potential advantages of these novel industrial award provisions remained unavailable in relation to the equally pressing concerns about the OHS of clothing outworkers and the lack of their insurance coverage for workers' compensation. The effective enforcement of OHS provisions and workers' compensation coverage for outworkers is equally dependent upon the knowledge of regulatory agencies about the *location* of these outworkers and the *conditions* (including payment rates and hours of work) under which they labour. In addition, the past inability of governmental regulatory agencies to provide sufficient resources for enforcement ensured that real compliance with such formal legal provisions remained sporadic at best.

In response to these deficiencies, further trade union and community pressure led in 1995 and 1996 to the adoption of voluntary codes of practice by retailers and manufacturing employers aimed at securing these entitlements for outworkers. Predictably, however, such voluntary schemes tended to place the more ethical retailers at substantial commercial disadvantage, since less ethical retailers who refused to volunteer could consequently benefit commercially from the exploitation of outworkers that more ethical retailers had agreed to forego. Only one major retailer adopted a form of voluntary retailer code that facilitated effective enforcement. The retailer was obliged, by that particular code of practice, to comply with parallel obligations for contractual disclosure and the provision of regular supply lists. This

particular voluntary code of practice also created a specific commercial incentive mechanism for the *effective commercial remedy* of supply chain failures to comply with outworkers' entitlement obligations. The retailer was obliged to designate a specific corporate officer to whom the relevant signatory trade union could bring specific instances of outworker exploitation, and was also obliged to respond to proven instances of outworker exploitation by means of a range of commercial disciplinary measures aimed at the relevant supplier of clothing. In particular, this innovative voluntary code of practice obliged the signatory major retailer to consider discipline of the relevant supplier by terminating the contract for supply between that retailer and that supplier, and by refusing to enter into further contracts of supply, if the supplier failed to remedy the disclosed breaches of the outworker legal protections.

A range of integrated proposals was put forward by the author in June 1999 to deal with the remaining deficiencies in the legal system of protection for outworkers in general (as opposed to merely clothing outworkers in particular).[48] The first Australian state jurisdiction to act in response to this set of proposals has been New South Wales, where the enactment of both the *Industrial Relations (Ethical Clothing Trades) Act 2001* (NSW) and more recent provisions such as the addition of the new s 175B into the *Workers' Compensation Act 1987* (NSW) have together combined to achieve the three following key outcomes.

First, they impose liability almost throughout the entire supply chain (for example, upon principal manufacturers) for outworker entitlements, and create a highly innovative recovery mechanism for outworkers. Under this recovery mechanism, clothing outworkers are entitled to serve a claim for unpaid industrial entitlements upon any entrepreneur throughout the relevant clothing supply chain up to, and including, the level of the principal manufacturers themselves. The form of the claim is cheap and simple. Once served with such a claim, the principal clothing manufacturer effectively experiences a reversal of the traditional onus of proof for civil law recovery. In other words, unless the principal manufacturer could prove that the outworker serving the claim had not done the work or that the claim calculation was erroneous, the principal manufacturer served with such a claim would thereupon be obliged to pay that claim within a relatively short fixed period of time, regardless of how many entrepreneurial parties had intervened in the succession of contractual arrangements between the principal manufacturer and the clothing outworker who ended up performing the work.

Second, under s175B of the NSW *Workers' Compensation Act*, obligations have been imposed upon principals generally (that is, not only in the clothing industry) either fully and accurately to disclose full details of supply chain subcontracting or else bear the liability for any unpaid workers' compensation insurance premiums throughout that supply chain. This provision contains elements that are very similar to the novel statutory recovery mechanism contained in the newly adopted ss 127A to 127G created by schedule 2 of the *Industrial Relations (Ethical Clothing Trades) Act 2001* (NSW).

48. Nossar (June 1999), above n.31 at 1 to 28.

Third, in relation to major retailer obligations, these statutory provisions created a tripartite stakeholder consultation process with a fixed timetable triggering the potential exercise of ministerial statutory powers unilaterally to proclaim mandatory retailer obligations. These powers were not confined to consideration of industrial legal entitlements alone: rather, any such mandatory retailer obligations were to be predicated on the delivery of all relevant employment protections for outworkers, both in relation to industrial legal entitlements and also explicitly in relation both to OHS obligations and also access to workers' compensation insurance.

Even before the expiry of the timetable for this tripartite process, the dynamic created by these statutory provisions (and most notably by the limited timetable prior to potential proclamation of mandatory retailer obligations) rapidly produced, in the private sector, a new improved voluntary retailer code of practice – now promptly embraced by most major Australian retailers – and also a separate, new corporate wear(and sportsgoods) code of practice, along with separate auditing arrangements authorised as an Australian state government tender requirement by a public sector effective business controller.

Following protracted negotiations conducted by the author and others, high profile transnational clothing firms such Nike and Reebok and (more locally in Australia) R.M.Williams have become signatories to this new Australian corporate wear and sportsgoods code of practice. This new corporate wear and sportsgoods regime entrenches targeted compliance auditing and enforcement measures by requiring the effective business controllers of the relevant clothing supply chains to contractually secure both identification of all sites of production (without exception) and also access by the relevant trade union to those sites, without any requirement for prior notification of inspections. These contractually secured measures are underpinned by the potential loss of supply contracts for any suppliers who attempt to avoid compliance. (The author had first proposed this package of targeted compliance auditing and enforcement measures to an agency of the New South Wales government, during the government's review of implementation guidelines concerning government purchase of textile, clothing and footwear products.)

The tripartite stakeholder consultation process in New South Wales culminated in a decision to recommend that the relevant minister unilaterally proclaim mandatory retailer obligations which specifically incorporate targeted compliance auditing and enforcement measures of the type to be found in the new corporate wear and sportsgoods code of practice. It should be noted that this recommendation was supported by five out of the (total of) six stakeholder organisations represented in this tripartite consultation process. More specifically, this recommendation was supported by the stakeholder organisations representing both the retailers and a segment of the manufacturing employers.[49]

……

49. Nossar, Johnstone and Quinlan (2004), above n.24 at 149 to 150 and at 155 to 158. The text of this can be found at <http://www.industrialrelations.nsw.gov.au/resources/ethicalclothingtcouncil.pdf> under the title 'New South Wales Ethical Clothing Trades Council (Twelve Month Report) 2003' as 'Recommendation One' from pages 36 to 52. The author of this paper served in the capacity of stakeholder organisation representative on the New South Wales Ethical Clothing Trades Council throughout its deliberations, in the course of which he designed and drafted the relevant Council recommendation.

This recommendation has now been effectively adopted by the relevant ministers and the resulting mandatory retailer obligations were proclaimed by order in gazette as a delegated legislative instrument entitled the "*Ethical Clothing Trades Extended Responsibility Scheme*". This legislative instrument took effect in New South Wales on 1st July 2005. **(See Annexure A.)** Attention is particularly drawn the legal obligations owed by retailers to the relevant trade union by virtue of clauses 11, 12(3), 12(4), and 20 – especially 20(8).

It should be noted that these provisions together empower the relevant trade union to exercise effective regulatory oversight over the entire clothing supply chain in relation to compliance with labour law minimum standards. While these provisions are legislated by an instrument pursuant to New South Wales state industrial relations legislative capacity, it should be noted the resulting trade union regulatory powers permit the relevant trade union to effect compliance with workers compensation (as well as occupational health and safety) legal obligations – in addition to compliance with industrial relations legal obligations.[50]

More specifically, these provisions together require all clothing retailers to **proactively** inform the relevant trade union about all parties with whom the retailers contract for the supply of clothing products. In addition, these provisions also empower the relevant trade union to have complete access to all details of the consequent contracts. In summary, these provisions together now empower the relevant trade union to track down all sites of clothing production throughout Australia, even though (at the time of writing) these provisions have only been legislatively adopted in just one Australian State jurisdiction so far – namely, the state jurisdiction of New South Wales.

The effective cross-jurisdictional consequences of this novel type of public regulatory instrument are particularly evident in clause 19, Obligations of suppliers who carry on business outside the state. This particular provision interacts with the provisions in clause 5, Definitions, which define "agreement" and "lawful entitlements" (by inter alia reference to "other legislation") and "manufacture" and "manufactured", as well as defining the key terms "relevant industrial instrument" and "retailer" and "supply" and "transfer". Together with clause 19, these definitional provisions represent the practical embodiment of the potential inherent within "contractually entrenched forms of regulation" (C.E.F.O.R.) to overcome the regulatory obstacle of geographical jurisdiction.

Attention is also drawn to the contractually entrenched form of regulation (C.E.F.O.R.) legislated in Schedule 2 (Part B) as the compulsory standard contractual provision entitled " UNDERTAKING AS TO THE EMPLOYMENT OF OUTWORKERS UNDER RELEVANT AWARD". (The innovative regulatory scheme described above has now been adopted by other Australian State jurisdictions, where the scope of the relevant legislative obligations has now been broadened to potentially encompass all domestic Australian supply chains involved in the production of goods or the performance of clerical work – and not merely those supply chains in the textile clothing and footwear industries. Particularly noteworthy

50. See the definition of "lawful entitlements" – in particular, the reference to "other legislation" – within Clause 5, Definitions, of the New South Wales *Ethical Clothing Trades Extended Responsibility Scheme*

are the recently amended provisions of the South Australian Fair Work Act 1994 – especially in the amendments to sections 4 and 5 and the addition of the newly enacted Chapter 3, Part 3A, Outworkers.) [51]

This legislative instrument was one of a number in relation to whose design, negotiation and final drafting the author of this paper played a leading role. Two other such instruments are discussed below.

Related Developments within Industrial Relations Law: (The Supply of Services):

While the supply chain regulatory model discussed above arose first in the Australian textile clothing and footwear (TCF) industries, key features of this innovative regulatory regime have begun to appear in other Australian industrial sectors also characterised by supply chain structures.

.

For example, major financial institutions have contracted out the transportation of cash and valuables to high profile security firms which have in turn further subcontracted out the same work to small (often under resourced) security businesses. In recent years, New South Wales witnessed a spate of armed robberies resulting in the tragic killing of cash transit security guards, whose occupational health and safety had seemingly been ignored by each successive business in the relevant supply chains.

Campaigning around this issue by the relevant trade union led the NSW state industrial tribunal to grant an interim award covering this hazardous work, an industrial instrument later made permanent in 2002 as the "Transport Industry – Cash - In – Transit (State) Award" in New South Wales. **(See Annexure B.)** Attention is particularly drawn to clause 27, Contract Work – Chain of Responsibility, with specific focus upon the disclosure obligations owed by supply chain principal contractors to the relevant trade union by virtue of clause 27.1. This entire clause is an adaptation of parallel industrial award provisions contained in the relevant New South Wales state clothing award.[52] In this respect, further attention is drawn to the innovative principal contractor liability rule contained within subclause 27.8 – which represents an adaptation of the novel "second person clause" which originated in the respective Federal and New South Wales state clothing awards.

.....

51.Rawling, M. "A Generic Model of Regulating Supply Chain Outsourcing" in Arup et al. (op. cit.)at 520 ET SEQ. This particular scholarly work provides perhaps the most detailed analysis of the key relevant historical developments throughout Australia concerning the legislative regulation of domestic Australian supply chains. For more recent developments within Australia, see Rawling M. "The Regulation of Outwork and the Federal Takeover of Labour Law" (2007) 20 *Australian Journal of Labour Law* 189.

52. Nossar (June 1999), above n.31 at 10 to 11 and at 14 to 18.

Further Developments in the Field of Occupational Health and Safety Law: (The Supply of Services):

The recurring tragedy of road deaths involving trucks engaged in long haul road freight transportation led to the establishment in April 2000 of an inquiry by the NSW Motor Accidents Authority. The inquiry, chaired by Professor Michael Quinlan, gathered testimony and expert evidence, notably from Professor Richard Johnstone.

The inquiry also investigated the role played by the industry's supply chain structure in permitting such a gruesome outcome.

In its final report [53], the inquiry recommended an impressive range of remedial measures, including the imposition of relevant legal obligations throughout transport supply chains. During the subsequent period of consideration for the inquiry's recommendations, the author of this paper put forward a range of specific proposals for the design and content of relevant legal obligations to apply to major retailer consignors and consignees which acted as effective business controllers.[54]

Consequently, the "*Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005*" in New South Wales was proclaimed on 10th June 2005, to commence on 1st March 2006. **(See Annexure C.)**

Attention is particularly drawn to the retailer legal obligations contained in the clauses 81B(3), Duty to assess and manage fatigue of drivers and 81C, Duty of consignors and consignees to make inquiries as to likely fatigue of drivers and 81E, Application of Part to consignors and consignees and their agents. Attention is also drawn to retailer obligations to provide full details of contracts to the relevant trade unions by virtue of clause 81F, Records -- in particular, sub clauses 81F(1) (b) and 81F(2) and 81F(5) and 81F(6).

……..

53. Quinlan, M. *Report of Inquiry into Safety in the Long Haul Trucking Industry* (Motor Accidents Authority of New South Wales, Sydney, 2001) available at http://www.maa.nsw.gov.au/default.aspx?Menu ID=189.
54. Nossar (November 2004), above n.32.

4. IMPLICATIONS FOR REGULATION BY STATE (AND PROVINCIAL) GOVERNMENTS WITHIN FEDERAL SYSTEMS:

The preceding discussion and the instruments discussed provide theoretical and practical justification for effective labour law regulation of business "hybrids". In particular, the legislative instruments discussed demonstrate how this particular approach can potentially overcome regulatory obstacles such as geographical jurisdiction in a manner which simultaneously offers the potential to transcend the previously restrictive approach to regulation theory and its central concepts – most notably, the conceptual construct of the "regulatory trilemma".

In so doing, the preceding discussion and the instruments discussed in this paper illustrate precisely why "[T]he actual contracting arrangements imposed by [effective business controllers of hybrid "networks"] should be the locus of more active public regulatory intervention".[55]

This paper has sought to describe a variety of practical adaptations of the regulatory strategy developed by the author of this paper over the preceding half decade or so – a strategic approach described elsewhere as "supply chain regulation".[56] Perhaps the most intriguing prospect for immediate further adaptation (and adoption) of this approach lies in the obvious scope for extension of this "supply chain regulation" model into the fair trading jurisdiction of Australian state legislatures.

In this regard, there seems little doubt about the legislative capacity of these state legislatures to impose valid disclosure requirements upon all retailers operating within their respective geographical jurisdictions. The existing obligations for retailer disclosure to consumers can be readily confirmed by any shopper while surveying the wide range of label details (concerning such matters as net weights as well as ingredients and locations of manufacture) which proliferate across the face of modern retail packaging.

There seems no obvious impediment preventing the relatively straightforward extension of this oft repeated, everyday exercise of legislative capacity so as to further require additional retailer disclosure – both in relation to the precise location at which the relevant work (either of manufacture or service provision) has been performed in the course of supplying the retail article concerned and also in relation to certain specified aspects of the actual conditions under which that same work was performed, aspects such as payments made and working time expended.

In other words, retailers across the board can already be compelled to disclose (upon retail packaging) a host of details about the articles on sale such as ingredients of manufacture and country of production, with clear consequential impacts upon the behaviour of those supplying the retailers-even where that supplier behaviour (such as product packaging) occurs beyond the traditional geographical jurisdiction of the relevant Australian legislature (and perhaps outside Australia altogether).

……

55. Nossar, Johnstone and Quinlan (2004), ibid at 152.
56. Rawling (2006), above n.51.

There seems no obvious obstacle hindering the extension of this existing Australian state legislative capacity in order to simply require additional retailer disclosure concerning particular key aspects of manufacture (or supply), such disclosure to be made to specified regulatory agencies, with the corollary further requirements that retailer supplier contracts be compulsorily structured both to ensure provision of the obligatory information – and even to ensure third party auditing by specified relevant regulatory authorities, regardless of the ultimate location of sites of manufacture (or supply).

The adoption of such retailer requirements for compulsory contractual structuring in order to ensure disclosure – and auditing – has been described elsewhere as "regime change by way of C.E.F.O.R.".[57] The legislative adoption of such "regime change by way of C.E.F.O.R." (by the exercise of fair trading jurisdictional capacity) would necessarily prevent access to the relevant Australian retail markets by any supply chain which failed to comply with the (newly adopted) disclosure (and contract structuring) obligations, thereby rendering irrelevant any speculative scholarly digressions concerning the relative commercial power of Australian retailer effective business controllers in comparison with their counterparts in (say) North America or Europe (or in relation to supply chains for retail products other than garments).

The preceding discussion clearly suggests that state jurisdictions can exercise their existing regulatory powers in order to effect extraterritorial – indeed, potentially supranational – regulatory outcomes. There seems to be no general reason in principle which might prevent the same type of regulatory powers being similarly exercised by state (or provincial) authorities within other Federal systems of government around the world today.

……

57. Nossar (2005), above n.39.

5. CONCLUDING SUGGESTIONS: A PRACTICAL ILLUSTRATION OF SUPRANATIONAL REGULATORY INSTRUMENTS:

To sum up: there seems to be no obvious impediment which might prevent more generalised adaptation of the type of regulatory measures and instruments discussed above – specifically, adaptation in order to achieve supranational regulatory outcomes. The cross – jurisdictional regulation of contract networks (such as supply chains) already falls within the existing regulatory powers of governments at all levels: national governments; state (or provincial) governments; and even potentially local (or municipal) governments.

In essence, the power to effect such cross – jurisdictional regulation rests upon a simple glaring reality: governments at all levels currently possess a variety of legal powers to regulate the supply contracting practices of business entities which in any way operate within (or through) the respective geographical jurisdictions of those governments. In other words, governments at all levels currently possess sufficient intra – jurisdictional power in order to effect cross – jurisdictional regulatory outcomes. That cross – jurisdictional use of intra – jurisdictional public regulatory power clearly extends to mandating a wide range of disclosures to be made by any business entity which is characterised by the requisite jurisdictional connection. Furthermore, governments already have the legal power to legislatively require such a business entity to forego involvement with any relevant contract network unless mandated disclosure requirements have been contractually imposed throughout the relevant contract network.

Finally, in conclusion, it is important to note that public regulatory authorities can impose such regulation of contract networks either across the board by legislative fiat or (alternatively) upon the suppliers (to government) of goods (or services) by way of standardised government contracts.

The following proposed "International Ethical Clothing Supply Deed" has been designed by the author as an illustration of a generic type of binding legal arrangement which can be entered into between a regulatory authority (such as a trade union or other NGO or a governmental labour inspectorate) on the one hand and (on the other hand) an effective business controller of a transnational supply chain.

Indeed, the adoption of this type of proposed arrangement might well be mandated by law – perhaps within a legislative framework similar to that found in Annexure A. This type of mandatory legal obligations could equally be applied to all retailers of the relevant goods or to all business purchasers of the relevant services. (In regard to such services, a legislative framework similar to that found in Annexures B or C might serve as a particularly appropriate alternative template for the form of mandatory legal obligations, especially if such a legislative framework adopted mandatory obligations in relation to business supply contracting practices of the type embodied in clause 27 – and especially 27.8 – of Annexure B.) The author invites readers to comment or suggest improvements in relation to the following proposed legal instrument (and the manner of its utilisation):

INTERNATIONAL ETHICAL CLOTHING SUPPLY DEED

PARTIES

Union [Full Name]
of [Full Address]

("Union")

AND **PRINCIPAL BUSINESS** [Full Name]
of [Full Address]

("Principal")

RECITALS

A For the benefit of its members and other workers in the clothing industry, the Union wishes to ensure that Employees of and Contractors to Suppliers are engaged upon terms and conditions no less favourable than those prescribed by the minimum legal obligations imposed in the relevant country in relation to the engagement of persons for the performance of work or in relation to the supply of clothing products or in relation to contracting for such supply.

B The Principal endorses the objective of the Union set out in Recital A and has agreed to assist the Union to achieve this objective by undertaking the obligations contained in this Deed.

C The Union has agreed to assist the Principal by providing it regularly with information and advice relating to the minimum legal obligations imposed in the relevant country in relation to the engagement of persons for the performance of work or in relation to the supply of clothing products or in relation to contracting for such supply and their operation.

D The Union has agreed to publicly acknowledge the Principal as a signatory to this Deed.

E The parties recognise and respect the right of all Contractors, Employees and Outworkers to join a union and to also organise and bargain collectively. The parties also state that the use of any form of forced or child labour will not be tolerated and that employees have a right to work in an environment free of discrimination, harassment and victimisation.

F The parties note that the matters set out in Recital E flow from the ILO Standards and Fundamental principles and rights at work. These principles and rights refer to how these standards are applied under the law in the relevant country.

G The parties acknowledge that standards in the relevant country are intended to provide for fair minimum standards for those performing work in the context of living standards generally prevailing in the community in the relevant country. The parties also acknowledge that employees must be paid at least the minimum applicable wage set out in the applicable minimum legal obligations imposed in the relevant country in relation to the engagement of persons for the performance of work or in relation to the supply of clothing products or in relation to contracting for such supply. Those performing work must also receive all entitlements due to them under the applicable minimum legal obligations imposed in the relevant country in relation to the engagement of persons for the performance of work or in relation to the supply of clothing products or in relation to contracting for such supply or under any relevant legislation.

H The parties make an in-principle commitment that purchasing practices should enable and not hinder the ability of Suppliers to meet the standards set out in this Deed.

I The parties agree that any mechanism in this Deed will not be used in any way as a punitive measure against an individual or group of workers who may raise issues of concern about their wages or work conditions.

OPERATIVE PROVISIONS

1 DEFINITIONS

In this Deed including the Recitals:

"Contract" means a contract between the Principal and a Supplier for the supply or manufacture of Goods which have been manufactured in the relevant country and includes the manufacture of all of the Principal's products in the relevant country for resale by the Principal.

"Contractor" means a person, company or organisation directly or indirectly engaged by the Supplier to assist the Supplier to manufacture Goods or part of Goods for resale by the Principal.

"Employee" means a person employed by a Supplier and includes any person whose usual occupation is that of an employee.

"Exploitation" occurs where a Supplier breaches the minimum legal obligations imposed in the relevant country in relation to the engagement of persons for the performance of work or in relation to the supply of clothing products or in relation to contracting for such supply or an applicable award or industrial instrument of an industrial tribunal or legislation in respect of the engagement in the relevant country of Outworkers or Contractors who perform work outside a factory or workshop.

"Federal Award in Australia" means the Clothing Trades Award 1999 as amended from time to time, or any award replacing that Award.

"Goods" means:

(a) the whole or any part of any male or female garment or of any article of wearing apparel including articles of neckwear and headwear;

(b) handkerchief, serviette, pillowslip, pillowsham, sheets, tablecloth, towel, quilt, apron, mosquito net, bed valance, or bed curtain;

(c) ornamentations made of textiles, felts or similar fabrics, and artificial flowers; and

(d) footwear items,

(e) but does not include imported component parts of the Goods referred to in (a) to (c) of this definition which include, but are not limited to, buttons, zips, tags and like items.

"Manufacture in the relevant country" means the process of manufacturing products in the relevant country or the process of altering or working on products in the relevant country (whether such products are imported into the relevant country or produced in the relevant country) by way of any process currently covered by either the minimum legal obligations imposed in the relevant country in relation to the engagement of persons for the performance of work or in relation to the supply of clothing

products or in relation to contracting for such supply or any other applicable industrial instrument in the relevant country.

"Non-compliance" occurs where a Supplier breaches the minimum legal obligations imposed in the relevant country in relation to the engagement of persons for the performance of work or in relation to the supply of clothing products or in relation to contracting for such supply or an applicable award or industrial instrument of an industrial tribunal or legislation in respect of the engagement of Contractors who perform work in a factory or workshop or the employment of its Employees or the engagement of Outworkers.
"Outworker" means a person who performs work (including making, constructing or finishing) in relation to the supply or manufacture of Goods or part of Goods ultimately on behalf of the Supplier outside the Supplier's workshop or factory under a contract or arrangement between that person and the Supplier or that person and any other party involved in the supply or manufacture of Goods or part of Goods.
"Persons properly authorised in writing by the Union" means those persons employed or otherwise authorised by the Union who have been nominated by the National Secretary of the Union for the purposes of clauses 3.3 and 4.7 of this Deed.
"Records" means the contracts referred to in clause 3.1 and the records required to be made under clause 3.2.
"Supplier" means a person, company or organisation in The relevant country which agrees with the Principal under a Contract to manufacture or arrange for the manufacture in the relevant country of Goods or part of Goods for resale by the Principal.
"The relevant country" means
…….
"Union" means
……..

2 TERM

This Deed shall operate from the date it is signed by the parties and continue to operate for a period of three years from the date of signing unless the term of this Deed is extended by mutual agreement of the parties or unless this Deed is terminated under clause 8.

The parties agree to commence negotiations about a successor to this Deed no later than three months prior to the expiry term of this Deed.

3 RECORDS

3.1 The Principal must make and retain for not less than 6 years records of all Contracts entered into with Suppliers except the sample garment referred to in clause 3.2(e) which must be kept for 12 months. The obligation on the Principal under this clause operates

from the date this Deed is signed by the parties. In relation to such Records as have been maintained prior to the signing of this Deed, the Principal must retain those prior existing Records for a period of three years from the date this Deed is signed by the parties and make these Records available to the Union in accordance with clause 3.3 of this Deed. This clause does not diminish any existing or future minimum legal obligations imposed in the relevant country in relation to the engagement of persons for the performance of work or in relation to the supply of clothing products or in relation to contracting for such supply and/or legislative requirements and/or other obligations to keep and maintain Records.

3.2 The Records must contain at least the following:

(a) the name of the Supplier;

(b) the address of the Supplier;

(c) the date of the Contract;

(d) the date for the delivery of the Goods to be made under the Contract;

(e) either the minute sewing time for that garment in accordance with the agreed operation of the General Sewing Database (as agreed between the Principal and the Union) or both a sample of the garment and a description of the nature of the work to be performed and the minute sewing time allowed for each item of Goods to be made;

(f) a drawing and size specification of the Goods to be made;

(g) the number of Goods to be made;

(h) the price to be paid for each item of Goods to be made;

(i) the total price to be paid for the Goods under the Contract; and

(j) a copy of the standard clause in the Contract requiring disclosure by each succeeding party (as required by Clause 6.7 of this Deed).

3.3 The Principal must:

(a) make the Records available to a person properly authorised in writing by the Union, after that person has given reasonable notice to the Principal of a request for access to the Records;

(b) allow the person properly authorised in writing by the Union to make appropriate copies of the Records as reasonably

required by the Union and provide copies of the Records copied to the relevant National Secretary of the Union; and

(c) give a copy of the Records to the Supplier upon entering into a Contract or purchase order.

4 OBLIGATIONS OF THE PRINCIPAL

4.1 The Principal must send to the relevant National Secretary of the Union, the name and address of each Supplier contained in the Record in the following manner:

(a) a full list of the Principal's current Suppliers within 10 business days of the date on which this Deed is signed by the parties; and

(b) a full list of the Principal's Suppliers for the preceding six month period within 10 business days of the last working day of February and August in each year.

4.2 The Principal agrees to inform all Suppliers of the existence of this Deed by taking the following action:

(a) the Principal will forward a copy of this Deed and a document setting out a brief explanation of the terms of this Deed to all Suppliers immediately following the Principal signing this Deed;

(b) the Principal will include a copy of this Deed and a document setting out a brief explanation of the terms of this Deed in its "Information For New Suppliers" package which is provided to all new Suppliers to the Principal; and

(c) the Principal agrees to advise all Suppliers that, as part of the implementation of this Deed, persons properly authorised in writing by the Union will be making regular visits to those establishments operated by the Supplier.

4.3 The Principal shall require each Supplier with whom it enters into a Contract to:

(a) keep appropriate records of where and with whom the Supplier may further contract to perform the work under the Contract between the Principal and the Supplier;

(b) retain a copy of the Records provided to it by the Principal under clause 3.3(c) of this Deed for a period of not less than six years. The obligation on the Supplier under this clause operates from the date this Deed is signed by the parties;

(c) make a copy of the Records available to the Union within 5 business days of a request by the Union to the Supplier for production being made;

(d) allow the Union to make copies of the Records retained by the Supplier;

(e) inform the Union about the address of each location where Goods are being manufactured and the identity of the parties responsible for the manufacture of the Goods at each of those locations; and

(f) require the Supplier to be registered under any minimum legal obligations imposed in the relevant country in relation to the engagement of persons for the performance of work or in relation to the supply of clothing products or in relation to contracting for such supply where the Contract between the Principal and the Supplier does not prohibit the Supplier from further contracting the performance of the work under the Contract to another person, company or organisation.

4.4 The Principal agrees to appoint a liaison officer for the purpose of handling all enquiries or allegations validly raised by the Union for the purposes of this Deed.

4.5 The name of the liaison officer (or officers if more than one) appointed by the Principal shall be notified to the Union on the signing of this Deed. Any changes to the liaison officer must be advised to the Union by the Principal.

4.6 If the Principal becomes aware that a Supplier has been or may be, or is using the services of Contractors or Outworkers for the manufacture of the Principal's Goods in the relevant country who have been or may be engaging in conduct that amounts to Exploitation or Non-compliance, then the Principal agrees to immediately inform the Union of this fact.

4.7

(a) The Principal shall not enter into any Contract with a Supplier unless the Supplier agrees in writing to permit persons properly authorised in writing by the Union to:

(i) after providing not less than 24 hours notice to the Supplier (or less if agreed with the Principal and the Supplier), visit any establishment operated by the Supplier (or any other establishment where Goods are being manufactured or otherwise worked on) at any time during normal working hours. Persons properly

authorised by the Union may visit a Supplier's premises without notice if the Union reasonably considers that the requirement to give notice would defeat the purpose of the visit. If a person properly authorised by the Union visits a Supplier's premises without notice, he or she must immediately notify the Supplier of his or her presence as soon as reasonably practicable after entering the premises;

(ii) inspect any Records between the Supplier and the Principal, together with any records at those establishments that are relevant to the manufacture (or supply or sale) under a Contract of Goods or part of Goods for resale by the Principal. Persons properly authorised by the Union may also inspect at those establishments time and wage records and work records (as defined in clause 46.2 of the Federal Award in Australia) and the relevant documents that evidence superannuation contributions being made on behalf of an employee and also the currency of workers' compensation insurance (including, but not restricted to, certificates of currency for workers compensation insurance);

(iii) undertake an inspection at those establishments in order to determine compliance with the minimum legal obligations imposed in the relevant country in relation to the engagement of persons for the performance of work or in relation to the supply of clothing products or in relation to contracting for such supply and any other applicable industrial instrument and compliance with any relevant occupational health and safety legislation;

(iv) interview, without causing unreasonable interruption to the production process, personnel who are present at those establishments in relation to the manufacture (or supply or sale) of any such Goods; and

(v) interview personnel (not present at those establishments) who are in any way involved in the manufacture (or supply or sale) of any such Goods, whether such personnel are described as Outworkers or Contractors or otherwise.

(b) The Principal will forward to the Union a clear photocopy of the agreement in writing by the Supplier.

(c) The Principal will forward any such photocopy to the Union as soon as possible after the Principal has received the original agreement in writing (or at least a clear photocopy of that agreement) from the Supplier.

(d) Notwithstanding the provisions of clause 4.7(a)(iii) of this Deed, the Principal will continue to monitor its Suppliers, which monitoring will be conducted by the Principal's internal and independent external monitors on a periodic basis.

(e) The Principal will not publish or otherwise distribute to any third party any copy of any pro-forma inspection sheets provided to the Principal by the Union in accordance with clause 5(h) of this Deed.

4.8 The Principal will comply with all applicable provisions of the minimum legal obligations imposed in the relevant country in relation to the engagement of persons for the performance of work or in relation to the supply of clothing products or in relation to contracting for such supply and any other applicable industrial instruments as long as the Principal remains directly involved in the manufacture or supply of Goods (or part of Goods).

5 OBLIGATIONS OF THE UNION

The Union must:

(a) provide the Principal with a current copy of the Federal Award in Australia and any minimum legal obligations imposed in the relevant country in relation to the engagement of persons for the performance of work or in relation to the supply of clothing products or in relation to contracting for such supply and promptly provide the Principal with any variations to any minimum legal obligations imposed in the relevant country in relation to the engagement of persons for the performance of work or in relation to the supply of clothing products or in relation to contracting for such supply;

(b) provide reasonable assistance to the Principal in interpreting the relevant provisions of the Federal Award in Australia or any relevant minimum legal obligations imposed in the relevant country in relation to the engagement of persons for the performance of work or in relation to the supply of clothing products or in relation to contracting for such supply;

(c) promptly inform the Principal in writing of any Exploitation or suspected Exploitation or of any Non-compliance or suspected Non-compliance of which it becomes aware and provide the Principal with any material it has which supports the allegation;

(d) upon request promptly meet with the Principal to consider any matter arising out of this Deed;

(e) keep confidential the copy Records made available to it by the Principal and/or the Supplier and not disclose their contents to any other person, company or organisation except to the Supplier specified in the Records or as required by law or in enforcement proceedings in a court or tribunal or in industrial dispute resolution proceedings in an industrial tribunal;

(f) promptly inform the Principal of any issues or concerns the Union has concerning the Principal's or Supplier's compliance with this Deed or any related matter or any issues or concerns the Union has concerning the Principal's or a Supplier's conduct (or alleged conduct) that may amount to Exploitation or Non-compliance and afford the Principal and/or Supplier an opportunity to address the issue or concern raised by the Union prior to the Union informing or discussing the issue with a third party. The Principal and/or Supplier has 10 business days (or a longer period as agreed between the parties) from the date it receives notice of the Union's issues and concerns to address these issues or concerns. The obligation under this clause does not apply where the issue or concern relates to a bona fide occupational health and safety issue or other legal obligation, the discovery of which requires immediate rectification or notification;

(g) report any concerns the Union may have relating to a Supplier's compliance with obligations under relevant occupational health and safety legislation to the proper authorities in each relevant country if the Union is not satisfied that its concerns have been addressed after the issue has been raised with the Principal under clause 5(f) of this Deed;

(h) as part of the inspection procedures set out in clause 10 of this Deed and in Schedule A to this Deed, record in writing on an agreed pro-forma inspection sheet (that sets out the Supplier's compliance obligations under the relevant minimum legal obligations imposed in the relevant country in relation to the engagement of persons for the performance of work or in relation to the supply of clothing products or in relation to contracting for such supply or industrial instrument of an industrial tribunal or legislation) any concerns the Union have after conducting an inspection of a Supplier's premises and promptly provide a copy of the completed pro-forma inspection sheet to the Principal; and

(i) publicly acknowledge the Principal as a signatory to this Deed when the Principal becomes a signatory and for the period while the Principal observes the terms and conditions of this Deed.

6 CONDUCT BETWEEN PRINCIPAL AND SUPPLIER/S

6.1 If the Union has notified the Principal that it believes a Supplier is engaging in Exploitation or Non-compliance, then the Principal agrees to immediately investigate the claims made by the Union and further agrees that it will within 10 business days (or such other

period of time as is mutually agreed) of receipt of the notice advise the Union as follows:

(a) that the Principal believes that Exploitation or Non-compliance has occurred;

(b) that the Principal believes that neither Exploitation nor Non-compliance has occurred; or

(c) that the Principal has not been provided with sufficient information to formulate a belief as to whether or not Exploitation or Non-compliance has occurred, and in such event, the Principal must request such further evidence as is reasonable from the Union to enable a belief to be formulated.

6.2 If the Principal believes that Exploitation or Non-compliance by a Supplier has occurred, the Principal agrees that it will take all action reasonably required by the Union to remedy the Exploitation or Non-compliance or achieve such other outcome acceptable to both parties ("Agreed Outcome") within not more than 10 business days (or such other period of time as is mutually agreed) of that requirement by the Union.

6.3 If a Supplier fails to:

(a) comply with a requirement of the Principal to remedy the Exploitation or Non-compliance or submit to an Agreed Outcome; or

(b) retain a copy of the Records for not less than six years (which obligation operates from the date this Deed is signed by the parties); or

(c) make a copy of the Records available to the Union within 5 business days of a request (to the Supplier) for production being made by the Union; or

(d) allow the Union to make copies of the Records retained by the Supplier; or

(e) inform the Union about the address of each location where Goods are being manufactured and the identity of the parties responsible for the manufacture of the Goods at each of those locations; or

(f) allow persons properly authorised in writing by the Union to enter and inspect premises and records and to interview personnel in accordance with the agreement in writing

between the Principal and the Supplier under clause 4.7 of this Deed,

the Principal must:

(g) if the Principal becomes aware that a Supplier has not complied with the matters set out in clause 4.3(b), (c), (d), (e) or (f) of this Deed immediately inform the Union about the specific nature and dates of the failure to comply and the identity of the Supplier concerned and what action the Principal will be taking in light of the Supplier's failure to comply (including whether the Principal will elect to terminate the Contract with the Supplier concerned and, if so, the specific date of any such termination);

(h) terminate the relevant Contract in a manner consistent with its terms and conditions or implement an alternative remedy following discussions with the Union; or

(i) not enter into any further Contracts with that Supplier or extend the period of operation of an existing Contract with that Supplier until the Principal and the Union agree that the Exploitation or Non-compliance has been remedied unless, following discussions between the parties to this Deed, it is reasonable for the Principal to enter into further Contracts with the Supplier.

6.4 The Principal will ensure that the ability of the Principal to terminate the relevant Contract in circumstances where a Supplier has not complied with the matters set out in clauses 4.3(b), (c), (d), (e) or (f) of this Deed is included as a term in any new Contract entered into between the Principal and a Supplier. The Principal will also request Suppliers with current Contracts entered into before the signing of this Deed to agree to such an amendment and, if the Supplier agrees, the Principal will amend the Contract to include such a clause.

6.5 The Principal will ensure that no current Contract entered into before the signing of this Deed continues to operate or is extended to operate beyond twelve months after the signing of this Deed without the Principal and the Supplier entering into a separate agreement or arrangement to comply with the requirements of new Contracts in accordance with clause 6.4 of this Deed.

Any action to be taken by the Principal in relation to the conduct of the Supplier under clause 6.3 of this Deed shall be reasonable and appropriate, taking into consideration the seriousness of the conduct of the Supplier.

6.6 If the Principal advises the Union that it does not believe that Exploitation or Non-compliance by a Supplier has occurred and the Union continues to assert that Exploitation or Non-compliance has in fact occurred, then this issue must be mediated pursuant to clause 7 of this Deed.

6.7

(a) Every Contract between the Principal and a Supplier for the supply or manufacture of Goods for resale by the Principal must contain an enforceable (and effective) standard clause which obliges each succeeding party who is involved in the manufacture or purchase of the Goods (or who is involved in giving out orders for the manufacture or purchase of the Goods) to inform the Principal about the number and type of articles (and the wholesale price per article) to be supplied by each succeeding party.

(b) The Principal will send to the Union a copy of the standard clause referred to in clause 6.7(a) of this Deed.

7 DISPUTE RESOLUTION

It is the intention of the parties that they should co-operate with the other in good faith to resolve any differences arising under this Deed. In order to achieve this objective the following disputes settlement procedure is agreed:

(a) the parties must meet to consider any issue if:
  (i) either party considers the obligations of the other party under this Deed are not being performed, and the other party disagrees;
  (ii) the Union considers that Exploitation or Non-compliance is occurring and the Principal disagrees; or
  (iii) the Union believes that the Principal has not acted reasonably in continuing to contract with the Supplier as it may under clauses 6.3, (g), (h) and (i) of this Deed.

(b) If agreement on the issue referred to in clause 7(a) of this Deed cannot be reached or a party refuses to observe its obligations under this Deed, the parties must enter into mediation with a mediator who has experience in the clothing industry and is agreed by the parties, or failing agreement, as appointed by the Fair Labor Association;

(c) the parties must each pay half the costs of the mediator; and

(d) the mediation must be held and completed promptly.

8 TERMINATION

Either party may terminate this Deed:

(a) upon no less than 3 months written notice to the other;

(b) forthwith if the other party refuses to mediate in good faith as detailed in clause 7;

(c) upon the giving of 5 business days notice where the other party has committed a breach of this Deed and that breach has not been rectified within the 5 business days notice period;

(d) immediately by the Principal if the Union breaches clause 5(f) of this Deed; or

(e) immediately by the Union if the Principal breaches either clauses 4.3 or 4.7(a) of this Deed.

9 ENTIRE DEED / FUTURE VARIATION

9.1 This Deed represents the entire agreement between the parties on the matters referred to in the Recitals.

9.2 The parties agree that, should this Deed prove incapable of achieving its objective, then the parties will negotiate in good faith to effect an appropriate variation to its terms.

9.3 This Deed is intended to cover Principals who manufacture or arrange for the manufacture of Goods in the sports and corporate wear industry.

9.4 The parties agree to review and, if necessary, amend (by mutual agreement only) this Deed after the first year of this Deed's operation. The parties also agree to review the operation of this Deed when and if any mandatory code of practice for clothing retailers is introduced in the relevant country.

10 INSPECTION PROCEDURES

10.1 The agreed principles that will govern the procedures in relation to the conduct of inspections under this Deed are set out in Schedule A to this Deed.

Execution

Executed as a deed on the day of 2003.
Executed by (ABN ……) in accordance with section 127(1) of the Corporations Act by being signed by:

…….	…….
Signature of Director	Signature of Director*/Company Secretary*
…….	…….
Print full name	Print full name
*Delete whichever is not applicable	
The common seal of the **Union** is affixed in accordance with its Rules in the presence of:	))))
…….	
Secretary	
	…….
…….	President
Name of Secretary (Print)	
	…….
	Name of President (Print)

SCHEDULE A

The procedures in relation to the conduct of inspections under this Deed are divided into three areas, being:

1 the development of a pro-forma inspection sheet;
2 the training of Union personnel to conduct inspections under this Deed; and
3 the evaluation of completed inspection sheets.

The principles that will govern these matters are set out below.

Pro-forma inspection sheet

The pro-forma inspection sheet to be developed by the Union shall be divided into two parts with each part subdivided to maintain the distinction between Employee workforces and Contractor/Outworker workforces.

Part A of the inspection sheet will relate to employment law compliance, compliance with the minimum legal obligations imposed in the relevant country in relation to the engagement of persons for the performance of work or in relation to the supply of clothing products or in relation to contracting for such supply and compliance with this Deed for an Employee workforce and for a Contractor/Outworker workforce.
Part B of the inspection sheet will relate to compliance with relevant state occupational health and safety legislation for an Employee workforce and for a Contractor/Outworker workforce.
The parties recognise that some Principals/Suppliers may have a mixed workforce of Employees, Contractors and Outworkers and any issue that relates specifically to a particular category of worker can be overcome by being dealt with in the section relevant to the worker's category.
The Union should provide a pro-forma inspection sheet to the Principal and following that, the pro-forma inspection sheet would be the standardised inspection sheet for the clothing industry.

Training of Union officials

The objective of a training program is to ensure commonality and consistency of inspections and evaluation in all relevant countries in the clothing industry under this Deed. The Union shall undertake a training program aimed at delivering the consistent application of this Deed by union officials.
Inspection of a Supplier's and/or a Principal's workplace on occupational health and safety issues would be by Union accredited officials.
Such accreditation would be consistent with that offered by WorkCover New South Wales in Australia for union officials.

Evaluation of pro-forma inspection sheets

The Union will nominate a person in each relevant country who has received union accreditation to evaluate the pro-forma inspection sheets in relation to suspected occupational health and safety breaches.
The Union will also nominate a person in each relevant country to evaluate the pro-forma inspection sheets to ensure consistency of inspections and reporting of potential breaches of the Deed, employment law and the minimum legal obligations imposed in the relevant country in relation to the engagement of persons for the performance of work or in relation to the supply of clothing products or in relation to contracting for such supply.

APPENDIX 16

Centre for Values, Ethics and the Law in Medicine, The University of Sydney:

SUBMISSION TO THE INQUIRY INTO ESTABLISHING A MODERN SLAVERY ACT IN AUSTRALIA

The Centre for Values, Ethics and the Law in Medicine, University of Sydney is an internationally renowned centre of excellence in research and teaching housed within one of the nation's premier universities. The centre works on a wide range of ethical issues. We equip the leaders of tomorrow to constructively engage with local and international communities and innovatively address the big issues facing our world.

The Centre for Values, Ethics and the Law in Medicine, University of Sydney affirms the inherent dignity of all people and their right to live unbound by slavery in all its forms. For this reason, we are making this submission to the Parliamentary Inquiry into establishing a Modern Slavery Act in Australia.

Modern slavery in domestic and global supply chains

The Global Slavery Index estimates that there are 45.8 million people enslaved in our world today, 30.4 million of which are located in the Asia-Pacific region.[1] Modern slavery can manifest in various forms including forced or bonded labour, human trafficking, the worst forms of child labour and forced or servile marriage. The International Labour Organization estimates that the prevalence of forced labour is 20.9 million people, while the number of children experiencing the unconditional worst forms of child labour is 8.4 million (with children subject to forced and bonded labour (5.7 million), trafficking (1.2 million), prostitution and pornography (1.8 million), illicit activities (0.6 million) and armed conflict (0.3 million)).[2] Such slavery permeates all industry sectors and all countries.

Businesses and their supply chains are of particular concern regarding modern slavery, not least because of the lack of transparency and traceability within complex, geographically dispersed supply chains. Increasingly, supply chains are shaping the economic landscape,[3] generating an ever-greater need for governance structures to guard against slavery. Assuredly, despite what might be thought, Australia is not immune to slavery. One such example is the extensive use of exploited child and forced labour[4] within medical goods supply chains which equip hospitals, clinics and aged care facilities across the country. Australian medical companies have been accused of being culpable of slavery and slavery-like practices.[5]

---

[1] *Global Slavery Index 2016* (Perth, WA: Walk Free Foundation, 2016).
[2] International Labour Organization (SAP-FL), *ILO Global Estimate of Forced Labour: Results and Methodology* (Geneva: International Labour Office, 2012); International Labour Organization (IPEC-SIMPOC), *Every Child Counts: New Global Estimates on Child Labour* (Geneva: International Labour Office, 2002).
[3] One such indicator of the extent to which supply chains are influencing production, trade and investment is the finding that approximately 80% of global trade is linked to international production networks of transnational corporations (James Zhan et al., *Global Value Chains and Development* (Geneva: United Nations Conference on Trade and Development, 2013)).
[4] See, for example, Mahmood Bhutta, and Arthy Santhakumar, *In good hands: Tackling labour rights concerns in the manufacture of medical gloves* (London: BMA, 2016); Haider H. Zaidi et al., *Baseline survey report on child labour in surgical instruments manufacturing industry Sialkot* (Lahore: AKIDA Management Consultants, 2004).
[5] See, for example, an independent Swedish social audit on Ansell factories in Malaysia which documents forced labour in breach of the UN Declaration of Human Rights and ILO Conventions 29 and 105 (Sara Gripstrand, & Ellysna Muchlizar, *Social Audit* (Stockholm: Goodpoint, 2015)).

Slavery within domestic and global supply chains for the Australian market is a persistent and pervasive problem. However, there is growing momentum to redress this crime, especially among civil society and academia. For example, *The University of Sydney* has conducted research, convened public events and championed initiatives on the topic. *The Centre for Values, Ethics and the Law in Medicine, University of Sydney* is a founding member of the Healthy Supply Chains Initiative.

Many businesses have also come to appreciate the need for effective government legislation to ensure that they are not undercut by unscrupulous competitors profiting from slavery and slavery-like practices. With regard to the present Inquiry, the Business Council of Australia has stated that "Australia needs a comprehensive approach, including legislation, to combat modern slavery in all its forms."[6] Indeed, responsible businesses recognise that modern slavery can only ever be a threat to good business practices.

International best practice in supply chain regulation (legislation)

Internationally, there are a suite of relevant regulatory instruments available which may assist the Australian Government in appraising how best to redress modern slavery and slavery-like practices in supply chains. Notable legislation includes:

- *European Union Directives and Regulations* such as 2014/24/EU (Public Procurement), 2014/95/EU (Non-Financial Reporting) and the Conflict Minerals Regulation (2017). These, in turn, have been or are being integrated into the national laws of EU and EEA States, often augmenting existing and extensive systems of supply chain regulation.[7]
- *Mandatory due diligence legislation* such as the Child Labour Due Diligence Bill (The Netherlands, 2017), the Corporate Duty of Vigilance Law (France, 2017), the Trade Facilitation and Trade Enforcement Act of 2015 (USA), the Trafficking Victims Protection Reauthorization Act and the Reporting Requirements for Responsible Investment in Burma (USA, 2013) and the California Transparency in Supply Chains Act (California, USA, 2012). The Nigerian Petroleum Industry Governance Bill is expected to be passed within a month.
  Moreover, mandatory due diligence legislation is under consideration in other countries (e.g. Germany, Spain and Switzerland) and is being sought by the British Parliament's Joint Committee on Human Rights as a means of enhancing the UK Modern Slavery Act.[8]
- *Reporting and public disclosure initiatives* such as the Modern Slavery Act (UK, 2015), the Danish Financial Statement Act (Denmark, amended 2012), the Balancing Social and Environmental Responsibility Law (Buenos Aires, Argentina, 2008).

In addition, Australia has a highly-developed system of cross-jurisdictional supply chain regulation in the form of mandatory retailer codes.[9] This legislative regime, commonly known as

---

[6] "No Place for Modern Slavery," *Business Council of Australia*, March 29, 2017, http://www.bca.com.au/media/no-place-for-modern-slavery (accessed 20 April 2017).
[7] With regard ethical public procurement see, for example, Anna Harvey, Marcus Borley, and Eleanor Tighe, *Mapping Initiatives for Ethical Public Procurement in Europe* (London: 3shifts, 2017); Veselina Vasileva et al., *Verifying Social Responsibility in Supply Chains: A Practical and Legal Guide for Public Procurers*, ed. Philipp Tepper (Freiburg, Germany: The Landmark Consortium, 2012).
[8] House of Lords and House of Commons Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability*, 6th Report (London: UK Parliament, 2017), https://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf (accessed 20 April 2017).
[9] See, for example, the Ethical Clothing Trades Extended Responsibility Scheme, Order made under the Industrial Relations (Ethical Clothing Trades) Act 2001 (NSW), NSW Government Gazette no. 200, Official Notes, 17 December 2004.

the Australian Model, has been operational in Australia for over a decade and is recognised internationally as an example of best practice. A summary of the model is included in the supplementary material of this submission (please see the attachment entitled "The Australian model of cross-jurisdictional supply chain regulation").

Recommendations

The Centre for Values, Ethics and the Law in Medicine, University of Sydney commends the Parliament of Australia for undertaking this Inquiry, the importance and timeliness of which cannot be overstated. Certainly, the establishment of robust legislation sends a clear and unequivocal message: the Australian Government aspires to promote ethical business arrangements, protect human rights and prevent modern slavery.

The Centre for Values, Ethics and the Law in Medicine, University of Sydney therefore endorses the introduction of a Modern Slavery Act in Australia and affirms that a comprehensive strategy of effective supply chain regulation is required to combat modern slavery in all its forms.

The Centre for Values, Ethics and the Law in Medicine, University of Sydney accordingly recommends that a Modern Slavery Act in Australia be no less robust than current international best practice and that it include, as a minimum, the following priority provisions.

1. The appointment of an independent, adequately resourced Anti-Slavery Commissioner, with oversight for
    a. legislative review and reform,
    b. mandatory due diligence, and
    c. research and reporting.
2. The enforcement of mandatory due diligence which
    a. upholds core UN instruments and local labour laws,
    b. applies to all businesses and all subsequent tiers of the supply chain,
    c. implements proactive reporting requirements, and
    d. ensures compliance due diligence and commercial remedy.
3. The establishment of an independent, publicly-accessible research and reporting platform which
    a. enables coordinated and collaborative scholarly research,
    b. publishes due diligence reports and independent reviews,
    c. translates research into legislative and policy advice, and
    d. provides guidance documents and training to assist implementation.

The Centre for Values, Ethics and the Law in Medicine, University of Sydney further notes that Australia is at the forefront of supply chains scholarship and practice and thus invites innovation in the establishment of a Modern Slavery Act in Australia. The Australian Government has a fantastic opportunity to take a strong stand against slavery and cement our position as a global leader in this field.

Prepared by Katherine Moloney
Research Affiliate, Centre for Values, Ethics and the Law in Medicine (VELiM), University of Sydney
Chair, Healthy Supply Chains Initiative

GLU

Global Labour Column
http://column.global-labour-university.org/

Number 264, February 2017

UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG

The Australian model of cross-jurisdictional supply chain regulation

Katherine Moloney

The 105th session of the International Labour Conference considered decent work in global supply chains. During the general discussion on governance systems and measures, the Australian model was presented as an international example of good practice in cross-jurisdictional supply chain regulation (Passchier, 2016). The Australian model is paradigmatic. This article considers the core characteristics of its conceptual framework and its contextual adaptation in the Australian domestic textile, clothing and footwear (TCF) industry.

What is the Australian model?

The core characteristics of the Australian model can be summarised as follows.

Transparency and traceability through all tiers of the supply chain: The Australian model addresses human rights due diligence by mapping the flow of work and the associated transfers of money and goods in order to monitor contractual arrangements.

Contractual arrangements and cross-jurisdictional coverage: The Australian model conceptualises contemporary supply chains as a series of commercial contracts which govern the entire supply chain. Commercial influence is typically concentrated at or near the apex of the supply chain and exerted through complex, pyramidal contracting arrangements, often spanning legislative jurisdictions. Lead firms exercise commercial influence to ensure their commercial interests, notably in terms of price, time and quality. The capacity for commercial leverage is often incrementally curtailed with each successive tier down. Working within existing supply chain structures, the model therefore seeks to embed human rights due diligence protections and provisions in contractual arrangements. In this manner, businesses operating in a jurisdiction, as well as all subsequent tiers of the supply chain - even those outside that jurisdiction[1] - are governed by mandatory legal obligations, including compliance mechanisms and commercial remedies.

Mandatory legal obligations and mutual cooperation: The model establishes robust minimum standards of human rights due diligence throughout the supply chain, ideally through compulsory statutory regulation. It therefore ensures a level playing field for all business entities so that ethical businesses are not commercially disadvantaged by unscrupulous businesses able to undercut their prices. The model concurrently enables constructive and collaborative tripartite partnerships based on commonality of purpose and continued improvement. It emphasises the complementary and crucial contribution of government, businesses and unions, as well as academia and the community sector, to proactively and innovatively advance probity.

The right of all workers in the supply chain to inclusion in human rights due diligence protections and provisions: The model safeguards comprehensive protections, including fair pay and working conditions, health and safety, and entitlements for all workers regardless of their formal employment status or geographical location.[2] This includes the most vulnerable workers at the bottom of the supply chain, such as clothing outworkers in the textile sector and owner-drivers in the transport sector, who are often considered independent contractors. A written contract is prescribed for all workers, and precarious working arrangements such as zero-hour contracts are proscribed.

The responsibility of all business entities in the supply chain to ensure human rights due diligence through protections and provisions: The model holds businesses accountable for protecting the rights of workers in that business and in each subsequent tier of the supply chain, in what is known as a chain of responsibility.[3] This includes the most powerful businesses at the top of the supply chain, such as retailers in textile supply chains, and, supermarkets and financial institutions in transport supply chains (which are often considered external to industry regulation). Contractual arrangements must contain provisions and protections - including adequate payments and timeframes - which do not prevent the rights of any worker from being upheld.

Enforceable, proactive and responsive legal obligations and authorisation of unions to undertake compliance: The model emphasises harm prevention and accountability. Legal obligations are fully enforceable. The model requires proactive reporting from businesses rather than relying on reactive or retrospective actions. It also gives workers' representatives a pivotal role in regulatory oversight. Thus, business entities are required to inform the relevant union of all contracting arrangements and allow them to verify the location of worksites, the conditions of work and the identity of workers throughout supply chains. The model also provides workers and other business entities with an avenue for effective and timely commercial remedy in the event of workers' rights breaches.

The Australian model of supply chain regulation is dynamic because it can be applied in myriad ways, according to context, and can augment existing legislation. The most established manifestation of the model is in the TCF sector.

The application of the Australian model

The existing framework of laws enacted at both national and state level represents a pragmatic, stepwise response to the prevailing socio-political context over several decades. A two-tiered structure of supply chain regulation, consisting of mandatory and voluntary legislation, governs human rights due diligence in the Australian domestic TCF industry.

On a national level, the regulatory package is supported by work health and safety (WHS) legislation, and industrial relations legislation. The nationally harmonised WHS statutes maintain that a 'person conducting a business or undertaking' retains overall responsibility for workplace health and safety even where work is contracted out. Indeed, 'improved work health and safety through supply chains and networks' is an actionable area of the national WHS strategy, one strategic outcome of which is leveraging commercial relationships to champion WHS (Safe Work Australia, 2011).

The TCF industrial relations legislation contains innovative provisions such as the 'deemed employee' status of all outworkers and the 'deemed employer' status of almost all business entities.

The deemed employee provisions ensure that contract outworkers have the same rights and obligations as do employees, and can only be given work on a full-time or regular part-time basis, not casual. Moreover, presumptive legal obligations are placed on deemed employers which invert the burden of proof for civil law recovery. Business entities in any preceding tier of the supply chain, right up to the principal supplier, can be held liable for unpaid wages and workers' compensation claims (Nossar et al., 2015).

In addition, national industrial relations legislation anticipated mandatory supply chain regulation. For example, the TCF Industrial Award requires proactive reporting from business entities. Regulators must be provided with quarterly access to details of all external work arrangements, including up-to-date, standardised Work Records. Work Records contain the name and contact details of trading partners, the physical location of all worksites and the 'value and volume' – that is, unit pricing details (value), number of units (volume), timeframe, and production time - of all work orders. This enables the regulator to cross-check sewing times and to establish the equivalent number of full-time workers required to carry out the work. It thus helps to avoid a hidden workforce, protect all workers, and produce greater supply chain transparency and traceability.

The efficacy of the regulatory package, however, rests on enforceable legislation which encompasses all business entities, including lead firms. The mandatory retailer code at state level applies to all retailers who sell Australian-made clothing within the legislating state, and to all suppliers of these products throughout the supply chain, even where subcontractors are outside the state jurisdiction. The only exception is retailers and manufacturers who are accredited and compliant with the nation-wide voluntary code, which is a less rigorous regime administered by an independent tripartite authority, and characterised by collaborative partnership.

The mandatory code regulates retailer contracting arrangements and oversight (Rawling, 2014). At the apex of the TCF supply chain are retailers. Thus, prescribed contracting provisions are embedded into all retailer commercial contracts. These legally binding contractual terms for subcontractors specify that conditions for all workers throughout the supply chain are to be at least as favourable as the Industrial Award. Similarly, retailer contracts must contain compulsory, inbuilt human rights due diligence compliance mechanisms and commercial remedies.

Retailer contracts must also authorise external regulatory oversight by government inspectorates and unions. Australian unions have historically occupied a central role in monitoring and compliance and have been shown to enhance effectiveness and responsiveness of regulatory enforcement (Landau et al., 2014). The TCF union exercises contractual oversight, right of inspection of all production sites and records, and enforcement. It also uses cutting edge strategies to support compliance. For example, the 'minute rate' is a calculation to determine the required payment at the Award rate.

The Australian model of cross-jurisdictional supply chain regulation harnesses existing governance architecture for human rights due diligence. Binding upon all business entities for the protection of all workers, this enforceable mandatory model is robust and readily adaptable for the regulation of cross-jurisdictional supply chains. It offers significant potential for global supply chain regulation.

Katherine Moloney is the Chair of the Healthy Supply Chains Initiative. She has undertaken research, policy development and change management for the United Nations, civil society and academic institutions. Her doctoral thesis focuses on human rights due diligence in global medical goods supply chains.

References

Landau, I., Cooney, S., Hardy, T., & Howe, J. (2014) Trade Unions and the Enforcement of Minimum Employment Standards in Australia, Melbourne: Melbourne Law School.

Nossar, I., Johnstone, R., Macklin, A., & Rawling, M. (2015) 'Protective legal regulation for home-based workers in Australian textile, clothing and footwear supply chains,' Journal of Industrial Relations, vol. 57, no. 4, pp. 585-603.

Passchier, C. (2016) 'General discussion on decent work in global supply chains: workers' statement (Point 3),' paper presented to the 105th Session of the International Labour Conference, Geneva, 30 May-10 June.

Rawling, M. (2014) 'Cross-jurisdictional and other implications of mandatory clothing retailer obligations,' Australian Journal of Labour Law, vol. 27, no. 3, pp. 191-215.

Safe Work Australia (2011) Australian Work, Health and Safety Strategy 2012-2022: healthy, safe and productive working lives, Canberra: Safe Work Australia.

1 In the Australian context, cross-jurisdictional coverage exists between states within the Australian federation and is limited to domestic supply chains.
2 While at present, legislation is limited to Australian jurisdictions, the Model is readily adaptable for application across national borders.
3 Note: this term is derived from the road transport sector.

University of the Witwatersrand

Nicolas Pons-Vignon, E-mail:
Mbuso Nkosi, E-mail: