

# **Australian Supply Chain Regulation: Practical Operation and Regulatory Effectiveness**

Draft Report on Textile Clothing and Footwear Sector Regulation

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November 2017

This draft report reports on research undertaken for an Australian Research Council funded project, Australian Supply Chain Regulation: Practical Operation and Regulatory Effectiveness, DP120103162.

It reports on legal and research material current as of 29 November 2017, and may be updated from time to time.

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## **1. Introduction**

There is a growing body of evidence that workers within supply chains can 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). 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 document provides an overview 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 labour 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. 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.

This document draws on empirical data collected 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). In this report we report only on data collected in the TCF industry. (There is a second related report available on the road transport industry.) We conducted qualitative interviews, observed union and state regulators as they went about their work, collected documents generated by regulators, retailers and contractors, and accessed statistical data and records about working conditions within the industries (e.g., the number of workers, number of workplaces, working conditions, regulator's workplace visits, etc.).

## **2. 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.

### **3. Clothing retailers operate as effective business controllers**

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.

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 (Bair, 2005). Typically, the effective business controller can specify in the contractual conditions 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 (Wright and Brown, 2013). In some circumstances, effective business controllers may also directly monitor or intervene into the work practices of their indirect labour force. 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 (Grimshaw *et al.*, 2005). 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 accept their terms as well as manipulate competition among potential suppliers to achieve the right price and quality for goods or services (Nossar, 2007). 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 (Rawling and Howe, 2013). Despite the controls maintained by the business controller, it is other parties to the supply

chain who bear the risks of the supply process (Nossar, 2007). 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 (Quinlan, 2011).

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 (Wright and Brown, 2013). 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 (Rawling 2014). There is also increasing expectations of investors to safeguard the business's reputation by satisfactorily addressing labour conditions within their supply chains (Australian Council of Superannuation Investors, 2013). The discussion below in this report demonstrates that the mandatory clothing retailer codes have effectively addressed this kind of tactic.

In the Australian TCF industry an oligopoly of major retailers are effective business controllers of TCF supply chains (Islam and Jain, 2013). 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 (Nossar, 2000). 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 (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 and make up approximately 40% of the workers in the TCF industry (Diviney and Lillywhite, 2007).

In the journey down the supply chain each successive party takes its 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 (Mayhew and Quinlan, 1999). 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 (Rawling, 2006). 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) (Nossar, 1999). 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 (Mayhew and Quinlan, 1999), long hours, a high incidence of work-related injuries and high levels of threats and abuse from work providers (Mayhew and Quinlan, 1999). It is difficult for regulators to locate workplaces to enforce industrial laws because outwork is frequently carried out at residential premises in the largely 'invisible' economy.

#### 4. 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.

## 5. 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 crosscheck 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. 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.

In 1995, by 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).

## 6. 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 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.

## **7. The evolution of mandatory clothing retailer obligations**

### **(a) 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 anywhere in Australia.

In June 1999, legislative outworker protections in New South Wales were proposed by Nossar. In December 1999 the NSW government released an issues paper on the NSW government's outwork strategy (NSW Department of Industrial Relations 1999). 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. Part 2 of

that Act established a tripartite industry council known as the Ethical Clothing Trades Council of New South Wales, 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 (Nossar 2003). 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), a new Pt 1 to the Homeworkers Code of Practice. Both of these codes incorporate all of the key features of the 1995 Target Deed. 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 Practice.

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. This draft was reflected in the NSW Ethical Clothing Trades Council's first recommendation in its 2003 report (NSW Ethical Clothing Trades Council 2003). 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). 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 and is still currently in operation at the time this report was written (Rawling 2014).

(i) 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). 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). 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 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 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.

(ii) 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. 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). 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.

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 such that, under general contract law and consumer law, parties are being required to include or exclude particular contractual terms. For example, under consumer protection laws, the state requires the parties to read particular terms into contracts with consumers. In addition, the contract law doctrine of illegality prohibits parties from including certain terms in a contract. 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). Where the retailer enters into such an agreement with a supplier, the retailer must also keep *records of all locations* where work is performed. 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 clothing. And it appears that clothing retailers are acting upon such contractual rights. Factory inspections of some makers undertaken as part of fieldwork by the authors revealed that the quality control representative of the retailer and principal manufacturer was present at or had recently visited maker sites when inspections occurred (Diviney and Lillywhite, 2007).

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). 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. 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). 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. 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). 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.

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 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. 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. 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'. 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.

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). Finally, a contractor to a supplier (which includes a subcontractor to a supplier's contractor) 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. 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. 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.

The mandatory code capitalises on retailers' commercial influence in the clothing supply chain to ensure the transparency of the contracting process in 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. 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. 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. These examples demonstrate that, as a result of mandatory retailer obligations, certain retailers have been encouraged to act ethically and police supply chains (Rawling 2014).

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. 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. 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. This indicates the importance of harnessing retailer power in order to successfully implement regulation and produce increased workforce visibility. Moreover, in each of the 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 (Rawling 2014: 206-207).

However, these findings need to be fully tested and confirmed. 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 (Rawling 2014:207). 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, 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 (Rawling 2014: 207).

## b. 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). One of those inserted provisions allows the SA government to make a mandatory clothing retailer code 'by regulation'. 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 (Safe Work Australia, 2014) 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 mandatory clothing retailer code. 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 and are still currently in operation at the time this report 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). 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). 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 (Rawling 2014).

### c. 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). 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. 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. 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 Industries of Australia mainly representing small clothing manufacturers, the Queensland mandatory code was repealed.

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. 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. 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).

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. A supplier also had to inform the contractor that a breach of the undertaking allowed the supplier to terminate the agreement with the contractor. 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. In this way, under the former Queensland code, there was an unbroken chain of 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. The Queensland code also contained similar obligations to have ascertained whether an outworker was to be engaged; 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; and to not have entered into an agreement with a supplier unless the supplier and its contractors had registered to give out work.

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. 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.

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. 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, 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. This unsuccessful attempt to explain the Queensland mandatory code may have fuelled business opposition to the code, which became a crucial factor in bringing about 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 (Rawling 2014).

## **8. Implications of regulating the effective business controller**

Draft findings about the implementation of currently applicable mandatory clothing retailer codes indicate that governments can regulate the contracting practices of effective business controllers. 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. 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.

## 9. 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). 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*. Therefore, these codes already have or had consequences beyond the geographical borders of the relevant state jurisdiction. There seems no obvious legal impediment preventing domestic jurisdictions from exercising these same regulatory powers to span national borders and achieve outcomes abroad. 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). Notably, 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 form of international supply chain regulation being proposed here would not rely on an extra-territorial application of state powers. 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 (Rawling, 2010). 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.

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 (Rawling 2014).

## 10. 2012 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 (Stewart et al, 2016: 139–141). 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. This 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)*

## **11. 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 . . . . 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.

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