

MULTI-STAKEHOLDER FRAMEWORKS FOR RECTIFICATION OF NON-COMPLIANCE IN CLEANING SUPPLY CHAINS: THE CASE OF THE CLEANING ACCOUNTABILITY FRAMEWORK *

ABSTRACT

There is now an expanding body of literature on the significant problem of business non-compliance with minimum labour standards including 'wage theft'. Extended liability regulation beyond the direct employer is seen as one solution to this non-compliance in fragmented but hierarchically organised industries – such as the cleaning industry. This paper uses empirical evidence to assess the effectiveness of one such regulatory scheme, the Cleaning Accountability Framework (CAF), in addressing non-compliance with minimum labour standards (including provisions of the Fair Work Act 2009 (Cth) and the Cleaning Services Award 2020). We find that CAF has been successful in identifying and rectifying certain non-compliance, improving working conditions for some cleaners involved in the scheme. We synthesise the key success factors of CAF in view of envisioning the adoption of such co-regulation frameworks in other industries. We also propose legal reforms that will support change across the cleaning industry.

I INTRODUCTION

There is now an expanding body of literature on the problem of business non-compliance with labour standards including 'wage (and superannuation) theft' and other forms of labour exploitation.¹ Frequently, the fragmented or 'fissured' nature of the industry is discussed as a significant barrier to the rectification of underpayment and other exploitation due to the lack of resources of governmental and union regulators to monitor and/or take enforcement action, including prosecution, against the vast multitude of non-compliant smaller businesses who are the direct employers near the base of the industry structure.² One mechanism deployed as a solution to this

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¹ See, eg, Stephen Clibborn, 'Multiple Frames of Reference: Why International Student Workers in Australia Tolerate Underpayment' (2018) *Economic and Industrial Democracy* (forthcoming); Stephen Clibborn and Chris F Wright, 'Employer Theft of Temporary Migrant Workers' Wages in Australia: Why Has the State Failed to Act?' (2018) 29(2) *Economic and Labour Relations Review* 207; Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* (Migrant Worker Justice Initiative, November 2017) ('*Wage Theft in Australia*'); Laurie Berg and Bassina Farbenblum, 'Remedies for Migrant Worker Exploitation in Australia: Lessons from the 7-Eleven Wage Repayment Program' (2018) 41(3) *Melbourne University Law Review* 1035. This article does not consider the relative merits of the terms 'wage theft' and 'underpayment' but uses them interchangeably to refer to the situation where an employer does not pay a worker their full, legal, payment entitlements. The broader term employer 'non-compliance' is also used to denote the situation where an employer does not comply with legal standards including standards relating to payment of workers.

² David Weil, *The Fissured Workplace: How Work Became So Bad for So Many and What Can be Done to Improve It* (Harvard University Press, 2014). For prior research on the fragmented workplace see Judy Fudge, 'Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the

non-compliance in fragmented but hierarchically organised industries – such as the cleaning industry³ – is extended liability for non-compliance (beyond the direct employer) throughout supply chains and business networks.⁴ At its best this is a proactive measure which is used to effectively harness the influence of lead firms that hold a strategic position in supply chains/business networks to ensure that all businesses directly engaging labour comply with labour standards. An established body of literature has now also investigated the legal regulation of supply chains for employment policy purposes.⁵

A formal legal approach to enforcement has been a focus of research so far since voluntary schemes of self-regulation, notably those using private auditing, often fail to produce the desired outcome in terms of adherence to labour standards⁶ and can even be subject to falsification.⁷ However, we know much less about the possibilities of leveraging the influence of lead firms to create ‘co-regulation’ schemes. In these schemes stakeholders jointly attempt to address the issue of the enforcement of legal requirements. Co-regulation corresponds to cooperative forms of steering in which

Scope of Labour Regulation’ (2006) 44(4) *Osgoode Hall Law Journal* 609, 622–5, 635–46; Jill Earnshaw and Mick Marchington, ‘Blurring the Boundaries to the Employment Relationship: From Single to Multi-Employer Relationships’ in Mick Marchington et al (eds), *Fragmenting Work: Blurring Organizational Boundaries and Disordering Hierarchies* (Oxford University Press, 2005) 63.

³ Criminal penalties have also been proposed as a solution to wage theft. Extended liability and criminal penalties could be combined and are not mutually exclusive. This article does not deal further with the issue of criminal penalties but focusses on the extended liability solution.

⁴ The Fair Work Ombudsman (‘FWO’) deploys this mechanism in litigation by pleading that price maker businesses are accessories under s 550 of the *Fair Work Act 2009* (Cth) (‘FW Act’) to non-compliance by price taker non-compliance with labour standards. See Tess Hardy and John Howe, ‘Chain Reaction: A Strategic Approach to Addressing Employment Noncompliance in Complex Supply Chains’ (2015) 57(4) *Journal of Industrial Relations* 563 (‘Chain Reaction’).

⁵ Guy Davidov, ‘Indirect Employment: Should Lead Companies Be Liable?’ (2015) 37(1) *Comparative Labour Law & Policy Journal* 5; Chris F Wright, ‘Should Corporations be Responsible for Labour Standards in their Supply Chains? (Deben las empresas ser responsables de las normas laborales en sus cadenas de suministro)’ (2016) 40(463) *Analisis Laboral*, 10; Chris F Wright and William Brown, ‘The Effectiveness of Socially Sustainable Sourcing Mechanisms: Assessing the Prospects of a New Form of Joint Regulation’ (2013) 44(1) *Industrial Relations Journal* 20; Igor Nossar et al, ‘Protective Legal Regulation for Home-Based Workers in Australian Textile, Clothing and Footwear Supply Chains’ (2015) 57(4) *Journal of Industrial Relations* 585; Michael Rawling and John Howe, ‘The Regulation of Supply Chains: An Australian Contribution to Cross-National Legal Learning’ in Katherine VW Stone and Harry Arthurs (eds), *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (Russell Sage Foundation, 2013) 233; Phillip James et al, ‘Regulating Supply Chains to Improve Health and Safety’ (2007) 36(2) *Industrial Law Journal* 163.

⁶ Daniel Berliner et al, *Labor Standards in International Supply Chains: Aligning Rights and Incentives* (Edward Elgar Publishing, 2015); Richard M Locke, *The Promise and Limits of Private Power: Promoting Labour Standards in a Global Economy* (Cambridge University Press, 2013).

⁷ Gale Raj-Reichert, ‘Safeguarding Labour in Distant Factories: Health and Safety Governance in an Electronics Global Production Network’ (2013) 44 *Geoforum* 23; Andrew Crane et al, ‘Governance Gaps in Eradicating Forced Labor: From Global to Domestic Supply Chains’ (2019) 13(1) *Regulation & Governance* 86.

actors aim to achieve common objectives.⁸ Co-regulation was initially conceived of as involving state regulators and worker collectives⁹ but more recently as collaborations between state regulators, worker collectives and lead firms.¹⁰ The actual operation and effectiveness of these forms of co-regulation needs to be investigated.¹¹

Accordingly, this article explores the capacity of powerful actors in supply chains to leverage their economic power to influence labour standards; examines the development and implementation of a co-regulation scheme based on cooperation and consensus; reveals the central importance of worker engagement mechanisms to overcome the well-known weaknesses of social auditing and suggests legal reform that would assist in redressing non-compliance with labour standards. This article makes these contributions by investigating the operation of a scheme of regulating whole national supply chains, the Cleaning Accountability Framework (CAF), and assesses the effectiveness of that scheme. The CAF is an independent multi-stakeholder organisation that seeks to promote good labour practices in the cleaning services sector.¹² CAF stakeholders including building owners, building managers, contract cleaning companies, employee representatives and the state (through the Fair Work Ombudsman ('FWO')) collaborate in a jointly developed and implemented program. The CAF scheme is largely directed at securing compliance with minimum labour standards (including the national employment standards in the *Fair Work Act 2009* (Cth) ('FW Act') and the federal *Cleaning Services Award 2020*).¹³

Through a detailed evaluation of a range of data on all the key components of the CAF, we conclude that CAF has been largely successful in rectifying certain non-compliance, improving working conditions for some cleaners involved in the scheme. Based on that success, we then argue for the application of a two-tier structured scheme (adapted from a Textile Clothing and Footwear sector scheme) which would embed CAF within a set of mandatory cleaning industry supply chain laws. Furthermore, the CAF model might be considered for adoption in other hierarchically organised industries such as the security industry, transport and logistics industry, construction industry and potentially the personal care services industry.

⁸ Reinhard Steurer, 'Disentangling Governance: A Synoptic View of Regulation by Government, Business and Civil Society' (2013) 46(4) *Policy Sciences* 387.

⁹ Matthew Amengual and Janice Fine, 'Co-Enforcing Labor Standards: The Unique Contributions of State and Worker Organizations in Argentina and the United States' (2016) 11(2) *Regulation & Governance* 129; Janice Fine, 'Enforcing Labor Standards in Partnership with Civil Society: Can Co-Enforcement Succeed Where the State Alone Has Failed?' (2017) 45(3) *Politics & Society* 359.

¹⁰ Sarah Kaine and Michael Rawling, 'Strategic "Co-Enforcement" in Supply Chains: The Case of the Cleaning Accountability Framework' (2019) 31(3) *Australian Journal of Labour Law* 305.

¹¹ See Tess Hardy and John Howe, 'Partners in Enforcement? The New Balance Between Government and Trade Union Enforcement of Employment Standards in Australia' (2009) 23(3) *Australian Journal of Labour Law* 306, 330-1; Hardy and Howe, 'Chain Reaction' (n 4).

¹² See Cleaning Accountability Framework ('CAF'), *Introduction to CAF Certification Agreement* (CAF, 2019).

¹³ Fair Work Commission, *Cleaning Services Award 2020*, MA000022, 30 April 2020.

The article proceeds as follows: Part II identifies the challenge of extensive business non-compliance with labour standards in the market generally and in the Australian cleaning industry in particular. We argue that a key aspect of the problem in the cleaning industry is the way supply chain pressures drive down labour standards. Part III outlines our project design/methodology. Part IV explains and assesses the adequacy of the CAF regulatory framework and evaluates some of the measures taken in practice to identify and rectify non-compliance. In Part V we review the key success factors for multiple-stakeholder co-regulation schemes, concluding that while the CAF methods have had some level of success, they need a more robust financial and regulatory underpinning in order to make a broader impact on labour abuses in the Australian commercial cleaning industry.

II EMPLOYER NON-COMPLIANCE, AN ONGOING ISSUE

Australia has a system of minimum wages and conditions enshrined in National Employment Standards in the *FW Act* (and in federal modern award provisions). By and large these provisions apply to most employers in the Australian private sector.¹⁴ Australian business non-compliance with these binding provisions has become a major issue.¹⁵ Academic research,¹⁶ government inquiries¹⁷ and the media¹⁸ have documented extensive underpayment and other business non-compliance with legislated labour standards. The FWO uncovered widespread evidence of exploitative practices by 7-Eleven franchisees in 2014. Since then there has been a number of worker-underpayment revelations. Some of the country's most iconic companies including Woolworths, Qantas, Myer, Bunnings and the Commonwealth Bank have admitted to, or have been caught committing, wage theft. Those companies have

¹⁴ The *FW Act* does not apply to some employers in Western Australia, and where an enterprise agreement is registered the relevant award does not apply. The *FW Act* also applies to the Commonwealth public service but the focus of this article is on business non-compliance.

¹⁵ Clibborn and Wright (n 1) 207.

¹⁶ Berg and Farbenblum, *Wage Theft in Australia* (n 1).

¹⁷ Senate Education and Employment References Committee, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (Report, 17 March 2016). Three States (Western Australia, South Australia and Victoria) have concluded separate inquiries into wage theft laws, concurrent with a federal inquiry into the issue, prompted by a Queensland report: Education, Employment and Small Business Committee, Parliament of Queensland, *A Fair Day's Pay for a Fair Day's Work? Exposing the True Cost of Wage Theft in Queensland* (Report No 9, 56th Parliament, November 2018).

¹⁸ See for example Peter Ryan and David Chau, 'Woolworths Investigated After Admitting it Underpaid 5,700 Staff up to \$300 Million', *ABC News* (Online, 30 October 2019) <<https://www.abc.net.au/news/2019-10-30/woolworths-underpays-5700-staff-up-to-300-million-dollars/11652656>>; ABC Online, 'Woolworths Contractors Underpaying Cleaners in "Serious Exploitation" across Tasmania, Inquiry Finds', *ABC News* (Online, 14 February 2018) <<https://www.abc.net.au/news/2018-02-14/woolworths-cleaners-underpaid-tasmanian-inquiry-finds/9444916>>; Madeleine Heffernan, 'Fair Work Takes Myer to Cleaners Over Underpaid Wages', *Sydney Morning Herald* (Sydney, 30 May 2016).

subsequently been required by the FWO to make wage backpayments to underpaid staff.¹⁹

The Australian Council of Trade Unions (ACTU) estimates that wage theft practices affect as many as one-third of Australian workers, becoming part of the new business model for large corporations.²⁰ Furthermore, wage theft has implications for workers beyond those that are directly affected. As Peetz explains:

[I]f one group of workers can be paid well below the legal minimum, that opens opportunities for employers to apply pressure to other workers, using the implicit or explicit threat of replacing them with lower-paid workers.²¹

It appears that Australia is not the exception, with wage theft also being a major problem in parallel developed economies such as the United States of America²² and the United Kingdom.²³ Migrant workers are particularly vulnerable to exploitation with considerable evidence mounting that underpayment of this subset of workers is systematic and widespread in the Australian labour market.²⁴ One major survey of 4,322 temporary migrants found that a substantial proportion of those migrants (30% of those surveyed) were paid around half the legal minimum (\$12 per hour or less).²⁵

Wage theft is particularly prevalent in low-wage, low-skill job markets such as those in the retail, hospitality, horticulture, cleaning and security industries. Clibborn and Wright²⁶ state that these types of fragmented industries tend to have common 'structural characteristics' such as

weak or absent unions, extensive casual employment and subcontracting, intense commercial competition, labour cost minimisation as a dominant strategy, and other features associated with poor job quality.

In the majority of those industries including the retail, cleaning, horticulture and security industries, work is given out through supply chains or other business networks (such as franchises) to smaller businesses and workplaces with low union density. Those direct employers are then subject to considerable commercial pressures

¹⁹ Eugene Schofield-Georgeson and Michael Rawling, 'Industrial Legislation in 2019' (2020) 62(3) *Journal of Industrial Relations* 425, 426.

²⁰ Australia Council of Trade Unions ('ACTU'), *Wage Theft – The New Model for Big Business* (ACTU, 2019).

²¹ David Peetz, *The Realities and Futures of Work* (ANU Press, 2019) 292–3.

²² David Weil, 'Creating a Strategic Approach to Address Wage Theft: One Academic's Journey in Organizational Change' (2018) 60(3) *Journal of Industrial Relations* 437, 439.

²³ Clibborn and Wright (n 1) 208, citing Monder Ram et al, *Non-Compliance and the National Living Wage: Case Study Evidence from Ethnic Minority and Migrant-Owned Businesses* (Low Pay Commission, 2017).

²⁴ Clibborn and Wright (n 1) 208; Bassina Farbenblum and Laurie Berg 'Migrant Workers' Access to Remedy for Exploitation in Australia: The Role of the National Fair Work Ombudsman' (2017) 23(3) *Australian Journal of Human Rights* 310.

²⁵ Berg and Farbenblum, *Wage Theft in Australia* (n 1) 5.

²⁶ Clibborn and Wright (n 1) 212.

passed down the supply chain or through the contractual network that increase the risk of business non-compliance with labour standards.²⁷

Given the extent of the wage theft issue in the Australian labour market, clearly the established methods of addressing business non-compliance are inadequate and give rise to the need for innovative further measures such as CAF and others to address this issue.

A Non-Compliance is Rampant in the Cleaning Industry

Contract cleaning provides an exemplar of an industry whose characteristics and market structure match those listed by Clibborn and Wright as associated with non-compliant labour practices.²⁸ One such characteristic is the nature of the business relationships within the contract cleaning supply chain. Commercial building owners (such as retail and investment banks, property development companies and other large investors such as industry superannuation funds), as well as their tenants (which include well known consumer brands), are at the 'top' of the chain. Commonly, the building owners and tenants outsource the cleaning of the property to specialised cleaning companies, either directly or mediated through a facilities management company. The use of an external facilities manager adds another tier to the supply chain.²⁹ In some cases, the cleaning companies subcontract to smaller companies or individual contractors. When asked about their role in the cleaning supply chain a facilities manager (property manager) explained that:

Well, as a property manager we tender cleaning contracts when we think they need doing. So, then we go through the process of selecting the appropriate cleaner, in consultation with the owner, obviously. Then ... once the cleaner's in place and working, the Facilities Manager controls that contract ... makes sure that they're doing what they're supposed to be doing or what they're getting paid to do. Then obviously we pay the cleaner out of funds that we receive out of the building and handle the normal issues that come with a contract.³⁰

In other words, commercial decisions regarding cleaning contracts are not simply determined by owners or tenants in negotiation with cleaning contractors but are further moderated through the facilities management company paid by the building owners. Therefore, facilities managers are another entity that have power to influence the pay and conditions of cleaners.

In addition to complexity and fragmentation facilitated by its multi-tiered nature, the contract cleaning sector reflects many other 'structural characteristics' conducive to

²⁷ See generally Clibborn and Wright (n 1) 214; Kaine and Rawling (n 10). However we note that wage theft is not confined to small business employers at the base of business networks – large employers can also steal wages from their direct employees: see, eg, Ryan and Chau (n 18).

²⁸ Clibborn and Wright (n 1) 212.

²⁹ Kaine and Rawling (n 10) 315.

³⁰ Interview with facilities manager (2018).

labour exploitation.³¹ Union activity in contracting has met only limited success. In the early 2000's, the Liquor, Hospitality and Miscellaneous Workers Union (LHMU – now known as the United Workers Union – UWU) undertook a concerted campaign known as 'Clean Start'. In an acknowledgement that traditional collective bargaining involving parties at the bottom of the supply chain did not address the realities of the industry (namely the economic power of entities at the apex of the supply chain for cleaning services), the campaign attempted to exert pressure on building owners to only grant contracts to cleaning companies that were party to a Clean Start enterprise agreement. While successful in negotiating a Clean Start agreement with 50 cleaning companies and obtaining federal government support, there was significant opposition from property owners. They claimed that the Clean Start campaign had created a two-tier industry in which those companies paying above award wage rates (through the Clean Start agreements) were being disadvantaged. A specific concern was that building owners were not prepared to pay more in their contracts to cover higher wages.³² Despite the efforts of the union much of the sector remained outside Clean Start, creating a two-tiered market that did not address the key issue: the intensely competitive market in which cleaning companies were themselves often price-takers.

The market for contract cleaning is sizeable and growing.³³ It is also fiercely competitive, driven by low barriers to entry and a ready supply of low-skilled, low-paid workers. This environment, in which price is a significant, if not overriding, consideration of building owners in the awarding of cleaning contracts, creates pressure for cleaning companies to tender for contracts at rates that are inadequate to fund compliance with award pay and conditions. This was succinctly summarised in an interview with a CAF Steering committee member who noted that:

The economic pressures are relentless. Tenants and investors want a lower cost and increased return and the workforce, not uniquely but particularly, is very vulnerable. So they're part-time. They're casual. They're foreign students. They're women – English as second language. So just this vulnerability up against this incredibly powerful economic force.³⁴

Data collected from a stakeholder as part of this project revealed that of about 400 tenders submitted by cleaning companies for contracts to clean large commercial buildings around Australia, more than 34 percent underestimated labour costs, and/or the per square metre cost of cleaning areas in the relevant building, and/or over-estimated the per square metre cleaning productivity rate. This gives rise to serious doubts as to whether the contractors who submitted those tenders could fulfil

³¹ Clibborn and Wright (n 1) 212.

³² Kaine and Rawling (n 10).

³³ In 2016/17 it was estimated that the sector would generate \$8.6 billion in revenue and grow to \$9.8 billion over 5 years: Alen Allday, *Commercial Cleaning Services in Australia* (IBISWorld Industry Report No N7311, November 2016).

³⁴ Interview with Steering Committee Member (CAF, 2019).

the contract without either exploiting the cleaning workforce or making a loss on that contract.

As a consequence, the contract cleaning industry has become infamous for sham contracting, underpayment and poor working conditions. In the report of the National Cleaning Services Compliance Campaign 2014-15, the FWO showed that the percentage of businesses that were non-compliant had ranged between 37 percent and 40 percent between 2011 and 2015. Additionally, an investigation into sham contracting in 2011 found that over 21 percent of cleaning businesses were misclassifying employees, resulting in cleaners missing out on leave, superannuation and other entitlements.³⁵ Aside from misclassification, work in the cleaning sector is characterised by casual and part-time engagement leading to underemployment despite increasing workloads.³⁶ Altogether, work in the cleaning services sector matches many of the features associated with poor job quality.

III METHODOLOGY

In this article, we aim to evaluate the effectiveness of CAF in addressing non-compliance with minimum labour standards for the cleaning workforce.³⁷

Our design followed the principles of action research. In action research, the researchers engage actively, along with operational members of the project, to promote change.³⁸ In line with our objectives, action research combines the needs of the participating organisations with the production of high-quality research outputs with the objective of triggering transformative change.³⁹

Due to our role in the project, we were allowed unparalleled access to data and decision making at CAF. However, this comes with a need for self-awareness and reflection on how theory is elaborated and emerges from the 'intervention' to limit the bias associated with actively engaging in transformative change.⁴⁰ In particular, it is important to clearly consider what role the research participants play in theory building. Considering our research objective, which was to provide an assessment of the implementation of CAF, we opted for a clear delineation where research participants were considered as 'subjects' and as such did not take part in the

³⁵ See FWO, *National Cleaning Services Compliance Campaign 2014/15 Report* (Report, March 2016).

³⁶ Iain Campbell and Manu Peeters, 'Low Pay, Compressed Schedules and High Work Intensity: A Study of Contract Cleaners in Australia' (2008) 11(1) *Australian Journal of Labour Economics* 27.

³⁷ This objective and the data on which the article draws are part of a larger project funded through a Linkage grant from the Australian Research Council. The main objective of the project was to contribute to the implementation and improvement of CAF and evaluate its outcome.

³⁸ Mark Saunders, Phillip Lewis and Adrian Thornhill, *Research Methods for Business Students* (Financial Times Prentice Hall, 7th ed, 2009); Edgar H Schein, *Process Consultation Revisited: Building the Helping Relationship* (Addison Wesley, 1999).

³⁹ Schein (n 38).

⁴⁰ Colin Eden and Christine Huxham, 'Action Research for the Study of Organizations' in Stewart R Clegg and Cynthia Hardy (eds), *Studying Organization: Theory and Method*, (SAGE Publications, 1999) 526.

elaboration of theory.⁴¹ The authoring team was thus limited to academics and did not include other members of CAF. This facilitated a process of theory building that was distinct from that of the intervention research, with significant time dedicated to our theoretical elaboration. This process took place outside of the settings of the research.⁴² This was possible because none of the authors allocated more than 20 percent of their time to the research project.

Given our extensive access to data, we were also able to limit bias by triangulating the information collected through several sources, including interviews and observation, as well as access to and work on project documents. We conducted 39 semi-structured interviews with key stakeholders, including building owners, facility management, cleaning contractors, the relevant union, the CAF core team, the CAF steering committee, and tenants (see table 1 for details). While the interview guide varied depending on the stakeholders, the main topics covered included work standards issues in the cleaning supply chain, involvement in remediation (including CAF), the stakes for CAF, approaches to remediation, efficiency of CAF, the relationship between the CAF core team and other stakeholders and the future of CAF. We also conducted two group interviews with cleaning workers, focused on their perception of key issues in the industry, the role of CAF in relation to remediation and tools that could help address issues. We also combined participant and non-participant observation. Participant observation was in the form of the facilitation of workshops, participation in CAF organised workshops and project meetings, as well as membership of CAF committees (steering committee, accreditation committee, and standards committee), totalling over 50 hours of participant observation across 33 meetings. Non-participant observation concerned mainly the workers' induction meetings (10 meetings of one hour each). Regarding documents, we not only had unrestricted access to a database of 3,792 documents related to the project, but also contributed to improving processes and procedures through ongoing revisions of related documentation. For instance, the research team did a full review of the pricing schedule for commercial buildings (see below for a detailed description) and was then involved in defining a new pricing schedule for the retail industry. The main documents that were useful sources for the current article include the certification documents (audit reports, certification correspondence and workers' engagement reports) and the successive iterations of the procedure documents (remediation procedure, CAF standard, pricing schedules, etc).

Our approach conforms to best practice in action research, which is typically conducted in successive phases of diagnosing, planning, taking action and

⁴¹ John Rowan, 'A Dialectical Paradigm for Research' in Peter Reason and John Rowan (eds), *Human Inquiry: A Sourcebook of New Paradigm Research* (John Wiley and Sons, 1981) 93.

⁴² Eden and Huxham (n 40); Laurel Richardson, 'Writing: A Method of Inquiry' in Yvonna S Lincoln and Norman K Denzin (eds), *Turning Points in Qualitative Research: Tying Knots in a Handkerchief*, (AltaMira Press, 2003) 379.

evaluation.⁴³ By doing so, we were able to gain full access to data, while also providing an assessment of efficiency and determining how the framework can be improved in order to minimize non-compliance.

Table 1: Semi-structured interviews

| Stakeholder type | Number of Interviews | Steering Committee Members |
|-------------------------------------|----------------------|----------------------------|
| Building owner | 6 | 2 |
| CAF core team | 5 | 3 |
| Cleaning contractors | 10 | 5 |
| Facilities manager | 7 | 1 |
| External Steering Committee members | 2 | 2 |
| Tenants | 3 | n.a. |
| Union | 3 | 3 |
| Total | 36 | 14 |

IV THE CAF REGULATORY FRAMEWORK AND ITS IMPLEMENTATION

In light of the extensive problem of non-compliance with minimum labour standards in the Australian cleaning industry, some form of additional regulation of the industry to improve compliance was warranted. The CAF came into existence in Australia in 2013 to begin to address the problem. It attempts to construct a regulatory model to supplement the formal legal framework in an effort to overcome the inadequacies of that framework. The CAF model developed around a number of tools and protocols that reinforced minimum standards (determined through collaboration among stakeholders in the cleaning supply chain) and created a system of monitoring and enforcement of these standards (through engagement with workers and leveraging of supply chain dynamics). Currently, there are 6 instruments that constitute the core of the CAF regulatory model: the core principles, the star standard, the pricing schedule,

⁴³ Saunders, Lewis and Thornhill (n 38).

the external audit process, the worker engagement protocol, and the remediation procedure. The core principles, the 3 Star Standard and the pricing schedule together constitute the tools through which CAF has determined and articulated minimum standards. The external audit process and the worker engagement protocol are the basis of monitoring compliance with the standards. Finally, the remediation procedure forms the basis of the enforcement activities undertaken by CAF which are prioritised by severity of non-compliance with the minimums (detailed below).

In that sense, CAF is an attempt to create a co-regulatory framework that overcomes the limitations previously observed in such initiatives.⁴⁴ It seeks to do so by relying on an ensemble of instruments and enforcement mechanisms that aim at correcting an over-reliance on audits⁴⁵ that has been widely criticised, notably in relation to global supply chains. Social auditing practices, when applied as the main enforcement mechanism, failed to demonstrate a strong contribution to remediation of labour issues in such contexts,⁴⁶ often being unsuccessful in detecting or correcting labour issues.⁴⁷ This is notably the case because of excessive control by companies over the process, risk falsification and no incentive for significant/lasting remediation.⁴⁸ CAF also answers a call 'to engineer governance initiatives that respond to the specific forms of complexity typical of domestic chains'.⁴⁹

Since 2013 the standard setting, monitoring and enforcement mechanisms that have been developed by the CAF have been improved and adjusted, taking stakeholder views into consideration. The establishment of the framework and its adjustments have been conducted through a model of consensus standard setting. This means that before any element of the framework is set, CAF seeks to gain the agreement of CAF stakeholders. The advantage of this consensus approach to multi-stakeholder decision making is that it facilitates stakeholder buy-in and ownership, which in turn can promote compliance. However, the consensus model has at times hampered and significantly slowed the operation of CAF.

Each of the CAF mechanisms is examined below, articulating the regulatory framework that CAF uses to conduct the rectification of business non-compliance and

⁴⁴ Edward J Balleisen and Marc Allen Eisner, 'The Promise and Pitfalls of Co-Regulation: How Governments Can Draw on Private Governance for Public Purpose' in David A Moss and John A Cisternino (eds), *New Perspectives on Regulation* (Cambridge, 2009) 127, 130-3.

⁴⁵ Jolyon Ford and Justine Nolan, 'Regulating Transparency on Human Rights and Modern Slavery in Corporate Supply Chains: The Discrepancy between Human Rights Due Diligence and the Social Audit' (2020) 26(1) *Australian Journal of Human Rights* 27, 28.

⁴⁶ Thomas Clarke and Martijn Boersma, 'The Governance of Global Value Chains: Unresolved Human Rights, Environmental and Ethical Dilemmas in the Apple Supply Chain' (2015) 143(1) *Journal of Business Ethics* 111.

⁴⁷ Genevieve LeBaron, Jane Lister and Peter Dauvergne, 'Governing Global Supply Chain Sustainability through the Ethical Audit Regime' (2017) 14(6) *Globalizations* 958; Berliner et al (n 6); Locke (n 6); Raj-Reichert (n 7).

⁴⁸ LeBaron, Lister and Dauvergne (n 47).

⁴⁹ Crane et al (n 7) 101.

improve the working conditions of cleaners and how it supplements the limitations of social audit approaches.

A CAF Core Principles

The Core Principles are at the heart of the CAF certification scheme. They set out the principles of best-practice for stakeholders involved in the cleaning services and property industries. Participants in the CAF certification scheme are expected to uphold these core principles at buildings undergoing certification and across their own business operations. These principles include decent treatment of workers, a workplace free from discrimination, enabling freedom of association, having grievance mechanisms for workers, cooperation to ensure workplace health and safety, reasonable workloads and performance indicators, job security at change of contract, wages and conditions above minimum standards recognised as best practice, conditions for subcontracted staff are no less favourable than direct employees, the contract price is sufficient to enable contractors to meet all of their legal obligations and stakeholders who are committed to continual improvement of sustainable practices are to be recognised.⁵⁰ These core principles are similar to the code of conduct often implemented in parallel with social audit mechanisms. While not sufficient in isolation,⁵¹ such mechanisms are still important in setting the base for a common understanding of what CAF is aiming to achieve.

B CAF 3 Star Standard

CAF has developed a 3 Star Standard, which provides a mechanism to certify individual buildings. The 3 Star Standard focuses on six areas of compliance:

- 1) Labour (wages and conditions, job security, visa compliance);
- 2) Responsible Contracting (sustainable pricing, record keeping, transparency about subcontracting and oversight of contractor compliance);
- 3) Workplace Health and Safety (a safe working environment, compliance with legislation, inductions and training, bullying and harassment);
- 4) Financial Viability (whether appropriate financial viability checks have been undertaken);
- 5) Worker Engagement (education, consultation and freedom of association);

⁵⁰ 'The Cleaning Accountability Framework: Core Principles', *Cleaning Accountability Framework* (Web Page, 2019) <<https://www.cleaningaccountability.org.au/wp-content/uploads/2019/03/CAF-Core-Principles.pdf>>.

⁵¹ Clarke and Boersma (n 46).

6) Remediation (ensuring all relevant stakeholders play an active role in investigating and resolving compliance issues).⁵²

The 3 Star Standard has been developed to ensure compliance with legislative requirements determined in the applicable award and relevant legislation including the *FW Act*. For example, the first mentioned area of compliance, labour, focuses on wage, tax and superannuation obligations of employers, as well as legal record-keeping and payslip requirements. This compliance area also verifies whether cleaners have the right to work in Australia, and whether they are working in compliance with their visa conditions. Similarly, in the other areas of compliance, the benchmark is determined by obligations set out in the applicable award and relevant legislation. In effect, adhering to the 3 Star Standard implies compliance with minimum legal requirements. Despite this, there was still the need for a consensus to be built among stakeholders as to which aspects of the minimum requirements would be prioritised and enforced within the standard and how the requirements around worker engagement would be operationalised. Over time, CAF intends to develop 4 and 5 Star Standards which set out aspirational requirements that go beyond minimum legal compliance.

The other instruments created by CAF aim at ensuring that the 3 Star Standard is met. The pricing schedule is used by CAF members on an ongoing basis to allocate contracts to cleaning contractors. To have a building certified, CAF initially undertakes two simultaneous processes that, combined, constitute the CAF audit process: an external audit of the cleaning contractor by an independent auditor and a worker engagement process. To date, almost invariably, these processes have uncovered non-compliance with the CAF 3 Star Standard. There is then an annual health check for certified sites that updates the information initially collected and includes ongoing worker engagement activities. Finally, the remediation procedure allows for the rectification of issues identified during the certification process, or down the track through the annual health checks and ongoing worker engagement.

C The Pricing Schedule

The competitive tendering process in the cleaning industry, during which cleaning contractors bid on tenders put out by building owners, has seen cleaning contractors lower their prices to unsustainable levels. This has resulted in wage payments below the legal minimum and excessive workloads. To counter this trend, CAF has developed a 'contract quantum adequacy' tool to ensure that the price stated by the cleaning contractor is sufficient to cover minimum labour rates and entitlements and does not result in unacceptable workloads. The pricing schedule incorporates two benchmarks based on aggregated industry data. It is a key tool that leverages the

⁵² 'Three Star Standard', *Cleaning Accountability Framework* (Web Page, 2019) <<https://www.cleaningaccountability.org.au/wp-content/uploads/2019/03/190327-3-Star-Standard-public.pdf>>.

power of the organisations at the apex of the cleaning supply chain as building owners and facilities managers make tender decisions informed by a process that expressly considers capacity for labour compliance. The first benchmark specifies the minimum level of labour on-costs that are expected to be incurred by the contractor. This is meant to ensure that the contract price is sufficient to cover worker entitlements. The second benchmark specifies the maximum productivity rate per square metre for a given property type and area. This makes visible the minimum amount of labour hours required to clean a specific property. Comparison of the calculated on-cost and productivity rates with industry benchmarks acts as a 'red flag' for potential non-compliance. Contracts priced lower than the established minimum are likely breaching labour standards. The disclosure of labour costs and workloads is mandatory. A building cannot be CAF certified unless the pricing schedule is completed as part of the tendering process. This creates transparency and an increased likelihood that cleaners will be paid their entitlements and that workloads are sustainable. Use of the productivity schedule will lead to less divergence in prices submitted as part of the tendering process, and shift emphasis from cost as the primary determinant to other qualitative factors such as quality of service. As a result, it also operates as an important tool for aligning incentives within the client organisation between cost and ethical concerns, where conflicting incentives was one of the limitations preventing social auditing from being more than a legitimisation exercise.⁵³

D *The External Audit Process*

The external audit of the areas of compliance of the CAF 3 Star Standard is conducted by an externally engaged auditor, chosen by CAF, and paid for by the building owners. The auditor collects data to verify compliance or otherwise with the 3 Star Standards. The audit process includes the collection of data and documentation that can be provided electronically by the cleaning contractors, facilities managers and building owners; fieldwork that includes interviews with stakeholders; and finally, the issuing of a report by the auditors to the CAF Certification Panel.

Through the external audit process, cleaning contractors demonstrate compliance in various ways, including by providing the auditor with an overview of relevant employment policies, procedures and management systems with a specific focus on the relationship between cleaning workers and the cleaning contractor. For instance, they are asked to provide evidence of compliance with the CAF 3 Star Standards. Similarly, for building owners and managers, record keeping pertains to documents that capture the relationship between the owner/manager and the cleaning

⁵³ Locke (n 6); Berliner et al (n 6); Lone Riisgaard and Nikolaus Hammer. 'Prospects for Labour in Global Value Chains: Labour Standards in the Cut Flower and Banana Industries' (2011) 49(1) *British Journal of Industrial Relations* 168; Emmanuel Josserand and Sarah Kaine 'Labour Standards in Global Value Chains: Disentangling Workers' Voice, Vicarious Voice, Power Relations, and Regulation' (2016) 71(4) *Relations industrielles/Industrial Relations* 741.

contractor, such as a record of investigation and remediation of unauthorised subcontracting, if any has been detected, as well as the completion of the pricing schedule, and a signed declaration from cleaners stating that they have received documents (such as employment contracts). A notable element of the CAF audit system is that it limits the control of companies over the process since, while the auditor is paid by the company, it is chosen and reports its results directly to CAF who then informs the company of the outcome and is in a position to request remediation before the 3 star rating is granted.

E Worker Engagement Protocol

Fundamental to the frequent inability of workers to realise their rights is the absence of avenues that allow them to express their voice.⁵⁴ The lack of worker voice has been highlighted as a key limitation of social auditing.⁵⁵ The importance of including workers' voice is illustrated by the research on 'worker-driven social responsibility'; where workers themselves are the driving force behind creating, monitoring and enforcing workplace standards. For instance, the Fair Food campaign initiated by the Coalition of Immokalee Workers (CIW) in the United States is a membership-based organisation of farm workers that emerged to address the abusive recruitment and working conditions facing (predominantly migrant) tomato pickers.⁵⁶ The campaign, driven by the farm workers, relied on strong alliance building with consumer groups and human rights activists to persuade major brands to adopt the Fair Food Code of Conduct.⁵⁷ A binding agreement between the CIW and the buyer companies underpins the code, which requires the buyers to cease business dealings with growers that do not comply with the Fair Food Code.⁵⁸

In recognition of the need to provide workers with a strong voice in the process of enforcing social standards, the worker engagement component of CAF is critical to the identification of potential non-compliance with the CAF 3 Star Standard and hence minimum labour standards. It is the process through which the audit of labour standards is verified with data collected from workers. It is a process that is undertaken by CAF and the UWU. It consists of a minimum of two worker engagement meetings (30 minutes each) and a cleaner survey. CAF liaises with the

⁵⁴ Leah F Vosko, 'Mapping the Enforcement Gap: Historical and Contemporary Dynamics' in *Closing the Enforcement Gap: Improving Employment Standards Protections for People in Precarious Jobs* (University of Toronto Press, 2020).

⁵⁵ Ilona M Kelly et al, 'Fig Leaf for Fashion: How Social Auditing Protects Brands and Fails Workers', (Report, Clean Clothes Campaign, 2019) <<https://cleanclothes.org/file-repository/figleaf-for-fashion.pdf>>.

⁵⁶ Fair Food Standards Council, *Frequently Asked Questions* (Web Page) <<http://www.fairfoodstandards.org/resources/frequently-asked-questions/>>.

⁵⁷ Coalition of Immokalee Workers, *Fair Food Program: Frequently Asked Questions* (Web Page) <https://ciw-online.org/ffp_faq/>.

⁵⁸ Ibid.

building owner, facilities manager, cleaning contractor and UWU to organise these meetings.

The first worker engagement meeting serves as an introduction to CAF and takes place with all stakeholders in the room. This allows UWU, building owners, facilities managers and cleaning contractors to explain why they are involved in CAF. Surveys, CAF representative nomination forms and a CAF survey are distributed at this meeting, and a secure box is left for cleaners to place them in. Surveys and CAF representative forms are collected from the box following this first meeting.

For the second worker engagement meeting only CAF, UWU and the relevant workers are present. This tests, and ultimately demonstrates, the commitment of stakeholders involved in CAF to freedom of association. This meeting is a chance for cleaners to share their experiences without their employers in the room. A CAF representative is elected by the cleaners in each building to 'represent and advocate on behalf of their colleagues.'⁵⁹ This role is recognised through the payment of an allowance added to the hourly rate of the representative. The 'CAF Representative Allowance' is ultimately paid by the property owner who is invoiced by the cleaning contractor, as the representative receives the allowance in their normal pay through the contractor.⁶⁰ Finally, the information gathered from the two meetings and the survey is collated into a 'worker engagement report' that forms part of the audit documentation and evidence of compliance or otherwise.

It is not known if participants see this CAF worker representative mechanism as a method of compliance with the legislated Work Health and Safety (WHS) requirements for worker consultation, representation and participation.⁶¹ The CAF representative mechanism does not have a specific WHS focus but does incorporate a WHS aspect to it. Further, an overall aim of CAF is to ensure substantive compliance with legislative requirements, including those relating to WHS. Therefore, the CAF representative mechanism certainly has the potential to be expanded in order to serve the worker representation functions for the purpose of complying with WHS legislation (even if this is not what is currently envisaged).

F Remediation Procedure

The CAF Secretariat (consisting of a Chief Executive Officer and two compliance officers) undertake measures to follow up non-compliance issues revealed by the external audit and worker engagement processes in order to ensure that the businesses in question rectify the non-compliance and extend to cleaning workers their lawful rights and entitlements. A brief outline of the measures taken by CAF at

⁵⁹ CAF, *CAF Worker Engagement Costs* (CAF, 2020) 1.

⁶⁰ Processes relating to worker engagement have varied slightly over the course of the certification pilots and subsequent certification rounds.

⁶¹ See *Work Health and Safety Act 2011* (NSW) pt 5.

this point are specified in the written remediation procedure.⁶² Once the CAF Secretariat complete following up the non-compliance, evidence of the rectification process, the worker engagement report and the external auditor's report are provided to, and considered by, the CAF Certification Panel. If the panel is satisfied that the wages and conditions of cleaners at that particular site are in compliance with the CAF 3 Star Standard, then the building is certified for a three year period.

In terms of rectification, there are different courses of action depending on the seriousness of the issues. For the worst type of labour issues labelled in the procedure as 'critical issues' (such as modern slavery, which has 'recently become prominent in public debate'⁶³), the building owner is notified by CAF.⁶⁴ CAF does not notify the cleaning contractor in order to protect cleaning workers and prevent any action by the cleaning contractor to hide the issue or destroy any evidence.⁶⁴ There is some evidence from our interview data that certain building owners involved with CAF as well as cleaning contractors would prefer that the cleaning contractor is dealt with directly by CAF in the rectification process.⁶⁵ However the *raison d'être* of CAF is to use supply chain leverage as an additional mechanism to rectify labour abuses, further justifying the notification to the building owner.

The next type of issue that is classified in the written procedure is a major or serious issue. Such an issue is where cleaners' safety and well-being may be at risk and there is a major non-compliance with the CAF standard, a systemic or recurring issue, or a more complex non-conformance with the CAF Star Standard that requires further investigation and remediation. Examples of these major or serious issues include underpayment, significant increase in workload, significant freedom of association transgressions and bullying and harassment.⁶⁶

The procedure in relation to these major or serious breaches follows two initially different pathways depending on whether the contractor who directly hires the cleaning workers is CAF pre-qualified. Pre-qualification of a cleaning contractor means that that contractor has demonstrated to CAF that they have adequate management systems to support compliance with the 3 Star Standard when going through building certification audits and the capacity to participate effectively in the audit process and remediation process for CAF building certification.⁶⁷

⁶² At the time of writing this article the current version of the procedure was the one passed by the CAF building certification committee on 2nd October 2019.

⁶³ Justine Nolan and Martijn Boersma, *Addressing Modern Slavery* (UNSW Press, 2019) 6.

⁶⁴ CAF, 'Appendix D: CAF Remediation Procedure' in *Guide to the CAF Building Certification Scheme* (CAF, 2019) 31 ('Remediation Procedure').

⁶⁴ *Ibid.*

⁶⁵ Building Owner Site 2 and Facilities Manager Site 2 cited in Kaine S et al, *Report on the Pilot Audit Process* (Sydney, 26 April 2019) 11.

⁶⁶ 'Remediation Procedure' (n 64) 33-4.

⁶⁷ CAF, *Contractor Prequalification* (Web Page)

<<https://www.cleaningaccountability.org.au/contractor-prequalification/>>.

If the cleaning contractor is pre-qualified in this way, CAF notifies the cleaning contractor directly of any major or serious issues.⁶⁸ The cleaning contractor is then given 10 days to investigate and report back to CAF with a corrective action plan to implement.⁶⁹ For serious or major breaches where the cleaning contractor is not pre-qualified, CAF notifies all relevant multi-stakeholder participants including the building owner/manager, the cleaning contractor and the relevant union. The relevant stakeholders then have to investigate the issues that CAF has outlined to them within 10 business days.

The procedure then merges into one stream for both pre-qualified contractors and those contractors that are not pre-qualified. If the investigation by the cleaning contractor or stakeholders corroborates the issues raised by workers, CAF advises of an appropriate timeframe to remedy the issue and what evidence is needed to be provided to CAF. Here CAF can consult with the UWU and the CAF Certification Panel and if necessary engage an independent assessor.⁷⁰ If the investigation does not corroborate the issues raised by cleaners, CAF recommends to the stakeholders at the site that they implement proactive measures to prevent those types of issues occurring in the future.⁷¹

In the case of pre-qualified contractors, CAF then notifies the building owner or manager so that they know that the issues are being addressed and completes the worker engagement report that goes to the CAF Certification Panel.⁷² In the case of non-pre-qualified contractors this process is not necessary given the building owner/manager has been notified by CAF earlier and is involved in the investigation process.

There is also a brief protocol for minor issues (such as insufficient evidence to demonstrate compliance with a CAF standard, cleaners not receiving pay slips or information sheets).⁷³ The procedure does not involve an investigation by any stakeholder. Instead, CAF completes the worker engagement report that goes to the Certification Panel on these minor issues and the cleaning company is asked to remedy these issues as part of the certification process.⁷⁴

There is thus a clear coupling in CAF between the information collected through audits and the worker engagement process and remediation action, where, contrary to what has been observed in most social auditing schemes, there is a strong incentive to remediate to achieve and maintain the 3 star rating.

⁶⁸ 'Remediation Procedure' (n 64) 32.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid 34.

⁷⁴ Ibid 32.

G Audit findings, Certification and Remediation

We now turn directly to the evidence on the implementation of the CAF regulatory framework. The table below provides an overview of the audits undertaken and of the outcomes, notably including the number of issues identified.

Table 2: Certification and issues for the period 2017–19

| Building Type | Number Audited | Number Certified | Number of Issues Identified (Total across sites) | Number of Issues Identified (Average/site) |
|----------------------|-----------------------|-------------------------|---|---|
| A Grade Office | 13 | 12; 1 on hold | 60 | 4.62 |
| B Grade Office | 4 | 2; 2 in progress | 25 | 6.25 |
| Retail | 7 | 7 | 57 | 8.14 |
| Total | 24 | 21 | 142 | 5.92 |

Table 2 presents the outcome of the audit process and the number of issues identified in total and in average. Altogether, while the average number of issues varies according to the category, issues were identified with all sites, with an average of close to 6 issues per audited site. However, the CAF certification committee certified all but one of the sites listed in the table after the cleaning contractor or building owner produced evidence to CAF that the non-compliance issues had been rectified. This demonstrates a direct impact of CAF: its capacity to detect issues and drive remediation. Considering the severity of some of the issues detected – see discussion below – this represents a significant improvement in the working conditions of cleaners at those CAF sites.

Throughout the various rounds of certification, it became apparent that while there were issues singular to particular buildings and the number of compliance issues varied across sites, some issues emerged as more common than others. The 10 most common issues identified through the audit process between 2017 and 2019 were as follows:

- 1) Oversight of contractor compliance;
- 2) Financial viability;
- 3) Provision of information sheet;
- 4) Underpayment;
- 5) Right to work in Australia;
- 6) Unsustainable workloads;

- 7) Leave policies and procedures;
- 8) Record-keeping;
- 9) Induction and training; and
- 10) Freedom of association⁷⁵

Notably these top ten most common issues include all four of the issues (pertaining to right to work in Australia, unsustainable workloads, underpayment and leave policies) that attract a 'severe' impact rating in a non-compliance rating system designed by CAF. That is, some of the most commonly identified issues are also rated by CAF as some of the most severe. Furthermore, there were two common issues that became a point of particular contention: sick leave and payment for induction. These two appeared to fall into a grey area of compliance. The CAF standard requires compliance with the National Employment Standards in the *FW Act* and the *Cleaning Services Award 2020* or the relevant collective agreement.⁷⁶

While the CAF 3 Star Standard notes compliance with 'recording and providing leave entitlements', the certification process revealed that there was a wide-ranging interpretation (or misinterpretation) of the notice provisions for taking leave in s 107 of the *FW Act*. Subsections (1) and (2) of that section provide that an employee must give notice of the taking of leave to their employer 'as soon as practicable'. Some cleaning contracting companies were requiring cleaners to notify of the intent to take sick leave in an unreasonable time-frame. That is, in some cases cleaners were being required to notify of an intended absence four hours prior to the commencement of their shift. This was particularly difficult for cleaners engaged on early morning shifts and resulted in the non-payment of sick leave in some cases. This may place an additional requirement on employee beyond s 107(2) of the *FW Act* which explicitly contemplates that notice may be given after the leave has commenced.

Likewise, there was some dispute as to what constitutes appropriate paid induction – which occurs once an employment relationship exists – and what is better described as pre-employment activity. Through the audit process and follow-up investigations, CAF discovered that a common practice was to pay cleaners only for the on-site induction but not for activities off-site which could include things such as Work Health and Safety training and familiarisation with company policies. In the more extreme cases there appeared to be a requirement for new starters to undertake unpaid training that amounted to several shifts prior to official commencement.⁷⁷

The uncertainty around interpretation of the relevant legal requirements prompted the CAF Secretariat to move to developing more specific policies in both of these areas (sick leave and induction). These policies were aimed at proactively addressing a

⁷⁵ CAF, *Attachment B: Summary of Compliance Issues and Key Insights* (CAF, 2019) ('*Summary of Compliance Issues*').

⁷⁶ CAF, *Three-star Standard Restructure MT 181212* (CAF, 2018).

⁷⁷ CAF, *CAF Guidelines for Inductions November 2019* (CAF, 2019) ('*Guidelines for Inductions*').

prevalent issue. Firstly, CAF communicated the new policies to employers who had undergone the audits which found that a potential non-compliance had occurred. CAF compliant policies and guidelines were then able to become part of the subsequent remediation processes when an issue relating to sick leave or induction emerged at further sites through the audit process. The CAF model leave policy contains a table that breaks the issue into key dimensions and then lists the relevant provision of the *FW Act*, examples of current industry practice that CAF deems to be inconsistent with the law and finally a suggested approach for cleaning companies.⁷⁸ Similarly, the CAF guidelines for induction processes detail legal obligations regarding the payment of inductions, common practice that CAF deems non-compliant with its standards and examples of practices that CAF would expect to constitute paid induction in comparison to pre-employment 'recruitment related activities'.⁷⁹ This policy development shows CAF engaging in interpretation of the legal minimums (on which its 3 Star Standards are based) and building that interpretation into its remediation processes. It also demonstrates arbitration by CAF between the interpretations of stakeholders and the overall goal of improving labour standards for cleaners. In this example, the CAF Secretariat took a more decisive role in the determination of a policy that became part of the minimum CAF requirements. It took this action out of concern that the overall goal was not being met by stakeholders autonomously.

The worker engagement process was key to identifying issues during the audit and annual health check processes – particularly those which were subject to varied interpretation of the kind referred to above. The worker engagement aspect is a fundamental component of CAF and recognises that 'the everyday experience of workers is a significant means of identifying noncompliance'.⁸⁰ Indeed, all of the 18 audits that contained written worker engagement reports revealed issues relating to non-compliance with the CAF standard. More significantly, the worker engagement reports uncovered potential non-compliance that was not captured through other aspects of the audit, with a number of these related to issues ranked with the highest severity rating. Specifically, 12 of the 18 pointed to concerns regarding 'unsustainable workloads'; seven identified an issue with the taking of leave; one highlighted concerns with the right to work in Australia; one uncovered underpayment and three others pointed to the related issue of the use of Australian Business Numbers (ABNs).

The more serious incidences of non-compliance with the labour component of the CAF standards were uncovered through the worker engagement process as a consequence of the information provided by cleaners to CAF in face-to-face meetings or through the survey. What is evident from the audit process and results is that the worker engagement process was pivotal in identifying potential non-compliance with the

⁷⁸ CAF, *CAF Compliant Personal/Carer's Leave Policy Guidelines* (CAF, 20 February 2020).

⁷⁹ CAF, *Guidelines for Inductions* (n 77).

⁸⁰ Kaine and Rawling (n 10) 319.

CAF standard. Given the CAF standard is itself based on binding minima (including the *Cleaning Services Award*), the worker engagement process provides a greater level of assurance to parties throughout the supply chain that legal breaches will be uncovered than the other components of the audit alone.

H Extent to which the Top of the Supply Chain is Leveraged

Perhaps a key indicator of the effectiveness of the CAF scheme is CAF's ability to leverage the influence of property owners at the top of the cleaning supply chain. The literature has for some time indicated that supply chains across various industries are already 'regulated' for private purposes by lead controlling firms at the apex of supply chains and that this influence of those lead controllers might be harnessed by regulators for the public purposes of addressing labour abuses.⁸¹

Our research has found that this is the case in many of the supply chains in buildings whose owners are now participating in CAF. Prior to CAF involvement and intervention, owners of commercial buildings had mechanisms in place throughout the cleaning supply chain to ensure the quality of cleaning services. The facilities managers hired by building owners carry out the function of ensuring the cleaning of the owner's building adheres to quality standards. Facilities managers use various mechanisms to ensure that the owners and their tenants quality requirements are quickly addressed. Many use automated systems which allow tenants, facilities managers or owners to log cleaning jobs when needed, including jobs to address omissions of cleaning work, deal with spillages or plan specific cleaning jobs. Alternatively, or in addition, facilities managers use a communication book for tenants and facilities managers to leave messages for cleaners.⁸² Also, facilities managers might discuss issues in person with a tenant or owner and launch the process of improving the cleaning services.⁸³ In turn, facilities managers also tend to maintain consistent contact with the cleaning company representative in the form of a regular meeting – such as a weekly meeting – to relay feedback about the cleaning work

⁸¹ See Igor Nossar, 'Cross-Jurisdictional Regulation of Commercial Contracts for Work Beyond the Traditional Relationship' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (Federation Press, 2006) 202; David Walters and Phil James, 'What Motivates Employers to Establish Preventive Management Arrangements within Supply Chains?' (2011) 49(7) *Safety Science* 988. Gary Gereffi has a large body of work that investigates global supply chain dynamics and while CAF is a domestic supply chain, many of the concepts explored by Gereffi with regard to fragmentation of business, drive in supply chains, the role of private and civil governance are instructive: see Gary Gereffi and Joonkoo Lee, 'Economic and Social Upgrading in Global Value Chains and Industrial Clusters: Why Governance Matters' (2016) 133 *Journal of Business Ethics* 25; Gary Gereffi and Joonkoo Lee, 'Why the World Suddenly Cares About Global Supply Chains' (2012) 48(3) *Journal of Supply Chain Management* 24; Gary Gereffi, John Humphrey and Timothy Sturgeon, 'The Governance of Global Value Chains' (2005) 12(1) *Review of International Political Economy* 78; Gary Gereffi, 'The Organization of Buyer-Driven Global Commodity Chains: How US Retailers Shape Overseas Production Networks' in Gary Gereffi and Miguel Korzeniewicz (eds), *Commodity Chains and Global Capitalism* (Praeger, 1994) 95 ('Global Commodity Chains').

⁸² Kaine et al (n 65) 9.

⁸³ *Ibid.*

done by the cleaners on the site. The facilities manager also routinely conducts inspections of the site in conjunction with or in addition to these regular meetings.⁸⁴

Moreover, legislative intervention has meant that, to a degree, on some sites, the facilities managers have also begun to monitor cleaning contractors for the public purpose of ensuring compliance with mandatory WHS requirements.⁸⁵ This is of course, mainly due to the owner's liability for the health and safety of all workers on site including cleaning workers (regardless of their work status) under mandatory WHS laws.⁸⁶ Compliance is attempted through a range of mechanisms including, at times, working with contractors on the implementation of WHS procedures.⁸⁷ However, these measures appear to be less embedded in facility manager practices; less extensive – at times mainly limited to, for example, proper site inductions for workers;⁸⁸ not as clearly articulated; and less well understood by stakeholders (such as tenants) than some quality control systems.⁸⁹

The bifurcation of WHS requirements, on the one hand, and pay and conditions laws, on the other,⁹⁰ has allowed building owners to silo compliance with WHS laws from their addressing of pay and conditions standards. Indeed as we have foreshadowed, in contrast to WHS laws, there is no clear-cut extended liability of lead controlling firms throughout supply chains for pay and conditions standards in Australia.⁹¹ Perhaps as a consequence of this inadequacy of the regulatory framework, our research has found that, prior to CAF intervention, there was not any widespread use of the type of mechanisms discussed above (currently used to improve the quality of cleaning services and to a lesser degree WHS) to systematically detect non-compliance with pay and conditions standards.⁹² Rather, responsibility for pay and conditions has been pushed down the supply chain and as a consequence there has been a lack of real oversight of cleaners' pay and conditions by parties up that chain. Building owners have placed responsibility for cleaning workers with the cleaning company and facilities manager and avoided knowledge of any non-compliance with labour standards altogether. Both owners and tenants were very clear that compliance with

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Richard Johnstone, 'Regulating Health and Safety in "Vertically Disintegrated" Work Arrangements: The Example of Supply Chains' in John Howe, Anna Chapman and Ingrid Landau (eds), *The Evolving Project of Labour Law: Foundations, Development and Future Research Directions* (Federation Press, 2017) 130.

⁸⁷ Kaine et al (n 65) 10.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Michael Quinlan, *Supply Chains and Networks* (Safe Work Australia Report, July 2011).

⁹¹ Rather, as others have examined there is more piecemeal and limited accessory liability under s 550 of the *FW Act* which for the most part allows lead firms to escape liability for labour abuses in extended supply chains: see 'Chain Reaction' (n 4).

⁹² Kaine et al (n 65).

pay and conditions standards was not their responsibility.⁹³ For instance, when asked about who is responsible for cleaners' working conditions, one owner indicated:

Well obviously it's the cleaning company. Then if there's unrealistic expectations put on them, they would be put to the facilities manager. So it's really between the facilities manager and the cleaner.⁹⁴

In turn, facilities managers place the responsibility for pay and conditions with the cleaning company. For example, when asked about their involvement in employment standards issues, a facilities manager stated:

We don't. Because we leave that to the contractor to do. Specifically, no I don't think we get involved in it.⁹⁵

Further, an analysis conducted by CAF of 25 sites involved in the first and second pilot and the CAF certification program intake in 2019 found that lack of adequate oversight of contractor compliance was *the* most common breach of the CAF 3 Star Standard in those buildings.⁹⁶ Yet, in most cases, either the building owner and/or their facilities manager are well positioned to influence working conditions in their buildings due to their experience in regulating cleaning quality and WHS by way of their strategic and influential position at the apex of Australian cleaning supply chains.⁹⁷ Thus CAF has begun to fulfil an important function in encouraging building owners and their facilities managers to exercise this existing power and establish the necessary monitoring mechanisms in order to improve the labour law compliance of their cleaning contractors.

This is not to say that CAF has uniformly requested building owner intervention in every instance of non-compliance identified by the labour standards audits and worker engagement meetings. Due to a level of resistance from some participating owners and their facilities managers,⁹⁸ not only does the CAF remediation policy discussed above indicate the selective use of owner involvement, but CAF has also exercised its discretion to call on owner supply chain leverage in its post audit and post worker engagement follow up during the certification process. Indeed, CAF has increasingly taken a flexible approach depending on the level of cooperation that they are receiving from the various supply chain participants.⁹⁹

⁹³ Ibid 11.

⁹⁴ Ibid.

⁹⁵ Ibid. See also Certification Interview with CAF (CAF, 2019) 21.

⁹⁶ *Summary of Compliance Issues* (n 75).

⁹⁷ Kaine et al (n 65) 12.

⁹⁸ See, eg, Kaine et al (n 65) 11. Oversight of contractor compliance was the issue that the auditor reported during the two pilots and the 2019 certification process: *Summary of Compliance Issues* (n 75).

⁹⁹ Interview with CAF (CAF, 22 August 2019) ('22 August Interview'); Interview with CAF (CAF, 19 September 2019) ('19 September Interview'); Interview with CAF (CAF, 12 December 2019) ('12 December Interview').

For example, in one building certification process where the cleaning contractor and on-site facilities manager were not responsive in uploading documents for the auditor, CAF called directly on the head office of the building owner to request assistance with arranging for labour issues identified by CAF to be rectified. The building owner then organised to visit the site to meet with the cleaning contractor and site management.¹⁰⁰ In another instance of major non-compliance which took the form of systematic underpayment of wages and related superannuation, CAF requested action from both the building owner (an independent audit to identify the full scope of the underpayment) and the cleaning contractor (independent verification that the payroll system had been updated to reflect currently applicable wage rates) as a condition of certification.¹⁰¹ When the building owner was slow to act, CAF personnel reminded them that they may have accessorial liability for the wage and superannuation theft under s 550 of the *FW Act* due to their knowledge of these underpayments.¹⁰² In other words, CAF invoked mandatory accessorial liability laws to stir the building owner into action.

However, at another site, where no major current issues were identified by the audit, the worker engagement process indicated that the cleaning workers were generally satisfied with their working conditions and there was high union density, CAF did not need to call upon the owner's supply chain leverage; but, instead, worked with the cleaning contractor to rectify minor labour issues at the site.¹⁰³

In most, if not all, instances CAF appears to prioritise the overarching purpose of rectifying labour abuses and improving working conditions over process considerations such as leveraging supply chain power. Instead of a doctrinaire approach, CAF appears to be proceeding on the practical basis that it will work with whichever party in the supply chain it needs to in order to achieve its immediate goals. This appears to be working as CAF has, in the main, been able to rectify labour abuses and grant certification to the buildings involved.

However, it may be that business owner monitoring of labour standards could be implemented more fully over time (if building owners become more familiar with, and less resistant to, CAF involvement) so that there is a more efficient use of CAF resources. If building owners fully cooperate with CAF and partially assume responsibility for monitoring labour standards in their own supply chains, this may help to streamline CAF input into the rectification process. The consensus required amongst stakeholders (including building owners) for it to be written into the CAF remediation procedure that the owner is to be notified in all instances of major labour issues (where the cleaning contractor is not pre-qualified) signals that some initial progress towards this broader use of owner influence and more efficient deployment

¹⁰⁰ 22 August Interview (n 99).

¹⁰¹ 19 September Interview (n 99) 10.

¹⁰² 12 December Interview (n 99) 3.

¹⁰³ 22 August Interview (n 99).

of CAF resources may have already begun. Moreover, CAF's actions have been largely consistent with this written rectification procedure (which escalates the level of owner intervention according to the seriousness of the issue) indicating that CAF can demonstrate a rational approach to its case-by-case rectification of non-compliance. That CAF can demonstrate a consistent rectification process may help with the legitimacy of CAF in the eyes of stakeholders. Beyond that, if the CAF framework is considered more broadly, supply chain leverage is wielded through the power of multi-stakeholder mechanisms including through the Certification Panel and CAF Secretariat.¹⁰⁴ But, as we have seen, there is still considerable scope for a much wider harnessing of building owner power in CAF and throughout the entire commercial cleaning industry. In particular, proactive monitoring measures taken by building owners to ensure such matters as quality of cleaning (discussed above) could be adapted to the task of preventing labour abuses.

V THE SUCCESSES AND LIMITS OF THE CAF AND THE NEED FOR REFORM

In this Part we synthesise the key success factors of the scheme to facilitate implementation of similar frameworks in other industries. We then explore some of the CAF's limitations and suggest regulatory reforms that would support a more extensive application of CAF across the cleaning industry.

A *Key Success Factors of Co-Regulation Frameworks*

As Crane et al argue, labour abuses in supply chains have predominantly been described as a problem caused by supply chain complexity.¹⁰⁵ They argue that there is a need to engineer governance initiatives that respond to typical domestic chains. CAF has succeeded in doing this by developing a framework that specifically seeks to address social standards in the Australian commercial cleaning supply chain. While it takes the particularities of this specific supply chain into account, a number of success factors exist that can be applied to domestic supply chains that share similarities with the commercial cleaning supply chain.

Below, we synthesise the factors that are key to the successes of CAF to date. Our objective in doing so is to facilitate the adaptation of CAF to other industries. Industries to be targeted in priority should be those combining exposure to higher risks of labour abuses with a hierarchical supply chain structure, meaning that the organizations at the apex of the supply chain can drive enforcement of the standard. Such industries include the security, construction, transport and potentially the personal care industries.

A first key success factor of CAF is the capability to leverage the power of the organisations placed at the apex of the supply chain. As discussed above, such power

¹⁰⁴ Interview with Steering Committee Member (n 34) 5.

¹⁰⁵ Crane et al (n 7).

will manifest in hierarchical supply chains where the organisations at the apex of the supply chain benefit from what is labelled as 'drive' in the supply chain.¹⁰⁶ It is also important to note that actors positioned at different levels in the supply chain might benefit from such power.¹⁰⁷ This is exemplified in the case of CAF by the fact that both building owners and tenants can influence the decisions made by cleaning companies. This means that attempts to adapt the CAF framework to other industries should take into account the specificities of the supply chain of that industry and potentially target organisations placed at different levels of the supply chain. Another key question in relation to leveraging the power in the supply chain is that of the incentive to do so by participating organisations. In CAF there was a key business objective of avoiding reputational risks associated with poor labour standards down the supply chain. Nevertheless, research has shown that another key aspect in order to leverage drive was the question of the incentive for the supply chain lead-organisations to exert their power.¹⁰⁸ One such incentive, which manifested in the case of CAF, is the reputational risk to the lead organisation.¹⁰⁹ However, some organisations or industries are less exposed to such risks, meaning a lesser incentive.¹¹⁰ Efforts to adapt the CAF framework to other industries must take into account the degree to which lead organisations in the targeted supply chain are susceptible to the negative impact of reputational effects.

A second essential success factor for CAF was that the standard was consensus-based and resulted from the collaborative efforts of all stakeholders. This was key to ensuring buy-in from participants and practical relevance. CAF organised this consensus-based approach through its structure, where each aspect of the standard and its implementation were decided and monitored by multiple-stakeholder committees (such as the certification committee, steering committee, etc). This echoes former research indicating that leveraging the power of a lead firm is more efficient when conducted collaboratively across traditional sector boundaries.¹¹¹ This was especially demonstrated in the capability of CAF to provide consensual interpretations of the legal framework regarding sick-leave and the payment of induction activities. However, we also noted that some of the outcomes of the consensual efforts were sometimes still contested, showing that communication about the standard is important and should be continued throughout its operation.

¹⁰⁶ Gereffi, Humphrey and Sturgeon (n 81); 'Global Commodity Chains' (n 81); Josserand and Kaine (n 53).

¹⁰⁷ 'Global Commodity Chains' (n 81).

¹⁰⁸ Josserand and Kaine (n 53).

¹⁰⁹ Berliner et al (n 6); Josserand and Kaine (n 53).

¹¹⁰ Josserand and Kaine (n 53) 755; Matthias Smelzer, 'Marketing Morals, Moralizing Markets: Assessing the Effectiveness of Fair Trade as a Form of Boycott' (2010) 5(2) *Management and Organizational History* 221.

¹¹¹ Locke (n 6).

Third, worker engagement proved essential in exposing some of the worst labour practices within the supply chain. This was the case for the initial audit but also for the yearly health checks and for addressing issues that could arise during the year. This addresses one of the main limitations of supply chain audit systems which is that they can miss some key issues or even be subject to falsification.¹¹² Our findings are supported by former, more generic findings, showing that workers' voice mechanisms were essential in reporting issues in supply chains.¹¹³ The criticisms of the traditional code of conduct and social auditing approach show that worker involvement is not only critical in verifying audit findings, but that alternative approaches characterised as worker-driven social responsibility can help to shift the focus from protecting brand reputation towards protecting workers' rights. The CAF framework provides an interesting mix of classic voice channels. Indeed, it falls under the category of non-union employee representation, while addressing the limitations of such voice channels due to supply chain fragmentation.¹¹⁴ However, because the effort is multi-stakeholder, it also has a connection with union voice, which has proven crucial in the implementation of diverse sorts of voluntary labour standard remediation frameworks.¹¹⁵

Finally, our findings provide some interesting insights on how a successful framework can approach implementation and remediation. CAF found a delicate balance between the objectives of different stakeholders through adopting a flexible approach to implementation and remediation. This meant, for instance, depending on the stakes and cooperativeness of stakeholders, balancing the recourse to self-implementation or to stronger enforcement, demonstrating flexibility in their approach to implementation. For example, when needed, and especially for serious issues, CAF did leverage the drive along the supply chain while working directly with cleaning suppliers for more minor issues. Also, when stakeholders lost sight of their role in implementation, the CAF team did refer to mandatory accessorial liability. This was one of the key threats that could possibly be used for enforcement. Finally, the principle of flexibility applied to the standard and its associated instruments allowed for ongoing learning and improvement of the standard and the production of guidelines and interpretations of the core principles and legal framework as both of these and the practices of stakeholders change over time.

B Proposal for Legal Reform

CAF-certified buildings are run by best-practice cleaning industry leaders in Australia in terms of their efforts to secure improved pay and conditions for cleaners. Even with this type of ethical stakeholder, in the current competitive industry environment, CAF

¹¹² Raj-Reichert (n 7); Crane et al (n 7).

¹¹³ Berliner et al (n 6).

¹¹⁴ Riisgaard and Hammer (n 53).

¹¹⁵ Steve Davies et al, 'Labour Standards and Capacity in Global Subcontracting Chains: Evidence from a Construction MNC' (2011) 42(2) *Industrial Relations* 124.

efforts to ensure compliance with labour standards is ongoing and a number of issues continue to occur with some certified buildings at annual health checks.¹¹⁶ Also, the voluntary standards set by CAF only apply to 20 or so buildings in capital cities; small microcosm of the commercial and retail buildings that have to be cleaned by cleaning workers throughout the country every day. This raises the question as to how to systematically address extensive labour abuses in the vast, competitive Australian commercial cleaning market not participating in CAF.

In light of these limitations of the current scope of CAF, in the mid-term, we foresee the necessity of a mandatory federal legislative scheme of regulating whole supply chains in the Australian cleaning industry in order to improve the pay and conditions of vulnerable cleaning workers. Endemic recalcitrance in the cleaning industry¹¹⁷ demands a systematic response and confirms this argument in favour of applying a specific set of additional, mandatory laws to that industry. As evidenced by parts of our discussion in this article, even when building owners have made the decision to participate in CAF, some of those owners are still reluctant to exercise their leverage in order to monitor labour standards in their own supply chains. However, if building owners had mandatory liabilities for labour abuses and responsibilities to monitor supply chains in order to secure compliance with minimum pay and conditions standards, there could be a much more programmatic and quicker improvement to the conditions of cleaning workers throughout the cleaning industry than CAF has been able to achieve over a seven year period.

Such a proposal is consistent with Davidov's analysis where he argues that the cleaning industry is a special case requiring industry specific regulation.¹¹⁸ As Davidov states, where the universalism of labour law fails to protect a sub-set of workers 'special treatment by way of selective regulations could be justified'.¹¹⁹ But further to Davidov's argument (which involves analysis of law from overseas), we urge that the format of any such proposed laws considered by the Australian Parliament heed the lessons of CAF's experience with securing rectification of non-compliance. That is, a preferable legislative scheme might take the form of a two-tier structure. If a building is certified by CAF *and* currently operating in compliance with the CAF regime, the owner of that building might have a reasonable excuse (in relation to that building) to not comply with a (more robust) mandatory set of legislative provisions imposing supply chain liabilities and monitoring responsibilities (backed up by civil and/or criminal penalties).

¹¹⁶ 22 August Interview (n 99); 19 September Interview (n 99); 12 December Interview (n 99).

¹¹⁷ See analysis above in Part II A of this article and Interview with Steering Committee Member (CAF, 2020).

¹¹⁸ Guy Davidov, 'Special Protection for Cleaners: A Case of Justified Selectivity?' (2015) 36 *Comparative Labor Law and Policy Journal* 219.

¹¹⁹ *Ibid* 239.

These mandatory laws might include a secondary liability of supply chain participants beyond the direct employer for wage (and superannuation) underpayments (only) or a secondary liability for wage underpayments *as well as* other labour violations. This could be achieved by enacting a worker right to recover wages and other legal minimum entitlements from supply chain participants beyond the direct employer, in the event that their direct employer has failed to provide them those entitlements. The supply chain participant would then have the ability to claim back the amounts paid to workers from the direct employer.¹²⁰ Alternatively or additionally, the responsibilities of firms at the apex of cleaning supply chains could take the form of proactive monitoring and disclosure obligations (with strict penalties applying for not carrying out those obligations). One example is the responsibilities of clothing retailers under the Australian Textile and Footwear ('TCF') scheme (which we will now discuss).

The proposed two-tiered approach could be adapted from an actual existing mandatory scheme of supply chain regulation in the TCF industry which already has this structure under the Ethical Clothing Trades Extended Responsibility Scheme 2004 (NSW).¹²¹ This mandatory legislative instrument applies to all retailers, wherever domiciled, who sell clothing products within New South Wales.¹²² However, under this binding legislative instrument, clothing retailers who are signatories to or accredited under and are acting in compliance with the 'voluntary' Homeworkers Code of Practice ('HWCP') have a reasonable excuse not to comply with the mandatory provisions.¹²³ This mandatory retailer code is part of a package of federal and State mandatory rules that regulate to protect vulnerable TCF workers in Australia.¹²⁴ This mandatory code is a crucial component of that package because it applies specifically to retailers who are not the direct employers of clothing manufacturing workers but who are located at the apex of clothing supply chains. This mandatory code imposes upon clothing retailers (and those retailers' suppliers) record-keeping and reactive and proactive obligations to fully disclose supply chain contract details to regulators.¹²⁵ The code also imports standardised, enforceable

¹²⁰ For a slightly different but complementary argument for joint and several liability of supply chain participants for labour recruitment violations see Jennifer Gordon, 'Global Labour Recruitment in a Supply chain context' (Fundamental Working Papers, International Labor Organisation, June 2015) 19–20.

¹²¹ This legislative instrument was made under Part 3 of the *Industrial Relations (Ethical Clothing Trades) Act 2001* (NSW) and came into force on 1 July 2005. For an almost identical set of mandatory clothing retailer obligations, see the South Australian Clothing Outworker Code of Practice in Schedule 1 of the *Fair Work (Clothing Outworker Code of Practice) Regulations 2007* (SA) ('*South Australian Clothing Outworker Code of Practice*').

¹²² Michael Rawling, 'Cross-Jurisdictional and Other Implications of Mandatory Clothing Retailer Obligations' (2014) 27(3) *Australian Journal of Labour Law* 191, 201.

¹²³ *Ethical Clothing Trades Extended Responsibility Scheme 2005* (NSW) cl 8; *South Australian Clothing Outworker Code of Practice* (n 121) cl 8.

¹²⁴ Rawling (n 122) 198.

¹²⁵ Nossar et al (n 5) 592.

provisions into retailers' contracts with their clothing suppliers, requiring suppliers to inform retailers about all locations where domestic apparel manufacture is conducted, or else risk losing their contracts with the retailer.¹²⁶ The above mentioned provisions exempting the application of the mandatory code to retailers signatory to and operating in compliance with the 'voluntary' HWCP, has completely transformed the practical enforceability of the HWCP. As Nossar et al explain:¹²⁷

'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'. '

As such there was a significant increase in the number of signatories to the HWCP following the introduction of mandatory responsibilities.

Adapting and applying this type of TCF regulation to the cleaning industry, combined with improved government funding of CAF, might secure the future of CAF by building it into an Australian legislative scheme. A further benefit of the two-tier scheme is that it could potentially see rapid growth in the number of business stakeholders participating in CAF. Encouraging participation in CAF would mean that compliance could be boosted by funnelling regulatees into a pro-active scheme which is dedicated to substantive compliance. It may be preferable to have a multi-stakeholder framework such as CAF involved in securing compliance rather than leaving the difficult task of compliance solely to under-resourced government regulators. However, a concerted campaign for industry specific legislation would be required as the current federal government has not made public any plans to further regulate the cleaning industry, despite the mounting evidence that current laws are inadequate to address widespread labour law non-compliance in that industry.

Alongside the lofty recommendation that the federal Parliament should enact legislation, a fallback option for the short term, or a precursor to such a legislative scheme, would be for the federal government to require compliance with the CAF in relation to all federal government buildings as part of its public procurement policy. This could considerably enhance compliance in a sector of the cleaning industry given the government's considerable property portfolio.

VI CONCLUSION

Given extensive non-compliance with labour standards in the Australian cleaning industry, CAF was established in 2013 to secure the participation of all of the stakeholders in the cleaning supply chain in achieving compliance with minimum labour standards, including those contained in the relevant federal modern award. To improve the pay and conditions of cleaning workers, the *raison d'être* of CAF has been

¹²⁶ Ibid.

¹²⁷ Ibid.

to leverage the collective supply chain power of all the business participants in the cleaning supply chain including building owners. Through a range of measures including independent audits, worker engagement and tender controls, CAF identifies underpayments and other labour exploitation. In the two pilots of the CAF certification program and when CAF went to market in 2019, there have been either major or minor labour issues identified in almost every cleaning supply chain subject to the CAF certification processes.¹²⁸ Once these non-compliances with labour standards have been identified, CAF has undertaken a sometimes lengthy liaison with stakeholders in order to convince business owners and their facilities managers to use their leverage to encourage compliance in businesses below and/or to get the employing cleaning company to directly rectify labour issues. The CAF Certification Panel only certifies an owner's building once the relevant stakeholders can provide evidence that the non-compliance has been rectified. Through this process, CAF has been able to improve the labour conditions of the cleaning workers in the buildings of owners participating in CAF and certify at least 20 mostly large commercial and retail properties. The measures that CAF has undertaken to rectify non-compliance clearly show that supply chains can be regulated to improve the pay and conditions of workers because of the building owner's existing regulatory capacity and their decision to co-operate with an organisation such as CAF. Our findings demonstrate that the implementation of CAF exposed serious labour standard implementation issues in the cleaning supply chain and provided an efficient method of remediation. It shows that a co-regulation framework that leverages the power of the organisations placed at the apex of the supply chain can be an efficient supplement to legal enforcement.¹²⁹ Given the significant success of CAF, where there is stakeholder willingness, stakeholders might consider establishing multi-stakeholder frameworks adapted from the CAF model to address labour standards non-compliance in other industries.

Even within CAF, there is still some considerable lead firm resistance to assisting CAF to address labour exploitation. Furthermore, the process of rectifying non-compliance is an ongoing challenge and non-government organisations such as CAF urgently need more government assistance and funding to make a broader impact across an entire industry. The voluntary nature of the scheme means that CAF-compliant businesses remain a relatively small island of improved labour practices surrounded by a broader, ferociously competitive industry where labour standards are routinely thwarted because cleaning is treated as a cost to be minimised. Thus, we have argued that the voluntary should be made mandatory. Our proposal is that those businesses that are CAF members and operating in compliance with CAF standards have a reasonable excuse to not comply with a more robust, new federal legislative scheme

¹²⁸ Interview with CAF (CAF, 13 March 2019).

¹²⁹ See James et al (n 5) 175–6.

creating extended liability of lead firms at the apex of cleaning supply chains for compliance with labour standards.