



Articles

Cross-jurisdictional and other implications of mandatory clothing retailer obligations

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This article is about the imposition of mandatory obligations upon effective business controllers of supply chains for the protection of workers. Specifically, the article analyses the genesis, design and operation of New South Wales, South Australian and Queensland mandatory clothing retailer codes and their broader implications, including for the cross-jurisdictional regulation of international supply chains. The extent to which those state mandatory codes already operate cross-jurisdictionally to regulate supply chains spanning across jurisdictions throughout Australia is analysed. It is argued that imposing mandatory obligations upon effective business controllers of supply chains is necessary to adequately address the exploitation of domestic and overseas supply chain labour. In an analogous fashion to the operation of the mandatory clothing retailer codes, domestic legislative regulation of international supply chains can be achieved by piggybacking mandatory requirements onto the intrinsically cross-jurisdictional agreement between an effective business controller and its outside supplier.

Introduction

There is now a body of research on the adverse outcomes of supply chain outsourcing for vulnerable workers labouring within supply chains.¹ This includes the impact of domestic supply chain outsourcing on vulnerable workers in the textile clothing and footwear (TCF) industries who are labouring in developed countries² and exploitation of workers in developing countries.³ Increasingly, a preferred response to exploitation of 'supply chain labour' is legislative imposition of mandatory schemes regulating supply

* Lecturer, Faculty of Law, University of Technology, Sydney. This paper reports on research undertaken for an Australian Research Council funded project, *Australian Supply Chain Regulation: Practical Operation and Regulatory Effectiveness*, DP120103162. Thanks to Terry Carney, Shaunnagh Dorsett and the anonymous referees for their comments. Any errors are my own.

1 See, eg, C Wright and J Lund, 'Supply Chain Rationalization: Retailer Dominance and Labour Flexibility in the Australian Food and Grocery Industry' (2003) 17 *Work, Employment and Society* 137; P James et al, 'Regulating Supply Chains to Improve Health and Safety' (2007) 36 *ILJ* 163; P James and D Walters, 'What Motivates Employers to Establish Preventative Arrangements? An Examination of the Case of Supply Chains' (2011) 49 *Safety Science* 988.

2 See, eg, I Nossar, R Johnstone and M Quinlan, 'Regulating Supply-Chains to Address the Occupational Health and Safety Problems Associated with Precarious Employment: The Case of Home-Based Clothing Workers in Australia' (2012) 17 *AJLL* 137.

3 See, eg, G Gereffi et al, 'Introduction: Globalisation, Value Chains and Development' (2001) 32 *Institute of Development Studies Bulletin* 1; S Cooney, 'A Broader Role for the Commonwealth in Eradicating Foreign Sweatshops?' (2004) 28 *MULR* 290; M Anner, J Bair

chains, such as the industry-specific schemes in Australia.⁴ One key lesson is the importance of changing the commercial dynamics of the supply chain by imposing mandatory obligations on participants exercising the greatest commercial influence over other participants — a category of entrepreneurial entities variously described as ‘effective business controllers’⁵ or ‘lead firms’.⁶ This harnesses their influence to ensure that all other commercial parties in the chain meet their legal obligations towards supply chain labour.

This article breaks from established literature (which examines systems of supply chain regulation generally) by focusing solely on mandatory legal obligations (applying to a category of effective business controllers) at the top of the chain. This regulation exists in Australia under a world-leading form of ‘top down’ regulation contained within mandatory clothing retailer codes made under state legislation. This article is the first to analyse the codes in detail and identify their significant implications. The article argues that the imposition of mandatory obligations at the apex of domestic TCF supply chains can instil discipline throughout the chain to achieve improvements in the pay, conditions and work health and safety of vulnerable TCF outworkers at the base of those particular supply chains. It therefore concludes that imposing obligations on business controllers of supply chains is a crucial component of any scheme to improve the working conditions of supply chain labour, and on that basis suggests adapting and extending this regulatory model beyond the domestic TCF sector. In particular, it contends that the TCF industry legislative model could be adapted to apply to domestic supply chains in other industries. Moreover, the pre-existing cross-jurisdictional state regulation of domestic supply chains (which currently spans different Australian state jurisdictions) indicates that domestic legislation could be used to cross-jurisdictionally regulate the international supply chains of effective business controllers (operating within that domestic jurisdiction) to improve the conditions of workers engaged by their overseas suppliers.

The article proceeds as follows. First, it explains the research methodology of partly completed empirical research drawn upon in this article. Next, it explains the widespread emergence of supply chains. It then considers the necessity for regulating the effective business controllers of supply chains by examining their influence over whole supply chains. This includes both a generic analysis of the influence of effective business controllers within both domestic and international supply chains in any industry, as well as a more specific analysis of effective business controllers in the domestic TCF industry. Second, the article traces the development of, and analyses, legal obligations applying to clothing retailers under mandatory retailer codes in three Australian jurisdictions (New South Wales, South Australia and

and J Blasi, ‘Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks’ (2013) 35 *Comp Lab L & Pol’y J* 1.

4 Nossar, Johnstone and Quinlan, above n 2; James et al, above n 1; R Johnstone et al, *Beyond Employment: The Legal Regulation of Work Relationships*, Federation Press, Sydney, 2012, pp 68–9; M Rawling and S Kaine, ‘Regulating Supply Chains to Provide a Safe Rate for Road Transport Workers’ (2012) 25 *AJLL* 237.

5 Nossar, Johnstone and Quinlan, above n 2.

6 Gereffi et al, above n 3.

Queensland).⁷ This section considers the extent to which these mandatory retailer obligations are triggered by the (frequently cross-jurisdictional) deal between a retailer and its supplier so that they may achieve consequences for all TCF supply chain workers including consequences outside the geographical boundaries of the regulating state. Compared to the NSW and SA mandatory codes (which, upon a preliminary assessment, may have been implemented as intended), the initially proclaimed form of the Queensland code is shown to have had the broadest potential application but that this was weakened by amendment, poor implementation (and its ultimate repeal). The final section considers the significance and broader implications of these developments for the regulation of domestic and international supply chains within and beyond the TCF sector.

Research project and methodology

This article is part of an Australian Research Council funded project⁸ investigating the operation in practice of industry-specific legislative schemes regulating the TCF supply chains in three jurisdictions (New South Wales, Queensland and South Australia) and the road transport supply chains in two (New South Wales and Queensland) along with the impact on supply chains of Work Health and Safety (WHS) legislation in those states. Although the study will ultimately compare and contrast the implementation of legislation in the TCF industry to the implementation of legislation in the road transport industry, this article concentrates on industry-specific legislative initiatives in the TCF industry.

The larger study utilises a range of research methods including interviewing key informants and workplace observations.⁹ The project will involve at least 50 qualitative interviews overall including 20 with governmental regulators, 20 with union regulators and at least 10 with businesses (or business representatives) and workers. At the time of writing, 30 interviews and five workplace inspections had been completed.¹⁰ Twenty-six of the interviews completed were with governmental and union regulators from both the TCF and road transport industries. Four of the interviews completed were with businesses involved in TCF and road

7 Ethical Clothing Trades Extended Responsibility Scheme 2004 (NSW) (NSW Mandatory Retailer Code); Fair Work (Clothing Outworker Code of Practice) Regulations 2007 (SA) Sch 1 – South Australian Clothing Outworker Code of Practice (SA Mandatory Retailer Code); Mandatory Code of Practice for Outworkers in the Clothing Industry (Qld) (Qld Mandatory Retailer Code). Those mandatory retailer obligations remain in place in New South Wales and South Australia, but were abolished in Queensland in November 2012. See further analysis below in this article.

8 *Australian Supply Chain Regulation: Practical Operation and Effectiveness*, DP120103162.

9 In addition to legal and documentary analysis, the project fieldwork includes semi-structured interviews principally to capture the experience of regulators (namely, government officials and relevant union officials) but also regulated businesses. Participant observation of regulators is also being undertaken by accompanying them to workplace inspections. Finally quantitative analysis will be undertaken of measurable statistical data or records about working conditions within the industries.

10 Additionally, around seven follow-up interviews were conducted with particularly informative interviewees (from the initial 30) in order to gain a deeper understanding of their experience.

transport supply chains or employer associations who represent such businesses. Interview protocols were utilised (and refined in light of experience) to provide some common structure, but semi-structured interviews were deliberately chosen so interviewers could be guided by the conversation rather than a rigid set of questions. Issues raised by one interviewee were able to be discussed with later interviewees.

While the empirical research is incomplete, this article draws on five interviews completed in the TCF industry, and reports some preliminary indications about the implementation of the TCF model of regulation, to be fully tested and refined once the field work and data analysis is finished.

The widespread emergence of supply chains

Australian labour law, at least from the mid-twentieth century, predominately assumed that labour law's scope was regulation of the direct relationship between employees and a single entity known as the employer.¹¹ However, the assumed standard employment arrangement has declined. This has involved the demise of the unifying category of 'employee'¹² and the emergence of a spectrum of worker types (including a range of 'precarious workers').¹³ In addition, following widespread outsourcing of work, the unitary employer has been replaced¹⁴ with more complex business network structures (involving a number of interconnected organisations) such as the vertical supply chain. This type of supply chain is an interconnected series of contracts organised to produce and sell goods and/or services at a profit for the effective business controllers of the chain. Supply chains reach from the commercial party who sells goods or services to consumers through a number of interposed commercial parties, right down to the workers who perform the work.

The role of the effective business controller in the supply chain

A study of the role of effective business controllers who wield the most commercial influence in supply chains clearly demonstrates the need to regulate them in order for schemes of supply chain regulation to improve working conditions of workers at the base of the chain.

Powers of effective business controllers generally

Just as the commercial power of the large, unitary employer (common in the twentieth century) enabled all relevant aspects of the business to be shaped or governed — crucially including all aspects of labour relations — so too the contemporary effective business controller of a supply chain retains the same

11 Johnstone et al, above n 4, at p 1.

12 J Howe and R Mitchell, 'The Evolution of the Contract of Employment in Australia: A Discussion' (1999) 12 *AJLL* 113.

13 See M Quinlan, C Mayhew and P Bohle, 'The Global Expansion of Precarious Employment, Work Disorganisation and Occupational Health: Placing the Debate in a Comparative Historical Context' (2001) 31 *International Journal of Health Services* 507.

14 See J Fudge, 'Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation' (2006) 44 *Osgoode Hall LJ* 609.

potential,¹⁵ even if it is sometimes wrongly asserted that their activities do not shape the labour relations of other commercial parties in the supply chain, or that they are too small to do so.

Effective business controllers can coordinate multiple-level, vertical, international and domestic supply chains made up of direct suppliers, contractors to those suppliers, distributors and other businesses who can indirectly and cost-effectively provide them with labour. The goods or services produced by that indirect labour and supplied up through the chain of businesses can then be sold to consumers more profitably than if they were produced by an integrated firm.¹⁶

Direct access to consumer markets and/or control over intangibles such as brands and product design allow effective business controllers to outsource production to suppliers, severing any direct relationship with supply chain workers, but, at the same time, maintaining the key role in specifying who produces what and how it is produced.¹⁷ Typically, the effective business controller sets, in contracts with its direct suppliers, the size and frequency of orders, delivery schedules, time allowed for production and price and quality of goods or services. These parameters (which are passed down the chain to all further participants) practically determine matters such as supply chain workers' pay and work time.¹⁸ In some circumstances, effective business controllers may also directly monitor or intervene into the work practices of their indirect labour force.¹⁹ The effective business controller is frequently not even physically located within the same geographical jurisdiction as the supply chain workers whose working conditions they influence.²⁰ As part of the power inherent of a client who can provide (or cease to provide) another commercial party with work, effective business controllers can get suppliers to

15 See H Collins, *Regulating Contracts*, Oxford University Press, Oxford, 1999, p 24; A Rainnie, 'The Reorganisation of Large Firm Subcontracting: Myth and Reality' (1993) 49 *Capital and Class* 53 at 68.

16 M Rawling and J Howe, 'The Regulation of Supply Chains: An Australian Contribution to Cross-National Legal Learning' in *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment*, K V W Stone and H Arthurs (Eds), Russell Sage Foundation, New York, 2013, p 233 at p 235.

17 J Bair, 'Global Capitalism and Commodity Chains: Looking Back, Going Forward' (2005) 9 *Competition and Change* 153 at 165; Gereffi et al, above n 3, at 1.

18 C Wright and W Brown, 'The Effectiveness of Socially Sustainable Sourcing Mechanisms: Assessing the Prospects of a New Form of Joint Regulation' (2013) 44 *Industrial Relations Journal* 20 at 22; D Grimshaw, H Willmott and J Rubery, 'Inter-Organizational Networks: Trust, Power, and the Employment Relationship' in *Fragmenting Work: Blurring Organizational Boundaries and Disordering Hierarchies*, M Marchington et al (Eds), Oxford University Press, Oxford, 2005, p 39 at p 40; I Nossar, 'The Scope for Appropriate Cross-Jurisdictional Regulation of International Contract Networks (Such as Supply Chains): Recent Developments in Australia and Their Supra-National Implications', Business Outsourcing and Restructuring Regulatory Research Network Working Paper No 1, 2007, p 9, at <http://www.borrrn.org/index.php?option=com_content&view=article&id=3:first-working-paper&catid=1:working-paper-series&Itemid=8> (accessed 3 November 2014).

19 J Rubery, J Earnshaw and M Marchington, 'Blurring the Boundaries to the Employment Relationship: From Single to Multi-Employer Relationships' in *Fragmenting Work: Blurring Organizational Boundaries and Disordering Hierarchies*, M Marchington et al (Eds), Oxford University Press, Oxford, 2005, p 63 at p 76.

20 Nossar, above n 18, p 9.

accept their terms as well as manipulate competition among potential suppliers to achieve the right price and quality for goods or services.²¹ This influence comes from the strategic position as clients at or near the apex of the supply chain, allowing smaller, astute controllers (as well as those with significant market share) to decide who participates in a particular supply chain and on what terms they participate.²² Despite the controls maintained by the business controller, it is other parties to the supply chain who bear the risks of the supply process.²³ There is now substantial evidence that dictation of aspects of production and services delivery (notably time and costing) by effective business controllers has significantly contributed to poor work and health and safety outcomes for workers engaged within their supply chains.²⁴

Despite their extensive influence, a key commercial tactic of many effective business controllers is to deny they have any control beyond their dealings with direct suppliers.²⁵ Certainly part of the initial attraction of the supply chain structure is the creation of legal distance between effective business controllers and workers down the chain. But this has been an increasingly risky strategy given the reputational damage that might result from a failure of business controllers to enforce adequate labour conditions throughout their supply chains. There is also increasing expectations of investors to safeguard the business's reputation by satisfactorily addressing labour conditions within their supply chains.²⁶ The discussion below in this article demonstrates that the mandatory clothing retailer codes have effectively addressed this kind of tactic.

Clothing retailers operate as effective business controllers

In the Australian TCF industry an oligopoly of major retailers are effective business controllers of TCF supply chains.²⁷ In contracts for the supply of TCF goods these retailers impose on manufacturers or suppliers onerous contractual terms to secure the price and quality of goods and the turnaround times that the retailers require.²⁸ Principal manufacturers in Australia who enter into supply contracts with retailers either manufacture TCF products in their own factories or enter into arrangements with smaller manufacturers

21 I Nossar, 'Cross-Jurisdictional Regulation of Commercial Contracts for Work beyond the Traditional Relationship' in *Labour Law and Labour Market Regulation: Essays in the Construction, Constitution and Regulation of Labour Markets and Work Relationships*, C Arup et al (Eds), Federation Press, Sydney, 2006, p 202 at p 209; Grimshaw, Willmott and Rubery, above n 18, p 57; James et al, above n 1, at 166.

22 Rawling and Howe, above n 16, p 241.

23 Nossar, above n 18, p 10.

24 M Quinlan, *Supply Chains and Networks Report*, Safe Work Australia, July 2011, p 4.

25 See Wright and Brown, above n 18, at 26; Australian Council of Superannuation Investors, *Labour and Human Rights Risks in Supply Chain Sourcing: Investment Risks in S&P/ASX200 Consumer Discretionary and Consumer Staple Companies Research Paper*, Australian Council of Superannuation Investors, June 2013, p 11.

26 Australian Council of Superannuation Investors, above n 25, p 3; Walter and James, above n 1, at 992.

27 M Islam and A Jain, 'Workplace Human Rights Reporting: A Study of Australian Garment and Retail Companies' (2013) 23 *Australian Accounting Review* 102 at 103.

28 I Nossar, 'Behind the Label': *The New South Wales Government Outworker Strategy — The Importance of the Strategy and Prerequisites for Its Success*, Briefing Paper, TCFUA, Sydney, 2000, p 3.

(popularly known as ‘makers’) for the supply of these products. When this occurs, principal manufacturers pass on the stringent requirements of the retailers to the makers so that they can meet their own obligations to retailers. These smaller Australian makers will engage onsite manufacturing workers but will also often further contract out the clothing orders through varying stages of intervening entrepreneurial parties until the actual production work is finally given out to ‘outworkers’. These outworkers typically work at home²⁹ and make up approximately 40% of the workers in the TCF industry.³⁰

In the journey down the supply chain each successive party takes its share of financial return but passes on the contractual demands originally determined by the retailer. By the time the orders reach the smaller operators who directly engage workers, those direct work providers (who frequently have insufficient resources to carry out their labour law obligations) have an incentive to evade any legal obligations owed to their workers so as to survive in an environment where competitors undercut each other by offering the lowest price for manufacturing work.³¹ Therefore, the structuring of the supply chain primarily by effective business controllers (as well as principal manufacturers) creates an environment that is conducive to outworker exploitation.³² Prior to the introduction of mandatory retailer obligations, major retailers were content to preside over supply chains which provided them with quickly produced, high quality clothing and large profit margins, but which also led to the exploitation of outworkers (who were sufficiently distant from the retailers to ensure that retailers could escape legal liability for this exploitation).³³ As a result of cost, quality and time pressures from major retailers and fashion houses which are passed down the entire chain, many clothing outworkers experience pay as low as the equivalent of between \$2 and \$5 an hour,³⁴ long hours, a high incidence of work-related injuries and high levels of threats and abuse from work providers.³⁵ Because outwork is frequently carried out at residential premises in the largely ‘invisible’ economy, it is difficult for regulators to locate workplaces to enforce industrial laws.

Implications of the effective business controller’s role for public regulation

The above analysis of effective business controllers demonstrates that they already regulate supply chains for their own commercial interests. This also

29 Nossar, Johnstone and Quinlan, above n 2, at 145.

30 E Diviney and S Lillywhite, *Ethical Threads: Corporate Social Responsibility in the Australian Garment Industry*, Brotherhood of St Laurence, Melbourne, 2007, p 5.

31 C Mayhew and M Quinlan, ‘The Effects of Outsourcing on Occupational Health and Safety: A Comparative Study of Factory-Based Workers and Outworkers in the Australian Clothing Industry’ (1999) 29 *International Journal of Health Services* 83 at 88.

32 M Rawling, ‘A Generic Model of Regulating Supply Chain Outsourcing’ in *Labour Law and Labour Market Regulation; Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships*, C Arup et al (Eds), Federation Press, Sydney, 2006, p 520 at p 525.

33 I Nossar, *Proposals for the Protection of Outworkers from Exploitation*, TCFUA, Sydney, June 1999, p 2.

34 Mayhew and Quinlan, above n 31, at 98; Diviney and Lillywhite, above n 30, p 4.

35 Mayhew and Quinlan, above n 31, at 98; Quinlan, above n 24, p 7.

suggests that they might regulate supply chains to enhance rather than undermine the pay, conditions and safety of supply chain labour. This foreshadows opportunities for public regulation to harness the existing powers of the business controller. Such public regulation could, for example, require effective business controllers to set down work standards for supply chain labour and to monitor and enforce compliance with these requirements throughout their supply chains.³⁶ Despite these opportunities for public regulation, prior to the introduction of mandatory clothing retailer codes, few (if any) existing legislative provisions in Australia imposed any mandatory obligations regarding working conditions at the base of supply chains upon retailers.

The evolution of mandatory clothing retailer obligations

This section examines the evolution of effective business controller obligations under mandatory clothing retailer codes which came into force in New South Wales in 2005, in South Australia in 2008 and in Queensland in 2011 (until its repeal in Queensland in November 2012). Although these are industry-specific codes applying to clothing retailers, their design could be adapted to apply to effective business controllers in other industries. Moreover, although these codes regulate domestic supply chains, their cross-jurisdictional application spanning different Australian states indicates that the regulation's conceptual basis could inform cross-jurisdictional regulation of supply chains spanning national borders.

The mandatory retailer codes are part of a package of federal and state mandatory rules that regulate supply chains to protect vulnerable TCF workers in Australia. Under state legislation there are also deeming provisions and rights of recovery for outworkers.³⁷ At the federal level the Fair Work Act 2009 (Cth) contains Pt 6-4A — special provisions about TCF outworkers which also provide deeming provisions, an outworker right of recovery and provisions for the making of a mandatory code (at some future time). In addition, special provisions regulating outwork exist within the federal Textile Clothing, Footwear and Associated Industries Award 2010.³⁸ These other parts of the package contain important provisions which allow regulators to protect vulnerable TCF outworkers. However, the mandatory retailer codes are a crucial component of the scheme because, as is discussed further below, these codes interlock with the Homeworkers Code of Practice to specifically regulate powerful retailers at the top of the chain.

³⁶ Nossar, above n 18, p 9; Walter and James, above n 1, at 989.

³⁷ See S Marshall, 'An Exploration of Control in the Context of Vertical Disintegration' in *Labour Law and Labour Market Regulation; Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships*, C Arup et al (Eds), Federation Press, Sydney, 2006, p 542 at pp 553–4; Rawling, above n 32, pp 528–36.

³⁸ For the history of TCF industry awards, see S Marshall, 'Australian Textile Clothing and Footwear Supply Chain Regulation' in *Human Rights at Work: Perspectives on Law and Regulation*, C Fenwick and T Novitz (Eds), Hart, Oxford, 2010, p 555 at pp 566–9.

New South Wales

Mandatory clothing retailer obligations originated in New South Wales. The process by which these mandatory obligations were achieved in New South Wales involved complex interactions between the development of voluntary and mandatory retailer obligations and lengthy negotiations and consultations between government, unions and, at times, disunited, subsets of capital. The genesis of this mandatory retailer regulation was a sustained campaign to address outworker exploitation led by the Textile Clothing and Footwear Union of Australia (TCFUA) along with community organisations including Fair Wear and Asian Women at Work. This was a ground-breaking campaign in New South Wales given that, at that point in time, no other mandatory clothing retailer code existed in anywhere in Australia.

The NSW inquiry into pay equity released in 1998 found that there was ‘widespread and endemic failure’ to comply with pre-existing award clothing outwork provisions.³⁹ Justice Glynn stated that:

it is important that all retailers, fashion houses, governments and government agencies become party to appropriate codes of practice/conduct . . . If all relevant participants do not sign then consideration should be given to making the code mandatory.⁴⁰

In June 1999 Igor Nossar, the then Chief Advocate of the TCFUA (NSW) also identified the importance of regulating retailers in order to effectively address outworker exploitation:

garments in NSW will often not be made under NSW state award conditions unless the parties at the apex of the contracting pyramid — the major retailers — are subjected to a NSW state legislative regime which compels those commercially powerful parties to utilise that very commercial power in favour of the protection of outworkers (rather than against that purpose of protection) . . . the commercial behaviour of those retailers — especially their behaviour in relation to the giving out of work — must be rendered transparent and visible to all authorised policing agencies.⁴¹

Due to the link between commercial pressures emanating from the top of the supply chain and adverse work outcomes for supply chain labour, the accountability of retailers was a prerequisite to effective enforcement of outworker protections. To this end, in 1996, the TCFUA had negotiated a ‘Deed of Cooperation’ with at least one major retailer, which obliged the retailer to inform the TCFUA about the number, type and price of products supplied to the retailer, obliged the retailer to compel all of its suppliers to keep records about further giving out of work to further parties down the chain, and impelled the retailer to inform the TCFUA if the retailer became aware of any instances of outworker exploitation by any party at any level in that retailer’s supply chain.⁴²

Also, in 1997, the Homeworkers Code of Practice, a self-regulatory

39 Industrial Relations Commission of NSW, *Pay Equity Inquiry Report to the Minister*, Matter No IRC6320 of 1997, 14 December 1998, p 641 (Glynn J).

40 *Ibid*, p 643.

41 Nossar, above n 33.

42 *Ibid*, p 3.

industry scheme, was negotiated between the TCFUA and major employer bodies representing TCF manufacturers and retailers.⁴³ Part 2 of that code provided for the accreditation and regulation of TCF manufacturers. The (original) Pt 1 of the Homeworkers Code of Practice committed TCF retailer signatories to obtain TCF products from manufacturers accredited under Pt 2 of the code. But it failed to set more rigorous retailer obligations which might have addressed outworker exploitation such as an obligation which would require retailers to find out where their work orders were going and under what conditions their work was performed. In any case, voluntary, self-regulatory schemes tend to commercially disadvantage more ethical retailers because they had agreed not to profit from outworker exploitation, while less ethical retailers not covered by the voluntary scheme continue to profit from such exploitation.⁴⁴

In June 1999, legislative outworker protections in New South Wales were proposed by Nossar.⁴⁵ In December 1999 the NSW government released an issues paper on the NSW government's outwork strategy.⁴⁶ While the NSW Labor government was in power (from 1995 to 2005), the Industrial Relations (Ethical Clothing Trades) Act 2001 (NSW) (the Ethical Clothing Act (NSW)) was enacted.⁴⁷ Part 2 of that Act established a tripartite industry council known as the Ethical Clothing Trades Council of New South Wales⁴⁸ which had the ability to recommend the making of a mandatory clothing retailer code for New South Wales. Such a council consisting of a chairperson and representatives from the Australian Retailers Association, Australian Business Ltd, the Australian Industry Group (NSW), Unions NSW and the TCFUA (NSW) was formed after the Ethical Clothing Act (NSW) commenced in February 2002. This council had a fixed timetable to consult and report to the relevant Minister, who (upon considering the council's report) could then proclaim mandatory clothing retailer obligations.⁴⁹ Before the expiry of the timetable for this tripartite process, the dynamic created by the impending possibility of mandatory retailer obligations allowed the TCFUA to negotiate first a new self-regulatory code for NSW retailers,⁵⁰ and then a new Pt 1 to the Homeworkers Code of Practice.⁵¹ Following this the TCFUA finalised individual code agreements with three major clothing retailers binding them to identical terms to the National Retailers/TCFUA Ethical Clothing Code of

43 See Homeworkers Code Committee Inc, *Application for Revocation of A91252-55 and Substitution of Authorisations A91354-57 in respect of Homeworkers Code of Practice*, Australian Competition and Consumer Commission, 21 February 2013, p 1.

44 Nossar, above n 28, pp 2, 4–5, 12; see also Marshall, above n 38, p 572.

45 Nossar, above n 33.

46 NSW Department of Industrial Relations, *Behind the Label — The NSW Government Clothing Outwork Strategy Issues Paper*, NSW Department of Industrial Relations, December 1999.

47 This Act contained stand-alone provisions as well as amendments to the Industrial Relations Act 1996 (NSW). Previous literature has examined the crucial 'bottom up' rights of outworkers contained with this NSW legislative scheme: Nossar, Johnstone and Quinlan, above n 2; Marshall, above n 37; Rawling, above n 32.

48 Industrial Relations (Ethical Clothing Trades) Act 2001 (NSW) s 5 (NSW Ethical Clothing Trades Act).

49 NSW Ethical Clothing Trades Act ss 11, 12.

50 NSW Retailers/TCFUA Ethical Clothing Code of Practice, 18 September 2002.

51 National Retailers/TCFUA Ethical Clothing Code of Practice, 9 October 2002.

Practice.⁵² However, at this point, many less ethical retailers did not become signatories to this self-regulatory scheme.

The first version of the Ethical Clothing Council's recommendation drafted by Nossar recommended the making of a mandatory clothing retailer code for New South Wales.⁵³ This draft was reflected in the NSW Ethical Clothing Trades Council's first recommendation in its 2003 report.⁵⁴ The council's recommendation to make a mandatory code was supported by five out of the total six stakeholder organisations sitting on the council including the Australian Retailers Association (representing retailers) and the Australian Industry Group (representing a portion of clothing manufacturer employers).⁵⁵ The relevant NSW Ministers then adopted the council's recommendation. By order in Gazette on the 15 December 2004, mandatory retailer obligations were proclaimed in the form of a delegated legislative instrument entitled the Ethical Clothing Trades Extended Responsibility Scheme (the NSW mandatory code). This mandatory retailer code took effect on 1 July 2005⁵⁶ and is still currently in operation at the time this article was written.

Coverage of NSW mandatory code

The NSW mandatory retailer code applies to all retailers, wherever domiciled, who sell clothing products within New South Wales (NSW retailers) where those products are manufactured or altered in Australia (except those retailers who are signatories to and are operating in compliance with the National Retailers/TCFUA Ethical Clothing Code of Practice (formerly known as Pt One of the Homeworkers Code of Practice).⁵⁷ It also applies to all suppliers, wherever domiciled, including locations outside of New South Wales, who enter into any agreement with a NSW retailer for the supply of such clothing products; and those supplier's contractors (including subcontractors to contractors).⁵⁸ Therefore, the only limits on the cross-jurisdictional application of the code are that clothing is manufactured in Australia and sold in New South Wales. Otherwise, it appears that retailers and suppliers can be domiciled in any location. Many direct suppliers will also be manufacturers such that the cross-jurisdictional application of the code would be confined within Australian borders. However, the scope of the code is, in theory, broad enough to apply to a supplier domiciled overseas who arranges for goods manufactured in Australia for a NSW retailer. It is also sufficiently broad enough to regulate a retailer domiciled overseas who sells Australian-made clothes in New South Wales. Therefore the definition of retailer appears to have foreshadowed the era of arms-length internet retailing. This aspect of the code signals the development of a model for obligations upon effective

52 These individual agreements ensured that code terms would still apply to those major retailers even if they ceased membership of the Australian Retailers Association.

53 I Nossar, *Mandatory Code Recommendations — First Draft*, 26 May 2003.

54 NSW Ethical Clothing Trades Council, *Twelve Monthly Report*, NSW Ethical Clothing Trades Council, 2003, p 36.

55 *Ibid*; Nossar above n 18, p 15.

56 Order under the NSW Ethical Clothing Trades Act s 12, New South Wales Government Gazette No 200, Official Notes, 17 December 2004.

57 NSW Mandatory Retailer Code, definitions of 'retailer' and 'manufacture', cl 5, 8.

58 NSW Mandatory Retailer Code, definitions of 'supplier', 'retailer', 'manufacture' and 'contractor', cl 5.

business controllers which could be adapted to regulate any kind of domestic or international supply chain including those where goods are sold over the internet.

The National Retailers/TCFUA Ethical Clothing Code of Practice imposes disclosure obligations parallel to the mandatory code obligations upon each affected retailer. This ensures that no domestic retailer of (domestically worked on) clothing products can escape from the obligation to proactively provide the governmental and union regulators⁵⁹ with the necessary information required to track down all locations where clothing work is performed within Australia, as long as the finished product is sold by clothing retailers which are subject to a state mandatory code or the National Retailers/TCFUA Ethical Clothing Code of Practice.

Obligations under NSW mandatory code

Both retailers and suppliers are subject to two main types of obligations under the NSW mandatory code. First, the commercial parties in the TCF supply chain are required to contract in a particular way due to requirements to include certain contractual terms. Second, there are more traditional statutory obligations which require regulated parties to record and disclose relevant information.

Under the NSW code, when retailers enter into an agreement with a supplier (for the supply of domestically-produced Australian clothing), these retailers are required to obtain a range of outcomes from their suppliers which extend to mandatory contractual terms (in the form of an undertaking). In those circumstances, the retailer must obtain an *undertaking* from the supplier that (a) all addresses where work is performed on the clothing products (whether at a factory or at the residential address of an outworker) will be disclosed to the retailer; and (b) the engagement of outworkers by the supplier (or its contractors) will be under conditions no less favourable than the prescribed industrial award conditions.⁶⁰ The retailer must also inform the supplier that a *breach of the supplier's undertaking* (by the supplier, or the contractor, or both) will be *taken to be* a breach of the agreement and grounds *for termination of the agreement* (between the retailer and the supplier).⁶¹ Therefore the undertaking becomes an essential term of the agreement between the retailer and the supplier. A NSW retailer must not enter into an agreement with a supplier in those circumstances if the retailer has not obtained the undertaking from that supplier.⁶²

This first type of obligation whereby the state intervenes into the contracting practices of commercial parties has ample precedent. Modern welfarist principles have modified freedom of contract⁶³ such that, under general contract law and consumer law, parties are being required to include

59 The term 'regulators' is used in this article to describe both parties charged with responsibilities for enforcing retailer obligations — governmental inspectorates and unions. See further T Hardy and J Howe, 'Partners in Enforcement? The New Balance between Government and Trade Union Enforcement of Employment Standards in Australia' (2009) 22 *AJLL* 306.

60 NSW Mandatory Retailer Code cl 10(2), Sch 2 Pt B.

61 *Ibid.*

62 NSW Mandatory Retailer Code cl 10(3).

63 See Collins, above n 15.

or exclude particular contractual terms. For example, under consumer protection laws, the state requires the parties to read particular terms into contracts with consumers.⁶⁴ In addition, the contract law doctrine of illegality prohibits parties from including certain terms in a contract.⁶⁵ This form of regulation has the inherent capacity to apply cross-jurisdictionally because the regulation attaches to the contract or agreement between parties which has always been able to span jurisdictional boundaries. In any case, under the mandatory codes, the agreement between the retailer and its supplier forms the principal basis for most of the regulatory intervention including traditional and contracting obligations. As is argued more fully below, the extent to which the mandatory code obligations are solely triggered by the existence of a deal between a retailer and its supplier is significant, given that this deal (if not accompanied by other jurisdictional restrictions) could form the basis of domestic state regulation of international supply chains.

Retailers also have information-gathering and record-keeping obligations under the NSW mandatory code. Under the NSW code, if a retailer enters into an agreement with a supplier (for the supply of domestically-produced Australian clothing), that retailer must request from the supplier (and the supplier must thereupon provide to that retailer) all addresses where work is performed, whether outworkers are used, the name and address of each outworker (and of each employer of the outworkers), the name and address of each contractor engaged by the supplier, and the number and type of clothing products made under the agreement (between the retailer and that supplier).⁶⁶ Where the retailer enters into such an agreement with a supplier, the retailer must also keep *records of all locations* where work is performed.⁶⁷ The only requirement for these obligations to apply is the retailer/supplier agreement (and not the engagement of a particular type of worker).

Furthermore, these obligations mean retailers have a 'need to know' important information about outworkers performing work within their own supply chains. It is no longer possible for clothing retailers to comply with their legal obligations under the mandatory code and deny any knowledge of what happens beyond their direct contract with suppliers. The 'need to know' obligation operates so that the clothing retailer cannot pretend to not know information about who is performing their clothing manufacture work. This 'need to know' obligation is analogous to the well-known commercial concept of 'due diligence.' Like due diligence, the 'need to know' obligation allows the retailer to gain important information about other commercial entities they deal with, allowing them to make decisions about future dealings with those other entities. In many cases, the retailer would have already acquired the required information by way of pre-existing commercial activities. For example, in one contract imposed by a retailer on a manufacturer, the retailer was allowed to inspect (and even substantially control) the manufacturing of

64 See discussion of consumer guarantees regime in A Bruce, *Consumer Protection Law in Australia*, 2nd ed, LexisNexis Butterworths, 2014, Sydney, Ch 10.

65 See discussion in J W Carter, *Contract Law in Australia*, 6th ed, LexisNexis Butterworths, Sydney, 2013, pp 624–34.

66 NSW Mandatory Retailer Code cl 10(1)(b), Sch 2 Pt B cl 15.

67 NSW Mandatory Retailer Code cl 12(1)(f).

clothing.⁶⁸ And it appears that clothing retailers are acting upon such contractual rights. Recent factory inspections of some makers undertaken as part of fieldwork by the author and research colleagues revealed that the quality control representative of the retailer and principal manufacturer was present at or had recently visited maker sites when inspections occurred.⁶⁹

In addition, a NSW retailer has important disclosure obligations. A NSW retailer must proactively (and regularly) disclose to the governmental and union regulators (at least every 6 months) records of all suppliers' names and addresses (and whether outworkers are engaged).⁷⁰ Hence, regulators have a 'right to know' corresponding to the retailers' 'need to know'. The retailer obligations to obtain information and to keep and disclose records arise when a retailer enters into an agreement with a supplier but are not tied to the engagement of an outworker.⁷¹ Therefore, the retailer must keep records of all clothing supply chains and provide details of all locations where work is performed for a contractor or subcontractor, whether the work is performed by a factory worker or an outworker or by any kind of worker who performs clothing manufacturing work.

Further, if a NSW retailer enters into an agreement with a supplier (for the supply of domestically-produced Australian clothing), a retailer must ascertain (from the supplier) whether an outworker is to be engaged (to perform work under the agreement between the retailer and that supplier).⁷² Where a NSW retailer becomes aware that an outworker was (or would be) engaged (by a supplier, contractor, transferee, or supplier's continuing entity) on less favourable terms or conditions than those prescribed under a relevant award (or relevant industrial instrument), then the retailer must report the matter to the relevant union or government officer.⁷³ If a NSW retailer enters into an agreement with a supplier (for the supply of domestically-produced Australian clothing), the retailer must provide (to the supplier) a specified standard form (itemising all relevant information about that agreement) to be completed (and returned to the retailer) by the supplier — and the retailer must then retain that completed standard form (and provide an extract of that standard form to the relevant regulators).⁷⁴ Finally, under the currently applicable codes, a retailer must not enter into an agreement with a supplier (for the supply of domestically-produced Australian clothing) or accept clothing products (from a supplier or contractor) unless the supplier (and each contractor used by the supplier) is registered to give out work under the relevant industrial instrument.⁷⁵

Intervention into commercial contracting practices under the NSW mandatory code's provisions also imposes requirements on suppliers who provide clothing goods to retailers. Specifically, a supplier must include with the invoice to the retailer (for the supply of domestically-produced clothing

68 Nossar, above n 28, p 3.

69 See also Diviney and Lillywhite, above n 30, p 5.

70 NSW Mandatory Retailer Code cl 12(3), Sch 1.

71 NSW Mandatory Retailer Code cl 12, definition of 'agreement' cl 5.

72 NSW Mandatory Retailer Code cl 10(1)(a).

73 NSW Mandatory Retailer Code cl 11(1), definition of 'relevant person' cl 5.

74 NSW Mandatory Retailer Code cl 13(1), Sch 2 Pt A, cl 15, cl 12.

75 NSW Mandatory Retailer Code cl 21.

products) a completed copy of the undertaking from the supplier to the retailer. Additionally, with such an invoice, suppliers are required to disclose information to retailers about *all locations where work is performed* on that clothing.⁷⁶ This obligation to provide work locations is not dependent on the type of worker performing the work (although it includes the situation where an outworker is engaged). Under the NSW mandatory code, a supplier must also provide the retailer with sufficient information to enable the retailer to keep (and disclose) accurate records. A supplier must further provide the retailer with sufficient information to enable the retailer to take reasonable steps to ascertain compliance with the NSW mandatory code throughout the retailer's supply chain.⁷⁷ In particular, a supplier must, 'when showing samples of clothing or offering for sale ready-made items of clothing to a retailer, indicate to the retailer whether any or all of the clothing items will be, or have been manufactured in Australia'.⁷⁸ A supplier must keep records about *all locations of where work is to be performed*, details of the originating agreement between the retailer and the supplier, and details about each of the supplier's contractors.⁷⁹

The NSW mandatory code also imposes obligations upon each supplier in regard to that supplier's dealings with its own contractors. In particular, at the time of engaging a contractor, the supplier must provide that contractor with full details of the originating agreement between the retailer and the supplier (including the undertaking from the supplier to the retailer and all locations where work is to be performed).⁸⁰ Finally, a contractor to a supplier (which includes a subcontractor to a supplier's contractor)⁸¹ has obligations under the NSW mandatory code. Such a contractor must provide the contractor's own subcontractor with details about the contract between the retailer and supplier, including the undertaking from the supplier to the retailer.⁸² A supplier's contractor must also keep records of the originating agreement (between the supplier and the retailer), including the undertaking from the supplier to the retailer.⁸³ These obligations ensure that parties below the supplier in the TCF supply chain have explicitly been made aware that the retailer has required its principal supplier (and the supplier has undertaken to the retailer) that the principal supplier and all of its contractors in the supply chain will engage outworkers under conditions no less favourable than those under the relevant award or industrial instrument. Under the NSW mandatory code, a retailer, supplier, contractor or subcontractor covered by the code who fails without reasonable excuse to adopt any code standard or practice is guilty of an offence.⁸⁴

The mandatory code capitalises on retailers' commercial influence in the clothing supply chain to ensure the transparency of the contracting process in

76 NSW Mandatory Retailer Code cl 15 (3), Sch 2 Pt B.

77 NSW Mandatory Retailer Code cl 14.

78 NSW Mandatory Retailer Code cl 15(1).

79 NSW Mandatory Retailer Code cl 16(1)(b), Sch 2.

80 NSW Mandatory Retailer Code cl 16(1)(a), Sch 2.

81 NSW Mandatory Retailer Code, definition of 'contractor' cl 4.

82 NSW Mandatory Retailer Code cl 16(2)(a).

83 NSW Mandatory Retailer Code cl 16(2)(b).

84 NSW Mandatory Retailer Code cll 7(2), 10(3); NSW Ethical Clothing Trades Act s 13.

the supply chain and to efficiently capture crucial information about where production work is taking place and who is undertaking that work. Some preliminary evidence suggests that the system of 'top down' obligations imposed on NSW retailers is taking effect. In at least one instance unearthed in the course of fieldwork interviews, a NSW retailer, with the assistance of a regulator, reportedly used knowledge gained by the imposition of retailer obligations to compel other commercial entities to comply with industrial obligations owed to workers within their supply chain.⁸⁵ In another instance raised during fieldwork, a major retailer, working with a regulator, found that a particular supplier was not in compliance with industrial obligations owed to workers within their chain. The retailer reportedly cancelled clothing supply orders from that supplier for a number of weeks, until the retailer was contacted by the regulator to say that the supplier was working with the regulator to address those non-compliance issues. The retailer apparently wanted to send a message to the rest of their suppliers that, if a supplier was not compliant with industrial obligations owed to relevant workers, the retailer was prepared to suspend their clothing orders.⁸⁶ These practical examples appear to substantiate previous comments made by James et al that regulating a few large commercial parties with the greatest commercial influence in the chain can achieve a 'multiplier' effect of compliance throughout many smaller commercial operations in the chain.⁸⁷ These examples demonstrate that, as a result of mandatory retailer obligations, certain retailers have been encouraged to act ethically and police supply chains.

Moreover, it appears that regulators have initiated the cross-jurisdictional regulation of supply chains spanning the borders of various Australian states. In a further instance revealed during the course of interviews, regulators have reportedly followed a cross-jurisdictional supply chain involving a retailer with retail stores in a number of states, a large factory in one state and smaller makers located in a number of other states.⁸⁸ Indeed NSW regulators have used information disclosed by businesses at or near the top of the supply chain to track down many sites of clothing production performed for retailers throughout Australia, making the hidden workforce visible.⁸⁹ In one reasonably large clothing supply chain, the original number of workers (identified by traditional means by a NSW regulator visiting workplaces) grew to four times the original amount of workers (as a result of top down tracking mechanisms by that NSW regulator). In another large supply chain the number of workers known to regulators increased by seven times the original number of identified workers. And finally in a third, smaller, supply chain the number of identified workers grew by approximately three times the number originally identified.⁹⁰ This type of data presented by Nossar in 2011⁹¹ was also

85 Regulator Interview A.

86 Regulator Interview B.

87 James et al, above n 1, at 176.

88 Regulator Interview C.

89 Nossar, above n 18, p 16.

90 I Nossar, 'Supply Chain Regulation in the US and Australia: A Comparative Perspective of the Effectiveness of Regulating OHS', presentation delivered at International Symposium on Regulating OHS for Precarious Workers, Deakin University, Melbourne, 17 June 2011.

91 Ibid.

discussed by an interviewee who stated, 'that's the sort of information the [mandatory] code delivers'.⁹² This indicates the importance of harnessing retailer power in order to successfully implement regulation and produce increased workforce visibility. Moreover, in each of these three cases of dramatically increased visibility, regulators were able to secure compliance for most or all of these workforces with pay and conditions standards, work health and safety standards as well as workers compensation legal requirements.⁹³

However, these preliminary findings need to be fully tested and confirmed after collecting and analysing all of the project data. Furthermore, it appears that some retailers are attempting to get around the domestic system by sourcing a tiny amount of ethically-produced clothes from Australian producers so that they can say they are operating ethically, but then sourcing the rest of their clothing from overseas.⁹⁴ This reinforces the need for domestic regulation of international supply chains which is discussed further below.

Regulators play a critical role in implementing the NSW mandatory code. Although there have been few if any prosecutions of the NSW mandatory code, it appears that the threat of prosecution is frequently deployed by regulators,⁹⁵ and retailers act to avoid prosecution and negative media exposure.

The mandatory code has been used by regulators specifically in relation to retailers. But the NSW mandatory code is also used in conjunction with the whole TCF industry legislative scheme including the federal modern award to successfully regulate the entire TCF supply chain.

South Australia

In South Australia, outworker provisions were inserted into the (renamed) Fair Work Act 1994 (SA) by the Industrial Relations (Fair Work) Act 2005 (SA).⁹⁶ One of those inserted provisions allows the SA government to make a mandatory clothing retailer code 'by regulation'.⁹⁷ The making of a code by executive regulation drastically simplified the process compared to the parallel method required in New South Wales described above (involving the formation of a tripartite industry council). The relevant SA governmental agency then conducted consultations with key stakeholders⁹⁸ including those with the TCFUA (NSW/SA/Tas branch). In 2006, during the term of the Rann Labor government, the SA government released for public consultation a draft

92 Regulator Interview B.

93 Nossar, above n 90.

94 Business interview A.

95 Regulator interview A.

96 The amending legislation renamed the Industrial and Employee Relations Act 1994 (SA) as the Fair Work Act 1994 (SA) (SA Fair Work Act). Previous literature has examined the resulting, 'bottom up' rights of SA outworkers: see Marshall, above n 37; Rawling, above n 32. For a proposal for legislative protections for outworkers in South Australia, see I Nossar, *Proposals for Protection of Outworkers in South Australia*, TCFUA, Sydney, 2002.

97 SA Fair Work Act s 99C.

98 Safe Work Australia, 'Clothing Outworker Code', explanation available at SafeWork SA, *Clothing Outworker*, at <http://www.safework.sa.gov.au/show_page.jsp?id=5052> (accessed 3 November 2014).

mandatory clothing retailer code.⁹⁹ In 2007, regulations called the Fair Work (Clothing Outworker Code of Practice) Regulations 2007 (SA) were made. Those regulations, which contain the South Australian Clothing Outworker Code of Practice (SA mandatory code) in Sch 1, commenced on 1 March 2008¹⁰⁰ and are still currently in operation at the time this article was written.

The SA mandatory retailer code has a parallel scope of application to the NSW mandatory retailer code. It applies to all retailers (wherever domiciled) who sell clothing products within South Australia (SA retailers) as long as those clothing products are manufactured (or altered) in Australia (except for those retailers who are signatories to — and are operating in compliance with the National Retailers/TCFUA Ethical Clothing Code of Practice).¹⁰¹ It also applies to each supplier, wherever domiciled, who enters into any agreement with a SA retailer for the supply of such clothing products (including ‘a supplier who carries on business outside’ South Australia); and also applies to those supplier’s contractors (including subcontractors to contractors).¹⁰² Those retailers, suppliers, contractors and subcontractors are then subject to almost identical (if not identical) obligations under the SA mandatory code to those which exist under the original NSW mandatory retailer code.¹⁰³

Queensland

During the term of the previous Queensland Labor government, additional outworker protections were inserted into the Industrial Relations Act 1999 (Qld) by the Industrial Relations and Other Acts Amendment Act 2005 (Qld).¹⁰⁴ These amendments included the insertion of a provision which allowed the Queensland government to make a mandatory clothing retailer code by giving notice of such a code which constitutes subordinate legislation.¹⁰⁵ Hence, this Queensland process of making a mandatory code closely parallels the simplified SA method of executive regulation. A mandatory retailer code called the ‘Mandatory Code of Practice for Outworkers in the Clothing Industry’ (Qld mandatory code) was made and commenced on 1 January 2011.¹⁰⁶ At the time the code was made a Labor government still retained office in Queensland. In March 2012, the Newman coalition government was elected to the Queensland Parliament. In November 2012, after a concerted campaign by the Council of Textile and Fashion

99 Draft Outworker (Clothing Industry) Protection Code (SA).

100 Fair Work (Clothing Outworker Code of Practice) Regulations 2007 (SA) s 2.

101 SA Mandatory Retailer Code, definitions of ‘retailer’ and ‘manufacture’ cl 5, 8.

102 SA Mandatory Retailer Code definitions of ‘supplier’, ‘retailer’, ‘manufacture’ and ‘contractor’, cl 5.

103 The SA Mandatory Retailer Code has an additional cl 28 (which concerns the application of SA award protections) and an additional cl 8(2). The maximum penalty for a breach of the SA Mandatory Retailer Code differs from the maximum penalty for a breach of the NSW Mandatory Retailer code: see SA Mandatory Retailer Code cl 7(2).

104 For a proposal for legislative outwork provisions for Queensland see I Nossar, *Proposals for the Protection of Outworkers in Queensland*, TCFUA, Sydney, 2002.

105 Industrial Relations Act 1999 (Qld) s 400I.

106 Qld Mandatory Retailer Code cl 2.

Industries of Australia mainly representing small clothing manufacturers, the Queensland mandatory code was repealed.¹⁰⁷

Although there are certain generic features common to all three mandatory retailer codes, obligations under the Queensland code were not identical to the obligations under the other two codes. Despite its repeal, the initially proclaimed form of the Queensland mandatory code is of continued interest, given that it contained a number of regulatory innovations beyond the previous extent of retailer obligations under mandatory codes in New South Wales and South Australia. Specifically, the Queensland code contained a broader set of obligations which intervened into the contracting practices of the parties compared to the NSW and SA codes.

The Queensland mandatory code had a similar scope of application to the NSW and SA mandatory codes. It applied to all retailers who sold clothing products in Queensland, suppliers, wherever domiciled, who supplied to those retailers, supplier's contractors and subcontractors to those contractors.¹⁰⁸ Under the initially proclaimed form of the former Queensland code, when a retailer entered into an agreement with a supplier (for the supply of domestically-produced Australian clothing) the retailer previously had to obtain an *undertaking* from the supplier that (a) *all addresses where work is performed* on the clothing products (*whether at a factory or residential address*) will be *disclosed to the retailer*; and (b) the engagement of outworkers by the supplier (or its contractors) would be under conditions no less favourable than the prescribed industrial award conditions.¹⁰⁹ Under that former Queensland code, like the other state mandatory codes, the retailer also had to inform the supplier that a *breach of the supplier's undertaking* (by the supplier, or the contractor, or both) would be *taken to be* a breach of the agreement and *grounds for termination of the agreement* (between the retailer and the supplier).¹¹⁰

In an innovation beyond the operation of the NSW and SA codes, under that Queensland code suppliers previously had to obtain an undertaking and work locations from their contractors.¹¹¹ A supplier also had to inform the contractor that a breach of the undertaking allowed the supplier to terminate the agreement with the contractor.¹¹² Therefore, under the former Queensland code, the intervention into contracting practices applied to contracts between suppliers and their contractors (as well as the contract between retailers and their suppliers). In addition, contractors to suppliers had similar obligations to suppliers. That is, previously in Queensland, a contractor would have had to provide an undertaking and work locations to the supplier.¹¹³ In this way, under the former Queensland code, there was an unbroken chain of

107 Repeal Notice [Subordinate Legislation 2012 No 193 made under the Industrial Relations Act 1999 (Qld)] as of 9 November 2012.

108 Qld Mandatory Retailer Code, definitions of 'retailer', 'supplier', 'manufacture' and 'contractor' cl 4.

109 Qld Mandatory Retailer Code cl 10(1).

110 Qld Mandatory Retailer Code cl 10(1)(b), (c), Form 3A; NSW Mandatory Retailer Code cl 10(2), Sch 2 Pt B; SA Mandatory Retailer Code cl 10(2), Sch 2 Pt B.

111 Qld Mandatory Retailer Code cl 15(c), Form 4A.

112 Qld Mandatory Retailer Code cl 15(d), Form 4A.

113 Qld Mandatory Retailer Code cl 15(c), Form 4A.

intervention into contracting practices throughout the supply chain.

The former Queensland code contained similar retailer obligations to the other state codes to keep records of work locations and proactively and regularly disclose supplier and work location records to government and union regulators.¹¹⁴ The Queensland code also contained similar obligations to have ascertained whether an outworker was to be engaged;¹¹⁵ to have reported when an outworker was engaged under less favourable than award conditions; to have provided to the supplier and then collect from the supplier and report to regulators a form itemising agreement information;¹¹⁶ and to not have entered into an agreement with a supplier unless the supplier and its contractors had registered to give out work.¹¹⁷

Under the former Queensland mandatory code, suppliers faced similar obligations to the NSW and SA code obligations to provide the retailer with sufficient information for that retailer to maintain records and ascertain compliance.¹¹⁸ Furthermore, under that mandatory code, a supplier's invoice to the retailer (for the supply of domestically-produced clothing products to that retailer) had to be accompanied by the supplier's provision of full details of any contracts between that supplier and the supplier's contractors.¹¹⁹

According to fieldwork interviews, a regulator visited workplaces to give out copies of the Queensland mandatory code to TCF businesses in an effort to educate regulated parties about their obligations under the code.¹²⁰ However, after these workplace visits, many regulated parties were reportedly confused about who had what obligations and, as a result, in certain instances, outworkers were reportedly incorrectly led to believe that they had to comply with (non-existent) code obligations to receive work. Unlike regulator activity in at least one other state, it appears from the fieldwork data gathered so far, that there may have been less effort by regulators to work with TCF businesses so that those businesses could work towards full compliance over a period of time.¹²¹ This unsuccessful attempt to explain the Queensland mandatory code may have fuelled business opposition to the code, which became a crucial factor which led to the code's abolition. Nevertheless, some features of the design of the initially proclaimed form of the Queensland mandatory code remain the best template for adaptation to other contexts.

Implications of regulating the effective business controller

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

114 Queensland Mandatory Retailer Code cl 16(2)(a), 14, Form 3, Form 1.

115 Qld Mandatory Retailer Code cl 10(1)(a).

116 Qld Mandatory Retailer Code cl 11(1), Form 2, cl 12.

117 Qld Mandatory Retailer Code cl 12.

118 Qld Mandatory Retailer Code cl 16(1), cl 16(2), Form 3, Form 3A.

119 Qld Mandatory Retailer Code cl 16(2)(b).

120 Regulator interview C.

121 Regulator Interview D. See also 'Shock at Steps to Repeal Queensland Code Protecting Outworkers', Fairwear Latest News, 30 November 2012, at <<http://fairwear.org.au/resources/latest-news/>> (accessed 3 November 2014).

Governments can dictate to commercial parties with the greatest influence in the chain how to contract in order to successfully regulate supply chain outsourcing for employment policy purposes. It is appropriate for governments to so dictate contracting practices to business controllers where those business controllers set the parameters of work performed within their chain. It is especially important for governments to intervene into contracting practices of effective business controllers where commercial pressures coming from those business controllers lead to low pay, poor working conditions and poor work health and safety outcomes. By regulating entire supply chains, including the activities of commercial parties with the most commercial influence in the chain, the root causes of poor outcomes for supply chain labour can be addressed. Moreover, by harnessing the power of business controllers, mandatory regulation can operate to empower those business controllers to police their supply chains for ethical as well as commercial reasons; if mandatory regulation can encourage business controllers to become the most ethical or responsible parties in the supply chain, the role of addressing supply chain labour issues might be partially assumed by the business controllers themselves. Therefore the imperatives of regulators and business controllers can be aligned to compel the rest of the parties in the supply chain to comply with their legal obligations towards supply chain labour.

Domestic implications

The lessons of prior experiences in implementing mandatory retailer codes need to be heeded, especially the crucial importance of having a regulator with sufficient incentive and resources to work with business controllers over time to achieve business compliance. Although this point is important it would be broadly applicable to implementing a variety of legislation in the commercial sphere and beyond. Provided that sufficient attention is given to implementing the regulation, and, in light of preliminary indications that business controllers may be successfully regulated under the currently applicable mandatory codes, it is appropriate to consider extending mandatory regulation of TCF retailers to other jurisdictions around Australia. One possible avenue for such an extension of the scope of mandatory retailer obligations is under federal legislation. Indeed, under the Fair Work Act 2009 (Cth), a TCF industry mandatory retailer¹²² code can be made by executive regulation.¹²³ Such a federal code may make provisions for retailer obligations by applying, adopting or incorporating any matter contained in one of the mandatory codes made under state law.¹²⁴ Currently a federal mandatory code has not been made. Such a federal code is unlikely to be made during the term of the current Abbott coalition government. In this context, the currently applicable state mandatory codes demonstrate that there is a continuing role for state jurisdictions to regulate TCF business controllers even in the era of transfer of industrial relations powers to the Commonwealth. If Labor regains government in an Australian state, a campaign for extending the scope of

122 See especially Fair Work Act 2009 (Cth) (FW Act) s 789DC(5).

123 FW Act ss 789DA–789DD.

124 FW Act ss 789DE(3), (4).

mandatory clothing retailer obligations under that state jurisdiction might simply use the implementation of the NSW and SA mandatory codes (and the initially proclaimed form of the Queensland code prior to amendment) as a regulatory model for TCF retailers.

The regulation of TCF retailers under mandatory codes also has cross-industry application. That is, the regulation of TCF retailers might be used as an illustrative, currently-existing model of regulation which could be adapted and applied to other industries such as the road transport, construction,¹²⁵ cleaning¹²⁶ and aged care industries,¹²⁷ within which effective business controllers also affect the work parameters of supply chain labour. Indeed, in somewhat uncertain political circumstances¹²⁸ the road safety remuneration tribunal considered the application of mandatory obligations to another subset of business controllers — consignors and consignees of road freight. The existing state mandatory clothing retailer codes were raised in the tribunal proceedings as existing examples of laws already regulating a category of effective business controllers.¹²⁹

Implications for regulating international supply chains

The current geographical scope of the mandatory clothing retailer codes also has potentially far-reaching implications for the regulation of transnational or international supply chains which are used by effective business controllers to source goods or services from overseas jurisdictions and sell those goods or services in a home, developed-world jurisdiction. The NSW, SA (and formerly Queensland) mandatory retailer codes applied (or formerly applied) legislative obligations to any ‘supplier who carries on business outside’ the respective state as long as the supplier was supplying TCF products to a retailer regulated (by the respective mandatory code).¹³⁰ The mandatory codes currently require (or required) retailers to gather and keep records about contracts for the supply of clothing products manufactured *anywhere in Australia*.¹³¹ Therefore, these codes already have or had consequences beyond the geographical borders of the relevant state jurisdiction. There seems no obvious legal impediment

125 See H Collins, ‘Ascriptions of Legal Responsibility to Groups in Complex Patterns of Economic Integration’ (1990) 53 *MLR* 731 at 732.

126 See United Voice, ‘Clean Start: Fair Deal for Cleaners — Subcontracting and Illegal Practices Fact Sheet’, United Voice, 17 October 2009, at <<http://www.unitedvoice.org.au/tender/fact-sheets/subcontracting-and-illegal-practices>> (accessed 3 November 2014).

127 See S Kaine, ‘Collective Regulation of Wages and Conditions in Aged Care — Beyond Labour Law’ (2012) 54 *JIR* 100.

128 Eric Abetz, the federal Minister for Employment, announced a review of the operation of the Road Safety Remuneration Tribunal: E Abetz, ‘Review of the Road Safety Remuneration System’, Media Release, 30 November 2013. At the time of writing a review of the road safety remuneration tribunal was being conducted, see Commonwealth Department of Education, ‘Review of Road Safety Remuneration System’, at <<https://employment.gov.au/review-road-safety-remuneration-system>> (accessed 3 November 2014).

129 Transcript of Proceedings, *Re Transport Workers’ Union of Australia*, Road Safety Remuneration Tribunal (RTO2013/1), 29 October 2013.

130 NSW Mandatory Retailer Code cl 19, definition of ‘supplier’, ‘retailer’ and ‘manufacture’ cl 5.

131 NSW Mandatory Retailer Code, definition of ‘clothing products’ cl 5.

preventing domestic jurisdictions from exercising these same regulatory powers to span national borders and achieve outcomes abroad.¹³²

The form of international supply chain regulation being proposed here would *not* rely on an extra-territorial application of state powers.¹³³ Rather, it would involve the exercise of intra-territorial legislative jurisdiction. From the beginnings of commercial activities, commercial parties have conducted business deals which stretch across national boundaries. This is how international supply chains are formed. Commercial parties within one jurisdiction contract with commercial parties in another, overseas jurisdiction. It is these commercial contracting practices which enable intra-territorial regulation of international supply chains.¹³⁴ Specifically, the exercise of intra-territorial powers to extend regulation beyond national borders rests upon the business dealings between a regulated retailer (with sufficient geographical nexus to the relevant state in order to invoke the exercise of intra-territorial legislative jurisdiction) and a supplier having commercial dealings with such a regulated retailer. That is, the intra-territorial basis for this form of regulating international supply chains arises from the fact that the regulated retailer who contracts with an outside supplier must conduct retail business within the geographical borders of the relevant home-state jurisdiction. Therefore intra-territorial legislative jurisdiction could be used to regulate the actual contracts or arrangements between such a regulated retailer and its suppliers located around the globe. In particular, like the mandatory codes, this legislative jurisdiction could be used to dictate additional terms of (prime) supply contracts between a regulated retailer and its overseas suppliers and harness the influence of the regulated retailer conducting within-jurisdiction commercial activities to achieve outcomes throughout an international supply chain even where *most* of that relevant commercial behaviour and *all* of the *work actually performed* (ultimately for the retailer) physically occurs outside the geographical borders of the regulating state.¹³⁵

For example, in the TCF sector, an Australian clothing retailer might have obligations to obtain information from suppliers about all overseas locations of production and the conditions under which clothing products are produced at those locations. The retailer could then be obliged to report this information to regulators and use commercial sanctions against a supplier where working conditions are unsatisfactory. Governments at all levels possess this intra-jurisdictional power to regulate international supply contracts of business entities which in any way operate within or through the respective geographical jurisdictions of those governments.¹³⁶

It has been suggested that domestic regulation of international supply

132 Nossar, above n 18; R Johnstone, 'Informal Sectors and New Industries: The Complexities of Regulating Occupational Health and Safety in Developing Countries' in *Challenging the Legal Boundaries of Work Regulation*, J Fudge, S McCrystal and K Sankaran (Eds), Hart, Oxford, 2012, p 67 at p 80.

133 For a proposal to use extra-territorial powers to regulate supply chains to achieve outcomes abroad see Cooney, above n 3.

134 M Rawling, 'Supply Chain Regulation: Work and Regulation beyond the Employment Relationship', PhD Thesis, University of Sydney, 2010, p 322.

135 Nossar, above n 18.

136 Ibid; Johnstone, above n 132.

chains should focus on the eradication of 'egregious labour abuses'¹³⁷ such as forced labour and child labour. This would have considerable support amongst non-government organisations. Yet it is unclear whether an 'egregious labour abuse' scheme would secure the necessary support from business. In this regard the recent experience the Ethical Clothing Australia organisation changing the name of its clothing label from 'No Sweatshop' to 'Ethical Clothing Australia' is instructive. The name change occurred because business didn't want to be associated with the negative term 'sweatshops'. A system simply requiring a retailer to report information on where the work is done and under what conditions may be preferable to some businesses, as it would allow reporting of any satisfactory working conditions as well as any unsatisfactory conditions or egregious labour abuses.

However, if the past is anything to go by, the conditions for adapting and extending supply chain regulation to protect further categories of workers would require a concerted union and community campaign akin to the previously successful campaigns led by the TCFUA, which preceded legislative regulation of TCF supply chains under Labor governments. Given the current political climate that is hostile to unions, a weakened union movement and a less active public campaign, it remains uncertain as to when the necessary conditions would arise.

Conclusion

This article has evaluated the mandatory clothing retailer codes made under state legislation in Australia. The article, by reference to examples, argued that retailer obligations have contributed to the improvement of pay, working conditions and the work health and safety of hitherto invisible clothing outworkers. Mandatory obligations on clothing retailers with the greatest influence in the supply chain were pivotal to particular instances of successful implementation of the NSW legislative scheme regulating supply chains in the TCF sector. This indicates the entire supply chain needs to be regulated to improve the working conditions of supply chain labour. However, these findings are preliminary because the empirical research for the project described in this article is incomplete. The field work and data analysis for this project need to be finished to gain a fuller understanding of the implementation and effectiveness of the legislative schemes in Australia which regulate supply chains.

The article argued that the effective implementation of clothing retailer obligations indicates that imposing obligations on effective business controllers of domestic supply chains in other industries in Australia ought to be considered as a measure to address the exploitation of supply chain labour in those industries. Moreover, it was argued that the current cross-jurisdictional application of the state mandatory codes beyond the boundaries of the state within which those respective codes were made, demonstrates there is an existing legislative capacity for intra-jurisdictional regulation of international supply chains to protect workers abroad. Just as the (sometimes cross-jurisdictional) deals between retailers operating in New

¹³⁷ Cooney, above n 3, at 329.

South Wales, South Australia and Queensland and their suppliers formed the basis of regulatory intervention under the mandatory codes, so too the deal between retailers (active in the domestic jurisdiction) and their overseas suppliers could form the basis of domestic regulation of international supply chains. Imposing obligations upon the effective business controller of the supply chain is an essential element of the mandatory schemes required to adequately address the exploitation of domestic and overseas supply chain labour.