**Protective Legal Regulation for Home Based Workers in Australian Textile, Clothing and Footwear Supply Chains[[1]](#footnote-1)**

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**Introduction**

There is now a growing body of evidence that workers within, and especially at the bottom of, supply chains experience a range of adverse working conditions, including inferior pay and work health and safety, linked to the commercial dynamics of outsourcing arrangements (Walters and James 2011: 989; James et al. 2007: 166-170; Rawling and Kaine 2012: 238; Nossar, Johnstone and Quinlan 2004: 145-147; Quinlan and Wright 2008; Mayhew and Quinlan 2006). This paper examines the position of home-based workers in the textile, clothing and footwear (TCF) industry, where major retailers routinely exercise commercial influence throughout their supply chains to control the parameters under which work is performed, even by workers who have no direct dealings with them.

Supply chain outsourcing of this type has posed problems for conventional labour regulation, which focuses on employers contracting directly with workers, particularly employees (Nossar, Johnstone and Quinlan 2004: 137; Rawling and Kaine 2012: 238; Johnstone et al. 2012). These difficulties have been exacerbated by the regulatory tradition of three separate legal frameworks for (i) WHS, (ii) pay, working hours and conditions, and (iii) workers’ compensation.

This paper develops the existing scholarship on Australian supply chain regulation by analysing the parallel development, and interaction, of two legal developments that address working conditions in Australian TCF supply chains.. The first is the legislative establishment of mandatory contractual tracking mechanisms within state and federal labor law systems. These mechanisms follow the allocation of TCF work, tie in liability and legal responsibility for fair working conditions throughout entire supply chains and integrate minimum standards for pay, hours and working conditions, WHS and access to workers’ compensation for supply chain workers.

The second development is in the newly harmonised Work Health and Safety Acts, which no longer impose duties on ‘employers’ to ‘employees’ and ‘others’ (see Johnstone 1999 and 2006), but rather introduce general duties to ensure WHS and duties to consult, co-operate and co-ordinate on each ‘person conducting a business or undertaking’ (PCBU) in relation to all ‘workers’ who carry out work for the PCBU.

This paper argues that the combined effect of these developments is to require retailers and their clothing suppliers to track exactly which workers, including outworkers, are performing the work, and to ensure their health, safety, correct pay and other labour law entitlements. It also argues that a broad range of supply chains in industries beyond the TCF sector might also be regulated effectively by similar mandatory schemes which adapt and apply the essential features of the TCF industry specific model to other industry contexts. This paper highlights that, if governments are willing, appropriate regulatory solutions can be used to satisfactorily address the problems identified in the employment relations scholarship regarding the significant adverse effects for precarious workers of supply chain outsourcing, fissured workplaces and capital fragmentation.

**The context: TCF supply chains**

Historically, Australian TCF production involved principal clothing suppliers, such as fashion houses, handing out manufacturing work to multiple factories, many of them engaging substantial onsite workforces. Traditional responses to seasonal peaks in retail demand were met by engaging home-based clothing workers (also known in Australia as ‘homeworkers’ or ‘outdoor workers’ or ‘outworkers’), a reserve labour force in the TCF industry.

Forty years ago, the Australian government’s removal of tariff barriers against overseas imports resulted in a change from factory-based manufacturing to an industry formulated of interlocking pyramidal contracting arrangements and workforces heavily composed of outworkers. At the apex of these contractual chains, the ‘effective business controllers’ of these supply chains - a small number of commercially dominant retailers - typically entered into arrangements for the supply of clothing products with principal manufacturers and/or fashion houses. These principal manufacturers and fashion houses then contracted production from multiple smaller manufacturers or offsite contractors. In some instances these production orders were successively handed down through a sequence of intervening parties until the goods were finally constructed by an outworker. The finished goods were then delivered back up the contractual chain to the original principal manufacturer or fashion house.

Each step down the pyramid involved an increasing number of commercial players, each of which exerted a lesser degree of commercial influence over the supply chain than those on the step above them. At the base were clothing outworkers, with little influence over their working conditions. The commercial power of major retailers enabled them to secure favourable terms (price, quality control and turnaround time), proactive rights of inspection for quality control and exacting indemnity provisions in their contractual arrangements with principal manufacturers, whether domestic or international. These arrangements gave the retailers considerable legal authority to intervene actively into key aspects of the operation of their supply chains, so that in the past major retailers have presided over contractual arrangements providing them with quickly produced, quality clothing and high profit margins derived at the expense of outworkers sufficiently distant, in a legal sense, from the retailers to minimise the retailers’ legal liability for workers’ pay and conditions (Nossar, Johnstone and Quinlan 2004: 143-146, 151). In the absence of government intervention, however, contractual ‘governance structures’ (Nossar 2008: 1, 8) of this kind have rarely, if ever, provided effective protections for outworkers.

**Historical Legal Regulation of TCF Supply Chains in Australia**

During the twentieth century, TCF outworkers’ working conditions were predominantly regulated by Federal and state industry-specific industrial award provisions, established by industrial tribunals, usually for employees. This traditional labour law framework suffered from three systematic deficiencies limiting the effective regulation of TCF labour, and clothing outworkers in particular. First, the regulatory framework displayed an ‘entitlement gap’, because it generally only covered ‘employees’ directly employed by an ‘employer’ under a ‘contract of employment’ (Nossar, Johnstone and Quinlan 2004: 147). Clothing work providers sought to minimise their exposure by formally characterising outworkers as ‘independent contractors’, or even sometimes as ‘trust unit holders’, rather than as ‘employees’. Such corporate structuring arrangements also enabled employers to avoid or minimise insurance premiums or manipulate claims.

State and territory parliaments responded to these issues by inserting deeming provisions in workers’ compensation and some state industrial relations and WHS statutes. These provisions assigned legal responsibilities and obligations of an ‘employer’ to parties that immediately and directly dealt with outworkers, who then became the ‘deemed employees’ of those work providers (Rawling 2006). In the TCF industry, however, the majority of the direct work providers to outworkers were small entities with limited commercial power and resources to carry out their labour law obligations. These entities tended to be transient and outworkers were frequently unable to initiate and complete legal proceedings to enforce obligations or recover debts before these providers exited the industry. In addition, the use of strategies such as falsified business records, shelf companies and complex group company structures protected these entities from traditional enforcement proceedings (Nossar, Johnstone and Quinlan 2004: 147).

The use of these strategies for evading the operation of awards and deeming provisions reveals the second deficiency of traditional regulatory frameworks – even workers who were formally protected found the mechanisms for enforcement to be inadequate. WHS regimes were traditionally designed for permanent employees, usually located at large workplaces (Johnstone 1999; Johnstone, Mayhew and Quinlan 2001, Johnstone 2006 and Maxwell 2004: ch 3 and 13). Employers were often confused about their responsibilities to subcontractors and other precarious workers under WHS general duty provisions, a problem exacerbated by inadequate resourcing of WHS inspectorates (Australian Senate Committee Inquiry 1996; Senate Committee Inquiry 1998). Where there were complex subcontracting arrangements, employers and inspectors struggled to identify the relevant employer, or otherwise determine the employment status of particular parties, and inspectors had difficulty locating isolated, easily mobile home-based workers. Regulatory oversight was inhibited by workers’ relative ‘invisibility’. Effective enforcement of supply chains requires regulators to be able to locate all work sites in a chain, so that they can physically inspect premises, check documentary records and determine the conditions under which each individual worker labours (Nossar, Johnstone and Quinlan 2004: 148).

The final systemic regulatory deficiency arose from the absence of any formal legal obligation upon the major retailers at the apex of the supply chains. Traditionally, retail sale activity fell outside the jurisdictional scope of clothing industry manufacture, and thus outside the scope of clothing trades awards, especially in the Commonwealth system. This deficiency provided an economic context in which parties further down the supply chain could only survive commercial pressures by reducing their costs, often through non-compliance with their labour law or WHS obligations.

**Regulatory Development beyond the Traditional Framework**

Following campaigns by trade unions and community groups highlighting these issues, the federal industrial tribunal inserted innovative provisions into the federal clothing award in 1987/88 enabling union and government regulatory agencies to track the contracting process from the level of principal manufacturers down, through each level, to the outworkers themselves. The award required each employer who gave out clothing work to proactively provide a list of the destinations (both identity and location) of their garment manufacture work. Each employer was to provide the required list every six months and was also required to keep a record of the sewing time for each clothing product. The award provisions empowered regulatory agencies to access records of work orders (most importantly, the number of goods ordered – known as ‘volume’) and to cross-check the validity of the assigned sewing time (by conducting time tests in comparable factory contexts). Any failure to provide this information was automatically a breach of industrial law. These award provisions were supplemented in 1995 by a federal industrial tribunal decision giving regulatory agencies access to contract details of pricing (for each of the goods ordered) at each level of the contracting process (Australian Industrial Relations Commission: 1995) (known as ‘value’) from the level of principal manufacturers downwards.

These new award provisions were soon incorporated into the counterpart state clothing awards in a number of state jurisdictions, but the provisions were confined to the realm of ‘industrial relations law’ – with no immediate application to either WHS regulation or workers’ compensation coverage for outworkers. The award provisions also failed to impose any enforceable obligations upon the most significant players in the clothing supply chains: the major *retailers*. Further trade union and community campaigning induced the industry bodies representing retailers and manufacturing employers to adopt voluntary codes of practice aimed at securing these entitlements for outworkers. The retailer and manufacturing employer voluntary codes were united under the single umbrella of the *Homeworkers Code of Practice* (HWCP) but both exhibited inherent regulatory flaws. The manufacturing employer code, for example, relied upon documentary assertions by the manufacturers themselves (in the form of statutory declarations). The various versions of voluntary codes (Homeworkers Code of Practice 1996, 1997, 1998) adopted by the retailer representative body were even weaker.

By contrast, one major retailer, Target, adopted a voluntary code that included provisions resembling those in the federal award obliging it to proactively provide regular lists of suppliers (along with reactive obligations for disclosure of all supply contracts) and to consider disciplining any supplier, by terminating their supply contract and by refusing to enter into any further contracts, if the supplier failed to remedy any breaches of outworker legal provisions that had been brought to the retailer’s attention by the regulator (Target Deed 1995). This kind of Deed was subsequently adopted by a handful of other effective business controllers, including Country Road, Ken Done and Australia Post (Nossar, Johnstone and Quinlan 2004: 149-150).

**The Emergence and Export of Supply Chain Regulation**

From June 1999 a new regulatory model emerged in New South Wales (Nossar 1999), designed to integrate traditional regulatory mechanisms with proposals that harnessed the contractual power of the major retailers in TCF supply chains and created a general model available for export to other Australian jurisdictions (Nossar, Johnstone and Quinlan 2004: 137, 156 - 158; Rawling 2006). The new model proposed that major retailers be bound by legal obligations giving regulatory agencies full access, at regular intervals, to details of contracting arrangements across the entire supply chain. The proposed model also adapted the commercial disciplinary mechanism introduced in the Target Deed in 1995. Suppliers faced legislatively prescribed discipline by the effective business controllers of their supply chain, the retailer, for the persistent breach of any legal provision protecting outworkers, whether imposed by industrial law, WHS or workers’ compensation legislation (Nossar 1999: 24-27).

Rather than simply adopt the existing legal mechanisms from the awards and the voluntary codes discussed above, the new regulatory model proposed that legislation import carefully designed standard contractual provisions into retailer contracting arrangements (Nossar 1999: 24-27). These standardised provisions enabled retailers themselves (under the active oversight of regulators) to regulate working conditions wherever TCF outworkers carried out work. The model provides effective cross-jurisdictional reach to regulate supply chains across Australian jurisdictions, potentially providing an effective solution to geographical jurisdictional limits which have traditionally posed problems for enforcement. These developments open the way for the establishment of new contractual mechanisms requiring effective business controllers to regulate working conditions wherever work is performed - even at overseas locations outside the regulating state altogether (Nossar 2007: 9, 16, 20; Nossar 2008: paras [14-21]; Johnstone 2012: 79-80).

In addition to the ‘top down’ obligations imposed on the retailers, the new model included two corresponding ‘bottom up’ components. The first centred on entrenching the ‘employee’ status of all (not just TCF) outworkers by proposing that the statutory deeming provisions for outworkers be extended to jurisdictions where no such deeming provisions yet existed (Nossar 1999: 1-23). The second created a new statutory recovery mechanism entitling outworkers to serve a claim for unpaid industrial entitlements upon any entity in the supply chain up to (and including) the level of the principal supplier. Once served with such a claim, the onus of proof for civil law recovery would be reversed onto the principal supplier, who would then be obliged to pay that claim within a relatively short fixed period of time – regardless of how many commercial parties there were between the principal supplier and the outworker – unless the principal supplier could prove that the outworker serving the claim had not done the work or that the claim calculation was erroneous (Nossar 1999: 1-23). Together, these key features of the new regulatory model came to be labelled ‘supply chain regulation’ (SCR) (Rawling 2006).

To date, five state jurisdictions have implemented aspects of the supply chain regulatory model: New South Wales in 2001, Victoria in 2003, both Queensland and South Australia in 2005 followed by the Commonwealth in March 2012 (Rawling 2006; Johnstone et al. 2012: 68-69, 103-106, 160-161). Although the NSW provisions were confined to the TCF industry the ‘deemed employer’ status was extended to virtually all parties further up the supply chain by inserting the phrase ‘directly or indirectly’ into the existing NSW industrial deeming provision for clothing outworkers (see in particular, Schedule 1(f) *Industrial Relations Act 1996* (NSW)). This created a framework for a statutory right of recovery by outworkers that could be developed around the concept of the ‘apparent employer’ - a legal concept extended to any party in the contracting chain, aside from the retailer (Rawling 2006: 530). As part of these reforms the NSW state parliament also amended the Workers Compensation Act 1987 (NSW) to oblige all suppliers within supply chains to fully and accurately disclose details of their subcontracting or else bear the liability for any unpaid workers' compensation insurance premiums within that chain (Nossar, Johnstone and Quinlan 2004: 156-158).

Subsequent enactments of the SCR statutory package around various jurisdictions became progressively less industry-specific. In 2005 South Australia enacted legislation that provided a legal foundation for model provisions that do not rely on the concept of direct employment, delivering labour law protections via commercial contractual arrangements (Rawling 2006: 532-33). Under these South Australian statutory provisions a contractual pyramid in any industry may be regulated despite the absence of any common law contract of employment within that pyramid, establishing the basis for a generic legislative model regulating contract networks more generally (Rawling 2006: 538-41).

Three of the four states that enacted the statutory package - NSW in 2004, South Australia in 2006, and Queensland in 2010 - also created broadly similar mandatory apparel retail codes that impose upon TCF retailers and suppliers record-keeping and reactive and proactive obligations to disclose full supply chain contract details to regulators. These mandatory codes import standardised, enforceable provisions into retailer supply contracts requiring suppliers further down the chain to inform retailers about all locations where domestic apparel production is conducted, on pain of loss of their contracts with the retailer (Johnstone 2012: 79). The Queensland mandatory code was repealed in 2012.

The state legislative developments described above stimulated negotiation of a new voluntary retailer code of practice in NSW (NSW Ethical Clothing Code of Practice, 2002) and a later mirror national voluntary retailer code (National TCFUA/Retailer Ethical Clothing Code of Practice, 2002). Both of these codes incorporate all of the key features of the 1995 Target Deed and have been adopted by all major retailers in Australia. As the issue gained public attention, high profile transnational effective business controllers such as Reebok also entered into new improved voluntary Deed arrangements which now authorise regulators to access and inspect sites of production outside Australia (Reebok Deed 2003; R M Williams Deed 2003; Nossar 2007: 5-12, 19-36; Nossar 2008: paras 14-21; Johnstone 2012: 79-80).

The two remaining state mandatory codes explicitly refrain from applying their mandatory provisions to any retailer or manufacturing supplier that is signatory to – and compliant with – the voluntary codes and current provisions of the HWCP (NSW Mandatory Code, 2005: cl 8(1)(e); South Australian Mandatory Code, 2006:cl 8(1)(e)). These provisions exempting the application of the two mandatory codes for retailers have completely transformed the practical enforceability of the HWCP provisions. Failure, by either retailers or suppliers, to comply with the ‘voluntary’ HWCP provisions now incurs the full application of the entire mandatory code regime, which is tougher in the scope – and severity – of the obligations imposed and is also enforceable in court with substantial financial penalties upon conviction (NSW Mandatory Code 2005: cl20 (8); South Australian Mandatory Code 2006: cl 20(8)). Thus, by one instrument or the other, all national Australian retailers are now compelled to provide details of their TCF supply contracts to regulators.

**Recent Federal Developments**

Each of these state SCR legislative provisions has survived a succession of Commonwealth statutory encroachments up to, and including, the enactment of the federal Fair Work Act 2009 (Rawling 2007; Rawling 2009) and the latest referral of most state industrial relations powers to the Commonwealth (Creighton and Stewart 2010: 118-21). The federal TCF award, made under the Fair Work Act 2009 (Cth) (FWA) has the same key features as the original clothing award provisions created in the late 1980s.

In March 2012, amendments to the FWA (Part 6 - 4A) enacted a new regulatory model by largely adopting the earlier NSW state SCR legislative formula, with the same TCF industry-specific limitations, the extension of the deeming provisions and statutory right of recovery to work given out ‘directly or indirectly’ (part 604A, Div 2), and by adapting the definition of ‘principal’ (section 17A) from the current federal TCF award. The federal provisions also adapted certain features from the South Australian state SCR legislative approach, including the reference to ‘a chain or series of 2 or more arrangements’ in the definition of ‘principal’ (FWA: s17A; see also Rawling 2006: 533) and in the definition of a retailer as being a retailer that does not have ‘any right to supervise or otherwise control the performance of the work before the goods are delivered to’ that retailer (FWA: Part 6 - 4A, Divs 3, s789 CA(5)(b); see also South Australian Mandatory Code 2006: cls 5 and 28). The FWA provisions also create a statutory right of recovery that includes a reversal of the onus of proof (onto the party served with the claim for recovery) and scope for recovery against almost any party in the supply chain apart from retailers without rights to supervise or otherwise control production prior to delivery of goods (FWA: Part 6-4a, Div 3; Potter 2012: 42-43).

Although these amendments to the FWA confer the capacity to create mandatory legal obligations that can bind all parties in TCF supply chains, up to and including the ultimate retailers, (Part 6-4A, Div 4), there are currently no practically enforceable SCR legal obligations imposed on major retailers by Commonwealth legislative instruments. The only effective provisions regulating retailers on a national level throughout Australia are the NSW and South Australian mandatory codes, operating with their cross-jurisdictional reach, together with the new and improved national ‘voluntary’ retailers’ code.

Once this type of information could be accessed and cross-checked from the level of the retailers down throughout the entire contract chain, the combination of these ‘value and volume’ measures has become a key tool in the practical operation of TCF regulation. Regulators can track the real flow of TCF work orders to all locations and access all relevant information, especially price paid and volumes ordered (the numerical output of garments and assigned working times for each particular product) for each of the contracts between all the commercial parties in the contracting chain. Regulators can then aggregate this information (along with the piece rate paid) to estimate the total labour time required for production at any level in the supply chain. At this point the regulator may be able to estimate the equivalent number of full time employees required to complete a particular production order. Regulators can then utilise their legislative and contractually-based powers to inspect all production sites without notice to check the accuracy of workplace records and locate the entire workforce.

The significance of this was explained by the union regulator as follows:

So probably the most significant thing I think is the method in being able to determine how many employees are within any one operation. And that’s brought about by an award requirement where each company … is to provide us with a list of each of the contractors they give work to, [and] an array of other information on name, address, and contact details. But in particular they have to provide us with the sewing time that’s required to be provided for each garment that’s produced. So as a garment is issued to a contractor there has to be a sewing time provided. …a payment that’s made for each minute’s worth of work. And in the case of our industry, it’s currently on 53 cents a minute. That rate, with the minutes, lets us determine the number of hours that are required, the number of days that are required in terms of work, and the number of full time employees that are required to produce the work. That in itself creates massive transparency within the industry. So for me, that’s the critical tool that’s different I think from a lot of other supply chains maybe in other industries (*Interview with union regulator, 2013*).

**Extending the reach of work health and safety regulation**

Beginning in 2008, and culminating in the adoption by 2011 of a Model Work Health and Safety Act (Model Act) in the form of Work Health and Safety Acts (WHS Acts) in each Australian jurisdiction apart from Victoria and Western Australia, Australian WHS legislation has been largely harmonised. Four features of the WHS Acts substantially complement the labour law provisions discussed previously by requiring TCF retailers, fashion houses, makers and contractors to identify the location of outworkers and to consult, co-operate and co-ordinate their WHS activities.

The first significant provision is the ‘primary duty’ of care (s 19) owed, not by employers to employees, as was the dominant pre-harmonisation approach, but by ‘a person conducting a business or undertaking’ (PCBU) to ‘workers’. The National Review into Model Occupational Health and Safety Laws in its First Report (2008: 46) argued that the pre-harmonisation approach was ‘too limited, as it maintain[ed] the link to the employment relationship as a determinant of the duty of care’ and ‘the changing nature of work arrangements and relationships make this link no longer sufficient to protect all persons engaged in work activities.’ Consequently, the primary duty(s 19(1)) provides that the PCBU must, as far as is reasonably practicable, ensure the WHS of all workers engaged or caused to be engaged, or whose activities are influenced or directed, by the PCBU ‘while the workers are at work in the business or undertaking’. The *Explanatory Memorandum* (at [23]) to the Model Act makes it clear that the phrase ‘business or undertaking’ is ‘intended to be read broadly and covers businesses and undertakings conducted by persons including employers, principal contractors, head contractors, franchisors and the Crown’.The case law on ‘business or undertaking’ in the pre-harmonisation WHS statutes does indeed take a broad approach (see *Whittaker v Delmina Pty Ltd* (1998) 87 IR 268), and has held that the extent of the undertaking is a question of fact (*Victorian WorkCover Authority v Horsham Rural City Council* [2008] VSC 404: [36]). More than one person may be conducting an undertaking in any one situation.

The WHS Acts (s 7) define ‘workers’ very broadly to include any person who carries out ‘*work in any capacity for*’ a PCBU, and specifically includes ‘outworkers’. It is clear that the primary duty applies to the TCF supply chains described earlier in this paper, at least from the fashion house downward, so that outworkers at the bottom of TCF supply chains will be owed the primary duty by the fashion house which designs the clothing and draws up the specification sheets, and all head contractors, contractors subcontractors further down the chain. For example, the fashion house will owe the primary duty to its direct employees, employees of the maker or contractor, or any subcontractors or outworkers engaged by any of those parties, because the fashion house has caused each of those workers to be engaged, and/or directs and/or influences the work of each worker, and the outworkers are ‘at work’ in the fashion house’s business of designing and making clothes.

Whether *all* retailers owe the primary duty to outworkers is a little more complex. Where the PCBU fashion house is also the retailer, then the PCBU would owe the duty as both fashion house and retailer. If the retailer is not also the fashion house, but, for example, a department store, and plays some part in the design and/or specifications of the clothes, then the outworker is most likely part of the department store’s business, and the department store will be engaging, influencing and directing the outworker. If, however, the department store simply provides retail space for the fashion house/retailer to sell its clothes, it might be argued that the outworkers are not ‘at work in’ the department store’s business, and may not be engaged, influenced or directed by the department store. In this instance, however, the department store will owe the PCBU’s section 19(2) duty to ‘ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from the work carried out as part of the conduct of the business or undertaking.’ This duty might be breached by, for example, the department store putting pressure on the supply chain to reduce the price of the clothes, although it might be argued that this is not ‘a risk from work carried out as part of the business’.

The primary duties of retailers, fashion houses, makers, contractors and subcontractors are overlapping and non-delegable: each party owes the duty to workers below it, even though others owe a similar duty (see s 14-16 of the WHS Acts). Clearly this requires each party owing the primary duty to know of the existence and location of each worker in the chain in order to exercise the requisite care. As one clothing company manager observed, once the SCR statutory package and the primary duty came into force:

we basically picked up 350 extra people who we were responsible for … because we tell them that whilst we have always had a duty of care and I guess, wanted to support whatever issues they are experiencing, we now have a legal responsibility to do that. I think the OHS legislative changes have really opened up dialogue beyond what was normally happening (*Interview with Australian clothing company, 2013*).

The duty owed to outworkers will include psychosocial issues (s 4, definition of ‘health’), including stress induced by the way outworkers’ work is organised, including excessive working hours.

The second significant provision is the ‘officers’ duty (WHS Acts, s 27). Unlike the officers duty in the pre-harmonisation statutes, which relied on *attributed liability* (ie imputed or accessorial liability), the officer’s duty is a positive and proactive duty to ‘exercise due diligence to ensure that’ the PCBU ‘complies with’ a duty or obligation that the PCBU owes under the Act (s 27(1)). It is a positive duty in the sense that an officer who does not exercise the required due diligence can be in breach of the duty even if the PCBU is not breaching its duties (s 27(4)). Thus each company secretary, director and senior manager of each PCBU in a TCF supply chain must (s 27(5)) ‘take reasonable steps’ to

1. acquire and keep up-to-date knowledge of WHS matters;
2. gain an understanding of the nature of the PCBU’s operations and generally of the hazards and risks associated with those operations; and
3. ensure that the PCBU has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to WHS from work carried out as part of the conduct of the business or undertaking; and
4. ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information;
5. ensure that the PCBU has, and implements, processes for complying with any duty or obligation under the Act; and
6. verify the provision and use of the resources and processes referred to above.

These are far-reaching duties, and require each officer to have extensive knowledge of the supply chain and the WHS risks faced by all workers in the supply chain. Managers who are not ‘officers’ owe the worker’s duty (s 28) to take‘reasonable care’ that their acts or omissions do not adversely affect the health and safety of other persons, which would include outworkers.

The third significant provision is section 46 of the WHS Acts, which provides that ‘if more than one person has the same duty concurrently under this Act, each person with the duty must, so far as is reasonably practicable, consult, co-operate and co-ordinate activities with all other persons who have a duty in relation to the same matter.’ This provision seeks to prevent WHS issues arising from fractured work arrangements or from a lack of co-ordination between duty holders. The *Code of Practice: Work Health and Safety Consultation, Cooperation and Coordination* ensures that the PCBUs in TCF supply chains cannot assume that other PCBUs will take care of a health and safety matter, and requires each PCBU to find out who else is carrying out work, and to work together with other PCBUs in a co-operative and coordinated way to eliminate or minimise risks so far as is reasonably practicable.

The combined effect of these provisions (s 7, 19, 27 and 46) is that not only does each PCBU influencing the work carried out in the supply chain owe a duty to each worker below it in the chain, but that the PCBUs must work together to ensure that their duties are discharged in a coordinated manner. Officers have a proactive duty to exercise due diligence to ensure compliance by their PCBU, and this will include fulfilling the duty to consult, co-operate and co-ordinate with other officers owing the same duty (s 46). The impact of these provisions on clothing companies was described as follows:

…. with the new changes that came in a couple of years ago with effectively making all of those makers part of our responsibility … we had a legal obligation to do the right thing. … we had meetings, we brought them in, we had sessions to educate them on the new legislation and what it means. We do warehouse audits, site visits, inspections, we give them feedback. We’ve helped them engage contractors … If we didn’t do that we’d be exposed.

.… because of our relationship with [Retailer] and their … ensuring that everyone in their supply chain is compliant, that really forced [us] to have a long hard look at our strategy. It’s made us rethink everything. … Under the current regime, the retailers will effectively audit us and have the right to audit us and that auditing relates primarily to: Do we have an OHS management system? ... they don’t necessarily need anything figures wise from our makers but they need to see that we are auditing the makers. They need to see that we are cascading that back down … [a]nd it cuts the other way too, I mean we, again under the OHS legislation, we would also have the opportunity to audit should we require or request the OHS management system from [Retailer] because we have got our employees working in their stores (*Interview with Australian clothing company, 2013*).

Even though Victoria has not enacted the Model Act, the general duties owed by an employer to employees and to ‘others’ in the Occupational Health and Safety Act 2004 (Vic) (OHSA) (s 21 and s 23 respectively), and the duty owed by a self-employed persons to persons other than employees (s 24), together have a similar effect to the primary duty in the WHS Acts, in that they impose a hierarchy of overlapping and complementary responsibilities on all the contracting parties in the supply chain to all workers below them in the chain. Further the Outworker (Improved Protection) Act 2003 (Vic) provides that ‘employee’ in a number of statutes (including the OHSA) includes an outworker. There is, however, in the OHSA no equivalent to section 46 of the WHS Acts.

The fourth key set of provisions are to be found in the worker consultation, representation and participation provisions in the WHS Acts (Part 5, Divs 2 and 3), which are all couched in terms of ‘workers’ and the PCBU rather than ‘employer’ and ‘employee’. Thus, a PCBU must, so far as is reasonably practicable, consult with workers (or their health and safety representative (HSR)) who carry out work for the business or undertaking who are, or are likely to be, directly affected by a matter relating to WHS (se 47(1)). The matters over which consultation must take place include all measures to identify, assess and control risks, all proposed changes to the business or undertaking that might affect WHS, and decisions about consultation, monitoring worker health, resolving WHS issues and so on (s 48(1)). It would be difficult to contest the proposition that TCF employees, subcontractors and outworkers are ‘directly affected’ by the operations of the PCBU fashion houses, makers and contractors above them in a typical TCF supply chain, and that, consequently, each PCBU must consult all the workers below them in the supply chainto the extent that consultation can be suitably accomplished in the circumstances. Again, this is a significant and profound duty, particularly in the context of the section 46 duty, and all PCBUs in the supply chain must therefore consult each other and co-ordinate their activities in consulting with workers, including all outworkers, below them in the supply chain.

Further, any worker, including an outworker, who carries out work for a business or undertaking, can request a PCBU to facilitate the election of a HSR (Part 5, Div 3, Subdiv 1). Workers and the PCBU are to negotiate to determine one or more ‘work groups’ at one or more workplaces (Part 5, Division 3, sub-divs 1 and 2, ss 50-59). Work groups may be determined for workers carrying out work for two or more PCBUs (Div 3, sub-div 3). All workers in a work group can elect the HSR. Elected HSRs have broad functions and powers (Part 5, Division 3, sub-divisions 5 and 6) including representation, inspection, consultation, and information rights and the right to assistance. All ‘workers’ have the right to refuse to carry out work if the worker has a reasonable concern that the work would expose the worker to a serious risk to the worker's health or safety, emanating from an immediate or imminent exposure to a hazard (s 84).

Further, elected HSRs have extensive powers to monitor PCBU compliance with sections 19, 27, 46 and 47, in particular, and could issue provisional improvement notices in the event that they were of the reasonable belief that a PCBU is not complying with those provisions. HSRs can also participate with PCBUs in processes to resolve WHS ‘issues’, and can make a direction to stop work that poses an immediate and serious risk to any worker (s 85). The WHS Acts also contain provisions enabling authorised union officials to enter workplaces to investigate suspected contraventions of the WHS Acts and to consult with workers over WHS issues (Part 7).

The net effect of these provisions is to require all PCBUs and their officers to consult with all other PCBUs and all workers in the supply chain over WHS issues, and to ensure the WHS of all workers in the chain. Officers and PCBUs cannot plead ignorance of the existence of workers in the supply chain because they owe duties to them, and they cannot provide evidence of compliance with their section 27 and 19, 46 and 47 duties if they are ignorant of the identity of other PCBUs or any workers. These provisions mirror those in the regulation of pay and conditions discussed earlier and can effectively be used by regulators to uncover the hidden workforces in TCF supply chains.

**Application of the SCR model to other supply chains**

There is now significant scholarship examining supply chain types and business networks (see Marchington et al. 2005; Gereffi, Humphrey, Sturgeon 2005; Weil 2009). This scholarship provides valuable insights into variances in the exercise of power in different types of supply chains and the different types of inter-organisational relations in business networks. It does not, however, follow that, because there is variance in supply chains, only some are amenable to an effective form of mandatory, top-down regulation, such as the legislative scheme described in this article.

This paper is not advocating that the entire TCF legislative scheme be applied to other industries in its current form. Rather, it argues that key elements can be adapted to different industry contexts and applied on a case-by-case basis (James et al 2007: 187; Rawling and Howe 2013: 246), for example, the current industry-specific legislative scheme in the road transport industry (Rawling and Kaine 2012).

To suggest that supply chain regulation should be confined to particular product markets or industries ignores the fact that supply chain arrangements are not static or monolithic (Gereffi, Humphrey, Sturgeon 2005: p 96). Individual supply chains change over time and supply chains vary considerably from firm to firm as well as among different industries (Rawling and Howe 2013: p 241). Further, most supply chains have certain basic elements which make them amenable to regulation. While certain effective business controllers may have a lower capacity to exercise commercial power (Nossar 2006; Gereffi Humphrey Sturgeon 2005), most firms at or near the apex of supply chains exhibit, or have the capacity for, *a requisite degree* of commercial influence. This influence need not be demonstrated by explicit coordination of other supply chain actors; rather firms can exercise market power via their strategic position at the apex of the chain (Rawling and Howe 2013; 241; Gereffi Humphrey Sturgeon 2005: 98).

Effective business controllers at the apex of supply chains will frequently argue against the imposition of mandatory supply chain regulation on the basis that they only have knowledge of their direct suppliers and no knowledge of, or control over, working conditions further down the chain( see Wright and Brown 2013: p26; Nimbalker, Cremen and Wrinkle 2013: 18)). However, in particular cases, unions have disproved these claims by providing evidence of significant knowledge and control (see Nossar, Johnstone and Quinlan 2004: 151). Also, after publicity and pressure from unions, business controllers are able to relatively quickly ascertain the conditions under which their supply chain workers labour (see for example ; Wright and Brown 2013: p 27 And, of course, the regulatory scheme itself further empowers firms at the apex to gather information about dealings further down the supply chain, and to exercise control over working conditions, as our study of TCF regulation demonstrates.

Thus it is consistent with the literature to suggest that the supply chains amenable to regulation might include those operating in a variety of private industry sectors other than the TCF sector; those in sectors where the supplier delivers not only goods but services; and those in domains where government agencies rather than private firms are the effective business controllers (Rawling and Howe 2013; p 242). Indeed, as we have shown, the WHS Acts *already regulate* supply chains throughout the Australian economy. An effective business controller at the apex of any Australian supply chain owes a duty to any worker (i) who carries out work for the business controller, and (ii) who is engaged (including through sub-contracting arrangements), caused to be engaged, influenced or directed by the PCBU.

Our argument for further regulation is restricted to the regulation of other supply chains, rather than all business networks or ‘production networks’ (Rainnie et al 2011). From a legal perspective, we distinguish between supply chains, made up of a vertical series of contracts or dealings between parties in the chain, and other types of business network such as the franchise (see Weil 2009; 419), the corporate group or the triangular labour hire arrangement which are likely to give rise to different regulatory issues and solutions (see Johnstone et al 2012 pp47-76).

Finally, there is no obvious impediment (other than a lack of political will) preventing the regulation of transnational supply chains extending into the jurisdiction of a domestic government. In principle an effective business controller selling goods within a developed world economy could be required to insert contractual provisions into contracts with overseas suppliers and disclose information about the overseas location of production of goods and the conditions under which those goods are produced (Nossar 2007; Nossar 2008; Johnstone 2012; 80).

**Conclusion**

Innovative responses to the problems posed by supply chain outsourcing have been a feature of labour regulation across the TCF industry in Australia since the late 1980s. This paper has shown some of the historical ways in which labour laws regulating employer-employee relationships have been circumvented in the past. These problems have been exacerbated by the traditional trifurcated approach to regulating TCF working life through industrial statutes and awards, WHS legislation and workers' compensation legislation.

This paper has described how developments in labour law regulation, particularly in awards, industrial statutes, mandatory and voluntary codes, and the newly harmonised WHS statutes, have created an innovative, fully enforceable and integrated regulatory framework for the TCF industry. The provisions discussed in this paper enable hidden workforces to be made visible and enable monitoring and enforcement of legal liability and responsibility for fair working conditions, correct pay and WHS in the industry. Importantly, these statutory schemes enable regulators to work in partnership with effective business controllers by harnessing their commercial power to ensure compliance.

The article argues that WHS provisions and the features of the supply chain regulatory model in industrial statutes, mandatory codes and voluntary codes outlined in this paper can apply to all kinds of supply chain arrangements. The challenge is for government regulators, trade unions and other civil society institutions concerned with the labour conditions of workers engaged at the bottom of contractual networks to push for the extension of the supply chain regulatory model into other industries. The developments examined in this article are an example of a mandatory regulation scheme which addresses problems identified for precarious workers well documented in academic and policy literature. The debate regarding the effectiveness of such mandatory legislative schemes is an essential contribution to the knowledge base on supply chains, human resource management practices and labour standards both in Australia and internationally.

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