

Leader or Laggard? Australian Efforts to Promote Better Working Conditions in Supply Chains within and beyond Australia's Borders

Ingrid LANDAU*

University of Melbourne

- I. Introduction
- II. Background
- III. The regulatory landscape in Australia
- IV. What accounts for this paradox?
- V. Conclusion

I. Introduction

This paper considers the extent to which, and how, Australian law and policy encourages large firms to take responsibility for working conditions within their supply chains. In Australia, this issue is receiving increased public and scholarly attention in light of media revelations of serious labour abuses within the supply chains of large, high-profile companies. Recent examples involving domestic supply chains include systematic underpayment and other labour abuses of vulnerable workers on farms producing fruit and vegetables for Australia's largest supermarkets,¹ and labour exploitation within the supply chains of the largest chicken processor, Baiada Poultry.² Examples involving transnational supply chains include revelations of Australian clothing retailers manufacturing clothing in abusive sweatshops in Bangladesh,³ iconic Australian surf wear company Rip Curl sourcing from factories in North Korea,⁴ and Australian supermarket retailers Woolworths, Coles and Aldi procuring seafood from Thai processing plants using forced and child labour.⁵

A number of scholars have described and analysed Australian regulatory initiatives to promote lead firm accountability for employment standards within domestic supply chains.⁶ There is also a small literature on how Australia regulates, and could potentially regulate, Australian-domiciled companies with respect to their transnational supply chains.⁷ The modest objective of this paper is to survey the contemporary regulatory landscape with respect to state efforts to promote better working conditions in supply chains

* PhD Candidate and Research Fellow, Centre for Employment and Labour Relations Law, Melbourne Law School.

1 See Caro Meldrum — Hanna and Ali Russell, *Slaving Away: The Dirty Secrets behind Australia's Fresh Food*, Four Corners, 4 May 2015.

2 Fair Work Ombudsman, 'A Report on the Fair Work Ombudsman's Inquiry into the Labour Procurement Arrangements of the Baiada Group in New South Wales,' June 2015.

3 'Australian Retailers Rivers, Coles, Target, Kmart Linked to Bangladesh Factory Worker Abuse,' Four Corners, 4 June 2013.

4 Nick McKenzie and Richard Baker, 'Surf Clothing Label Rip Curl Using "Slave Labour" To Manufacture Clothes in North Korea,' *The Sydney Morning Herald*, 21 February 2016.

5 'Woolworths, Coles and Aldi Admit to Child Slave Labour Seafood Link,' *The Guardian*, 15 December 2015.

6 See, eg, Richard Johnstone and Andrew Stewart, 'Swimming Against the Tide? Australian Labor Regulation and the Fissured Workplace' (2015) 37 *Comparative Labor Law and Policy Journal* 55; Tess Hardy, 'Who Should be Held Liable for Workplace Contraventions and on What Basis?' (2016) 29 *Australian Journal of Labour Law* 78; and various articles within the special issue of the *Journal of Industrial Relations* on 'Supply Chains, HRM Practices and Labour Standards,' Vol. 57(4), 2015.

7 See, eg, Ryan J. Turner, 'Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law's New Frontier' (2016) 17 *Melbourne Journal of International Law* 188; Brynn O'Brien and Martijn Boersma, 'Human Rights in the Supply Chains of Australian Businesses: Opportunities for Legislative Reform,' *Catalyst and the Australia Institute*, September 2016; Michael Rawling, 'Cross-Jurisdictional and other Implications of Mandatory Clothing Retailer Obligations' (2014) 17 *Australian Journal of Labour Law* 191; and Sean Cooney, 'A Broader Role for the Commonwealth in Eradicating Foreign Sweatshops' (2004) 28 *Melbourne University Law Review* 290.

both *within* and *beyond* Australian borders. It is hoped that this exercise will highlight some of the tensions inherent in Australian regulatory efforts to promote responsible business conduct, as well in encouraging greater exchange of analytical and empirical insights between what tend to be separate conversations running along disciplinary divides, with labour law and industrial relations scholars on the one hand, and the business and human rights and corporate law scholars on the other.

The overview presented in this paper reveals somewhat of a paradox. At the domestic level, Australia has adopted what are widely regarded as innovative and relatively effective, though fragmented and incomplete, approaches to supply chain regulation. These include the broader activities of the federal labour inspectorate as well as industry and standard-specific initiatives. At the transnational level, however, Australia is lagging well behind its counterparts, particularly in North America and Europe. Despite the high number of Australian businesses with transnational supply chains, the Australian government does very little in legal or policy terms to regulate this activity or even to encourage businesses to respect and promote basic labour rights throughout their business operations and relationships. The paper considers some possible reasons for this apparent paradox and ventures some observations on future regulatory possibilities and trajectories.

II. Background

As in many other developed countries, recent decades have seen increasing reliance by large businesses in Australia on supply chain or network arrangements for product and service provision. Rather than directly employing large numbers of workers to perform work in-house, large businesses organise the production and delivery of services and goods through extensive networks of smaller businesses, with relationships between these businesses governed by commercial contract.⁸ In Australia, supply chain arrangements are found across the economy but are particularly prevalent in road, rail and maritime transport, manufacturing, construction, agriculture, construction, off-shore oil, nursing and homecare, cleaning and waste disposal sectors.⁹ And it is not only private firms that are increasingly adopting supply chain modes of production — governments too are increasingly reliant on outsourcing goods and services.¹⁰

Supply chains often comprise complex business network structures within the same jurisdiction. However, it is also increasingly common for corporate supply chains to extend across multiple jurisdictions. As a result of trade liberalisation, technological innovation and falling transport and communication costs, and in line with global trends in business practice, large Australian firms have shifted the locus of many of their manufacturing and service activities to developing countries, particularly in the Asia-Pacific. Many have also moved away from direct production themselves or by their fully or partially owned subsidiaries towards production via supply chain arrangements, often involving multiple layers of corporate entities and different forms of corporate relationships spread across numerous countries.¹¹ Under this ‘new international division of labour,’¹² activities associated with raw material extraction, processing and manufacturing tend to be undertaken by suppliers in industrialising economies while activities associated with the design,

8 David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can be Done to Improve It* (Harvard University Press, 2014).

9 Johnstone and Stewart, above n 6, 62, and sources cited therein.

10 Michael Rawling and John Howe, ‘The Regulation of Supply Chains: An Australian Contribution to Cross-National Learning’ in Katherine VW Stone and Harry Arthurs, *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (Russell Sage, 2013) 233; and Katherine Ravenswood and Sarah Kaine, ‘The Role of Government in Influencing Labour Conditions through the Procurement of Services: Some Political Challenges’ (2015) 57(4) *Journal of Industrial Relations* 544.

11 John Ruggie, *Just Business: Multinational Corporations and Human Rights* (W.W. Norton, 2013) 2; Stephanie Barrientos et al, ‘Decent Work in Global Production Networks: Framing the Policy Debate’ (2011) 150 *International Labor Review* 299.

12 Jennifer Bair, ‘Global Commodity Chains: Genealogy and Review’, in Jennifer Bair (ed) *Frontiers of Commodity Chain Research* (Stanford University Press, 2009) 1, 5.

research and development and marketing continue to be performed by the large businesses within the industrialised economies.¹³

These developments in business organisation have significant implications for employment practices, including within supplier firms. In many circumstances, ‘lead firms’¹⁴ exert significant influence, if not control, over the business practices of their direct suppliers through contractual terms relating to the nature, price and quality of goods or services produced, the size and frequency of orders, and delivery schedules.¹⁵ Through setting these parameters — which are then passed further down the supply chain — lead firms also influence the pay, working time and other conditions of workers engaged by other entities at various tiers of the supply chain.¹⁶ In some cases, lead firms may directly monitor or intervene in the work practices of those employed within their supplying firms.¹⁷ The lead firm may also wield significant through its power to provide or cease to provide work to a specific supplier.¹⁸ In industries where outsourcing is motivated by cost reduction, contractual pressure from lead firms may have a ‘corrosive effect’ on employment standards, contributing to low wages, insecure employment, work intensification, and health and safety risks.¹⁹

While supply chain arrangements may enhance the economic efficiency of the business enterprise, they create significant challenges for the regulation of minimum employment standards. This is true for both domestic and transnational-oriented supply chains. Within Australia, employment regulation (principally by way of the federal *Fair Work Act 2009* (FW Act) and the common law) continues to be predicated on the dominant ‘employment paradigm’: that is, the presumption of a single employer directly employing employees at a single workplace.²⁰ This means, among other things, that in cases of contraventions of employment standards that occur within domestic supply chains, primary responsibility and liability is assigned to the direct employer at common law.²¹ The proliferation of supply chain arrangements, however, has meant that responsibility for workplace conditions has become ‘blurred.’²² Lead firms are able to structure their activities in a way that they exert significant control over their suppliers’ activities while distancing themselves from any potential legal liability under employment law.²³ As Hardy and Howe emphasise, exclusive focus on the direct employer may also limit the effectiveness of any sanctions imposed for contraventions of minimum standards as punishment of the direct employer may not address the key drivers of non-compliance which are shaped if not determined by more powerful firms higher in the supply chain.²⁴

The challenges posed by complex supply chain arrangements to the regulation of working conditions

13 Chris F Wright and Sarah Kaine, ‘Supply Chains, Production Networks and the Employment Relationship’ (2015) 57(4) *Journal of Industrial Relations* 483, 485.

14 The term is used in this paper to refer to ‘[l]arge businesses with national and international reputations operating at the top of their industries.’: Weil, above n 8, cited in Hardy, above n 6, 80.

15 Rawling, above n 7. The precise nature and level of control and/or influence varies significantly and depends on a range of factors including the nature and terms of the contract between the lead firm and its suppliers, the extent of supplier dependence on the lead firm and so on. For discussion see Hardy, above n 6; and Guy Davidov, ‘Indirect Employment: Should Lead Companies be Liable?’ 2015 37 *Comparative Labor Law & Policy Journal* 5. Within the context of transnational supply chains, see, eg, Yossi Dahan, Hanna Lerner and Faina Milman-Sivan, ‘Global Justice, Labor Standards and Responsibility’ (2011) 12 *Theoretical Inquiries in Law* 117 and Mark Anner, Jennifer Bair and Jeremy Blasi, ‘Towards Joint Liability in Global Supply Chains: Addressing the Root Causes of Labour Violations in International Subcontracting Networks’ (2013) 37 *Comparative Labor Law & Policy Journal* 1.

16 Rawling, above n 15, 195.

17 Ibid.

18 Ibid.

19 Wright and Kaine, above n 13, 489-90.

20 Johnstone and Stewart, above n 6, 80.

21 Hardy, above n 6, 86.

22 Weil, above n 8, 15.

23 Weil, above n 8, 14.

24 Tess Hardy and John Howe, ‘Chain Reaction: A Strategic Approach to Addressing Employment Noncompliance in Complex Supply Chains’ (2015) 57(4) *Journal of Industrial Relations* 563, 564.

are only greater at the transnational level. Transnational supply chains often extend into developing countries with lower de jure or de facto levels of labour protection. Indeed, particularly in labour-intensive sectors, low wages and levels of social protection along with lax enforcement of existing laws may be significant if not determinative factors in many business choices of where to source goods and services.²⁵ As a general rule, Australian labour law does not extend to regulate the employment relationships within these supply chains.²⁶ Under the common law, contractual obligations may arise between an Australian firm and a worker employed overseas where there is a direct employment relationship. However it is far more common for Australian firms to engage labour indirectly through contractual relationships with other legal entities, particularly in developing countries. In these cases, no such contractual obligations arise. While indirect relationships may give rise to action in tort against a lead employer where a worker has experienced significant injury, there are numerous and significant legal obstacles to workers in developing countries pursuing such actions, including the challenge of establishing a requisite duty of care where the lead firm is distanced from the claimant by complex corporate structures and multiple tiers of a supply chain, legal doctrines such as *forum non conveniens*, and logistical and financial challenges.²⁷ The extraterritorial application of the FW Act is also limited. It does not generally extend to regulate the relationship between an ‘Australian employer’ and employees engaged outside Australia to perform work overseas,²⁸ let alone the relationship between an Australian firm and employees of indirect suppliers based in other jurisdictions.²⁹

III. The regulatory landscape in Australia

The increasing disjuncture between contemporary production and employment practices on the one hand and labour regulation on the other has led to the adoption within Australia of a number of regulatory innovations to promote greater accountability of lead firms for working conditions within their supply chains. I provide a brief survey of these efforts below. Before proceeding, however, it is important to clarify the scope of this overview. It considers both regulatory initiatives directed at securing compliance with national legally-mandated minima and initiatives that are directed at promoting better working conditions more broadly (such as those labour rights that constitute internationally-recognised human rights). Secondly, it adopts a broad approach to the concept of state regulation, taking into account not just efforts by the state to influence behaviour through conventional command and control forms of regulation (whereby the state seeks to regulate through the use of legal rules backed by sanction)³⁰ but the use by the state of other regulatory techniques such as provision of information and education, attachment of conditions to government public procurement contracts or offering financial incentives or rewards.³¹ It also recognises that state regulation of working conditions may emanate from a variety of sources and paradigms, ‘from the narrow confines of contract law to broader discourses of human rights and decent work.’³²

25 Richard Locke, Locke, ‘We Live in a World of Global Supply Chains’ in Dorothee Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge, 2016) 299.

26 See further Cooney, above n 7.

27 Ibid.

28 FW Act, s 35(3). Under the FW Act, an Australian employer includes a body incorporated in the country, or whose ‘central management and control’ is located within Australia: FW Act s51(1). There are some exceptions, see FW Act ss 33, 34(1). The FW Act provides that regulations may extend the operation of the Act to anything done by Australian employers outside the country: s 34(3).

29 For two recent cases considering the reach of the FW Act and the need for an ‘appropriate connection’ with Australia, see *FWO v Valuair* (No 2), [2014] FCA 759 and *Australian and International Airlines Association v Qantas Airways Ltd and Jetconnect Ltd* [2011] FWAFB 3706. For discussion see Joellen Riley, ‘Regulating the Employment of Non-Employed Labour: A View from the Antipodes’ in Douglas Brodie, Nicole Busby and Rebecca Zahn (eds) *The Future Regulation of Work: New Concepts, New Paradigms* (Palgrave, 2016) 61, 62-64.

30 Julia Black, ‘Critical Reflections on Regulation’ (2002) 27 *Australian Journal of Legal Philosophy* 1, 2.

1. Domestic regulatory efforts

As noted above, a significant amount of work has been undertaken by labour law and industrial relations scholars to describe and analyse Australian labour regulation directed at lead firm accountability and their domestic supply chains. This regulation is somewhat ‘piecemeal’,³³ and there remain significant gaps in Australia’s regulatory framework.³⁴ However many scholars have also emphasised the innovative and relatively effective nature of these initiatives. For some scholars, they offer a potential model for supply chain regulation in other sectors or even internationally.³⁵

(1) Accessorial liability for contraventions of the Fair Work Act

The ‘accessorial liability’ provisions of the federal FW Act have proven to be a key mechanism to promote greater accountability of lead firms for contraventions of employment standard regulation that have occurred within their supply chains.³⁶ In general, the civil remedy provisions in the Act for failure to comply with minimum employment standards reflect the dominant employment paradigm by ascribing liability for contraventions of certain provisions of the Act and of industrial instruments to the primary employer. However under section 550, responsibility for breach of civil remedy provisions in the Act may be extended beyond the person directly responsible in the breach to others ‘involved in’ the contraventions.³⁷ This includes where a person has aided or abetted the contravention; procured or induced it (whether by threats or promises or otherwise); conspired with others to bring it about; or been, in any way, by act or omission, ‘knowingly concerned’ in the contravention.

The Australian employment standards enforcement agency — the Office of the Fair Work Ombudsman (FWO) — has used these accessorial liability provisions in the past to hold company directors, managers and advisors accountable. It has also in a series of recent cases sought to use them against lead firms ‘involved in’ a contravention by a direct employer lower in their supply chains. In one of the earliest and most significant of these cases, the FWO launched legal proceedings against Coles (one of two giant supermarket retailers in Australia) alleging that it had been knowingly involved in the underpayment of trolley collectors employed by subcontractors.³⁸ The litigation was discontinued in 2014, after the retailer formally accepted ‘ethical and moral responsibility’ for the underpayments.³⁹ Coles also entered into an agreement with the FWO in which it undertook to ‘revamp’ its trolley collection services in recognition of the fact that its former practices rendered workers highly vulnerable to exploitation; repay ten workers; put

31 Peter Gahan and Peter Brosnan, ‘The repertoires of labour market regulation’ in C Arup et al. (eds) *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets* (Federation Press, 2006) 127; J. Howe, ‘“Money and Favours”: Government Deployment of Public Wealth as an Instrument of Labour Regulation’ in Christopher Arup et al (eds) *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (2006) 167.

32 Douglas Brodie, Nicole Busby and Rebecca Zahn, ‘Introduction’ in Douglas Brodie, Nicole Busby and Rebecca Zahn (eds) *The Future Regulation of Work: New Concepts, New Paradigms* (Palgrave, 2016), 1, 3.

33 Johnstone and Stewart, above n 6, 89.

34 See further Hardy, above n 6; Johnstone and Stewart, above n 6.

35 E.g. Michael Rawling, ‘A Generic Model of Regulating Supply Chain Outsourcing.’ In C Arup et al (eds) *Labour Law and Labour Market Regulation* (Federation Press, 2006) 520; Rawling and Howe, above n 10, Igor Nossar, ‘Cross-Jurisdictional Regulation of Commercial Contracts for Work Beyond the Traditional Relationship’ in C Arup et al (eds) *Labour Law and Labour Market Regulation* (Federation Press, 2006) 202.

36 For a discussion of others strategies used by the FWO in this space, see Hardy and Howe, above n 26.

37 Part 4-1 of the FW Act. These standards include the National Employment Standards, a term of a modern award or enterprise agreement or the sham contracting provisions. The civil remedies provided for generally include a pecuniary penalty and compensation orders, although the courts have a broad power to make ‘any order the court considers appropriate’: FW Act, s. 545.

38 *Fair Work Ombudsman v Al-Hilfi* [2012] FCA 1166 *Fair Work Ombudsman v Al-Hilfi (No.2)* [2013] FCA 16. For detailed discussion of this and other cases, see Johnstone and Stewart, above n 6, 76-78; and Hardy and Howe, above n 26.

39 Fair Work Ombudsman, ‘Coles Accepts “Ethical and Moral Responsibility” to Help End Exploitation of Vulnerable Trolley Collectors,’ Media Release, 7 October 2014; Coles Supermarkets Australia Pty Ltd, *Annual Report Pursuant to the Enforceable Undertaking between FWO and Coles* (3 November 2015).

aside a sum to cover any future underpayments; and conduct random audits of its subcontractors to ensure they were meeting their obligations. While FWO has subsequently launched similar proceedings against other firms, the precise limits of the accessorial liability provisions remain unclear.⁴⁰ However they appear to impose a high threshold in terms of the requisite level of knowledge a lead firm must be proven to have to establish liability for breaches occurring further down in its supply chain.⁴¹

The accessorial liability provisions have been used strategically in the context of a broader campaign by the FWO to promote responsibility among lead firms for compliance with minimum employment standards within their supply chains.⁴² While professing their commitment to ‘leverage the current laws to the fullest extent,’⁴³ the inspectorate has also shown a willingness to use various other regulatory levers available to it. It has, for example, consistently emphasised to the business community that, even where a firm may not attract legal liability for contraventions of minimum employment standards within its supply chain, it runs the risk of incurring significant reputational and brand damage if its customers, suppliers, shareholders or the broader public learn that it has been profiting from the exploitation of vulnerable workers, especially where the firm is an established, profitable brand.⁴⁴ The FWO has also produced information and educational material encouraging business to minimise the risks of non-compliance within their supply chains through measures such as including clauses in all contracts requiring suppliers to adhere to the requirements of the FW Act, and undertaking due diligence to ensure contracted payments are reasonably able to cover the entitlements of those employees performing the work.⁴⁵

(2) Work, health and safety regulation

A second economy-wide regulatory initiative directed at securing greater accountability of lead firms for working conditions within supply chains is found in Australian work health and safety (WHS) regulation. In recent years, all Australian states except Victoria and Western Australia have adopted harmonised WHS Acts which have purposefully moved away from the ‘employment paradigm’ towards a regime which more adequately recognises risks to workers arising from contemporary business models.⁴⁶

Three features of the harmonised WHS Acts are particularly relevant to supply chains. First, the statutes impose a primary duty of care not on the ‘employer’ but on ‘a person conducting a business or undertaking’ (PCBU).⁴⁷ This duty is owed towards all persons who carry out work for that businesses or undertaking, regardless of the arrangement under which they work.⁴⁸ Importantly, the provisions are drafted in such a way as to prevent business higher up a supply chain from shifting liability or responsibility for WHS onto businesses or workers further down the chain.⁴⁹

Second, the nature of the liability imposed on lead firms under the harmonised WHS Acts is duty-based

40 See further (Hardy 2016 paper, section 3.4).

41 To be liable under section 550, an alleged accessory must have had ‘knowledge of the essential matters which go to make up the contravention,’ even if they were not actually aware that the law was being broken. For discussion see Hardy, above n 6.

42 See Hardy and Howe, above n 26.

43 Natalie James, ‘The Fair Work Ombudsman’s Role in the Development of Workplace Law,’ Address to the Australian Labour Law Association National Conference, 4 November 2016.

44 See, eg, *ibid.*

45 See, eg, <https://www.fairwork.gov.au/about-us/news-media-releases/newsletter/august-2016/what-is-accessorial-liability>.

46 See further Johnstone and Stewart, above n 6, Part VI and Richard Johnstone, ‘Regulating Health and Safety in “Vertically Disintegrated” Work Arrangements: The Example of Supply Chains’ in John Howe, Anna Chapman and Ingrid Landau (eds) *The Evolving Project of Labour Law: Foundations, Development and Future Research Directions* (Federation Press, in press).

47 See ss.19(1)-(2) of the harmonised WHS Acts. PCBUs includes ‘employers, principal contractors, head contractors, franchisors and the Crown’: WHS Acts s 5.

48 The term ‘worker’ is defined broadly to include a contractor, subcontractor, employee of a labour hire company, outworker and a volunteer: WHS Acts s. 7.

49 This is done through stating that: duties imposed under the Act cannot be delegated; that one person can owe a number of duties; and that more than one person can hold a duty and each person must comply with the duty even though it might also be owed by others: WHS Acts ss14-16.

rather than strict. All officers of a PCBU have the duty to ‘exercise due diligence to ensure that’ the PCBU ‘complies with’ a duty or obligation that the PCBU owes under the Act.⁵⁰ This due diligence obligation has the effect of requiring each officer of a PCBU to take proactive steps to gain an in-depth knowledge of the entity’s supply chain and the WHS risks worker engaged in these chains face, as well as to adopt additional voluntary measures to minimise legal liability.⁵¹

Third, the Acts effectively require lead businesses to consult, cooperate and coordinate their activities to ensure the health and safety of workers throughout their chains. This is done through imposing horizontal duties on PCBUs to consult with each other and vertical duties on PCBUs to consult workers involved in their work arrangements.⁵² As Johnstone and Stewart emphasise, to discharge this duty effectively, each party in a supply chain ‘must know who is carrying out the actual work and the terms and conditions under which they are working.’⁵³

(3) Industry-specific models

Australia also has several forms of industry-specific supply chain regulation, developed in response to a recognition of both the high level of vulnerability experienced by workers in these sectors and the need to regulate the activities of lead firms to improve working conditions sector-wide. The most well-known and longstanding of these industry-specific arrangements is in the textile, clothing and footwear (TCF) sector. This model seeks to leverage the commercial power of the lead firm to ensure that vulnerable workers in the supply chains receive basic workplace entitlements such as minimum rates of pay, conditions and work health and safety.⁵⁴ Key features of the model, which is implemented through statutory and award provisions at the federal and state levels⁵⁵ include:

- 1) provisions deeming ‘outworkers’⁵⁶ to be ‘employees,’ to enable their access to basic workplace entitlements such as minimum rates of pay and penalty rates for overtime;
- 2) provision of an expanded right of recovery, enabling workers to bring claims against third party firms higher up in the supply chain (who can then seek redress from the person actually liable),⁵⁷ and
- 3) a reverse onus of proof in cases where a demand for payment is served against ‘an apparent indirectly responsible entity.’⁵⁸

In addition, legislation in two Australian states provides for the adoption of mandatory clothing retailer codes which impose a series of disclosure and transparency requirements on retailers and suppliers within the industry. Under these codes, retailers and suppliers must include mandatory terms in their contracts requiring contractors and subcontractors in the chain to inform them where and under what conditions goods are produced. Retailers at the top of supply chains are also required to record and disclose information relating to work performed under all contracts for the supply of clothing products at every level of the supply chain. This includes details on the type of work being performed, by and through whom and what quantity. This information must be disclosed, regularly and on request, to the state enforcement agency and relevant trade union. The regime ‘capitalises on retailers’ commercial influence in the clothing supply chain to ensure the transparency of the contracting process in the supply chain and to efficiently capture crucial information about where production work is taking place and by whom.’⁵⁹ Moreover,

50 Harmonised WHS Acts, s. 27.

51 The substance of this duty is enumerated in section 27(5) of the WHS Acts.

52 Harmonized WHS Acts, ss. 46-49.

53 Johnstone and Stewart, above n 6, 82.

54 See further Igor Nossar et al, ‘Protective Legal Regulation for Home Based Workers in the Australian Textile, Clothing and Footwear Industry’ (2015) 57 *Journal of Industrial Relations* 585; Rawling (2014) and (2006).

55 At the federal level, see FW Act, Part 6-4A, and the Textile, Clothing, Footwear and Associated Industries Award 2010.

56 These are generally workers at the bottom of TCF supply chains employed as independent contractors. See FW Act s 789BB.

57 A worker cannot however recover entitlements against a retailer which did not have rights to supervise or otherwise control production prior to the delivery of goods: FW Act s 789CA(5).

58 FW Act ss 789CA-789CF.

through requiring disclosure of key information such as sites of production to the relevant trade union, it provides third parties with an important role in monitoring compliance with the regime.

A somewhat similar example of supply chain regulation is found in the transport sector. Here, a *Heavy Vehicle National Law* seeks to make each party in the supply chain with the capacity to exercise control or influence over any transport task equally responsible for compliance with the road transport laws.⁶⁰ It requires each party in the chain (even where they have no direct role as a driver or transport operator) to take all reasonable steps to ensure a heavy vehicle driver can perform their duties without breaching road transport laws and that the terms of work contracts or consignment do not result in, encourage, reward or provide an incentive for the driver or other party in the chain to contravene any road transport law. In addition, between 2012 and 2016, a Road Safety Remuneration Tribunal operated with a mandate to determine working conditions in the road transport industry across Australia and the power to impose binding requirements on all supply chain participants for the pay and safety of both employee and independent contractor drivers.⁶¹ While the Tribunal has been recently abolished by the Federal Liberal/National Coalition Government, scholars argue it continues to offer a promising model for supply chain regulation in sectors with complex hierarchical supply chains.⁶²

2. Transnational regulatory efforts

Before proceeding to outline the regulatory framework with respect to Australian-domiciled businesses and their transnational supply chains, it is important to provide some international context. Recent years have seen a growing international consensus on the nature and extent of business responsibility in this area. In 2011, the Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (UNGPs).⁶³ A set of non-binding principles, the UNGPs reiterate the duty of all states under international law to protect against human rights abuses within their territory and/or jurisdiction by third parties, including business enterprises.⁶⁴ They further make clear that states should clearly convey the expectation that all business enterprises domiciled in their jurisdiction respect human rights throughout their operations.⁶⁵ This may include through ‘domestic measures with extraterritorial implications [such as] requirements on ‘parent’ companies to report on the global operations of the entire enterprise.’⁶⁶

The UNGPs also state that business entities have a responsibility to respect all internationally-recognised human rights (which of course include a large number of labour rights).⁶⁷ This means that business enterprises should avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts where they occur. Most relevantly to supply chains, business should also seek to prevent or mitigate adverse rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to these impacts.⁶⁸ The UNGPs recommend that businesses operationalise this responsibility through conducting human rights due diligence: a process to identify, prevent, mitigate and account for how they address actual and potential

59 Rawling, ‘Cross-Jurisdictional and other Implications of Mandatory Clothing Retailer Obligations,’ above n 7, 204-206.

60 *Heavy Vehicle National Laws* have been passed in all Australian states and territories except the Northern Territory and Western Australia.

61 *Road Safety Remuneration Tribunal Act 2012* (Cth). For further discussion, see Richard Johnstone, Igor Nossar & Michael Rawling, ‘Regulating Supply Chains to Protect Road Transport Workers: An Early Assessment of the Road Safety Remuneration Tribunal’ (2015) 43 *Federal Law Review* 397.

62 *Ibid.*

63 *Human Rights Council, Human Rights and Transnational Corporations and Other Business Enterprises*, 17th sess, Agenda Item 3, UN Doc A/HRC/17/4 (16 June 2011).

64 UNGP 1.

65 UNGP 2.

66 UNGP, Commentary on Foundational Principle 2.

67 UNGP 11 and 12.

68 UNGP 13.

impacts on human rights throughout their operations and activities.⁶⁹ Other global soft law instruments such as the *OECD Guidelines for Multinational Enterprises* have subsequently been updated in line with the UNGPs, and contain detailed guidance for companies on the nature and extent of the responsibility to conduct due diligence on their supply chains. These normative standards on business conduct with respect to transnational supply chains, while continuing to be ‘soft’ law, have gained even greater global momentum as a consequence of the Rana Plaza disaster in Bangladesh in 2014.⁷⁰

In a related development, a number of industrialised states have now adopted regulatory measures directed at encouraging large companies domiciled or operating within their territory to have regard to the actual and potential negative human rights (including labour rights) impacts within their supply chains. To date, these have consisted largely of transparency-based measures: that is, measures requiring businesses above a threshold size to disclose publicly the steps they are taking to identify and address certain egregious labour practices in their supply chains, such as slavery and human trafficking.⁷¹ Some states have gone further. France, for example, has recently adopted legislation imposing a duty on large firms to establish and implement ‘vigilance plans’ to identify risks and prevent human rights violations and serious health and safety injuries arising from their activities and those of companies they control, as well as from within their supply chains.⁷²

(1) Forced labour and human trafficking

Slavery, ‘slavery-like’ practices (including servitude, forced labour and deceptive recruiting for labour or services) and human trafficking are all criminal offences under Australian law,⁷³ and the Australian Government has adopted a ‘comprehensive whole-of-government’ approach to combating these practices within Australia and abroad.⁷⁴ As part of these ongoing efforts, it has recognised the ‘vital role’ business has to play in addressing severe labour exploitation, including within supply chains.⁷⁵ In 2014, the Minister of Justice convened a multi-stakeholder Supply Chains Working Group to propose strategies to address serious labour exploitation in supply chains. The Group delivered its report to the Minister in December 2015, which took almost a year to respond. In November 2016, in response to the Group’s recommendations, the Government committed to working collaboratively with business and civil society over the following twelve months on a suite of possible ‘light touch’ regulatory initiatives. The only firm commitment was to the creation of a suite of awareness-raising materials for business. The Government also committed to ‘consider’ the feasibility of a model for large businesses in Australia to publicly report on their actions to address supply chain exploitation; ‘examine options for’ an awards program for businesses that take action to address supply chain exploitation; and ‘explore’ the feasibility of a non-regulatory, voluntary code of conduct for high risk industries.⁷⁶

According to the Attorney-General’s Department, the Government has also established ‘robust’ Commonwealth procurement rules ‘which ensure that businesses providing goods or services to the

69 UNGP 15.

70 In June 2015, for example, the Leaders of the G7 called for the private sector to implement human rights due diligence, including in relation to working conditions within supply chains: *G7 Leaders’ Declaration*’ (8 June 2015) <https://www.whitehouse.gov/the-press-office/2015/06/08/g-7-leaders-declaration>.

71 *California Transparency in Supply Chains Act*, Ca. Civ. Code § 1714.43 (2012); the UK’s *Modern Slavery Act* of 2015, s. 54(1). See also the US Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

72 A company may be liable for a civil fine of up to € 10 million for failure to produce a plan, or three times this if such a failure leads to injuries that could have otherwise be prevented. The French text of the Act is available at <http://www.assemblee-nationale.fr/14/pdf/ta/ta0924.pdf>. At the time of writing, the Act was subject to constitutional challenge.

73 *Criminal Code Act* 1995 (Cth), Divisions 270 and 271.

74 See, eg, Commonwealth of Australia, *National Action Plan to Combat Human Trafficking and Slavery 2015-19*, 2014.

75 See, eg, Department of Foreign Affairs and Trade, *Amplifying Our Impact: Australia’s International Strategy to Combat Human Trafficking and Slavery*, 23 March 2016, 17.

76 ‘Working with Business and Civil Society to Target Human Trafficking and Slavery,’ Joint Media Release, the Hon Julie Bishop MP, the Hon Peter Dutton MP and the Hon Michael Keenan MP, 28 November 2016.

government do not use products affected by human trafficking, slavery or slavery-like practices in supply chains.⁷⁷ The regulatory framework for this undertaking, however, appears under-developed. It consists of a general requirement in the Commonwealth Procurement Rules for Commonwealth Government officials to act ethically,⁷⁸ and a two-page information sheet for Commonwealth procurement officers on ethical procurement and supply chain exploitation.⁷⁹ Procurement officers do not appear to be supported or equipped with the tools and information necessary to further this policy objective, nor do these considerations seem to be further formally integrated into the procurement process (for example through imposing specific requirements at the tender qualification, assessment or contractual stages).⁸⁰

Two other developments are relevant here, though neither has yet eventuated in the adoption of regulatory measures. First, the Australian Government has indicated its commitment to ‘consider’ ratification of the 2014 International Labour Organisation (ILO) Protocol to the Forced Labour Convention. This is relevant as the Protocol recommends that states ‘support due diligence by both the public and private sectors to prevent and respond to risks of forced or compulsory labour.’⁸¹ Secondly, and perhaps most significantly, the Attorney-General has recently requested the Federal Parliament’s Joint Standing Committee on Foreign Affairs, Defence and Trade ‘to inquire into and report on Establishing a Modern Slavery Act in Australia.’⁸² This inquiry will cover, among other things, the incidence and current regulation of modern slavery and other forms of severe labour exploitation in domestic and global supply chains, as well as the desirability of further regulatory intervention in this area.

(2) Addressing other forms of labour exploitation in transnational supply chains

Several Commonwealth government departments have web pages that seek to convey the Federal Government’s expectations with respect to businesses and their overseas activities. The Attorney-General’s Department’s ‘Business and Human Rights’ web page, for example, explains that ‘the Australian Government encourages businesses to apply the United Nations Guiding Principles on Business and Human Rights,⁸³ and briefly enumerates the ‘business case’ for voluntarily doing so.’ Similar information is published by the Department of Foreign Affairs and Trade (DFAT). Australia’s national human rights institution, the Australian Human Rights Commission (AHRC) is more active in this area. It has produced information and advice to business in the form of a research and guidance document entitled *Human Rights in Supply Chains: Promoting Positive Practice*⁸⁴ and a series of business and human rights factsheets.⁸⁵ In none of these cases, however, is there evidence of these statements of commitment or informational material being actively disseminated to a broad business audience. DFAT also promotes business engagement in this area through its business partnership program. However there has been only one partnership of particular relevance to date: a two-year AU\$350,000 partnership with the Global Compact

77 <https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Business-and-Human-Rights.aspx>.

78 Department of Finance, Commonwealth Procurement Rules: Achieving Value for Money, 1 March 2017.

79 [ps://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Pages/Human-trafficking-guidelines-and-fact-sheets.aspx](https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Pages/Human-trafficking-guidelines-and-fact-sheets.aspx).

80 Contrast this approach with the various initiatives developed by the US Government, including research tools and guidance for federal contractors. These initiatives are enumerated in the US National Action Plan on Responsible Business Conduct, Outcome 1.3: Leveraging US Government Purchasing Power to Promote Higher Standards.’ On using public procurement to promote labour standards, see further Howe, above n 30.

81 <http://dfat.gov.au/about-us/publications/Pages/amplifying-our-impact-australias-international-strategy-to-combat-human-trafficking-and-slavery.aspx>. See also the Department of Employment’s Submission Report to the Commonwealth Parliament on this instrument, May 2015, available at https://docs.employment.gov.au/system/files/doc/other/tabling_of_forced_labour_protocol_and_recommendation.pdf.

82 http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery.

83 <https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Business-and-Human-Rights.aspx>.

84 AHRC, ACCSR, GCNA (2015) *Human Rights in the Supply Chains: Promoting Positive Practice*, Melbourne, December 2015. Available at https://www.humanrights.gov.au/sites/default/files/document/publication/2015_AHRC_ACCSR_HR_in_supply_chains_0.pdf.

85 <https://www.humanrights.gov.au/employers/business-and-human-rights/business-and-human-rights-factsheets>.

Network Australia to ‘promote its mandate and grow its Australian membership base.’⁸⁶

Since 2014, Australia has also held annual multi-stakeholder dialogues on business and human rights, at which supply chain issues have been discussed.⁸⁷ However despite repeated calls from civil society organisations for further progress in this area, including through the development of an Australian National Action Plan on Business and Human Rights,⁸⁸ the Australian Government has limited its commitment to ‘progress domestic consultations on the implementation of the *UN Guiding Principles on Business and Human Rights*, including the possibilities of guidelines to assist Australian businesses operating overseas.’⁸⁹

(3) Promotion of the OECD Guidelines for Multinational Enterprises

A survey of Australian efforts to promote responsible business conduct in transnational supply chains would be incomplete without a consideration of Australia’s obligations under the OECD Guidelines for Multinational Enterprises.⁹⁰ These Guidelines contain detailed recommendations from governments to companies on responsible business behaviour, including with respect to labour standards and human rights in transnational supply chains. As an adhering state, Australia is obliged to have in place a ‘National Contact Point’ (NCP) which is responsible for promoting and implementing the Guidelines by disseminating information and receiving and investigating complaints (termed ‘specific instances’) regarding alleged breaches by Australian-based companies. The NCP is a state-based but non-legal complaints mechanism through which, potentially, workers (or their representatives) engaged within transnational supply chains of Australian-based entities could pursue grievances up through the supply chain. The Australian NCP, however, is widely regarded as ineffective. It suffers from significant structural and operational deficiencies and is routinely compared unfavourably with its counterparts in states such as the UK.⁹¹ It has also come under criticism for misconceiving and misapplying the Guidelines and for failing to follow its own guidance documents.⁹² Despite repeated calls from civil society for its reform, there is little sign of any political appetite to do so.

IV. What accounts for this paradox?

Public policy in Australia now recognises that some level of regulatory focus on lead firms is strategically desirable — if not necessary — to address labour abuses within supply chains. This recognition is reflected in a series of regulatory initiatives applying to domestic supply chains. Yet this recognition stops abruptly at our shores. What accounts for this apparent paradox? While detailed analysis is beyond the scope of this paper, several possible explanations are discussed below.

The least convincing explanation is that regulatory efforts are not needed: Australian businesses

86 See further <http://dfat.gov.au/aid/who-we-work-with/private-sector-partnerships/opportunities/Pages/global-compact-network-australia-business-development-partnership.aspx>.

87 AHRC, ACCSR, GCNA, above n 84, 8. Summaries of these dialogues are available at <https://www.humanrights.gov.au/employers/business-and-human-rights>.

88 See, eg, AHRC, ‘Implementing the UN Guiding Principles on Business and Human Rights in Australia: Joint Civil Society Statement,’ August 2016 <https://www.humanrights.gov.au/sites/default/files/Implementing%20UNGPs%20in%20Australia%20-%20Joint%20Civil%20Society%20Statement.pdf>. A National Action Plan is a ways in which governments are expected to drive and guide implementation of the UNGPs. At least 12 countries (including the UK, USA and Germany) have adopted NAPs.

89 Department of Foreign Affairs and Trade, above n 72, 18.

90 Available from <http://www.oecd.org/corporate/mne/>.

91 See Shelley Marshall, ‘OECD National Contact Points: Better Navigating Conflict to Provide Remedy to Vulnerable Victims’, Non-Judicial Redress Mechanism Report Series 16, 2016; Kirsten Zornada, ‘The Australian OECD National Contact Point: How It Can Be Reformed,’ February 2017, draft report on file with author. The ANCP is currently a senior executive within the Foreign Investment Review Board of the Australian Treasury. See www.ausnccp.gov.au.

92 See, eg, Marshall, above n 91, 31; Zornada, above n 91; Australian Human Rights Law Centre, ‘Australian National Contact Point Rejects Complaint Against G4S,’ 3 July 2015, <https://www.hrlc.org.au/news/australian-national-contact-point-rejects-complaint-against-g4s>.

already have sufficiently robust policies and processes in place to prevent and address labour rights violations that occur within their transnational supply chains. Evidence on the extent to which Australian businesses choose voluntarily to monitor and influence their transnational supply chains is limited, and there are clearly significant variations according to factors such as sector and business size. However the data available suggests it is the exception rather than the rule for an Australian company to be aware of the conditions under which workers in their supply chain are engaged. A 2015 report examining measures taken by over ninety fashion brands sold in Australia, for example, found over 75% of those brands did not know where their cotton, fabrics and inputs were sourced from.⁹³ Another study found an overall decline in the level of priority accorded to human rights and supply chain issues by Australian companies between 2011 and 2015.⁹⁴ In conjunction with evidence on the prevalence of labour exploitation in global supply chains in the Asia-Pacific,⁹⁵ this explanation seems somewhat implausible.

Another possible explanation goes to lack of regulatory capacity. There is no doubt that, in seeking to address labour exploitation in the transnational supply chains of Australian-domiciled companies, the state faces legal and practical obstacles that are not encountered with respect to domestic-oriented supply chains. However, other states are experimenting with regulatory measures that seek to influence how firms manage labour and human rights risks in their transnational supply chain through imposing reporting and transparency requirements upon firms domiciled within their jurisdiction. It is also the case that Australia has adopted legislation imposing due diligence requirements on firms with respect to their transnational supply chains in other areas.⁹⁶

A more plausible explanation lies in an absence of political will. While there is some recent activity in relation to forced labour and trafficking, there is little indication of a willingness to address broader labour rights issues in transnational supply chains, such as through improving the functioning of the Australian NCP. While the reasons for this state of affairs is beyond the scope of this paper, a contributing factor may be the absence of an international labour rights advocacy and advisory sector within Australia of the scale found in the US, UK and many European countries that is capable of placing the type of concerted and sustained civil society pressure that has been brought to bear in domestic labour rights campaigns, such as that leading to the adoption of supply chain regulation in the Australian TCF sector.

Institutional carriage of regulatory efforts may also be a factor. At present, the state entities tasked with promoting responsible business conduct are largely those responsible for promoting international business activity. There is no question that the involvement of these entities in the task of responsible business conduct is essential.⁹⁷ However it would also seem sensible for entities with a specific interest and expertise in labour and human rights to be more actively engaged in this area of public policy. In the US, for example, the US Department of Labor has been very active in the area of labour rights and transnational supply chains, including working cooperatively with other federal departments in the design and implementation of regulatory initiatives. The Australian Department of Employment has an international engagement section but the latest news and resources published on this section's activities date back to 2014. In a number of other countries, national human rights institutions have taken a leading role in promoting responsible supply chains.⁹⁸ As noted above, the AHRC has begun to engage with these issues — indeed it identified business and human rights as a strategic priority in 2015⁹⁹ — but this engagement

93 Baptist World Aid Australia, *The Australian Fashion Report 2015*, 16 April 2015. Available at www.baptistworldaid.org.au/assets/Be-Fair-Section/FashionReport.pdf.

94 ACCSR, *Annual Review of the State of CSR in Australia and New Zealand*, cited in AHRC, ACCSR, GCNA, above n 84, 8-9.

95 See, eg, ILO, *Decent Work in Global Supply Chains*, Report IV, International Labour Conference, 105th Session, Geneva, 2016.

96 See *Illegal Logging Prohibition Act 2012* (Cth) and the *Illegal Logging Prohibition Regulations 2012* (Cth). See further Turner, above n 7.

97 Indeed policy coherence has its own Guiding Principle: see UNGP 8.

98 See, eg, the work of the Danish Institute for Human Rights.

does not appear to have been supported by a significant allocation of financial or human resources. There may be more activity in the area of transnational supply chains and labour standards if the task were to be taken up ‘by a body that empathises with the social goals instead of one that begrudgingly takes on the duties.’¹⁰⁰

V. Conclusion

This paper has provided an overview of Australian regulatory efforts to promote better working conditions in the supply chains of large Australian firms. It has revealed that while Australia’s domestic labour regulatory framework has developed innovative responses to the regulatory challenges posed by complex supply chains, Australia has made little progress with respect to addressing these challenges at a transnational level. This latter response has consisted largely of statements expressing commitment to international instruments on responsible business behaviour and gently and rather passively encouraging businesses’ voluntary adherence. While the global momentum surrounding the UNGPs and Australia’s strong endorsement of the principles have opened up possibilities for further activity in this area, this has not yet resulted in concrete regulatory proposals or actions. This paper has offered tentative explanations for this inconsistency, arguing that it is largely attributable to a lack of political will although the nature of the present institutional configuration in this area may also be a contributing factor.

It has not been the objective of this paper to draw lessons or insights from the domestic regulatory regime to the transnational, although this is undoubtedly a worthy exercise. There is inspiration, if not instruction, to be drawn from the Australian labour inspectorate’s proactive and strategic approach to encouraging supply chain responsibility, including its willingness to use reputational and other levers to effectively convey regulatory expectations and begin to change industry norms. As others have argued, features of Australia’s TCF regulation may also be adaptable to hierarchically-organised transnational supply chains. Rather, the objective here has been to provide an account of current Australian efforts to engage with the complex public policy challenges that the proliferation of supply chain arrangements poses for employment regulation. This overview has demonstrated that Australia has made progress in conveying to large business domiciled within its jurisdiction that it is no longer acceptable to turn a blind eye to labour exploitation within domestic supply chains. The same message, in an equally compelling fashion, needs to be conveyed with respect to supply chains transnationally.

99 Professor Gillian Triggs, Australian Human Rights Commissioner, Address at the Launch of Human Rights in Supply Chains: Promoting Positive Practice, 2 December 2015. <https://www.humanrights.gov.au/news/speeches/launch-human-rights-supply-chains-promoting-positive-practice>.

100 Jeff Schwartz, ‘The Conflict Minerals Experiment’ (2016) 6 *Harvard Business Law Review* 130, 182.