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Regulating supply-chains to address the occupational health and safety problems associated with precarious employment: The case of home-based clothing workers in Australia

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Abstract

Over the past 20 years the labour market, workforce and work organisation of most if not all industrialised countries have been significantly refashioned by the increased use of more flexible work arrangements, variously labelled as precarious employment or contingent work. There is now a substantial and growing body of international evidence that many of these arrangements are associated with a significant deterioration in occupational health and safety (OHS), using a range of measures such as injury rates, disease, hazard exposures and work-related stress. Moreover, there is an emerging body of evidence that these arrangements pose particular problems for conventional regulatory regimes. Recognition of these problems has aroused the concern of policy makers - especially in Europe, North America and Australia - and a number of responses have been adopted in terms of modifying legislation, producing new guidance material and codes of practice and revised enforcement practices.

This article describes one such initiative in Australia with regard to home-based clothing workers. The regulatory strategy developed in one Australian jurisdiction (and now being 'exported' into others) seeks to counter this process via contractual tracking mechanisms to follow the work, tie in liability and shift overarching legal responsibility to the top of the supply chain. The process also entails the integration of minimum standards relating to wages, hours and working conditions; OHS and access to workers' compensation. While home-based clothing manufacture represents a very old type of 'flexible' work arrangement, it is one that regulators have found especially difficult to address. Further, the elaborate multi-tiered subcontracting and diffuse work locations found in this industry are also characteristic of newer forms of contingent work in other industries (such as some telework) and the regulatory challenges they pose (such as the tendency of elaborate supply chains to attenuate and fracture statutory responsibilities, at least in terms of the attitudes and behaviour of those involved). Thus, should it succeed, this regulatory strategy could serve as a model for intervention in relation to other industries with analogous work arrangements (and indeed some moves are already evident here). The article concludes that the use of tracking mechanisms as well as the potentially historically significant re-integration of three bodies of employment law (industrial relations, OHS and workers' compensation and social security) warrants closer attention in terms of regulating contingent work arrangements.

Introduction

The past twenty years have witnessed a growth in contingent work arrangements such as the expanded use of temporary, fixed-term or leased workers, self-employed subcontractors and home-based work in most industrialised countries. The two terms now most commonly used to describe this array of work arrangements are precarious employment and contingent work. While this shift has sometimes been facilitated by new technologies (such as the potential for remote work afforded by telecommunications), in many instances it is predominantly a consequence of management-initiated change in service delivery or production (such as increased outsourcing or de-institutionalisation of healthcare) or substituting permanent full-time employees with temporary, leased or contract workers. In some cases what we see is the return to prominence of what can only be regarded as employment

arrangements that were common a hundred or more years ago. An example of the latter includes the re-emergence of widespread home-based clothing manufacture in Australia and some other industrialised countries. These arrangements (entailing numerous small workplaces and elaborate multi-tiered subcontracting chains in the case of home-based clothing manufacture) present a particular challenge to conventional or existing OHS regulatory regimes and the minimum labour standards that underpin those regimes.

Since 1995 in particular, there has been a growing stream of published research attempting to measure how the different types of work arrangement just mentioned as well as the increased job insecurity associated with widespread downsizing/restructuring by private and public sector organisations have affected OHS. As at March 2003 it has been possible to identify more than 180 individual studies undertaken in more than 20 countries, covering a wide range of industries (as well as general population studies) and using a range of indices (injury rates, sickness absence, disease, hazard exposures and psychological distress) and methods (longitudinal, survey etc). A series of reviews of this research revealed that the vast majority of these studies (around 80%) linked job insecurity and contingent work arrangements to adverse OHS outcomes (Quinlan et al 2001; Bohle et al 2001; Quinlan and Bohle 2003; Quinlan 2003). Neither country nor industry where the research was undertaken, nor the methods or indices used, appeared to influence these results. For example, of 37 studies of outsourcing or home-based work identified in the most recent review, 27 studies found these arrangements were associated with adverse (Quinlan and Bohle, 2002) OHS outcomes and the remaining 10 studies were deemed indeterminate (as they lacked a benchmark or control group). In other words, studies of these arrangements are yet to find a case where OHS outcomes have not been adversely affected.

In terms of the clothing or garment industry, a number of studies have argued that industry restructuring including the contracting out of work has had adverse OHS consequences for workers (for a Canadian study see Gannage, 1999). The only systematic study of OHS outcomes for clothing outworkers that we are aware of reached findings entirely consistent with the broader body of research on outsourcing and home-based work. This Australian (Mayhew and Quinlan, 1999) study examined self-reported injury amongst 100 clothing outworkers and compared this to 100 factory-based workers undertaking similar tasks. The study found that outworkers reported over three times the number of injuries (including chronic injuries) of their factory-based counterparts and this difference could be directly attributed to the longer hours and pressures associated with the exploitative piecework payment system they worked under. Outworker payments per hour or per garment were between a third and a quarter of the pay of factory-based workers (a finding confirmed by a subsequent survey of outworkers by Cregan, 2001) and as such in breach of legal minimum wage rates specified in the award (explained below). This case is a stark reminder of the sweating debates a century or more earlier where the low pay and long hours of female clothing workers (amongst others) was seen to endanger their health (for a discussion of this and other historical parallels see Quinlan et al, 2001a). Further, none of the outworkers surveyed had made a workers' compensation claim for injuries sustained even though (unlike their counterparts a hundred years ago) they were nominally entitled to make such claims.

Following on from the last point it is worth observing that only a relatively small number of the studies from the now extensive research on the OHS effects of contingent work have sought to measure the regulatory implications of these arrangements in terms of legislative knowledge, the capacity of workers to raise OHS issues, or compliance. A study undertaken by Aronsson (1999) found temporary workers were more likely than permanent employees to report deficiencies in training and OHS knowledge. Temporary workers also believed their employment status inhibited their ability to raise issues and have concerns treated seriously. In short, temporary workers were in a weaker position in terms of both their knowledge of OHS and their capacity to exercise their legal rights. What should be noted about this study is that it was undertaken in Sweden where union density remains relatively high (and far higher than in countries such as the USA, UK, Australia and Canada) – something that might have been presumed to strengthen the position of even temporary workers. A series of Australian surveys (Quinlan and Mayhew, 1999 and 2000) of temporary workers, subcontractors and self-employed workers (including micro-small businesses) indicated that these workers displayed a very limited knowledge of OHS legislative responsibilities (their own and other relevant parties) or of their entitlements to workers' compensation (or the taking out of private insurance in the case of many self-employed workers). In the construction industry elaborate subcontracting chains contributed to considerable ignorance, confusion and blame shifting amongst small builders and subcontractors. A comparable British study found that non-compliance was not simply the result of ignorance but a calculated response to economic pressures and the perceived risk of detection (Mayhew and Quinlan, 1997).

More recently attempts have been made to assess how existing OHS prevention and workers' compensation regimes are meeting needs of contingent workers as well as the broader regulatory challenges posed by these employment arrangements. The broad conclusion drawn from these studies (Johnstone, 1999; Johnstone et al 2001; Montreuil, and Lippel, 2003; and Quinlan 2003) is that OHS legislative regimes largely designed and enforced with permanent employees in large workplaces in mind are only slowly and partially adapting to some very serious challenges posed by contingent work. As far as Australia is concerned the studies found the use of subcontractors, leased workers and the like was conducive to stakeholder confusion about responsibilities under general duty provisions – a problem magnified by design-flaws in some state acts and only partially effective enforcement activity. Second, despite some recent initiatives, there were considerable gaps in the preparation of material or codes of practice to guide employers and others as to their responsibilities (especially in relation to temporary and home-based work). Third, the growth of contingent work had seriously weakened participatory mechanisms in OHS legislation because the relevant provisions were confined to employees (ignoring subcontractors or leased workers), failed to anticipate the effects of smaller workplace size (due to outsourcing etc) on the presence of workplace committees and employer health and safety representatives, and in any case compliance with these requirements was not being monitored. The growth of contingent work has also weakened union membership levels and workplace presence undermining the crucial logistical support for participative mechanisms under OHS statutes (as well as an alternative mode of input) that unions provide. Fourth, the growth of contingent work posed additional administrative problems in terms of identifying the relevant employer (where there were complex subcontracting or corporate 'veil' arrangements), determining the

employment status of particular parties or conducting inspections (in the context of mobile or multitudinous home-based workers). As far as can be determined these problems are not confined to Australia (see Paul and Townsend, 1998; Bernstein et al, 2000; Quinlan and Mayhew, 2000; Johnstone et al 2001; and Montreuil, and Lippel, 2003).

The growth of contingent work also poses serious problems for workers' compensation regimes including a decline in formal coverage and a parallel drop in effective coverage that is as least as significant (due to worker ignorance or fear that making a claim will jeopardize their job or future income). Like their counterparts in prevention, those charged with administering workers' compensation face additional administrative problems in determining worker eligibility and the responsible employer. The increased use of leased labour, subcontracting, small business and some other arrangements has also been associated with various forms of premium avoidance, under-insurance and claims manipulation, notwithstanding enforcement counter-measures. Finally, achieving a return to work for injured workers is more problematic in the case of workers in small business, temporary and leased workers. Again, these problems are by no means confined to Australia (see Paul and Townsend, 1998; Quinlan and Mayhew, 1999; Bernstein et al 2000; Montreuil, and Lippel, 2003).

As will be outlined below, the expanded use of home-based workers in the clothing industry provides a specific illustration of most of the regulatory problems just identified (for a Canadian report on regulatory problems in relation to home-based workers more generally, especially women, see Bernstein et al 2000). In many respects it is an extreme case. At the same time, this industry has been the subject of an innovative regulatory strategy designed to address the OHS problems of clothing outworkers in Australia. This paper traces the development and tries to assess its broader implications. The paper is divided into two parts. The first part establishes the context for assessing this development by identifying key characteristics of the industry (including the industrial relations framework and the growing use of outworkers) and the long history of regulatory attempts to deal with the underpayment and risks experienced by outworkers. Attention will focus on the period since the 1980s although earlier developments will be mentioned. The second part of the paper will describe the new regulatory strategy introduced in New South Wales, and now spreading to other jurisdictions.

The Framework for the Regulation of Working Life in Australia

Australia is a federation. Legislative and executive powers are distributed between, on the one hand, the Federal Parliament and, on the one hand, the various state and territory legislatures which exercise complementary residual responsibilities within their geographically determined jurisdictions (see Creighton and Stewart, 2000, Chapters 3 and 4; Pittard and Naughton, 2002: chapter 9; Williams, 1998).

Under this Federal structure established in 1901, both the Federal and the various state industrial relations systems developed a common approach to the regulation of pay and general working conditions through centralised tribunals. The tribunals have regulated the pay and conditions of workers engaged under contracts of employment through "industrial awards" which have governed the pay and conditions in each

industry by virtue of the award's status as delegated legislation. Traditionally, the legal right to secure compliance with these industrial awards (by means of inspection and prosecution) has been granted both to government inspectorates and also to trade unions. Since 1919 the pay and conditions of workers engaged in the industrial production of clothing in Australia have been governed by a succession of corresponding Federal and state tribunal awards.

OHS and workers' compensation have, however, been regulated by a separate statutory framework. The Australian constitution does not contain a head of power enabling the federal government to regulate OHS, workers' compensation and rehabilitation so these matters are regulated by state and territory governments (see Johnstone, 1997, 88-93). Each state and territory (and the federal government in relation to commonwealth government workers and the maritime industry) has enacted a separate OHS and a workers' compensation and rehabilitation statute (see Johnstone, 1997, chapters 3, 11 and 12). OHS statutes contain "general duties", which are imposed upon employers in relation to employees and persons other than employees; self-employed persons; persons in control of premises; designers, manufacturers, suppliers and importers of plant and substances; and employees. These general duties are supplemented with more specific provisions in regulations, and guidance material in codes of practice. These OHS statutes, and their regulations and codes of practice, generally regulate OHS across all industries (although there are specific provisions for some industries in regulations and codes of practice), rather than adopting the industry specific approach which has characterised the development of industrial awards (see above). Thus the OHS and workers' compensation of clothing workers in Australia has historically been governed by general OHS statutes enacted at the state level.

Consequently, three separate areas of law regulate the working life of clothing workers in Australia: industrial awards, OHS legislation and workers' compensation legislation. Each of these areas has developed its own legal framework and regulatory style, with different regulatory institutions, varying roles for trade unions and inconsistent legal definitions of who is a "worker" for the purposes of legal protection, remedy and redress. The historical role of trade unions has been most prominent in the field of industrial relations law, where collective bargaining and tribunal award-making has played a central role in setting minimum labour standards for pay and conditions, while the definitions of the types of workers covered by the different areas of regulation is broadest in the OHS arena (see Clayton, Johnstone and Sceats, 2002).

This "trifurcation" between three traditionally disparate fields of law has long been problematic for employers, as well as for workers and their unions. We argue in this paper that it is not practically possible to isolate issues of minimum labour standards in the Australian clothing industry to the traditional institutions of "industrial" (or "workplace") relations without also resolving the necessary impacts of those issues upon the health, safety, compensation and rehabilitation of affected workers in precarious employment in the industry. We argue that low pay drives hazardous practices and also affects actual access to workers' compensation (even where contingent workers have been granted formal legal rights to such compensation). Further, while the clothing industry may exhibit unique features relating to home-based clothing workers, our analysis of industrial structure, resultant problems and

potential remedies may be relevant to other industries where similar issues and concerns arise.

Home-based Clothing Workers

Traditionally, home-based clothing workers in Australia have been referred to either as "homeworkers", "outdoor workers" or "outworkers". During the twentieth century, these outworkers were engaged on a seasonal basis as a reserve source of production labour for clothing factory managers who sought to respond to temporary seasonal peaks of demand for clothing by giving out orders for clothing work to be performed by outworkers at their places of residence, as an alternative to more expensive capital investment in increased clothing factory production capacity. The overwhelming majority of clothing outworkers have been female sewing machinists, often women who have traditionally been restricted in their opportunities for factory employment by the need to combine childcare with income-producing work.

In addition, especially since the extensive immigration into Australia in the aftermath of the Second World War, the ranks of these outworkers have overwhelmingly been composed of migrant women with language backgrounds other than English (and since the 1980s especially from east Asia). The experience of cultural isolation for many recently arrived migrants in a predominantly Anglo-centric society combined with social isolation for women with childcare responsibilities has contributed to the creation of a vulnerable female immigrant workforce particularly susceptible to economic exploitation by the commercial intermediaries between the factory sector and the outworkers.

Every clothing industry award handed down by the relevant industrial tribunals since 1919 has attempted to regulate the pay and conditions of home-based clothing outworkers in Australia. In the period from 1919 to 1987, these attempts principally took the form of prohibitions (conditional or otherwise) against the practice of outwork in the clothing industry, supplemented by the prescription of minimum award pay rates and conditions in relation to the tightly restricted categories of legally permissible outwork. The decisions handed down by these tribunals have "disclosed widespread breaches of awards and statutory provision" which have attempted to protect the working conditions and pay of outworkers (*Re Clothing Trades Award 1982* (1987) 19 IR 416 at 422). As the Australian Conciliation and Arbitration Commission member, Riordan DP, in 1987 remarked in *Re Clothing Trades Award 1982* (1987) 19 IR 416 at 422-423:

> The employment conditions are substantially below those described by the relevant awards and/or State statutes and there is widespread failure to provide for workers' compensation insurance as required by State legislation. The rate of pay received by persons who perform work as outdoor workers appears to be between $2 and $4 per hour… This work is being performed at rates of remuneration and under other employment conditions which are substantially inferior to those prescribed by the relevant award standards … The evidence given established the existence of a well organised system of avoidance and/or evasion of federal and state arbitral award and statutory duties by a variety of companies, firms and persons engaged in the manufacture of clothing.

The same tribunal decision noted, at page 423, that a "marked increase in this avoidance and/or evasion has occurred over recent years" with "the reason for the growth in this particular method of performing work" being described, at page 423, by one employer witness as

> always related to the growth of ethnic [sic] minorities in the community and the fact that it is one of those industries that it is easy to enter capital-wise and there are people ruthless enough to exploit those in a position to be exploited.

In the words of Riordan DP (at 442):

> The results of all that has occurred since the first award was made in 1919, and all the attempts made to regulate this aspect of the industry, has been the survival, and over the years the massive growth, of a situation, where there is gross exploitation of persons who have very little, if any bargaining strength [since] any expression of dissatisfaction has been answered by the assertion that if the outdoor worker who makes the complaint does not wish to do the work at the level of remuneration being offered some other person will do so… The undisputed facts reveal the existence of widespread and grossly unfair exploitation of migrant women of non-English speaking background who are amongst the most vulnerable persons in the workforce (at 419).

The Structure of the Clothing Production Industry in Australia

The "very dramatic increase in the volume of work performed by outdoor workers over recent years" (*Re Clothing Trades Award 1982* (1987) 19 IR 416, *per* Riordan, DP at 423) has resulted from changes in the structure of the Australian economy. Until the 1970s, manufacturing production in Australia received a relatively high level of industry protection from foreign competition in the form of substantial tariffs levied against imports. During this period a substantial proportion of clothing manufacture took place in numerous comparatively large clothing factories. Towards the end of this period, this large factory sector was characterised by a high degree of unionisation and a considerable degree of compliance with award, OHS and workers' compensation obligations.

During the 1970s, this situation was irrevocably altered by continual (and at times precipitous) reduction in the levels of industry protection for domestic clothing manufacturing as successive federal governments pursued a neo-liberal trade agenda. The decline in tariff protection against foreign imports led to a restructuring of domestic clothing production, with the closure of most large clothing factories and the loss of thousands of clothing workers' jobs in the factory sector. At the same time, an oligopoly of major retailers consolidated their position in the Australian clothing industry (see below) and have come to exercise a disproportionately great commercial influence over the purchasing of domestically produced clothing manufactures.

By 1987, the uncontroversial testimony of a specialist witness at the 1987 tribunal proceedings in *Re Clothing Trades Award 1982* (1987) 19 IR 416 described (at 426-427) "the structure of the clothing industry and its workforce" with particular reference to a

> transfer of persons from full time factory employment to outdoor work … in the following terms: … the increase in import penetration and the increase in concentration in the retail sector has imposed far greater competitive pressures on

> [the clothing industry] over the period. We have seen people made redundant from the visible industry, and we have seen enterprises go out of business. Those pressures as from the … demand side and the release of capital equipment and employees from the supply side, as well as anecdotal experiences of increased incidence of both contracting and outwork lead us to believe that many of the workers who have been displaced from the [clothing industry] and, indeed, many of the employers, to some extent, who have been displaced from the [clothing industry] have gone from the visible industry to the invisible industry rather than being redeployed in any other industry or remain totally unemployed.

This "invisible industry" involves a chain of interlocking contracting arrangements for the production of clothing goods offsite. Typically, at the apex of this integrated system are major retailers that enter into arrangements with principal manufacturers for the latter to supply the retailers with clothing products. The principal manufacturer (with a substantial workforce) will give out orders for the production of clothing goods to a smaller manufacturer or offsite contractor or sub-contractor. In some instances a fashion house (with a very small onsite workforce) will give out orders directly to the small manufacturer or offsite contractor. The orders for production from the principal manufacturer or the fashion house will then be successively handed down through a sequence of intervening parties, or "middlemen", until the goods are finally produced by a small factory sweatshop, which usually passes the order for the actual production of the clothing product to an outworker working at home. The finished goods are then delivered back up the chain of contractual arrangements until they finally arrive back at the original principal manufacturers or the fashion houses (see further Nossar, 2002).

The major retailer sector is characterised by a highly oligopolistic concentration of market share and market power, which is used to drive down the prices the major retailers pay to manufacturers and to increase retail profit margins. The retailers are able to secure favourable terms (in the form of price, quality control and turnaround time) in the very specific and detailed contractual arrangements (such as proactive rights of inspection and the inclusion of exacting, heavy penalty provisions), which they effectively impose upon the manufacturing sector (whether domestic or otherwise). The contractual arrangements rarely, if ever, institute effective protections for the outworkers who ultimately produce the goods – for example, by means of contractual provisions to ensure proactive retailer inspection of the treatment of outworkers at the ultimate site of production, or even contractual requirements to report on where the work goes and under what contractual conditions. It is difficult not to conclude that this unwillingness to include protective contractual provisions suggests that key players in the oligopolistic retail sector have been content to preside over a pyramid of obscured interlocking contract arrangements which provide retailers with quickly produced, high quality clothing and high profit margins, principally by exploiting outworkers, who are in the main sufficiently distant from the same retailers to ensure that the retailers can escape any legal liability for this very exploitation. As a recent issues paper (*Behind the Label: Issues Paper,* December 1999) suggested:

> While retailers publicly disassociate themselves with outwork because of the harm it can do them commercially, it is in fact retailers that force fashion houses into the use of outworkers…

These arrangements reflect recent developments in overall business strategy that have focused upon the use or 'rationalisation' of supply chains which have the effect of bypassing or subordinating regulatory standards (for studies of the effect on industrial relations and working conditions in grocery warehousing in the US and Australia see Lund and Wright, 2003 and Wright and Lund, 2003). In practice, the adoption of this supply chain structure serves, legally, to distance effective business controllers over the supply chain from the ultimate locations at which the actual work is performed, and from legal liability for the conditions under which work is performed. This legal distancing is achieved by interposing often quite complex layers of contractual arrangements between successive commercial parties. This type of business structure creates and utilises a host of legal obstacles that serve to hinder the impact of regulation. The legal obstacles range from relatively uncomplicated issues of causation (such as the definition of sufficiently proximate nexus for the imputation of liability) through to more far reaching issues of jurisdiction, both geographical jurisdiction and also longstanding demarcations between traditionally disparate categories of law (such as the varying judicial approaches applied to employment protection law as opposed to commercial contract law and even taxation law).

Occupational Health and Safety Consequences for Clothing Outworkers

The dynamics of this particular business structure have resulted in the low payment and correspondingly long working hours for Australian clothing outworkers who consequently report about three times the number of injuries (both acute and chronic injuries) as their counterparts in factories (Mayhew and Quinlan 1999). Despite this, no outworker surveyed had made a workers' compensation claim (and this finding is supported by a more recent study of regulatory agencies, Quinlan 2003). At the bottom of the supply chain, clothing outworkers were also subjected to considerable occupational violence – largely at the hands of 'middlemen' who gave out the work (and were themselves often under considerable pressure). Almost half (49%) of surveyed outworkers reported being abused, 23% had been threatened and 7% assaulted. These responses were far higher than those for factory based clothing workers (only 4% of whom reported being abused and 1% threatened or assaulted) and comparable to industries with reputations for significant levels of occupational violence such as hospitality, childcare, transport and construction (Mayhew and Quinlan, 2000: 191). The high incidence of occupational violence amongst outworkers highlights the problems that can arise in moving work into homes or other locations remote from supervision, union access or regulatory purview (for evidence of similar problems in relation to homecare work see for example Barling, Rogers and Kelloway, 2001)

Failure to rectify the ongoing and inter-connected industrial and OHS problems experienced by clothing outworkers can be attributed to three systematic deficiencies in the traditional regulatory framework. First, there has been an "entitlement gap" between those workers who are formally entitled to the various protective elements of the traditional regulatory framework, and those who are not. Second, even for workers formally protected by the traditional regulatory framework, the mechanisms for the enforcement of these protections have been inadequate. Third, an overarching deficiency has been the absence of any relevant formal legal obligations upon the major retailers, who effectively control the Australian clothing supply chains. This has provided an economic context in which the different parties competing further

down the supply chains can only survive commercially by reducing their costs, most notably the costs of complying with formal legal obligations.

The "entitlement gap" in Australia has arisen principally because the protective provisions in Australian labour law generally only covers "employees" directly employed by an "employer" under a "contract of employment." As we briefly noted earlier in this paper, until relatively recently the coverage of federal industrial law has been limited to employees working under a contract of employment, which has restricted the various attempts of Federal industrial awards to establish minimum standards of pay and working conditions for clothing outworkers. In direct response to this legal framework, clothing work providers in Australia have configured their organisations and their workforces to minimise their exposure to industrial award obligations and statutory requirements in OHS and workers' compensation legislation, and in other areas, such as taxation. A key element of these strategies has involved denying clothing workers the formal status of "employees" through commercial arrangements under which outworkers are characterised as "independent contractors" or even "trustees" rather than "employees". As a result clothing outworkers have not been able to benefit from award provisions covering minimum wages and conditions, which situation, as we described earlier in this paper, has detrimental OHS consequences for outworkers. While some states (most notably Victoria and Queensland) provide formal statutory protection for workers who are not "employees" in their OHS statutes (see Johnstone, 1999), in the other Australian jurisdictions such protection is denied, either by limiting protection to persons at the employer or self-employed person's "place of work" (as in the case in New South Wales), or by limiting protection aimed at "deemed employees" to sub-contractors and their employees (as is the case in South Australia, Western Australia and Tasmania). "Deemed employee" provisions are also found in workers' compensation and some industrial relations statutes, and, like those found in some OHS statutes, have purported to apply to clothing outworkers by imposing deemed ***employer*** obligations upon the parties which immediately (and directly) deal with these outworkers – that is, the ***direct providers of work*** who are only one step away from those workers in the clothing supply chains. As noted earlier, these direct providers have few resources to carry out their employment law obligations, and tend to be transient members of the industry, so that outworkers engaged by these providers are unlikely to be able to initiate and complete legal proceedings to enforce obligations or recover debts before these providers "disappear" from the industry. More fortunate clothing outworkers have received clothing work orders directly from small factory operators with visible fixed assets and addresses, but even these operators have sought to undercut their competitors by seeking to avoid complying with their legal obligations, or at best by "paper compliance" alone, and by protecting their commercial assets from traditional enforcement proceedings by creatively utilising the "corporate veil" of shelf companies and complex company group structures.

Recent research into the Australian clothing industry has examined the lack of employment law compliance both by principal manufacturers (who supply clothing directly to major Australian retailers) and also by small clothing factories (to which these principal manufacturers contract out their orders for clothing production). In one Australian state jurisdiction, a large proportion of principal manufacturers and small clothing factories alike failed to comply with OHS and industrial obligations relating to the registration of workplaces. This recent research also documented the admitted

willingness of certain principal manufacturers to give out orders for the production of clothing to specific small clothing factories that these principal manufacturers knew to be in breach of the relevant workers' compensation and OHS obligations (Nossar, 2003). The latter finding points to the commercial "cost advantages" which can accrue to supply chain entrepreneurs who source clothing from small factories that evade obligations to provide sufficient workers' compensation premiums for ensuring adequate workers' compensation insurance. This calculated regulatory evasion and the more prevalent underinsurance in the Australian clothing industry undermines any potential "premium incentive" to address the OHS risks faced by clothing outworkers.

Consequently, the traditional regulatory mechanisms at best assign legal responsibility for the condition of these outworkers to a small factory sector that frequently fails to comply with employer legal obligations. For example, in most of the Australian states and territories (Victoria and Queensland being the notable exceptions), the OHS obligations on employers and self-employed persons do not extend far up the contractual chain (see Johnstone, 1999). In the area of workers' compensation insurance within the clothing industry small factory sector, there were "rampant examples of apparent underinsurance (for the purposes of workers' compensation)" (Nossar, 2002). At worst, traditional labour law regulation has failed to assign any legal OHS obligations to the providers of work orders in relation to the OHS of outworkers who receive these orders.

The Social and Political Response in Australia

Since the mid-1980s trade union and community groups have campaigned for legal mechanisms that establish minimum hours and rates of pay – in addition to reasonable working conditions and OHS and workers' compensation entitlements – for outworkers. This pressure led the Federal industrial tribunal, in 1987 and 1988, to adopt novel award provisions designed, *inter alia*, to permit regulatory agencies (including the relevant trade union) to ***track the contracting process*** from the level of principal manufacturers (and fashion houses) down to the industrial outworkers themselves (*Re Clothing Trades Award 1982* (1987) 19 IR 416). In addition, this package of novel award provisions established the legal right of clothing outworkers to receive pay rates and (in general) conditions no less than the legal minimum entitlements of factory-based clothing workers. These important provisions were supplemented by an equally significant Federal industrial tribunal decision in 1995 giving regulatory agencies full legal access to contract details of ***pricing*** at each level of the contracting process. However, unavoidable issues of legal jurisdiction enabled the most significant players in the contracting process – the major retailers – to escape the scope of these new award provisions. Further, these new award developments were isolated to the realm of "industrial relations law", so that the potential advantages of these novel industrial award provisions remained unavailable in relation to the equally pressing concerns about the OHS of clothing outworkers and the lack of their insurance coverage for workers' compensation. The effective enforcement of OHS provisions and workers' compensation coverage for outworkers is equally dependent upon the knowledge of regulatory agencies about the ***location*** of these outworkers and the ***conditions*** (including payment rates and hours of work) under which they labour. In addition, the virtual failure of governmental regulatory agencies to provide sufficient resources even to enforce the available existing protective legal provisions for outworkers ensured that real compliance with such

formal legal provisions remained sporadic at best (Australian Senate Economics References Committee, 1996 and 1998).

In response to these deficiencies, further trade union and community pressure led in 1995 and 1996 to the adoption of voluntary codes of practice by retailers and manufacturing employers aimed at securing these entitlements for outworkers. Predictably, however, such "voluntary" schemes tended to "place the more ethical retailers at substantial commercial disadvantage" (Nossar, 2000) since less ethical retailers who refused to "volunteer" could consequently benefit commercially from the exploitation of outworkers that more ethical retailers had agreed to forego. Only one major retailer adopted a form of the code that facilitated effective enforcement. The retailer was obliged, by that code of practice, to comply with parallel obligations for contractual disclosure and the provision of regular supply lists. The voluntary code of practice also created a particular commercial incentive mechanism for the ***effective commercial remedy*** of supply chain failures to comply with outworkers entitlement obligations. The retailer was obliged to designate a specific corporate officer to whom the relevant signatory trade union could bring specific instances of outworker exploitation, and the retailer was obliged to respond to proven instances of outworker exploitation by means of a range of commercial disciplinary measures aimed at the relevant supplier of clothing. In particular, the voluntary code of practice obliged the signatory major retailer to consider discipline of the relevant supplier by terminating the contract for supply between that retailer and that supplier, and by refusing to enter into further contracts of supply, if the supplier failed to remedy the disclosed breaches of the outworker legal provisions.

The stage was thus set for the development of a new regulatory strategy in Australia, built upon the actual commercial behaviour of parties in the supply chains described in previous sections. This new regulatory strategy also arose from a complementary analysis of the traditional regulatory deficiencies, but an as integrated phenomenon, rather than as a set of disparate problems.

A New Regulatory Strategy

As we demonstrated in previous sections of this paper, the major retailers had emerged, by the late 1980s, as the effective business controllers of domestic Australian clothing supply chains. A close analysis of some standard contractual arrangements imposed by major retailers upon clothing supply chains, and the precise manner in which these retailers exercised effective commercial control over a significant portion of domestic clothing manufacture (see Nossar, 2000), revealed that domestic clothing supply chains were, in reality, already being regulated. This regulation, however, was by private commercial means, in the commercial interests of the major retailers, rather than in the more recognizably traditional form of public regulation through legislation. This private contractual regulation took place by the principal retailers using standardised contractual arrangements to reserve for themselves the right to control substantially the process of manufacturing, and the right to inspect premises where work was performed under the contract. For example, some of these standard retailer contractual supply arrangements empowered the retailer to "at any time (both prior to and upon obtaining physical possession of Goods) inspect Goods, components and ingredients thereof, processes of manufacture and packing, labeling and storage of Goods." The same contractual arrangement gave

the retailer "the right to enter any premises where Goods may be found" and obliged the "Supplier" to provide the retailer "with reasonable assistance in any and all such inspections." Those contractual powers of the retailer were reinforced by precise and onerous penalty and indemnity provisions imposed upon the retailer's supplier in the very same contractual arrangements (Nossar, 2000).

This exercise of commercial power by the major retailers was aimed at obtaining specific price, quality control and delivery time outcomes. The existence (and apparently successful operation) of these contractual mechanisms for the private commercial regulation of supply chains, however, led to the proposal that these same contractual powers could equally be utilised to impose commercial discipline through the clothing supply chain to improve the working conditions of outworkers. More specifically, it was proposed that this effective commercial discipline could be used to secure all improvements in OHS, workers' compensation benefits and wages and general working conditions. In this was it was proposed that the effective commercial discipline imposed by the major retailers upon the clothing supply chain could potentially deliver a holistic improvement in the overall work situation of outworkers – as opposed to simply discrete outcomes in relation to industrial law, OHS or workers' compensation entitlements.

In June 1999 these proposals were elaborated, to integrate the matrix of traditional regulatory mechanisms described earlier in this paper, with more novel commercial proposals that harnessed the contractual power of the major retailers, and to create a model of legislative and administrative measures designed to secure the protection of clothing outworkers (Nossar, June 1999). The new regulatory model adapted the already existing disclosure obligations imposed by recently introduced Federal industrial award provisions providing for contractual disclosure and regular supplier list obligations which applied to all clothing supply chain participants apart from retailers at the apex of the supply chain (see above). It proposed that the major retailers be bound by parallel legal obligations to provide regulatory agencies (including the relevant trade union) at regular intervals with full access to details of contracting arrangements with textile, footwear and clothing (TCF) suppliers, including details of quantities, descriptions and production times and prices of all TCF products supplied. Retailers were also required to provide regulatory agencies at regular intervals with lists of the identities and locations of all parties supplying TCF products during those intervals.

The new regulatory regime also adapted the ***commercial remedy mechanism*** originally introduced in the particular 1995 voluntary code of practice adopted by only one major retailer (see above) whereby suppliers would face commercial discipline for the persistent breach of any category of outworker legal protection, whether such protection was imposed by industrial law, OHS or workers' compensation statute. In the view of the proponents of the new regulatory regime, such a commercial remedy mechanism, potentially affecting (as it does) the continued supply of contracts for clothing work to suppliers, could constitute an effective countervailing pressure (in favour of legal compliance with outworker protections) to counter the apparent commercial encouragement of reduced compliance levels throughout existing clothing supply chains (Nossar, 2003).

The new regulatory model did not just adapt pre-existing legal mechanisms (the contractual disclosure and regular supply list obligations, and the commercial remedy mechanism) to the major retail sector. Perhaps the most innovative aspect of the new regulatory model has been to further extend the implicit integration of traditionally disparate areas of law underlying this novel approach. Not only has this new model sought consciously to integrate industrial relations, OHS and workers' compensation law at the level of determining relevant minimum entitlements for clothing outworkers, but this new regulatory model also proposes a further (and more ambitious) integration between these three areas of law with the traditionally quite separate areas of business, commercial and trade law, as well as taxation law. The new regulatory model proposes that the actual contracting arrangements imposed by the major TCF retailers should be the locus of more active public regulatory intervention. It proposes that legislation import two types of standard contractual provisions into those retailer contractual arrangements (Nossar, June 1999).

The first type of standardised imported provision will require each successive party in the clothing supply chain to provide specified information to the original retailer. Most importantly, each successive party will be required to inform the original retailer about the number and type of TCF products (and the price per product) which form the subject of each successive order contracted out. In addition, each successive party will be further required to inform the original retailer as to whether the monies paid (for successive contracts of supply) are sufficient to provide "adequate alternative entitlements" by comparison with labour award conditions applicable within the geographical statutory jurisdiction within which the retailer's points of sale are located (Nossar, June 1999). In other words, this proposed standardised clause creates an obligatory, and enforceable, contractual mechanism which enables the TCF retailer to be informed about exactly where clothing and footwear destined for retail sale has been manufactured, and under precisely what conditions that clothing and footwear has been produced. The development of this type of standardised contractual provision statutorily incorporated into retailer contracts for clothing supply foreshadows certain potentially far-reaching implications for the hitherto insurmountable enforcement obstacles posed by the fundamental legal issue of geographical jurisdiction. It suggests that appropriately designed contractual legal mechanisms can (at least in part) effectively overcome the barrier which geographical jurisdictional limits have posed for traditional attempts at the enforcement of supply chain statutory obligations. In short, these developments open the way for new contractual mechanisms to ensure that the effective business controllers of supply chains become effectively legally liable for working conditions ***wherever the work is performed***.

The second type of standardised contractual clause imported by statute involves the imposition of contractual legal obligations upon clothing suppliers to ***facilitate targeted compliance auditing and enforcement*** throughout the relevant supply chains by regulatory authorities. The new regulatory model proposes that retailer contracting arrangements for supply of TCF products should contractually require each participant in the supply chain to permit regulatory authorities to access all sites of production without prior notification, upon pain of loss of the supply contracts (Nossar, 2003). These proposed enforceable contractual arrangements for effective regulatory auditing of supply chains would enable regulatory authorities (including the relevant trade unions) to focus their limited inspectoral resources in a way that

avoids the logistical nightmare so far plaguing previous regulatory attempts to deal with the multiplicity of (often concealed) worksites that characterize many forms of precarious employment.

Together, these two types of proposed statutory regulatory intervention into supply chain contractual processes foreshadow the prospect of creatively integrating, by statute, the different areas of labour law and commercial law in order to establish the legal liability of the effective business controllers of supply chains for the OHS risks generated throughout supply chains, that might even stretch beyond national borders, and simultaneously to buttress the practical enforcement of this newly established legal liability. Of course, this prospect depends entirely on the effective business controllers of supply chains, the large retailers, being located within the relevant geographical jurisdiction in which the legislation is enacted. The major Australian clothing retailers have few practical options other than conducting their core commercial activities within Australia. The accretion of intellectual property assets within the brand name value of fashionwear ensures that the major retailers remain anxious to exercise proactively any statutorily imposed contractual powers for tracking and auditing relevant supply chains out of fear of undermining the reputation of those fashion brand names in the eyes of consumers, who, of course, are usually also voters who elect the governments who are introducing the regulatory model.

Taken together, these features of the proposed new model to regulate the effective business controllers of supply chains interact to potentially overcome the two most potent legal obstacles hindering supply chain regulation – the geographical limitations restricting enforcement activity, and the liability limitation which stems from the lack of sufficient legal proximity between the effective business controllers at the apex of the supply chain and those contingent workers engaged in precarious employment at the opposite extremity of the supply chain. Further, the contractual features of the new regulatory model hold out the prospect of effective mechanisms for auditing and enforcement. Indeed, in limited voluntary trials conducted in Australia, these auditing and enforcement mechanisms have been applied at the level of effective business controllers with the objective of obtaining more cost effective compliance outcomes than previously obtained by traditional enforcement methods (Nossar, 2003).

The conditions of work of many clothing outworkers have always been regulated at state, rather than federal, level. For constitutional reasons (see above), OHS and workers' compensation provisions operate at state level. Further, many clothing outworkers have their pay and other working conditions regulated by state industrial awards. The implementation of the proposed regulatory model outlined above has been facilitated by Australia's social democratic party, the Australian Labor Party, holding government in every state and territory jurisdiction in Australia (despite the neo-liberal Liberal-National Party holding power federally). In 2000 the Australian Labor Party committed itself to ensuring that "no outworker in any Australian jurisdiction will have fewer rights to legal redress and protection than are offered by any other Australian jurisdiction." The adoption of this particular policy commitment has set the scene for the progressive implementation of an effectively national uniform scheme of outworker protection. This decision to pioneer novel industrial statutory provisions at the state jurisdictional level represents something of a reversal of the recent trend for industrial relations law reforms to be initiated at the Federal level, before flowing onto to the corresponding state jurisdictions.

The new regulatory model does not focus solely upon the proposed "top down" obligations which would apply upon effective business controllers of the clothing supply chains – the retail sector. The new regulatory model also consists of two other interlocking components that combine "top down" liability (and compliance enhancement) obligations with corresponding "bottom up" rights for outworkers. The first of these two other elements has entrenched the "employee" status of a group of Australian workers in precarious employment – clothing outworkers. In particular, this specific element of the new regulatory strategy has proposed both the statutory creation of adequate special "deeming" provisions for clothing outworkers in state and territory jurisdictions where no such deeming provisions yet existed, and the complementary improvement of already existing deeming provisions to ensure their legal validity, and enforcement efficacy. More specifically, in regards to industrial relations law, the new regulatory strategy has advocated adoption of the deeming provision enacted by the Queensland state industrial statute as the model suitable for most Australian state jurisdictions. Furthermore, in line with its underlying commitment towards integrating the traditionally disparate areas of employment protection law, the new regulatory model has proposed the alignment of industrial law deeming provisions with other deeming provisions in OHS and workers' compensation statutes, in order to overcome the mismatch in key definitions which has served to exacerbate enforcement problems. Finally, in conjunction with these entrenchment proposals, the new regulatory strategy has also proposed amendment of the relevant primary legislation to circumvent any the jurisdictional invalidation of these entrenchment proposals as a result of inadvertent circular reference back to traditional contracts of employment (Nossar, June 1999).

These specific proposals of the new regulatory model have been aimed at achieving effectively enforceable entrenchment of the "employee" status of clothing outworkers – precisely in order to defeat artificial commercial arrangements designed to undermine that "employee" status. This goal has been fundamental to ensuring that clothing outworkers have secure legal rights to the recovery of their work entitlements and the protections of their OHS.

In addition to this overall concern with the effective business controllers at the apex of the clothing supply chains and the entrenchment of "employee" status for outworkers at the other end of supply chains, the new regulatory model has also focused upon the role of the principal clothing manufacturers only one step removed from the position of the effective business controllers in the major retailing sector. While these principal manufacturers are no doubt subject to the commercial power of the major retailers, the control by these principal manufacturers over the dominant fashion brands leave them quite well positioned to proactively secure the delivery of legal entitlements and protections to clothing outworkers in Australia. Towards this end, the new regulatory model has proposed the imposition of specific statutory liabilities upon these principal manufacturers for the industrial legal entitlements of clothing outworkers operating in their supply chains – in conjunction with the creation of the following new statutory recovery mechanism. Under this proposed new recovery mechanism, clothing outworkers are entitled to serve a claim for unpaid industrial entitlements upon any entrepreneur throughout the relevant clothing supply chain up – up to, and including, the level of the principal manufacturers themselves. The form of the claim was proposed to be cheap and simple. Once served with such a claim, the principal

clothing manufacturer effectively experienced a reversal of the traditional onus of proof for civil law recovery. In other words, unless the principal manufacturer could prove that the outworker serving the claim had not done the work or that the claim calculation was erroneous, the principal manufacturer served with such a claim would thereupon be obliged to pay that claim within a relatively short fixed period of time, regardless of how many entrepreneurial parties had intervened in the succession of contractual arrangements between the principal manufacturer and the ultimate clothing outworker who ended up performing the work (Nossar, June 1999).

The new regulatory strategy further proposed that, in parallel with the legal obligations outlined above, statutory obligations for OHS and workers' compensation also be imposed upon principal manufacturers and owed to clothing outworkers. There were also novel proposals for interlocking compliance obligations designed to underpin the effective enforcement of these liability provisions, involving both the statutory creation of adequate workers' compensation liabilities imposed upon principal manufacturers in those state jurisdictions where no such liabilities had hitherto existed, and the complementary improvement of already existing principals' liabilities to ensure the provision of formal entitlements for outworkers. The new regulatory strategy also proposed the corresponding creation, or improvement, of OHS principals' liabilities for the protection of outworkers, also at the state, rather than federal, level.

The New Statutory Regimes

At present, three Australian state and territory jurisdictions are now actively involved in legislating key elements of this new regulatory model. All three of these jurisdictions have either enacted legislation, or are in the process of doing so. Almost all of the remaining Australian state or territory jurisdictions are, at the time of writing, actively considering legislative enactment of the model.

The first Australian state jurisdiction to enact the statutory provisions has been New South Wales, where the enactment of both the *Industrial Relations (Ethical Clothing Trades) Act* 2001 (NSW) and the more recent provisions such as section 175B of the *Workers' Compensation Act* 1987 (NSW) have combined to:

- entrench the "employee" status of clothing outworkers, subject to further statutory amendments to the New South Wales *Industrial Relations Act* to prevent jurisdictional invalidity of certain outworker protections;
- impose liability upon principal manufacturers for outworker entitlements, and to create the recovery mechanism outlined above;
- amend the *Workers' Compensation Act* to begin the process of matching key definitions (such as the definition of "worker") in both workers' compensation and payroll taxation law;
- under the *Workers' Compensation Act*, obligations have been imposed upon principals generally (that is, not only in the clothing industry) either fully and accurately to disclose full details of supply chain subcontracting or else bear the liability for any unpaid workers' compensation insurance premiums throughout that supply chain. This provision contains elements that are very similar to the novel statutory recovery mechanism in sections 127A to 127G of the *Industrial Relations (Ethical Clothing Trades) Act* 2001 (NSW);

- in relation to the proposed major retailer obligations, create a tripartite stakeholder consultation process with a fixed timetable triggering the potential exercise of ministerial statutory powers unilaterally to proclaim mandatory retailer obligations of the type outlined in the new regulatory model above. These powers are not confined to consideration of industrial legal entitlements alone. Rather, any such mandatory retailer obligations are predicated on the delivery of all relevant employment protections for outworkers, both in relation to industrial legal entitlements and also explicitly in relation both to OHS obligations and also access to workers' compensation insurance.

Even before the expiry of the timetable for this tripartite process, the dynamic created by these statutory provisions (and most notably by the limited timetable prior to potential proclamation of mandatory retailer obligations) has already rapidly produced, in the private sector, a new improved voluntary code of practice now promptly embraced by most major Australian retailers and also a sportsgoods code of practice, along with separate auditing arrangements authorised as a state government tender requirement by a public sector effective business controller. Together, these newly adopted codes of practice and tender requirements exhibit all of the key retailer obligations proposed by the new regulatory model. Similar amendments to New South Wales OHS law are now under consideration. For the TCF industries, factory registration obligations have already been introduced by the *Occupational Health and Safety (Clothing Factory Registration) Regulation* 2001 (NSW).

In particular, it should be noted that high profile transnational clothing firms such as Nike have already become signatories to this new Australian sportsgoods code of practice. This new sportsgoods regime entrenches the targeted compliance auditing and enforcement measures discussed earlier by requiring the effective business controllers of the relevant clothing supply chains to contractually secure both identification of all sites of production (without exception) and to also secure access by the relevant trade union to those sites (without any requirement for prior notification of inspections). These contractually secured measures are underpinned by the potential loss of supply contracts for any suppliers who attempt to avoid compliance.

At the time of writing, the tripartite stakeholder consultation process in New South Wales has culminated in a decision to recommend that the relevant minister unilaterally proclaim mandatory retailer obligations which specifically incorporate these targeted compliance auditing and enforcement measures of the type to be found in the new sportsgoods code of practice. It should be noted that this recommendation has been supported by five out of the total six stakeholder organisations represented in this tripartite consultation process. More specifically, this recommendation has been supported by the stakeholder organisations representing both the retailers and a segment of the the manufacturing employers.

In the state of Victoria, the *Outworkers (Improved Protection) Act* 2003 has been enacted by the Victorian Parliament following an inquiry (Family and Community Development Committee, 2002) that, not surprisingly perhaps, identified problems virtually identical to those canvassed in NSW. The Victorian provisions are almost identical to the New South Wales provisions outlined earlier in this section, but follow the original form of the new regulatory model more closely in two ways:

- it explicitly entrenches the "employee" status of Victorian clothing outworkers for the purposes of Victorian OHS law, as well as industrial law;
- it explicitly adopts the Queensland form of the deeming provisions for entrenching "employee" status, as originally proposed in the new regulatory model.

Finally, in the Australian Capital Territory, the Legislative Assembly has recently voted without dissent to commit itself to the imminent introduction of the foreshadowed mandatory retailer legal obligation proposed by the new regulatory model for all TCF retailers, without any requirement for preliminary tripartite stakeholder consultation. Again, the associated debate echoed arguments in other jurisdictions (ACT Hansard, 20 November 2002: 3795-3804). The same vote of the Legislative Assembly committed the legislature to enact OHS statutory provisions consistent with those proposed by the new regulatory model. At the time of writing, the ACT Government is currently involved in discussions about territorial government procurement policy and tender requirements. These discussions involve consideration of a model procurement policy which incorporates targeted compliance auditing and enforcement measures of the type to be found in the new sportsgoods code of practice.

Conclusion

As we argued at the beginning of this paper, recent developments in business strategy are focusing on manipulating supply chains to by-pass OHS regulation and subordinating labour law requirements to business law. We also suggested that the "trifurcation" of labour law obligations in the TCF industry into three categories – minimum wage standards, OHS and workers' compensation, each with its own regulatory philosophy, legal framework and institutions – has created difficulties for regulators, employers and particularly for workers. A study of OHS in relation to clothing outworkers suggested that the issue of minimum labour standards in the industry could not be resolved in one area (for example OHS) without resolving other issues, such as low pay.

While it is too early to fully assess the impact of this regulatory shift, it is widely accepted amongst TCF industry members, regulators and the TCF Union of Australia that the new regulatory regime outlined in this paper will secure a significant change in the working conditions of clothing outworkers. While the structure of the clothing industry would appear to be unique, the approach of modifying regulation to recognise and address power relationships in supply chains has applicability to other industries using multi-tiered subcontracting or analogous structures, such as shipping and construction. Indeed, a not dissimilar approach (which is also being implemented) has been developed to apply to the trucking industry in Australia. This new regulatory model illustrates an integration of otherwise disparate bodies of law - commercial, consumer, industrial relations, workers' compensation and OHS - in such a way as to potentially overcome traditional regulatory limitations in the context of globalised capital and complex commercial and work arrangements that are associated with this.

Further we note that the title of the New South Wales legislation which launched the legislative implementation of the new regulatory strategy discussed in this paper, the *Industrial Relations (Ethical Clothing Trades) Act* 2001 (NSW), explicitly recognises

the ethics of workplace relations – a timely reminder that industrial relations regulation pursues social issues, and that the struggle for fair working conditions for clothing outworkers is a later stage of a struggle for fair working conditions that began in response to “sweated labour” in the nineteenth century.

Beyond these points, our analysis of the TCF initiative highlights a number of broader issues about the regulation of contingent work. First, the "trifurcation" of labour law into three distinct if overlapping bodies of industrial relations/minimum labour standards, occupational health and safety and workers' compensation law is not confined to the TCF industry. It is a general, if historically contingent (for a brief discussion of the bifurcation of OHS and industrial relations law regimes see Carson and Henenberg, 1988), feature of the statutory framework in Australia and most if not all other industrialised countries. Arguably always far from ideal, this "trifurcation" has become increasingly problematic as a result of the effects of the growing pre-eminence of business law and the not unrelated expansion of job insecurity and precarious employment (see Quinlan, 2003). In this regard, there is a need to more closely integrate the three bodies of law if not abolish the "trifurcation", and the TCF initiatives in Australia provide one model of how to do this.

Second, to counter the attenuation if not outright evasion of legislative responsibilities associated with multi-tiered outsourcing or elaborate supply chains requires a combination of clearly enunciated minimum standards, contractual tracking mechanisms and a regulatory focus on the top of chain. Only by making the main beneficiaries of such chains the focus of accountability is it likely that regulators can achieve compliance. The development of chains of responsibility to match the growth of elaborate supply chains is almost certain to occupy an increasingly prominent place in OHS regulatory policy deliberations at both the national and international level. Without such measures conventional regulatory standards and tools will be rendered increasingly impotent. The need for a more active union role in monitoring and enforcement to ensure the effectiveness of such measures also raises critical policy issues in a climate where union influence has been diminishing in many industrialised countries.

Third and finally, the question needs to be posed as to whether a more fundamental questioning is required of those policies and practices that have encouraged job insecurity and contingent work. A growing body of evidence suggests, these arrangements are associated with significant externalities (not simply in terms of OHS but healthcare, social security, human capital development and the like), and devising regulatory responses is both expensive and time consuming. In the light of this a case could be made for a more direct response of discouraging these work arrangements or ensuring the costs to employers, suppliers and others of using them more clearly reflects the burden they impose on the community.

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