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The Australian model of cross-jurisdictional supply chain regulation

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The 105th session of the International Labour Conference considered decent work in global supply chains. During the general discussion on governance systems and measures, the Australian model was presented as an international example of good practice in cross-jurisdictional supply chain regulation (Passchier, 2016). The Australian model is paradigmatic. This article considers the core characteristics of its conceptual framework and its contextual adaptation in the Australian domestic textile, clothing and footwear (TCF) industry.

What is the Australian model?

The core characteristics of the Australian model can be summarised as follows.

Transparency and traceability through all tiers of the supply chain: The Australian model addresses human rights due diligence by mapping the flow of work and the associated transfers of money and goods in order to monitor contractual arrangements.

Contractual arrangements and cross-jurisdictional coverage: The Australian model conceptualises contemporary supply chains as a series of commercial contracts which govern the entire supply chain. Commercial influence is typically concentrated at or near the apex of the supply chain and exerted through complex, pyramidal contracting arrangements, often spanning legislative jurisdictions. Lead firms exercise commercial influence to ensure their commercial interests, notably in terms of price, time and quality. The capacity for commercial leverage is often incrementally curtailed with each successive tier down. Working within existing supply chain structures, the model therefore seeks to embed human rights due diligence protections and provisions in contractual arrangements. In this manner, businesses operating in a jurisdiction, as well as all subsequent tiers of the supply chain - even those outside that jurisdiction¹ - are governed by mandatory legal obligations, including compliance mechanisms and commercial remedies.

Mandatory legal obligations and mutual cooperation: The model establishes robust minimum standards of human rights due diligence throughout the supply chain, ideally through compulsory statutory regulation. It therefore ensures a level playing field for all business entities so that ethical businesses are not commercially disadvantaged by unscrupulous businesses able to undercut their prices. The model concurrently enables constructive and collaborative tripartite partnerships based on commonality of purpose and continued improvement. It emphasises the complementary and crucial contribution of government, businesses and unions, as well as academia and the community sector, to proactively and innovatively advance probity.

The right of all workers in the supply chain to inclusion in human rights due diligence protections and provisions: The model safeguards comprehensive protections, including fair pay and working conditions, health and safety, and entitlements for all workers regardless of their formal employment status or geographical location.² This includes the most vulnerable workers at the bottom of the supply chain, such as clothing outworkers in the textile sector and owner-drivers in the transport sector, who are often considered independent contractors. A written contract is prescribed for all workers, and pre-

carious working arrangements such as zero-hour contracts are proscribed.

The responsibility of all business entities in the supply chain to ensure human rights due diligence through protections and provisions: The model holds businesses accountable for protecting the rights of workers in that business and in each subsequent tier of the supply chain, in what is known as a chain of responsibility.³ This includes the most powerful businesses at the top of the supply chain, such as retailers in textile supply chains, and, supermarkets and financial institutions in transport supply chains (which are often considered external to industry regulation). Contractual arrangements must contain provisions and protections - including adequate payments and timeframes - which do not prevent the rights of any worker from being upheld.

Enforceable, proactive and responsive legal obligations and authorisation of unions to undertake compliance: The model emphasises harm prevention and accountability. Legal obligations are fully enforceable. The model requires proactive reporting from businesses rather than relying on reactive or retrospective actions. It also gives workers' representatives a pivotal role in regulatory oversight. Thus, business entities are required to inform the relevant union of all contracting arrangements and allow them to verify the location of worksites, the conditions of work and the identity of workers throughout supply chains. The model also provides workers and other business entities with an avenue for effective and timely commercial remedy in the event of workers' rights breaches.

The Australian model of supply chain regulation is dynamic because it can be applied in myriad ways, according to context, and can augment existing legislation. The most established manifestation of the model is in the TCF sector.

The application of the Australian model

The existing framework of laws enacted at both national and state level represents a pragmatic, stepwise response to the prevailing socio-political context over several decades. A two-tiered structure of supply chain regulation, consisting of mandatory and voluntary legislation, governs human rights due diligence in the Australian domestic TCF industry.

On a national level, the regulatory package is supported by work health and safety (WHS) legislation, and industrial relations legislation. The nationally harmonised WHS statutes maintain that a 'person conducting a business or undertaking' retains overall responsibility for workplace health and safety even where work is contracted out. Indeed, 'improved work health and safety through supply chains and networks' is an actionable area of the national WHS strategy, one strategic outcome of which is leveraging commercial relationships to champion WHS (Safe Work Australia, 2011).

The TCF industrial relations legislation contains innovative provisions such as the 'deemed employee' status of all outworkers and the 'deemed employer' status of almost all business entities.

The deemed employee provisions ensure that contract outworkers have the same rights and obligations as do employees, and can only be given work on a full-time or regular part-time basis, not casual. Moreover, presumptive legal obligations are placed on deemed employers which invert the burden of proof for civil law recovery. Business entities in any preceding tier of the supply chain, right up to the principal supplier, can be held liable for unpaid wages and workers' compensation claims (Nossar et al., 2015).

In addition, national industrial relations legislation anticipated mandatory supply chain regulation. For example, the TCF Industrial Award requires proactive reporting from business entities. Regulators must be provided with quarterly access to details of all external work arrangements, including up-to-date, standardised Work Records. Work Records contain the name and contact details of trading partners, the physical location of all worksites and the 'value and volume' – that is, unit pricing details (value), number of units (volume), timeframe, and production time - of all work orders. This enables the regulator to cross-check sewing times and to establish the equivalent number of full-time workers required to carry out the work. It thus helps to avoid a hidden workforce, protect all workers, and produce greater supply chain transparency and traceability.

The efficacy of the regulatory package, however, rests on enforceable legislation which encompasses all business entities, including lead firms. The mandatory retailer code at state level applies to all retailers who sell Australian-made clothing within the legislating state, and to all suppliers of these products throughout the supply chain, even where subcontractors are outside the state jurisdiction. The only exception is retailers and manufacturers who are accredited and compliant with the nation-wide voluntary code, which is a less rigorous regime administered by an independent tripartite authority, and characterised by collaborative partnership.

The mandatory code regulates retailer contracting arrangements and oversight (Rawling, 2014). At the apex of the TCF supply chain are retailers. Thus, prescribed contracting provisions are embedded into all retailer commercial contracts. These legally binding contractual terms for subcontractors specify that conditions for all workers throughout the supply chain are to be at least as favourable as the Industrial Award. Similarly, retailer contracts must contain compulsory, inbuilt human rights due diligence compliance mechanisms and commercial remedies.

Retailer contracts must also authorise external regulatory oversight by government inspectorates and unions. Australian unions have historically occupied a central role in monitoring and compliance and have been shown to enhance effectiveness and responsiveness of regulatory enforcement (Landau et al., 2014). The TCF union exercises contractual oversight, right of inspection of all production sites and records, and enforcement. It also uses cutting edge strategies to support compliance. For example, the 'minute rate' is a calculation to determine the required payment at the Award rate.

The Australian model of cross-jurisdictional supply chain regulation harnesses existing governance architecture for human rights due diligence. Binding upon all business entities for the protection of all workers, this enforceable mandatory model is robust and readily adaptable for the regulation of cross-jurisdictional supply chains. It offers significant potential for global supply chain regulation.

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1 In the Australian context, cross-jurisdictional coverage exists between states within the Australian federation and is limited to domestic supply chains.

2 While at present, legislation is limited to Australian jurisdictions, the Model is readily adaptable for application across national borders.

3 Note: this term is derived from the road transport sector.