

OCCUPATIONAL HEALTH AND SAFETY DUTIES TO PROTECT OUTWORKERS: THE FAILURE OF REGULATORY INTERVENTION AND CALLS FOR REFORM

PAUL HARPUR*

[Many Australian outworkers, especially recent immigrants working from home, currently endure poor working conditions. Outworkers often toil without traditional industrial support. Most retailers and suppliers do not monitor working conditions at the base of the supply chain. Occupational health and safety protections are often not enforced in practice. Increased obligations for retailers and suppliers at the top of the supply chain would reduce the violation of fair working conditions.]

I INTRODUCTION

Outworkers are some of the most vulnerable workers in Australia. In order to assist in protecting these workers, industrial commissions have provided outworkers protection in awards and legislatures have extended industrial and occupational health and safety (“OHS”) legislative protection to outworkers. Enforcing the laws which provide outworkers protection has been a difficult process. Rather than attempting to address all labour conditions, this article will focus entirely upon arguably the most serious labour condition: OHS. OHS protects outworkers’ most valuable resource: their health. Unlike violations of other labour conditions, such as unpaid wages, once an outworker has suffered a permanent disabling injury, that outworker must live with that injury for life. While unpaid remunerations can be later

* BBus (HRM) LLB (Hons), LLM, Solicitor, PhD Candidate, Queensland University of Technology. I would like to thank my doctoral supervisors, Professor Des Butler and Dr Sara Davies, Faculty of Law, Queensland University of Technology, for their helpful comments in developing this article.

recovered with interest, once an outworker's body has a disabling injury, outworkers' health can never be regained.

This article will firstly explore the industry in which outworkers operate. Outworkers work at the bottom of supply chains, which involve retailers outsourcing work to suppliers who provide work to outworkers. This article will review research which demonstrates the economic, cultural and structural vulnerability of these outworkers. Secondly this article will explore the OHS concerns in outworking and how parliaments have sought to remedy the situation. The most common vehicle through which outworkers are provided OHS protection is through deeming provisions. Deeming provisions deem the supplier, and in some situations, other corporations, the employers of outworkers for the purposes of OHS legislation. As a consequence outworkers have all the protection afforded to standard employees. Despite having formal protection, the third part of this article compares outworkers' statutory OHS entitlements verses research of their actual labour conditions. Finally this article explores how existing supply chain regulation over other labour conditions could be extended to afford outworkers increased protection.

II SUPPLY CHAINS AND OUTWORKERS IN AUSTRALIA

A *What is a supply chain?*

Supply chains are organisational structures developed to minimise costs for the parties at the top of the supply chain.¹ Nossa, Johnstone and Quinlan refer to the party at the top of the supply chain as the 'effective business controller'.² To maximise their profits, the effective business controller purchases products on the most favourable terms to their enterprise. This approach creates competition between suppliers as to who can produce products cheapest and with the fastest turn around. To maintain their profits, the suppliers out source work to either outworkers or other organisations who

¹ Ananda Jeeva, *Procurement dimensions in the Australian manufacturing sector: flexibility issues in a supply chain perspective* (2004) PhD thesis, Curtin University; Peter Robertson, *The impact of supply chain process integration on business performance* (2006) University of Wollongong.

² Igor Nossa, Richard Johnstone and Michael Quinlan, 'Regulating Supply Chains to Address the Occupational Health and Safety Problems Associated with Precarious Employment: The Case of Home-Based Clothing Workers in Australia' (2004) 17 *Australian Journal of Labour Law* 137, 146, 51.

then outsource the work to outworkers. The outsourcing of work is generally structured as a commercial relationship, and not an employment relationship. The supplier supplying the work to the outworker generally requires the outworker to operate as a contractor.

At each stage of the supply chain, competition forces the time and cost pressures to the bottom of the supply chain. Nossa, Johnstone and Quinlin observe that the effective business controller has the economic power to place considerable pressure upon the parties lower in the supply chain. The effective business controller's quality control mechanisms can control both the quality of the products and the circumstances in which the products are produced.

Scull, Nguyen and Woolcock found, the effective business controller provided the work to a Vietnamese middle man who distributed the work.³ The effective business controller placed the middle men under considerable time and cost restraints, which were passed onto the outworkers at the bottom of the supply chain. Where the garments had faults, middle men were reported as refusing to pay outworkers for work performed. The outworkers were in a competitive market and were not in a position to refuse work. The competition and cost saving strategy of the effective business controller resulted in outworkers operating in adverse working conditions.

Weller questioned whether the buyer-led model of supply chains was accurate for Australia.⁴ Despite this contention, she agreed the operation of supply chains resulted in the person at the bottom of the chain being under considerable pressure. Weller argued Australian supply chains can be divided into four segments:

³ Sue Scull, My-Linh Nguyen and Geoff Woolcock *Vietnamese Outworkers in Queensland: Exploring the Issues* (2004) University of Queensland Boilerhouse Community Service and Research Centre, at 33-34.

⁴ Sally Weller, 'Regulating Clothing Outwork: A Sceptic's View' (2007) 49 *Journal of Industrial Relations*, 1, 69-86, at 71; See also, Sally Weller *Fashion's influence on garment mass production: Knowledge, commodities and the capture of value* (2004) PhD thesis, Victoria University; Sally Weller 'The embeddedness of global production networks: the impact of crisis in Fiji's garment export sector' (2006) 38 *Environment and Planning Australia*, 1249-1267; Sally Weller, 'Fashion as viscous knowledge: fashion's role in shaping trans-national garment production' (2007) 7 *Journal of Economic Geography*, 39-66.

- (a) Brands that sell their products to a consumer market sensitive to the conditions of production;
- (b) Brands that sell their products to a consumer market more interested in price than the conditions of production;
- (c) Firms that are not brand owners (and are therefore not directly subject to the discipline of the consumer market) but which operate in accordance with the spirit and letter of industrial relations law; and
- (d) Firms that are not brand owners and which operate on a profit-maximization basis.

Weller argued segments (a) and (c) are likely to comply with regulation; however segments (b) and (d) were likely to attempt to avoid regulation, and should therefore be the focus of regulation. Research supports Weller's position. For example, Scull, Nguyen and Woolcock found a large percentage of outworking occurs in Queensland at night time, in an attempt to avoid government and union officials who only work during regular working hours.⁵ In Queensland, inspectors are not prevented from accessing workplaces at irregular hours and can inspect domestic premises they 'suspect' are a workplace, even if the workplace is upon domestic premises.⁶ Requiring outworkers to work non-standard hours is especially effective in New South Wales and South Australia, as within those jurisdictions OHS acts require inspections of workplaces to occur at 'reasonable times' or during times work is ordinarily carried on at the workplace.⁷

B *Outworkers in Australia*

The precise number of outworkers in Australia and their demography is uncertain. The outworker industry is largely invisible and hard to assess or regulate. It is difficult for governments to regulate a sector, of which they cannot even quantify. Reports prepared by Victorian government agencies have noted the precise number of outworkers in Australia is disputed, but

⁵ Sue Scull, My-Linh Nguyen and Geoff Woolcock, above note 3, at 35.

⁶ Paragraph 104(1)c of the *Workplace Health and Safety Act 1995* (QLD); however if the entry is under a warrant, the warrant will state times for entry of the workplace: see section 107.

⁷ Sub-section 77(3) of the *Occupational Health And Safety Act 1989* (ACT); sub-section 53(1) of the *Occupational Health and Safety Act 2000* (NSW); subsection 38(2) of the *Occupational Health, Safety and Welfare Act 1986* (SA).

placed the figure between 50,000 and 329,000.⁸ This report noted that the Australian Tax Office used a figure of 50,000, while the TCFUA claimed the figure was near 329,000.⁹ The Queensland government noted the estimate of how many outworkers were in Australia varied from 50,000 to 330,000.¹⁰ The Queensland government offered PhD funding in an attempt to clarify the number and reason this industry has low industrial relations laws compliance. In considering the OHS issues associated with outworkers, the Australian Capital Territory estimated there were approximately 329,000 outworkers in Australia.¹¹ The New South Wales Industrial Commission estimated there were approximately 50,000 outworkers in New South Wales and approximately 17,000 unpaid family members assisting those outworkers.¹² Lozusic estimates there is between 129,000 and 329,007 outworkers in Australia.¹³ While the estimate of outworkers varies greatly, there is little doubt that the outworker industry includes tens of thousands of workers.

The workers which operate as outworkers are largely made up of immigrant women, who have limited options for alternative employment.¹⁴ They work

⁸ Victorian Office of Training and Tertiary Education Study Textile, Clothing, Footwear & Leather (TCF&L) *Priorities Report* (2004): <<http://www.eduweb.vic.gov.au/edulibrary/public/voced/TCFL.pdf>> at 1 November 2007; the same figure was used by Economic Development Committee of Victoria *Inquiry into Labour Hire Employment in Victoria* (2005): <http://www.parliament.vic.gov.au/edic/inquiries/Labour_Hire/EDC-FinalReport_LabourHireEmployment_2005-07.doc> at 9 November 2007.

⁹ Ibid.

¹⁰ Growing the Smart State Funding Program, Areas of Policy Research Interest for Queensland Government Agencies for 2005-2006: <[http://www.premiers.qld.gov.au/library/office/Agency areas of research interest for 2005.doc](http://www.premiers.qld.gov.au/library/office/Agency%20areas%20of%20research%20interest%20for%202005.doc)> at 8 November 2007.

¹¹ *Australian Capital Territory Occupational Health and Safety Act 1989: Scope and Structure Review* (2005).

¹² NSW Department of Industrial Relations *Behind the Label – The NSW Government Clothing Outwork Strategy Issues Paper* (1999), at 8.

¹³ Roza Lozusic *Outworkers - Briefing Paper* (2002): <<http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/A327D9892FC6867FCA256ECF0007340E>> at 31 October 2007.

¹⁴ Danger Research Group, *Do consumers care about clothing outworker exploitation?* (1999) <<http://www.industrialrelations.nsw.gov.au/resources/consumer.pdf>?> at 1 November 2007; Family and Community Development Committee *Inquiry into the Conditions of Clothing Outworkers in Victoria September* (2002), chapter 4: <<http://www.parliament.vic.gov.au/fcdc/PDF%20Files/Outworkers/Chapter%204.pdf>> at 2 November 2007.

from their homes, and their workplaces are often not notified to any regulatory authority, so as far as regulation goes, they are invisible.¹⁵ Lacking fluent English, cultural assimilation and educational barriers, outworkers have limited options.¹⁶ Riordan Cregan interviewed 112 Australian outworkers and found systematic exploitation of recent immigrants.¹⁷ Immigrants with little English were encouraged to borrow money to purchase sewing machines, and then were forced to continue working to repay the debts. The immigrant's lack of cultural understanding and English fluency rendered them extremely vulnerable. Outworkers relied on people within their own cultural group for work. As outworkers were members of isolated cultural groups, often outworkers were scared to complain, as this would substantially impair their future employment prospects.¹⁸

Moreover, for many outworkers, the outworking income was the family's sole source of income.¹⁹

The plight of outworkers has been subject to judicial attention. Riordan DP in *Re Clothing Trades Award 1982* explained:

The evidence and material in this case discloses a very distressing situation which has no place in a society which embraces the concepts of social justice. 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.²⁰

Expressing similar sentiments, Marshall J in *Textile Clothing and Footwear Union of Australia v Southern Cross Clothing Pty Ltd* explained:

Outworkers in the clothing industry in Australia are some of the most exploited people in the Australian workforce. They perform garment making work often at absurdly low rates in locations outside their

¹⁵ Ibid.

¹⁶ J Heyes and A Gray, 'Homeworkers and the National Minimum Wage: Evidence from the Textiles and Clothing Industry' (2001) 15 *Work, Employment and Society* 4, 863-873.

¹⁷ Christina Cregan, *Tales of despair: outworker narratives* (2002).

¹⁸ TCFUA, *The Hidden Cost of Fashion* (1995) Sydney, Textile Clothing and Footwear Unions Federation of Australia, Sydney, at13-14.

¹⁹ Christina Cregan, *Home sweat home: preliminary findings of the first stage of a two-part study of outworkers in the textile industry in Melbourne* (2001).

²⁰ (1987) 19 IR 416 at 421.

employer's premises. This frequently occurs in the homes of outworkers.²¹

The general structure of outworking renders outworkers vulnerable. Webber and Weller argued, outworker models exploited ethnic and gender divisions within communities.²² Through targeting recent migrants with limited employment options, supply chains were able to force outworkers to work in conditions which were lower than factory based employees.

In addition to cultural issues, outworkers are generally isolated from other outworkers or traditional industrial support. Outworkers work often from their domestic residence. For example, Glynn J in the *New South Wales Pay Equity Inquiry* found outworkers were operating:

- In the outworker's residential lounge room and dining room;
- In the outworker's backyard shed, with a concrete floor, tin walls and inadequate tables or space to operate; and
- In a garage attached to the outworker's house.²³

The isolation associated with home-based work means it is harder for outworkers to discuss their concerns with other employees.²⁴ Generally fragmented workforces have less cohesion and are less likely to collectivise.²⁵ The New South Wales Minister for Industrial Relations has argued the inability of outworkers to collectively bargain meant outworkers required additional protection, above and beyond that of ordinary employees.²⁶

Research funded by the Queensland Department of Industrial Relations and performed by the University of Queensland identified the factors which

²¹ [2006] FCA, at (1).

²² Michael Webber and Sally Weller, *Refashioning the Rag Trade: Internationalising Australia's Textiles, Clothing and Footwear Industries* (2001) 291.

²³ *Pay Equity Inquiry* (1997) NSWIRC 6320:
<<http://www.workandfamily.nsw.gov.au/payequity/report/industries/outworkers.html>> at 11 November 2007

²⁴ Asian Women at Work & Vietnamese Women's Association of NSW, *Daring to act: A report on the establishment of a Vietnamese women outworkers network* (2001).

²⁵ P Brosnan and L Thornthwaite, 'The TV work is not so bad: the experience of a group of homeworkers' (1998) 8 *Labour & Industry* 3, 97-113; Clete Daniel, *Culture of misfortune: An interpretative history of textile unionism in the United States* (2001); I Watson, B Buchanan, I Campbell and C Briggs *Fragmented futures: New challenges in working life* (2003).

²⁶ *New South Wales State Wage Case 2006* (2006) 153 IR 268, at 320.

caused outworkers to be so vulnerable to exploitation.²⁷ One of the key factors identified was the nature of the industry they worked in. The women in this research were outworkers at the bottom of supply chains. They were deunionised immigrants with limited English and were generally economically and culturally vulnerable.

Some legislative reforms have not assisted the plight of outworkers, for example, the Commonwealth Senate, Employment, Workplace Relations and Education Committee unanimously concluded that outworkers are more vulnerable in Australia following the passage of the *Independent Contractors Act 2006* (Cth).²⁸ This act has encouraged the concept that independent contractors who are outworkers do not enjoy the protection of industrial relations regulations.

C Child labour in outworking

The OHS conditions of outworkers are especially relevant as outworkers' children often work beside their parents. While Scull, Nguyen and Woolcock found contradicting evidence to whether children were involved in outworking operations or not,²⁹ the Commonwealth, New South Wales and Victorian reports all concluded children were involved in outworking. The Commonwealth Senate Economics References Committee reported on outworkers, and concluded:

Evidence shows that children are involved in outworking and the Committee concludes that there is sufficient evidence to suggest that some children are involved to an unreasonable extent. The Committee believes that the situation endured by exploited children will only be ameliorated through an improvement in the employment conditions experienced by their parents. Having regard to Australia's international and national obligations to protect children from exploitation, the Committee suggests that Government consideration of this matter is warranted.³⁰

²⁷ Sue Scull, My-Linh Nguyen and Geoff Woolcock, above note 3.

²⁸ Commonwealth Senate, Employment, Workplace Relations and Education Committee, *Inquiry into the provisions of the Independent Contractors Bill 2006 and Workplace Relations Amendment (Independent Contractors) Bill 2006* (2006), 1.6.

²⁹ Sue Scull, My-Linh Nguyen and Geoff Woolcock, above note 3, 31.

³⁰ The Parliament of the Commonwealth of Australia Senate Economics References Committee, *Outworkers in the Garment Industry Report* (1996) 55.

The Commonwealth report recounted a TCFUA case study where an eight year old boy was found to be helping his outworker mother to keep up with the demand.³¹ The New South Wales Industrial Relations Commission's Pay Equity Inquiry heard evidence of children as young as 12, assisted their parent outworkers by performing simple measuring, marking and cutting strips needed for the garment, and folding completed garments.³² The New South Wales briefing paper completed by concluding that one of the most undesirable results of outworking was unpaid child labour.³³ The Victorian government concluded the involvement of children in the outworking industry is common.³⁴ The report provided an example of an 11 year old Victorian girl who worked three to five hours on every school day, and all day on weekends, ironing of the facings, sewing simple hems and general sewing using a sewing machine.³⁵ The evidence indicates, while children are not involved in every outworking operation, the fact that there is an estimated 329,000 outworkers in Australia, means even if even if only 1 in every 100 outworkers recruits their children to assist in their work, then thousands of Australian children are involved in outworking.

D OHS concerns in outworking

Generally the working conditions of outworkers are substantially worse than outworkers' factory based counterparts. The most comprehensive research on this comparison was performed by Mayhew and Quinlan. Mayhew and Quinlan's research involved both qualitative and quantitative surveys and semi-structured interviews with 100 randomly selected factory workers and 100 non-randomly selected outworkers.³⁶ The subjects ranged in age; however Mayhew and Quinlan claim several children outworkers were prevented from providing responses by their parents.

Mayhew and Quinlan's research found that the OHS conditions of outworkers were considerably worse than outworkers' factory-based

³¹ Ibid, see generally chapter 4.

³² *Pay Equity Inquiry* [1998] NSW IRComm 205.

³³ Roza Lozusic, above note 13.

³⁴ Victorian government, *Children at Work? The protection of children engaged in work activities: Policy challenges and choices for Victoria Issues Paper* (2001) 13-27.

³⁵ Ibid, case study 2.

³⁶ Ibid, at 96.

counterparts.³⁷ Fifty-seven percent of outworkers reported working over ten hours per day, while over two percent of factory based workers reported working over ten hours per day. No factory based workers reported working over twelve hours per day, while forty-seven percent of outworkers reported working over twelve hours per day.

The most recent research on outworkers working hours found most subjects worked approximately twelve hours per day and sixty-two percent claimed to work seven days per week.³⁸

Outworking has had a long history in Australia. In the 1860s manufacturers outsourced work to outworkers in order to reduce costs and compete with competitors.³⁹ For over a century the special risks associated with home based employment has had recognition.⁴⁰ Traditionally in Australia outworkers have been protected under federal awards. Nossa, Johnstone and Quinlan noted every industrial award governing the clothing industry, in every Australian jurisdiction, since 1919 has attempted to govern the protection of home-based outworkers.⁴¹

To the period ending in 1987, Australian awards prohibited certain conduct and prescribed minimal entitlements. Generally these awards were ignored, with prohibited conduct being the norm and outworkers consistently receiving entitlements, below that of factory based workers. In 1987 awards attempted to remedy the continual violations by allowing unions to monitor the conduct of outworkers and suppliers, and for outworkers to be entitled to remuneration at the same rate of remuneration of factory based workers. These amendments were frustrated by the use of separate corporate entities and the problems of geographical jurisdiction.⁴²

³⁷ Clair Mayhew and Michael Quinlan, 'The effects of outsourcing on occupational health and safety: A comparative study of factory-based workers and outworkers in the Australian clothing industry' (1999) 29 *International Journal of Health*.

³⁸ Brotherhood of St Laurence, *Ethical threads: corporate social responsibility in the Australian garment industry* (2007) 4.

³⁹ Frances, 'No more amazons: Gender and work process in the Victorian clothing trades, 1890-1939' (1986) 50 *Labour History* 98.

⁴⁰ A Ballantyne, 'Homework' in T Oliver (Ed.) *Dangerous Trades: The Historical, Social and Legal Aspects of Industrial Occupations as Affecting Health by a Number of Experts* (1902) 98-103; C Williams, 'Women and occupational health and safety: From narratives of danger to invisibility' (1983) 73 *Labour History* 30-52.

⁴¹ Igor Nossar, Richard Johnstone and Michael Quinlan, above note 2; *Re Clothing Trades Award* (1987) 19 IR 416 at 431-5 per Riordan DP.

⁴² Igor Nossar, *Proposals for the Protection of Outworkers from Exploitation* (1999).

The physical safety of outworkers has been subject to regulation for a comparatively short period. While effective business controllers could exert substantial economic pressure, due to the corporate veil, the effective business controller was not generally liable for the conduct of parties lower in the supply chain. The corporate veil provides that each company is a legal entity, which is separate from its share holders and related corporate entities.⁴³ While a company can obviously not take an oath,⁴⁴ appear in court on its own behalf⁴⁵ or go to jail,⁴⁶ a company can sue and be sued.⁴⁷ Companies are generally not liable for the conduct of other companies. Parent companies generally use contractual relationships to keep related companies at arms length. Where the court finds a related company is in fact the agency or trustee of the parent, then the parent can be liable for the other company's conduct.⁴⁸ Companies are only liable where the court finds the related company is carrying on business as the parent.⁴⁹ For an agency relationship to be established, both the parent company and the other company must have indicated the agency relationship, expressly or by implication from their words and conduct, exists.⁵⁰ When determining whether the other company, is in fact the agent of the parent, the court will consider factors such as:

- Do the companies regard the profits of the other company as the profits of the parent,⁵¹

⁴³ Section 124 of the *Corporations Act 2001* (Cth).

⁴⁴ *Tritonia Ltd v Equity and Law Life Assurance Society* [1943] 2 All ER 401, 402 (Viscount Simon LC); *Bay Marine Pty Ltd v Clayton Country Properties Pty Ltd* (1986) 5 ACLC 38, 43 (Samuels JA); *Sinto Resources Ltd v Normandy Capital Ltd* (1993) 11 ACLC 856, 861 (French J).

⁴⁵ *Fieldhouse v Commissioner of Taxation; sub nom Perron Investments Pty Ltd v Deputy Commissioner of Taxation* (1989) 25 FCR 187, 218 (Hill J); *MacDonald v Australian Securities Commission (No 2)* (1994) 12 ACLC 246 (Hill J).

⁴⁶ *Pharmaceutical Society v London and Provincial Supply Association Ltd* (1880) 5 App Cas 857 (Lord Blackburn).

⁴⁷ *Salomon v A Salomon & Co Ltd* [1897] All ER Rep 33.

⁴⁸ *Attorney-General v Equiticorp Industries Group Ltd (in Statutory Management)* [1996] 1 NZLR 528, 539.

⁴⁹ *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567 and *Re FG (Films) Ltd* [1953] 1 All ER 615.

⁵⁰ *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd & Bunge Corp* [1967] 2 All ER 353, 358.

⁵¹ *Adams v Cape Industries Plc* [1991] 1 All ER 929 (Slade LJ) and *Smith Stone and Knight Ltd v Lord Mayor, Aldermen and Citizens of the City of Birmingham* (1939) 161 LT 371 (Atkinson J).

- Does the parent control the appointment of the board of the other company;⁵²
- Does the parent control the day to day operations of the other company;⁵³
- Is the parent the only share holder in the other company;⁵⁴ or
- Are the employees of the other company remunerated by the parent?⁵⁵

It would be extremely rare for an effective business controller to create an agency relationship with another company to which work is outsourced in a supply chain. It is extremely easy for a parent company to structure its operation to ensure the corporate veil is not pierced through the establishment of an agency relationship.

E OHS protection extended to outworkers

The problems with ensuring outworkers workplaces comply with OHS laws are legion. Nossa, Johnstone and Quinlan claim three systematic problems with regulations cause OHS not to be regulated for outworkers:

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. As outworkers are not the employees of suppliers or retailers, outworkers have traditionally enjoyed no OHS protection.

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

⁵² *Spreag v Paeson Pty Ltd* (1990) 94 ALR 679, 711 (Sheppard J).

⁵³ *DHN Food Distributors Ltd v London Borough of Tower Hamlets* [1976] 1 WLR 852, 860 (Lord Denning MR) and *Spreag v Paeson Pty Ltd* (1990) 94 ALR 679, 711 (Sheppard J).

⁵⁴ *DHN Food Distributors Ltd v London Borough of Tower Hamlets* [1976] 1 WLR 852, 860-862 (Lord Denning MR and Goff LJ respectively).

⁵⁵ *Mario Piraino Pty Ltd v Roads Corporation (No 2)* [1993] 1 VR 130,148.

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.⁵⁶

This article will judge the OHS outworker reforms using Nossa, Johnstone and Quinlan's criticism of regulatory protection afforded to outworkers.

III OHS LEGAL INTERVENTION

A *Imposing duties upon suppliers*

The main way in which outworkers are provided OHS protection is through deeming provisions. Deeming provisions currently appear in slightly different forms in the Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania and Victoria. Currently Western Australia and the Northern Territory do not deem outworkers employees to bring them under OHS legislation. These reforms prima facie ensure outworkers are entitled to the same OHS protection as standard employees. The Australian Capital Territory's and Victoria's laws are the only jurisdictions which currently expressly link outworkers deeming provisions and OHS. A draft bill has been proposed in New South Wales.

The *Crimes (Industrial Manslaughter) Act 2003* (ACT) commenced operation on 1 March 2004 and expressly includes workplace protection for outworkers. Section 49A of the post reform *Crimes Act 1900* (ACT) adopts a wide definition of 'worker', which includes, inter alia, employees and outworkers. Section 49A defines an outworker to mean an 'individual engaged by a person (the principal) under a contract for services to treat or manufacture articles or materials, or to perform other services—

- (a) in the outworker's own home; or
- (b) on other premises not under the control or management of the principal.'

The *Outworkers (Improved Protection) Act 2003* (Vic) deems outworkers employees for the purposes of statutes, including the *Outworkers (Improved*

⁵⁶ Igor Nossa, Richard Johnstone and Michael Quinlan, above note 2.

Protection) Act 2000 (Vic) and the *Occupational Health and Safety Act 2004* (Vic).⁵⁷

The draft *Occupational Health and Safety Amendment Bill 2006* (NSW) would have inserted section 27A into the *Occupational Health and Safety Act 2000* (NSW).⁵⁸ Section 27A would have deemed all parties who supply outworkers with work to be those outworkers' employers for the purposes of the *Occupational Health and Safety Act 2000* (NSW). Sub-section 27A (2) would have enabled deemed employers to totally avoid any OHS duty. Sub-section 27A(2) would have limited the deemed employers duty to OHS obligations, 'in relation to matters over which the employer [had] control or would have control if not for any agreement purporting to limit or remove that control.' Therefore, while the *Occupational Health and Safety Act 2000* (NSW) would have extended OHS protection to outworkers, this protection would have been subject to an agreement between the deemed employer and the outworker to the contrary.

New South Wales, Queensland, Tasmania and South Australia do not expressly link OHS and their deeming provisions, rather these jurisdictions deem outworkers to be employees of suppliers. Once this deemed employment relationship is established suppliers and outworkers are treated as employer and employee for the purposes of OHS laws.

The *Industrial Relations (Ethical Clothing Trades) Act 2001* (NSW) deemed any person, who is not the occupier of a factory, who performs work outside a factory involving any work in the clothing trades or the manufacture of clothing products, whether directly or indirectly, for the occupier of a factory or a trader who sells clothing by wholesale or retail, to be an employee of the occupier or trader.⁵⁹ Even though occupiers or traders are not outworker's actual employers, the act deems them to be outworkers' apparent employers. The statutory creation of an apparent employment relationship attracts all the legal rights and obligations of a standard employment relationship.

⁵⁷ *Outworkers (Improved Protection) Act 2003* (Vic) s 4(2).

⁵⁸ Section 21 of the *Draft Occupational Health and Safety Amendment Bill 2006* (NSW); the government has expressed its intention to introduce these amendments following a review: New South Wales Legislative Council, Hansard, 4 May 2006, at 22578 (the Hon. John Della Bosca, Minister for Finance, Minister for Commerce, Minister for Industrial Relations, Minister for Ageing, Minister for Disability Services, and Vice-President of the Executive Council); As at the time of writing this Bill has not been read in Parliament.

⁵⁹ *Industrial Relations (Ethical Clothing Trades) Act 2001* (NSW) s 3 refers to) sch 1 clause 1(f) of the *Industrial Relations Act 1996* (NSW).

When the *Industrial Relations Act 1999* (Qld) was first enacted, it contained outworker protections. The act recognised outworkers could be employees⁶⁰ and extended the definition to include employees beyond the manufacturing industry. Schedule 5 of the *Industrial Relations Act 1999* (Qld) defined an outworker to include a person who is engaged, for “someone else’s calling or business, in or about a private residence or other premises that are not necessarily business or commercial premises, to:

- (a) pack, process, or work on articles or material; or
- (b) carry out clerical work.

Where an outworker falls within the definition contained in schedule 5, that outworker and the deemed employer have all the rights and duties which are attracted by a standard employment relationship.

Following reviews in 2000,⁶¹ the *Industrial Relations Act 1984* (Tas) was amended, so outworkers were deemed employees the term outworker was defined to mean ‘a person who performs for an employer work related to the manufacture of a garment outside the employer's premises’.⁶²

Amendments to the *Fair Work Act 1994* (SA) were modelled on adaptations of the New South Wales scheme proposed by Igor Nossa.⁶³ The *Industrial Law Reform (Fair Work) Act 2005* (SA) introduced amendments to the *Fair Work Act 1994* (SA).⁶⁴ The *Industrial Law Reform (Fair Work) Act 2005* (SA) came into operation on 16 May 2005.⁶⁵ This act defines a contract of employment to include the situation where a person contracts work to an

⁶⁰ Section 5 of the *Industrial Relations Act 1999* (Qld).

⁶¹ Parliament of Tasmania Legislative Council Select Committee, *Industrial Relations Bill 1999 (Tas) Report* (2000): <http://www.parliament.tas.gov.au/ctee/old_ctees/industrial.pdf> at 13 November 2007.

⁶² Section 3 of the *Industrial Relations Act 1984* (Tas).

⁶³ Igor Nossa, *Proposals for Protection of Outworkers in South Australia* (2002).

⁶⁴ Pt 2 of the *Industrial Law Reform (Fair Work) Act 2005* (SA).

⁶⁵ *Industrial Law Reform (Fair Work) Act 2005* (SA). For an explanation of the import of this amendment generally see Erin McCarthy, Elizabeth Priest and Andrew Stewart, ‘Fair Work Arrives in South Australia! But will it Really Make a Difference?’ (2005) 18 *Australian Journal of Labour Law* 292.

outworker.⁶⁶ The *Fair Work Act 1994* (SA) defines an outworker to include a person:

- (a) who is engaged, for the purposes of the trade or business of another (the employer) to —
 - (i) work on, process, clean or pack articles or materials
 - ...

Through being deemed an employee, an outworker can surmount one of the largest difficulties in outworker regulation: being regarded as a self-employed contractor rather than an employee.⁶⁷ Once the outworker is deemed an employee, then they are protected by the extensive OHS regime and the deemed employers are subject to OHS duties as employers.

B Extended deeming provisions

Due to the power of retailers, Nossa, Johnstone and Quinlan claim outworker regulation should place obligations upon retailers. As suppliers are the parties with the most contact with outworkers, this article has elected to analyse if OHS duties can be imposed over suppliers. On the basis suppliers do have OHS duties to ensure outworkers safety, this article will explore how these OHS laws are being enforced. If these laws are not enforced, this article will then discuss an alternative regulatory enforcement v and those OHS duties. Even though this part is not focusing upon duties imposed over retailers for outworkers safety, it is important to note here the Australian Capital Territory has expressly extended duties up to the top of supply chains for the safety of outworkers. The Australian Capital Territory is the only jurisdiction to expressly impose OHS duties up the supply chain. Employers' liability under the *Crimes Act 1900* (ACT) is very wide. Pursuant to the definition of employer in section 49A, employers are not only liable for outworkers they employ directly, but they are also liable for outworkers where an 'agent of the person engages the worker as a worker of the agent'. This means, where a corporation outsources the manufacturing of work to an unrelated corporation, and that unrelated corporation hires outworkers, both corporations will be liable for the OHS conditions of the outworker, within the scope of the

⁶⁶ S 4(d) of the *Fair Work Act 1994* (SA); for an example of where this provision was used to deem a taxi driver as an employee see: *Waite v Des's Cabs Pty Ltd* [1995] SAIRComm 157.

⁶⁷ Jane Tassie, 'Home based workers at risk: Outworkers and occupational health and safety' (1997) 25 *Pergamon Safety Science* 3, 179-186.

Crimes Act 1900 (ACT). Under section 49B, both corporations can be liable under the *Crimes Act 1900* (ACT), where the danger to the outworker arises from:

- (a) an act of the employer; or
- (b) anything in the employer's possession or control; ...

IV IS OUTWORKERS' OHS PROTECTION ENFORCED?

Nossa, Johnstone and Quinlan observed the extension of regulatory protection to outworkers must be enforced to have any effect. On this point the current OHS reforms fail outworkers dismally. As deemed employees of suppliers, outworkers should receive the same OHS protection as employees who are working away from their employers' premises. As the below analysis demonstrates, despite having OHS obligations imposed upon them, suppliers are not ensuring their outworkers' safety. On the basis of a search of all industrial cases in Australia cannot find a reported or unreported case, where in a supplier has been convicted for an OHS breach against outworkers, this article concludes OHS protections for outworkers is not being enforced.

A How suppliers could perform risk assessments

As supplier deemed employers largely have the power to dictate terms to outworkers, it is reasonable to presume supplier deemed employers have the capacity to ensure they have the control to perform risk assessments. One of the main ways in which OHS duties are discharged is through process based risk management. Process risk management broadly consists of three steps of hazard identification, risk assessment and risk control.⁶⁸ If a supplier is deemed to be the employer of an outworker, then they will be required as an employer to perform risks assessments.⁶⁹ Risk assessments are essential, as without a risk assessment, employers would not be cognisant of all the risks which face their employees.⁷⁰ Deemed employers cannot successfully take

⁶⁸ Chris Maxwell, *Occupational Health and Safety Act Review* (2004) State of Victoria, at 694.

⁶⁹ Richard Johnstone, *Occupational health and safety law and policy* (2nd ed, 2004) 25-27.

⁷⁰ Michael Tooma, *Tooma's annotated Occupational Health and Safety Act 2004* (2005) 99-100 and 108.

steps to manage a risk, until the deemed employer has identified the risk exist.

The requirement to perform risk assessment is not expressly prescribed in every jurisdiction's OHS statute. In Queensland, New South Wales, South Australia, Tasmania and Western Australia OHS laws expressly require employers to perform risk assessments. For example:

In Queensland, for an employer to properly manage exposure to risks to their employees, the employer must identify all hazards, assess the risks that may result because of the hazards and decide on appropriate control measures to prevent, or minimise the level of, the risks.⁷¹

In New South Wales, an employer is required to perform a risk assessment where the old risk assessment is no longer current, or when ever there is a change to work systems to which the old risk assessment relates.⁷²

Similar obligations appear in South Australia,⁷³ Tasmania⁷⁴ and Western Australia.⁷⁵ In those jurisdictions which do not expressly require employers to perform risks assessments, OHS laws imply this duty. For example, section 20 of the *Occupational Health and Safety Act 2004* (Vic) requires parties to eliminate "risks to health and safety so far as is reasonably practicable"⁷⁶, or "reduce those risks so far as is reasonably practicable"⁷⁷. In

⁷¹ Section 27A of the *Workplace Health and Safety Act 1995* (QLD).

⁷² Clause 12 of the *Occupational Health and Safety Regulations 2001* (NSW).

⁷³ *Regulation 1.3.3 of the Occupational Health, Safety and Welfare Regulations 1995* (SA).

⁷⁴ Regulations 5 and 18 of the *Workplace Health and Safety Regulations 1998* (Tas).

⁷⁵ Regulations 3.1 of the *Occupational Safety and Health Regulations 1996* (WA).

⁷⁶ Section 20(1) (a) *Occupational Health and Safety Act 2004* (Vic); while Victoria does not expressly include risk assessments in the general OHS statute, risk assessments are expressly required in certain aspects of the employment relationship. For example with the risk of falls: Section 203 of the *Occupational Health and Safety (Prevention of Falls) Regulations 2003* (Vic); with the risk of asbestos: Section 202 of the *Occupational Health and Safety (Asbestos) Regulations 2003* (Vic); where employees are manually handling hazardous materials: section 7 of the *Occupational Health and Safety (Manual Handling) Regulations 1999* (Vic); where employees are exposed to lead: section 210 of the *Occupational Health and Safety (Lead) Regulations 2000* (Vic); where employees work in confined spaces: Section 13 of the *Occupational Health and Safety (Confined Spaces) Regulations 1996* (Vic).

⁷⁷ Paragraph 20(1) (b) of the *Occupational Health and Safety Act 2004* (Vic).

determining what is “reasonably practicable”, section 20(2) presumes parties are aware of all risks which it is determined the party “ought reasonably to know” about⁷⁸. In effect, this presumption compels parties to take active steps to ensure they are aware of safety risks in the workplace.⁷⁹ A party, who fails to take such proactive steps, may be assumed to be aware of an OHS risk and be liable to a more substantial punishment due to their failure to manage the risk. Bottomley argues, “(h)azards may be classified into various types such as physical, chemical, environmental.⁸⁰ Employers cannot merely react to injuries or risks once they are manifested.⁸¹ Employers must actively identify all risks.

Even if suppliers have the contractual power to perform risk assessments, are they in a position to perform risk assessments? The proactive OHS duty requires continual vigilance from employers to identify possible risks. These risks can be created by the system of work or by the inadvertence of employees.⁸² Hill J explained in *WorkCover Authority (NSW) v Atco Controls Pty Ltd*:

Employers are obligated to take “abundant caution, maintain constant vigilance and take all practicable precautions to ensure safety in the workplace. It is essential that the approach be a proactive and not reactive one; employers should be on the offensive to search for, detect and eliminate, so far as is reasonably practicable, any possible areas of risk to safety, health and welfare which may exist or occur from time to time in the workplace.”⁸³

Unlike standard employers, supplier deemed employers are not on the same premises as the outworkers. Does this prevent suppliers from being able to maintain constant vigilance?

The proactive OHS duty is not contingent upon the employer’s ability to micromanage the employee. The proactive OHS duty arises due to the

⁷⁸ Paragraph 20(2) (c) of the *Occupational Health and Safety Act 2004* (Vic).

⁷⁹ See Chris Maxwell, above note 71, at 108-110.

⁸⁰ Bottomley, B. “Risk assessments: less ritual and more reliability” paper presented to Safety in Action Conference 2006.

⁸¹ *WorkCover Authority (Insp Egan) v Atco Controls Pty Ltd* (1998) 82 IR 80.

⁸² *Brooker v Foreman Pty Ltd* (2006) QIC 54; *Paparella v Lexaid Pty Ltd* (2006) SAIRC 23, at (31) and (32); *Parker v Q-Comp* (2007) QIC 25; *Workcover Authority of NSW v Main Lighting Pty Ltd* (1995) 200 IR 248, at 257.

⁸³ *WorkCover Authority (NSW) v Atco Controls Pty Ltd* (1998) 82 IR 80, at 85.

general OHS duty. Where the employer permits the employee to work without close supervision, the employer must ensure the employee has adequate training and instructions to adequately assess the risks. The task can be delegated, but not the duty.⁸⁴ For example, in *Short v Lockshire Pty Ltd* the injured employee was using a grinder to cut the baffles out of a stainless steel tank⁸⁵. The employee was wearing protective clothing. A fellow employee came to assist the injured employee. This employee did not wear the required safety gear.

During the work the employees altered the cutting disc. The altered disc would not operate effectively on the grinder with the safety guard on. Consequently the employees removed the guard and continued grinding.

The disc shattered and fragments lodged in an employee's cranium causing death.

There was an Advisory Standard Code of Practice which dictated what the system of work required. The employer did not attempt to suggest they had complied with the code. On the contrary, the employer argued they had adopted an equally safe method of performing the work. President Hall observed the code required the employer to perform an assessment of the risks of performing the work. The employer's system of work delegated the assessment of risks to the employee.

President Hall held that the code was directed at avoiding "misuse of equipment, employee laxity and neglect by an employee" of their own safety. When fellow employees were asked, they readily identified alternative safer approaches of completing the task which ultimately was fatal for the injured employee. The employer had no system of instructing employees of how work should be performed safely and did not perform spot cheques to ensure work was being conducted safely.

Supplier deemed employers are often in a position to perform a risk assessment. The proactive duty requires employers to take into consideration the subjective factors of all the surrounding circumstances of the workplace.⁸⁶

⁸⁴ *WorkCover Authority (Insp Glass) v Kellogg (Aust) Pty Ltd (No 1)* (1999) 101 IR 239 at 257.

⁸⁵ *Short v Lockshire* [2000] QIC 62.

⁸⁶ *Mainbrace Constructions Pty Ltd v WorkCover Authority (Insp Charles)* [2000] NSWIRComm 239; *WorkCover Authority (Insp Robinson) v Milltech Pty Ltd* [2001]

The proactive duty requires employers to do more than just identify risks which are obvious or which warning signals have identified.⁸⁷ While the proactive duty imposes a broad duty upon employers, this duty is not absolute. Employers are not expected to identify risks which are unable to be identified. Generally the High Court of Australia has held a person should only be liable for failing in their proactive duty where the risks are real or appreciable, and not merely speculative.⁸⁸ A similar approach is taken in OHS. Employers will not be liable for risks which are 'impossible to anticipate' or are 'entirely speculative' in nature.⁸⁹ Establishing a risk was not foreseeable or is speculative is extremely difficult. In almost all cases a risk to health will be foreseeable. For example, in *WorkCover Authority of New South Wales (Inspector Childs) v Stimson (No 2)* a trench in the ground was becoming unsafe.⁹⁰ The employer directed the employee to keep away from the area, but did not enforce their direction. The employee re-entered the trench and the trench collapsed. Staff J held the employer should have foreseen the possibility that the employee would ignore the employer's direction, and therefore should have erected a fence or barricade to prevent access.⁹¹

In relation to employers' proactive OHS duty in relation to hidden risks at work, Bolan J explained:

The obligation on the employer is to actively seek out all risks to safety and eliminate them. It is not obvious or foreseeable risks that must be eliminated but also those that often occur in workplaces, the unforeseen or hidden risk. In this case a visual inspection of the work was not sufficient. What [the employer] should have done is ask themselves whether there was even the remotest possibility the planks might shift and put persons at risk. This would have necessitated a much closer consideration of the potential risks, the

NSWIRComm 51 and *Kennedy-Taylor (NSW) Pty Ltd v WorkCover Authority (Insp Charles)* (2000) 102 IR 57,

Ferguson v Nelmac Pty Limited (1999) 92 IR 188.

⁸⁸ *McBride v The Queen* (1966) 115 CLR 44 at 49-50; *Jiminez v The Queen* (1992) 173 CLR 572 at 579; these High Court of Australia cases concerned statutory culpable driving offences, however the principles are transferable for OHS offences.

⁸⁹ *WorkCover Authority of New South Wales (Inspector Childs) v Kirk Group Holdings Pty Ltd & Anor* [2004] 135 IR 166, at 209, per Vice-President Walton J.

⁹⁰ *WorkCover Authority of New South Wales (Inspector Childs) v Stimson (No 2)* [2005] NSWIRComm 201.

⁹¹ [2005] NSWIRComm 201 at (79).

detriment to safety would have become evident and appropriate action could have been taken to eliminate the risk.⁹²

The proactive duty upon supplier deemed employers could easily identify many of the major OHS risks faced by outworkers.

For employers, the duty to assess the risks always remains the duty of the employer and not that of the employee⁹³. The responsibility to conduct a risk assessment cannot be informally delegated to employees. The onus remains the employers at all times. Marks J explained the duty to create a safe system of work remained the duty of the employer. The employer's OHS duty required them to ensure ' {a} All tasks must be assessed to ensure the system of work allows no risk of injury ... It is not sufficient for ... the employer to leave the responsibility for carrying out this task safely to be assessed by workers carrying out the task on the spot.'⁹⁴ If the employees do not 'exercise the necessary foresight and vigilance to avoid any undue risk to the health and safety', then the employer will be liable.⁹⁵

B Do suppliers deemed employers perform risk assessments?

There does not appear to be any evidence that suggests suppliers perform OHS audits of outworker's workplaces, even though they are often physically able to perform such inspections. The Brotherhood of St Laurence found most retailers and suppliers did not have a process in place to monitor labour conditions in factories lower in the supply chain.⁹⁶ They found, out of nineteen retailers, only two had ever met an outworker or visited an outworkers place of work.⁹⁷ The nature of outworking is that the supplier will deliver and collect products from the outworker's domestic residence, which

⁹² *Inspector Green v The Crown in the Right of the State of NSW (Department of Commerce)* [2004] NSWIRComm 64 at [20].

⁹³ *WorkCover Authority (Insp Glass) v Kellogg (Aust) Pty Ltd (No 1) (1999) 101 IR 239 at 258; WorkCover Authority (Insp Barnard) v Rail Infrastructure Corp (2001) 109 IR 209 at 211-212.*

⁹⁴ *WorkCover Authority (NSW) v Milltech Pty Ltd* [2001] NSWIRComm 51 at [18] – [21].

⁹⁵ [2001] NSWIRComm 51 at [18] – [21].

⁹⁶ Brotherhood of St Laurence, above note 38, at 4.

⁹⁷ *Ibid.*

generally is also their place of work.⁹⁸ In other words, the supplier is physically in the proximity of the outworker's place of work before every clothing order is commenced. This does not mean the supplier goes past the front door and inspects outworkers' work stations. In *Ngo and Commissioner of Taxation* the supplier provided in evidence that he had visited the outworker's home at least one hundred times.⁹⁹ The supplier claimed he had no idea how the outworker could have performed the work within the time frames, especially considering the outworkers 'poor health'. The supplier stated:

She took so much work that I don't think it was possible for her to have personally done all the work.¹⁰⁰

The Senate report concluded; while some suppliers complied with labour conditions, other suppliers actively sort to avoid compliance.¹⁰¹ Scull, Nguyen and Woolcock reported outworkers claimed no one was concerned for their working conditions or OHS.¹⁰² Scull found suppliers did not regard outworkers' OHS as their concern.¹⁰³ One supplier stated:

No-one wants to come to work in a factory. In the factory, employees are covered by WorkCover, but everything is kept safe, and OHS practice is followed. ... How can I be responsible for people working at home? I can't go and tell people what to do in their own home. Everyone working at home should be a contractor, and have to be registered as a business, which they have already as they have ABNs.

Rather than demonstrating concern for outworkers labour conditions, suppliers are reported to use aggressive tactics to force outworkers to perform work on unfavourable labour conditions. Mayhew and Quinlan report outworkers work in a violent industry.¹⁰⁴ In other research, Mayhew and

⁹⁸ Igor Nossar, Richard Johnstone and Michael Quinlan, above note 2, at 172; Supplementary Submission, *Developing Strategies to Address OHS and Workers' Compensation Responsibilities Arising from Changing Employment Relationships*, Sydney, 2002, Textile Clothing and Footwear Union of Australia, at 3.

⁹⁹ *Ngo and Commissioner of Taxation* [2003] [2003] 51 ATR 1244, at 1246.

¹⁰⁰ [2003] 51 ATR 1244, at 1248).

¹⁰¹ The Parliament of the Commonwealth of Australia, above note 30, at 55.

¹⁰² Sue Scull, My-Linh Nguyen and Geoff Woolcock, above note 3, at 34.

¹⁰³ *Ibid.*

¹⁰⁴ Clair Mayhew and Michael Quinlan, 'The Relationship between Precarious Employment and Patterns of Occupational Violence: Survey Evidence from Seven

Quinlan claimed 49% of outworkers in their research reported verbal abuse, 23% reported threats, while 7% reported being subject to physical violence.¹⁰⁵

C *How suppliers deemed employers could ensure a safe system of work*

Despite the geographical separation, supplier deemed employers could take steps to manage the system of work. Supplier deemed employers could use the results of a risk assessment to ensure the outworkers use sewing machines which have correct guards, ensure the workplace has sufficient lighting, the workplace is adequately ventilated, and children do not have access to the work area and other such general safety risks. Through taking inexpensive steps, suppliers can make outworkers' workplaces safer. Williams analysed how employers can make workplaces safer.¹⁰⁶ Through providing comfortable safety equipment and information, employers can substantially increase the level of safety at workplaces. Similar to employers, if suppliers ensured outworkers had guards on their machines, ergonomically sound work stations¹⁰⁷ or provided them advice on safe lighting, ventilation,¹⁰⁸ protective

Occupations' in Kerstin Isaksson, Töres Theorell, Christer Hogstedt, Charli Eriksson and Töres Theorell (eds.), *Health Effects of the New Labour Market* (2002) 183.

¹⁰⁵ Clair Mayhew and Michael Quinlan, 'The Effects of Outsourcing on Occupational Health and Safety: A Comparative Study of Factory-Based Workers and Outworkers in the Australian Clothing Industry' (1999) 29 *International Journal of Health*.

¹⁰⁶ Warwick Williams *Barriers to occupational noise management*, PhD Thesis, University of New South Wales, 2007.

¹⁰⁷ D Ksilak, D Golob and S Franc, 'Using the ergonomic principles in workplace design in clothing production' (2007) 47 *Sigurnost* 2, 117-123; J Nasel Saraji, S Mosavi, S Shahtaheri and M Pourmahabaclian, 'A surveying risk factors featuring upper extremity musculoskeletal disorders by okra method in a textile factory' (2005) 3 *Journal of School of Public Health & Institute of Public Health Research* 4.

¹⁰⁸ Zackary Berger, 'Prevalence of Workplace Exacerbation of Asthma Symptoms in an Urban Working Population of Asthmatics' *Journal of Occupational and Environmental Medicine* 8; A Laakkonen, P Kyyroenen, T Kauppinen and E Pukkala, 'Occupational exposure to eight organic dusts and respiratory cancer among Finns' (2006) 63 *Occupational and Environmental Medicine* 11, 726-733; John Lange, Giuseppe Mastrangelo, Hugo Fedeli, Ragnar Rylander, David Christiani, 'A benefit of reducing lung cancer incidence in women occupationally exposed to cotton textile dust' (2004) 45 *American Journal of Industrial Medicine* 4, 388-389; W Su and Y Cheng, 'Fiber Deposition in the Human Respiratory Tract' *Nora Symposium: Research Makes A Difference* (2006); X Wang, L Pan, X Zhang, B Sun, H Dai And

clothing¹⁰⁹ and noise,¹¹⁰ then suppliers would presumably improve outworker's safety at work.

The importance of employers ensuring a safe system of work is emphasised by the strict approach taken to this duty by the courts. For example, In *Paparella v Kerry Logistics (Australia) Pty Ltd* the employer had recently purchased a business which had OHS risks.¹¹¹ The employer had instructed the employees of the potential risks and relied upon employees' common sense not to suffer injuries. The employer had a program to remedy all the breaches. An employee was injured before one of the OHS risk could be remedied. The employer was convicted and fined.

Employers must ensure all the equipment in the workplace is safe and complies with regulations. In *Inspector Sequeira v Kodak (Australasia) Pty Ltd* the employer required employees to use a non-powered guillotine. The non-powered guillotine had been imported from Germany and did not strictly comply with Australian standards. An employee was injured on the machine. The employer had operated in Australia for over one hundred years without an OHS conviction. The employer was convicted and fined.

D Do suppliers deemed employers manage their outworkers' system of work?

Research indicates, despite outworkers working in dangerous working systems, suppliers do not seek to manage the OHS risks faced by outworkers. The research found a large number of OHS concerns with outworkers work stations and with the inadequacy of safety equipment, for example:

E Christiani, 'Follow-up study of respiratory health of newly-hired female cotton textile workers' (2002) 41 *American Journal of Industrial Medicine* 2, 111-118.

¹⁰⁹ E Dawes-Higgs and S Freeman, 'Allergic contact dermatitis caused by the clothing dye, disperse blue 106, an important contact allergen that may be frequently missed' (2004) 45 *Australasian Journal of Dermatology* 1, 64-66; F Giusti, L Mantovani, A Martella and S Seidenari, 'Hand dermatitis as an unsuspected presentation of textile dye contact sensitivity' (2002) 47 *Contact Dermatitis* 2, 91-95; Sheng-Ye Lu and Zhi-Wen Guan, 'The Potential Impacts of Chemical Pollution of Cloth Textile on Human Health' (2002) 14 *Journal of Environment and Health* 2, 355-357.

¹¹⁰ F Angrilli and V Cossalter, 'Noise of rotating yarn in textile machines' (1984) 22 *Noise Control Engineering Journal* 2, 48-52.

¹¹¹ *Paparella v Kerry Logistics (Australia) Pty Ltd* (2006) SAIRC 54.

- The Commonwealth Senate Economic References Committee, Chang, Asian Women at Work and the New South Wales Pay Equity Review found outworkers work at work stations which are poorly lighted.¹¹² Scull, Nguyen found most outworkers surveyed attempted to install adequate lighting, however as outworkers had no training on what levels of lighting is necessary, the research concluded outworkers opinions on the adequacy of their lighting did not mean such lighting would satisfy OHS laws.¹¹³
- The Commonwealth Senate Economic References Committee found some outworkers' work stations were excessively noisy.¹¹⁴
- The Commonwealth Senate Economic References Committee and the New South Wales Pay Equity Review found outworkers work stations were not ergonomically designed were cramped and had inadequate space for outworkers to discharge their duties.¹¹⁵
- Chang found outworkers work stations had inadequate climate control which were sufficiently extreme to create an OHS concern.¹¹⁶

Research has also indicated outworkers have inadequate equipment to perform their tasks safely. For example:

- The New South Wales Pay Equity Review Found outworkers were forced to lift heavy boxes without mechanical or human assistance.¹¹⁷
- Chang found outworkers involved with preparing products for sale wore inadequate protective clothing, and thus outworkers were exposed to bleaches and dyes.¹¹⁸ As a consequence many outworkers suffered from skin conditions, such as dermatitis as a result of their outworking.

¹¹² *Pay Equity Inquiry* (1997) NSWIRC 6320; the Parliament of the Commonwealth of Australia, Senate Economics References Committee *Outworkers in the Garment Industry Report* (1996), see chapter 3; Seaja Chang *Seamstress: A report on the health issues of women workers in the textile clothing and footwear industries* (2000) Victoria, Working Women's Health.

Asian Women at Work, above note 24.

¹¹³ Sue Scull, My-Linh Nguyen and Geoff Woolcock, above note 2, at 55.

¹¹⁴ Senate Economics References Committee, above note 30, see chapter 3.

Ibid.

¹¹⁵ Senate Economics References Committee, above note 30, see chapter 3; *Pay Equity Inquiry* (1997) NSWIRC 6320 <<http://www.workandfamily.nsw.gov.au/payequity/report/industries/outworkers.html>? at 31 May 2007.

¹¹⁶ Seaja Chang, above note 115.

¹¹⁷ *Pay Equity Inquiry* (2004).

¹¹⁸ Seaja Chang, above note 115.

- Hepworth found outworkers worked on poorly installed industrial machines using inadequate domestic power sources.¹¹⁹

Research indicates suppliers continue to allow their outworkers and their outworkers' children to operate in dangerous work environments. The above research did not indicate suppliers took any steps to redress the risks to their outworkers' health and safety.

1 *How suppliers deemed employers could provide training*

Arguably the easiest aspect of OHS for suppliers to manage is outworkers' level of training. While it may be difficult for suppliers to manage their outworker's daily OHS risks, it is relatively easy for supplier to identify the areas in which outworkers would require training to be able to perform their tasks safely. While outworkers may elect not to follow the training, suppliers can easily control the amount of training outworkers receive.

All OHS acts require employers to provide their employees sufficient training to ensure their employees are able to work safely.¹²⁰ Employers cannot just rely upon their employees common sense. In *WorkCover Authority of New South Wales (Inspector Mayell) v Claude Van Den Bruggen t/as Dolphin Antenna Service* a self-employed employer recruited an employee to assist with the installation of television antennas.¹²¹ The employee was a carpenter by trade and had received a one day training course on installing antennas. The employer permitted the employee a wide discretion in the discharge of his work. The reliance of the employee's 'common sense' and the failure to supervise, led to the employee allowing a television cable he was holding to come in contact with electricity, causing the employees fatal wounding.¹²² Staunton J found the employer was not entitled to rely upon their employee's

¹¹⁹A Hepworth, 'Pink collar sweat shops' *Refractory Girl* (1994), *Australia Women's Studies Journal*, at 54-57.

¹²⁰ Section 37 of the *Occupational Health and Safety Act 1989* (ACT); Section 16(2)(e) of the *Occupational Health and Safety Act 1991* (CTH); section 29 of the *Workplace Health and Safety Act 1995* (QLD); section 8 of the *Occupational Health and Safety Act 2000* (NSW); section 19 of the *Occupational Health, Safety and Welfare Act 1986* (SA); section 9 of the *Workplace Health and Safety Act 1995* (Tas); section 21 of the *Occupational Health and Safety Act 2004* (Vic); Paragraph 19(1)(b) of the *Occupational Safety and Health Act 1984* (WA).

¹²¹ [2007] NSWIRComm 193.

¹²² [2007] NSWIRComm 193, at (38) and (39).

common sense and limited training to conduct a risk assessment, and the OHS duty remained that of the employer. As the employer did not discharge their OHS duty they were guilty.¹²³

Even where the activity is obviously dangerous, in most cases, if the employer has failed to train the employee, the employer will be liable. In *Paul Bradley Waltham and Cairns Synergy Electrical Pty Ltd* the employee demonstrated a lack of common sense by walking on dangerously fragile and unsupported roofing.¹²⁴ Regardless of the employees conduct, the employer had not provided the employee training or adequate supervision. Hall P noted, the duty of employers, is to ensure their employees OHS. Employers' 'obligation is not discharged by engaging experienced staff and trusting them to care for themselves.'¹²⁵ Even though the employee was found to be blameworthy, as the employer had failed in their OHS duty, the blameworthiness of the employee was immaterial to the guilt of the employer.¹²⁶ As the employer did not provide training or adequate supervision, the employer was liable.

In general, these OHS obligations require employers to instruct employees of all OHS risks associated with their duties.¹²⁷ Employees in the manufacturing industry would require training in, inter alia, in the correct use of machines and of lifting materials. For example, in *Inspector Hopkins v Byron McIntyre D & R Henderson Pty Ltd* an employer had not instructed the employee in the correct way to make alterations to the machine.¹²⁸ The employee was adjusting a machine with an automatic cutting device. Due to the incorrect approach his finger was amputated. The employer had argued they had in place a guard and was unaware employees had breached its policy by removing it. The employer was convicted.

Where the employee's duty requires them to lift heavy materials or lift items in strange circumstances, employers must train their employees. In *Inspector Legge v Timminco Pty Ltd* the employee was required to lift a basket in and

¹²³ [2007] NSWIRComm 193, at (44).

¹²⁴ *Paul Bradley Waltham and Cairns Synergy Electrical Pty Ltd* (2007) QIC 19.

¹²⁵ (2007) QIC 19.

¹²⁶ (2007) QIC 19.

¹²⁷ *Short v Lockshire Pty Ltd* [2000] QIC 62; *DPP v Esso Australia Pty Ltd* [2001] VSC 263; *Loizidis v SA Sawmilling Pty Ltd* [2001] SAIRC 31; *R v A C R Roofing Pty Ltd* [2004] VSCA 215; *Wesche v Vancrete Pty Ltd* [2005] QIC 6; *Markos v Dinko Tuna Farmers Pty Ltd* [2005] SAIRC 48.

¹²⁸ *Inspector Hopkins v Byron McIntyre* [2003] NSWCIMC 86.

out of a washing machine.¹²⁹ The basket weighed approximately thirty kilograms. The employer had provided the employee no instruction on the correct lifting technique. The employee suffered a back injury. The employee pleaded guilty and was fined.

E Do suppliers deemed provide outworkers with training?

Research indicates suppliers often do not provide outworkers sufficient training. Most participating outworkers in a New South Wales report alleged they had no initial or ongoing training.¹³⁰ Scull, Nguyen and Woolcock found it was common for outworkers in Queensland to teach themselves how to perform their duties or to learn from their relatives.¹³¹ Suppliers provided no training for outworkers.

V ALTERNATIVE REGULATORY MODEL – EXTENDING SUPPLY CHAIN REGULATION

The current regulatory model has provided outworkers a prima facie entitlement to OHS protection, however this regulatory framework has failed to deliver substantive results. In summary, the current regulatory framework has failed to deliver improvements in outworkers labour conditions. The Brotherhood of St Laurence report noted that ‘[o]utworkers interviewed for this research indicated that conditions had worsened in the last five years’.¹³² Rather than attempting to amend the existing OHS laws to improve their coverage, this article supports the Nossa, Johnstone and Quinlan’s argument that existing supply chain regulation should be extended to expressly include OHS. This idea was first posed by Nossa, Johnstone and Quinlan before either the New South Wales or South Australian codes were drafted and introduced.¹³³ This article will now examine the terms of the existing supply chain codes and demonstrate how outworkers’ OHS protection could be extended using these codes.

¹²⁹ (2002) NSW Industrial Magistrates Court, unreported, 21 May 2002.

¹³⁰ *Pay Equity Inquiry* (1997) NSWIRC 6320.

¹³¹ Sue Scull, My-Linh Nguyen and Geoff Woolcock, above note 3, at 42.

¹³² Brotherhood of St Laurence, above note 38, at 4.

¹³³ Igor Nossar, Richard Johnstone and Michael Quinlan, above note 2.

There are currently two Australian based mandatory retail codes - one in New South Wales and another in South Australia. The New South Wales Ethical Clothing Trades Extended Responsibility Scheme was made under Part 3 of the *Industrial Relations (Ethical Clothing Trades) Act 2001* (NSW), and the South Australian Outworker (Clothing Industry) Protection Code was made under section 99C of the *Fair Work Act 1994* (SA).¹³⁴ Where voluntary corporate codes have not been widely adopted in Australia, the New South Wales and the South Australian codes surmount this limitation by imposing mandatory obligations. As a result, all retailers and suppliers subject to the codes must comply with the codes' provisions.¹³⁵

Clauses 15 of the New South Wales and South Australian codes requires suppliers to state if any of their goods were produced within Australia. If products were produced within Australia, then Schedule 2 - Part B of the code requires the supplier to inform retailers to whom they supply those goods, of the address where the actual work will be performed. If the work is to be performed in a factory, the supplier must provide details of the factory's registration under relevant OHS regulations.

It would be relatively easy to extend the requirements under the codes' schedules to include OHS. The New South Wales and South Australian codes seek to ensure outworkers receive their lawful entitlements under all relevant awards,¹³⁶ remuneration and 'other lawful entitlements to outworkers in the clothing trades' industry.¹³⁷ James, Johnstone and Quinlan have argued 'other legal entitlements' include OHS.¹³⁸ Even if OHS is included within the codes, the existing disclosure requirements under the codes will not protect outworkers' OHS. Currently the only express protection in relation to OHS is a duty to keep records where all work is performed and the factory registration number under relevant OHS regulations.¹³⁹ Given that the codes already aim to protect all labour conditions, it would be feasible to improve

¹³⁴ *Ethical Clothing Trades Extended Responsibility Scheme*, published in the NSW Government Gazette on 17 December 2004; this code will be referred to as 'the New South Wales code'; *Outworker (Clothing Industry) Protection Code*, See schedule 1 of the Fair Work (Clothing Outworker Code of Practice Regulations) 2007 (SA); this code will be referred to as 'the South Australian code'.

¹³⁵ Clause 7.1 of the New South Wales and South Australian codes.

¹³⁶ Sub-clause 3(1) of the New South Wales Code; sub-clause 3(b) of the South Australian Code.

¹³⁷ 3(2)(d) of the New South Wales Code; clause 3(d) of the South Australian Code.

¹³⁸ Phil James, Richard Johnstone and Michael Quinlan, 'Regulating Supply Chains to Improve Health and Safety' (2007) 36 *Industrial Law Journal*, 163-188.

¹³⁹ Sub-clauses 12(f) of the New South Wales and South Australian Codes.

outworkers' workplace safety. As explored above, OHS duties require parties to perform risk assessments, ensure a safe system and ensure employees have adequate training to enable them to work safely. All of these duties require documentation. Given that the codes already require details to demonstrate remuneration and other award entitlements are met, the imposition of the obligation to provide copies of safety documentation would not be unduly onerous. As explored above, various Parliaments have imposed OHS laws upon suppliers for outworkers OHS. This requires suppliers to generate OHS related documentation. If the codes required suppliers to provide copies of OHS documentation concerning outworkers, then this would not be imposing OHS duties upon suppliers, but merely requiring suppliers to photocopy documentation which they should have generated already under OHS laws. Requiring suppliers to photocopy existing documentation would not appear to be an onerous obligation, when the provision of such information could assist in protecting outworkers' right to health and safety at work.

The codes rely primarily on private enforcement to ensure suppliers comply with the codes.¹⁴⁰ Clause 13 of both codes requires retailers to obtain the information from Schedule 2 from suppliers. While the codes do not impose any obligations upon retailers or suppliers to proactively ensure the codes are complied with, the codes do prevent parties from wilfully shutting their eyes to breaches. Clause 11 of the codes requires retailers to report any violation they are aware of or where the retailer:

- (b) has knowledge based on previous dealings or commercial arrangements with or through a relevant person; or
- (c) has information arising from an inspection of premises where work is or has been performed by outworkers, that would lead a reasonable person in the position of the retailer to be so aware that the outworkers have been, or will be, employed on less favourable terms and conditions than that prescribed under the relevant award or other relevant industrial instrument.¹⁴¹

¹⁴⁰ Igor Nossa, 'The scope for effective cross-jurisdictional regulation of commercial contractual arrangements beyond the traditional employment relationship: recent developments in Australia and their implications for national and supranational regulatory strategies' in Christopher Arup et al (eds). *Labour Law and Labour Market Regulation* (2006) Australia, Federation Press, 202-222; Sally Weller 'Regulating Clothing Outwork: A Sceptic's View' (2007) 49 *Journal of Industrial Relations*, 1, 69-86.

¹⁴¹ Clause 11(2) of the *Scheme*.

Retailers and suppliers are entitled to rely upon assertions made by suppliers outside the jurisdiction. Clauses 8(2)(b) of the codes, enable a party to avoid liability if they have reasonably relied on information supplied by another person. The enforcement of the codes therefore depends on each party being honest about labour conditions at their workplace, parties keeping records and parties not wilfully shutting their eyes to breaches. As supply chains generally consist of various independent parties, it is probable a breach of the codes will be identified by at least one party. The problem with this approach is that people in the industry who most need auditing, are likely not to complain about breaches of the codes and thus the worst offenders may avoid detection.

Where a labour breach is not reported by outworkers, suppliers or retailers, then unions and public inspectors are charged with identifying prosecuting breaches. Sub-clause 8(3) of the codes enables an authorized member of the Textile Clothing and Footwear Union of Australia or a government inspector to prosecute a breach of the codes, subject to the operation of sections 15 and 399 of the *Industrial Relations Act 1996* (NSW) and section 235 of the *Fair Work Act 1994* (SA) respectively. When Australian regulatory authorities have sufficient evidence on OHS breaches it is highly probable that those authorities will take enforcement action. The ability of unions to prosecute arguably increases outworkers' OHS protection. The New South Wales Workcover recommended the continuation of union prosecutions for OHS breaches, on the basis that unions have been successfully been prosecuting such breaches in New South Wales for over sixty years.¹⁴² Braithwaite,¹⁴³ Gunningham and Johnstone have argued, the ability of unions to prosecute where regulators fail to prosecute, increases the level of OHS enforcement.¹⁴⁴ Presuming public authorities and/or unions will enforce outworkers rights once they have evidence of a breach, how are code breaches identified?

Breaches under the codes are not contingent entirely upon outworkers complaining about labour violations. Clause 20 of both codes enables public authorities and authorized officials of the TCFUA to require retailers to produce copies of all records required to be kept under the codes. The South

¹⁴² Workcover NSW, *Report on The Review Of The Occupational Health And Safety Act 2000* (2006), at 8.9.

¹⁴³ J Braithwaite, *Thinking Laterally: Restorative and Responsive Regulation of OHS* (2003) Working Paper 13, National Research Centre for OHS Regulation, The Australian National University.

¹⁴⁴ Niel Gunningham and Richard Johnstone, *Regulating workplace safety system and sanctions* (1999).

Australian code requires retailers keep these records for seven years and the New South Wales code requires retailers keep these records for six years. The codes enable the authorised person or the TCFUA to specify the geographical location where the records must be made available. To avoid problems with the retailers operations, the codes provides that the notice cannot require the records to be produced on the retailer's premises. This notice to produce records does not need to be associated with a complaint or breach. Clause 20(1) of both codes enables an authorised person to provide the notice either following a complaint or as part of routine investigations. This means a civil servant or union official can perform routine investigations into a retailer who they suspect of breaching the codes.

The capacity of government and unions to perform routine investigations increases the potential of detecting breaches. Retailers know they could be randomly identified for investigation and that such investigations are not subject to a complaint.

Where a retailer or supplier is proven to have breached the codes, then they will be subject to legal and commercial sanctions. Clauses 7(2) of the codes enable a party who has breached the code to be subject to a fine.

In addition to the direct impact of legal sanctions, if a supplier is fined for breaching the codes, then suppliers and retailers maybe reluctant to trade with that party, as once a supplier was convicted, there would be a commercial history of the party breaching the code provisions. In such circumstances, it would be questionable whether the retailer or supplier could reasonably rely upon the convicted suppliers' representations in relation to OHS. If retailers and suppliers cannot reasonably rely upon suppliers' representations, then the retailer or supplier increases the probability of direct liability for any breach of the codes. As a consequence, a sanction under the codes could result in a fine or a loss of business.

In addition to the threat from direct legal sanctions, if a supplier has been fined for breaching the codes, the existence of corporate social responsibility would pressure parties not to trade with the person who has been breached. While attracting legal sanctions under the codes may not justify blacklisting by retailers and suppliers, corporate social responsibility focuses on the image or perception of the target group.¹⁴⁵ This means, if a target group is

¹⁴⁵Stephen Bainbridge, 'Director Primacy: The Means and Ends of Corporate Governance' (2003) 97 *North western University Law Review*, 547-590, at 563; Corporations and Market Advisory Committee *Corporate social responsibility*

likely to perceive a supplier as unethical, then retailers and suppliers may blacklist the convicted supplier simply to avoid any negative taint.

Unlike existing OHS protection afforded to outworkers, expanding the existing New South Wales and South Australian codes to include OHS would substantially address Nossa, Johnstone and Quinlan's three concerns with existing outworker OHS protection.

By expressly including outworkers OHS protection under the codes, outworkers would be further ensured prima facie entitlement to OHS protection similar to standard employees. Where existing OHS protection for outworkers adopts the traditional OHS enforcement model, the New South Wales and South Australian codes adopt proactive disclosure requirements, which forces parties throughout the supply chain to keep records of outworkers supposed conditions. Furthermore, where the existing OHS regulation largely ignores the retailer's role in supply chains, the New South Wales and South Australian codes impose limited duties upon retailers. The codes do not impose OHS obligations upon retailers, rather the codes impose limited obligations upon retailers to assist in the protection of outworkers.

While the expansion of the existing retail codes to include OHS would likely improve the OHS conditions of outworkers, this option is not perfect. For example, inspections under the codes focus on disclosure of documents and not social audits of actual workplaces. As a remedial vehicle, requiring disclosure of documents is considerably less intrusive for businesses, however relying entirely upon documentary evidence will fail to identify unethical businesses who are prepared to fraudulently alter documents.¹⁴⁶ Where an unscrupulous supplier has simply kept no documentary evidence, the complications in legally confirming a breach creates practical opportunities for regulatory avoidance. Where an unscrupulous supplier or

discussion paper (2005), at 1.3.2; Minette Drumwright and Patrick E. Murphy, 'Corporate Societal Marketing' in Paul N. Bloom and Gregory T. Gundlach (eds.) *Handbook of Marketing and Society* (2001) 163-83; Marianne M. Jennings and Stephen Happel, 'The Post-Enron Era for Stakeholder Theory: A New Look at Corporate Governance and the Case Therein' (2003) 54 *Mercer Law Review*, 873-937, at 873; Debbie McAlister and Linda Ferrell, 'The Role of Strategic Philanthropy in Marketing 2Strategy.' (2002) 36 *European Journal of Marketing* (/6, 689-706; Xiaomin Yu, *Putting corporate codes of conduct regarding labor standards in a global-national-local context: A case study of Reebok's athletic footwear supplier factory*, PhD thesis, Hong Kong University of Science and Technology, 2006, at 89.

¹⁴⁶ Clean Clothes Campaign, *Looking for a quick fix - How weak social auditing is keeping workers in sweatshops* (2005).

retailer attempted to avoid the codes, then, on the basis outworkers are unlikely to complain, the enforcement of the codes would require government or unions to identify a person who may be breaching the codes and to inspect their records. Parties who are unscrupulous and are profiting from breaching the codes can be difficult to enforce orders against. For example, if a supplier has an inspection notice served upon them and they ignore it, then the supplier could be fined and ordered by the relevant Industrial Relations Commission to comply with the order. Due to the transient nature of the outworking industry the supplier may simply disappear with all their records. (Nossa, Johnstone and Quinlan claim that middle men corporations often disappear before a judgment can be enforced.)¹⁴⁷ Weller claims suppliers often go into liquidation to avoid proceedings and then re-enter the industry with a new corporate name.¹⁴⁸ The practice of suppliers entering liquidation to avoid prosecutions appears common. For example, in *Textile Clothing Footwear Union of Australia v Southern Cross Clothing Pty Ltd* the supplier ignored a court order to file a defence and instructed their solicitor to inform the court they were considering entering into liquidation.¹⁴⁹

Under the current arrangement, unscrupulous suppliers and retailers know when they receive an inspection notice that they have a window of opportunity to commence to wind up their operations and transfer their business to an alternative legal entity. On the other hand, those attempting to enforce the code cannot act against the unscrupulous supplier or retailer until the inspection order is breached and they have a court order. Even though these codes are not perfect, the fact remains they are operational regulatory models which can be adapted quickly to provide increased protection for the most vulnerable members in Australian supply chains. When considering vehicles to encourage corporations to act respect human rights, Ruggie observed there is ‘no single silver bullet’ that will resolve the business and human rights challenge.¹⁵⁰ This article contends that, while extending the codes may not provide the best option, it is a ‘vehicle’ which has been accepted by two state governments and appears to be providing benefits in

¹⁴⁷ Igor Nossar, Richard Johnstone and Michael Quinlan, above note 2.

¹⁴⁸ Sally Weller, above note 4.

¹⁴⁹ [2006] FCA 325.

¹⁵⁰ John Ruggie, *Business and human rights: Mapping international standards of responsibility and accountability corporate acts* (2007) Report of the Special Representative of the United Nations Secretary-General on the issue of human rights and transnational corporations and other business enterprises, at 24.

other labour conditions and affords a vehicle through which outworkers' workplace safety could be improved.¹⁵¹

VI CONCLUSION

Regulation has struggled to ensure outworkers' safety at work. As explored in the first part of this article, outworkers are generally the most vulnerable members of clothing manufacturing supply chains. Outworkers are vulnerable as they work from their domestic residence, are de-unionised and are culturally isolated from standard enforcement agencies. Nossa, Johnstone and Quinlan identified three systematic regulatory failures with outworker protections. This article used these three concerns as a basis to analyse OHS legislative reforms, which have attempted to redress the plight of outworkers. The second part of this article analysed in detail how OHS reforms have sought to remedy the plight of outworkers. This article concluded that these legislative reforms provided outworkers with a prima facie entitlement to OHS protection, but failed to impose duties upon retailers. The fourth part of this article explored how OHS duties have been enforced in practice. After a detailed comparison between suppliers' obligations under OHS laws and suppliers' conduct, as demonstrated by research, this article concluded outworkers' OHS protection is not enforced in practice.

In order to improve the situation of outworkers, this article has explored how existing mandatory retail codes in New South Wales and South Australia could be expanded to include disclosure requirements related to outworkers' OHS. Currently these codes ensure other labour conditions are met by requiring suppliers and retailers to disclose records to each other and to retain those records. Those records can then be subject to inspections by public agencies or by unions on routine investigations or based upon a complaint. As suppliers are already required by OHS to manage their outworkers' OHS, requiring suppliers to then keep records of how they manage their outworkers' OHS would not impose a substantial burden upon suppliers. The requirement for suppliers to provide such records to retailers, and for suppliers and retailers to make such documents available for inspection by public agencies and unions, would impose a small financial expense, but could provide substantial increases in the enforcement of outworkers' OHS. The increased obligations in disclosure and document retention across the supply chain would render it more difficult for rogue agents to violate labour conditions, and would consequently reduce the number of parties who keep

¹⁵¹ Igor Nossa, above note 143.

their costs low through violating labour conditions. When the expense in producing, disclosing and retaining records is compared to the cost to outworkers' physical safety, this article concludes, existing retail supply chain regulation should be extended to expressly include OHS protection for outworkers.

