LABOUR RIGHTS AS HUMAN RIGHTS: WORKERS' SAFETY AT WORK IN AUSTRALIAN-BASED SUPPLY CHAINS

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The work contained in this thesis has not been previously submitted to meet requirements for an award at this or any other higher education institution. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made.

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Abstract

The increase of buyer-driven supply chains, outsourcing and other forms of non-traditional employment has resulted in challenges for labour market regulation. One business model which has created substantial regulatory challenges is supply chains. The supply chain model involves retailers purchasing products from brand corporations who then outsource the manufacturing of the work to traders who contract with factories or outworkers who actually manufacture the clothing and textiles. This business model results in time and cost pressures being pushed down the supply chain which has resulted in sweatshops where workers systematically have their labour rights violated. Literally millions of workers work in dangerous workplaces where thousands are killed or permanently disabled every year. This thesis has analysed possible regulatory responses to provide workers a right to safety and health in supply chains which provide products for Australian retailers.

This thesis will use a human rights standard to determine whether Australia is discharging its human rights obligations in its approach to combating domestic and foreign labour abuses. It is beyond this thesis to analyse Occupational Health and Safety (**OHS**) laws in every jurisdiction. Accordingly, this thesis will focus upon Australian domestic laws and laws in one of Australia's major trading partners, the Peoples' Republic of China (**China)**.

It is hypothesised that Australia is currently breaching its human rights obligations through failing to adequately regulate employees' safety at work in Australian-based supply chains. To prove this hypothesis, this thesis will adopt a three- phase approach to analysing Australia's regulatory responses.

Phase 1 will identify the standard by which Australia's regulatory approach to employees' health and safety in supply chains can be judged. This phase will focus on analysing how workers' rights to safety as a human right imposes a moral obligation on Australia to take reasonablely practicable steps regulate Australian-based supply chains. This will form a human rights standard against which Australia's conduct can be judged.

Phase 2 focuses upon the current regulatory environment. If existing regulatory vehicles adequately protect the health and safety of employees, then Australia will have discharged its obligations through simply maintaining the status quo. Australia currently regulates OHS through a combination of 'hard law' and 'soft law' regulatory vehicles. The first part of phase 2 analyses the effectiveness of traditional OHS laws in Australia and in China. The final part of phase 2 then analyses the effectiveness of the major soft law vehicle 'Corporate Social Responsibility' (**CSR**).

The fact that employees are working in unsafe working conditions does not mean Australia is breaching its human rights obligations. Australia is only required to take reasonably practicable steps to ensure human rights are realized.

Phase 3 identifies four regulatory vehicles to determine whether they would assist Australia in discharging its human rights obligations. Phase 3 then analyses whether Australia could unilaterally introduce supply chain regulation to regulate domestic

and extraterritorial supply chains. Phase 3 also analyses three public international law regulatory vehicles. This chapter considers the ability of the United Nations Global Compact, the ILO's *Better Factory Project* and a bilateral agreement to improve the detection and enforcement of workers' right to safety and health.

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Awards

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3) The International Law Association Nygh Prize for 2006 for 'Domestic courts in private international law: The American experience'.

Publications

1) Paul Harpur, 'Clothing Manufacturing Supply Chains, Contractual Layers and Hold Harmless Clauses: How OHS Duties can be Imposed Over Retailers' (2008) 21 *Australian Journal of Labor Law* 3, 316.
2) Paul Harpur, 'OHS Issues to the Board: Company Directors Face Jail and Fines For Their Companies' Lack Of Safety' (2008) *Bond University Corporate Governance E-Journal*.
3) Paul Harpur, 'The Evolving Nature of the Right to Life: The Impact of Positive Human Rights Obligations' (2007) 9 *The University of Notre Dame Australia Law Journal*, 95.

4) Paul Harpur, 'Occupational Health and Safety Duties to Protect Outworkers: The Failure of Regulatory Intervention and Calls for Reform' (2007) 12 *Deakin Law Review* 2, 48.
5) Paul Harpur, 'Regulating Multi-National Corporations Through State-Based Laws: Problems with Enforcing Human Rights Under The Alien Tort Statute' (2006) 13 *International Law Journal*.
6) Paul Harpur, 'Occupational Health and Safety: Statutory Protection or Human Right?' (Paper presented at the Australian Labour Law Association's Third Biennial Conference, Brisbane, September 2006.

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CHAPTER 1

1 Introduction to the thesis

Western-based corporations have been repeatedly accused of increasing profits through allowing workers in developing States to be placed at risk to keep production costs low.[1] The problem of workers being compelled to work under dangerous working conditions is not a recent phenomenon. Perhaps the most common term to refer to factories with extremely poor labour conditions is the term 'sweatshop'.[2] Louie explained the history of sweatshops:

> [T]he term 'sweatshop' was initially coined during the industrial revolution in the 1880s and 1890s to describe the subcontracting system of labour. The sweatshops that served larger companies were run by middlemen who expanded or contracted their labour forces depending on the success or failure of different clothing fashions. The middlemen's profits were tied to the amount of labour they could 'sweat' out of their workers—most often women and children—through low wages, excessive hours, and unsanitary conditions.[3]

Modern sweatshops are often associated with the working conditions of parties at the bottom of buyer-driven supply chains.[4]

The impact of international and domestic supply chains upon the workers at the bottom of the chain has been subjected to extensive research. This research has uniformly concluded that workers at the bottom of supply chains are vulnerable to exploitation. Often these workers operate in an informal sector with no labour

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[1] Hassan Mare, *The Disproportionate Impact on Labour of the Economic and Social Damage Perpetrated by the Activities of Transnational Corporations* (PhD Thesis, University of Essex, 2007) ch 1.
[2] Santoro observes some supply models focus upon exploitation while others focus upon developing a positive image in the region. Whether the supply chain will involve sweatshops will depend upon, inter alia, the corporate objective: Michael A.Santoro, *Profits and Principles, Global Capitalism and Human Rights in China* (2000) 16-32.
[3] Miriam Louie, *Sweatshop Warriors* (2001) 4.
[4] Venu Keesari, *Fair Labor Standards in the Global Supply Chain: Humane Working Conditions and Their Effects on the Manufacturing Performance of Apparel Factories* (MA Thesis, Boston College, 2004) 1.

rights' protection.[5] As a consequence workers' rights to wages, to be free from discrimination or to health and safety are often violated.

The International Labour Organization (**ILO**) commissioned *Supporting Workers in the Informal Economy: a Policy Framework*, which recognised that the exploitation of workers in the informal economy occurred in developed and developing nations across the globe.[6] The ILO adopted the *Convention and Recommendation on Home Work* in 1996 to protect employees in the informal economy. To date only Ireland and Finland have ratified this convention.[7]

1.1 An introduction to the supply chain business model

1.1.1 What are supply chains?

Farzelle was one of the first authors to coin the phrase 'supply chain management'.[8] Supply chain management incorporates the process of procurement of raw materials, manufacturing those raw materials into products, the distribution of those products and the marketing/sale of those products.[9] Levi, Kaminsky and Levi explain supply chain management as a business model to integrate separate legal entities to decrease the expense of manufacturing, supply and retail of products, while meeting service level requirements.[10] As Johnstone and Wilson explain:

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[5] Keith Hart, 'Informal Income Opportunities and Urban Employment in Ghana*'* (1973) 11 *Journal of Modern African Studies* 61.

[6] Martha Chen, Renana Jhabvala and Frances Lund, *Supporting Workers in the Informal Economy: a Policy Framework*, ILO Task Force for the Informal Economy Report (2001). Chen, Renana and Lund's publication was part of the ILO Task Force on the Informal Economy. See also Valentina Forastieri, *Improvement of Working Conditions and Environment in the Informal Sector through Health and Safety Measures* ILO Programme on Health and Safety Work and the Environment (SafeWork) Report (1999).

[7] ILO Convention No. 177, *Convention Concerning HomeWork*, opened for signatures 20 June 1996, (entered into force 22 March 2000); ILO Convention No. 155 Ratifications:
<Http://www.ilo.org/public/english/employment/skills/hrdr/instr/c_177r.htm> at 15 December 2008

[8] Edward Frazelle, *Supply Chain Strategy: The Logistics of Supply Chain Management* (2002).

[9] Benita Beamon, 'Measuring Supply Chain Performance' (1999) 19 *International Journal of Operations and Production Management* 275; Zhao's doctorate focused upon improving the link between the stages of supply chains: Kanghua Zhao, *E-Marketplace Development and Trading Agent Design for Supply Chain Management* (PhD Thesis, University of Western Sydney, 2006); *E-Marketplace Development and Trading Agent Design for Supply Chain Management* (PhD Thesis, University of Western Sydney, 2006).

[10] David Levi, Sally Kaminsky and Edith Levi, *Designing and Managing the Supply Chain: Concepts, Strategies and Case Studies* (2000) ch 1.

> Many industries, particularly … parts of manufacturing, have a high incidence of the use of contractual chains or networks. For example, the production of clothing often takes place via a long contractual chain …[11]

At the top of the supply chain are generally retailers or large brand names who outsource the supply of products to unrelated corporate entities. These unrelated corporate entities often act as suppliers and further outsource the production of products to factories until finally workers toil to make the products.[12] Even though supply chains may consist of a number of separate entities, the entire chain may be controlled or owned by the one corporate entity.[13]

Nossar, Johnstone and Quinlin refer to the party at the top of the supply chain as the 'effective business controller'.[14] To maximise their profits, the effective business controller purchases products on the most favourable terms to their enterprise. This approach creates competition between suppliers who can produce products cheapest and with the fastest turn around. To maintain their profits, the suppliers outsource work to other organisations. These organisations then outsource work to the actual worker who will produce the products. Due to the nature of much of this work, there is a large labour pool ready to perform this work at low costs in unfavourable conditions.

Peck observed that corporations outsourcing work increases corporations' organisational flexibility.[15] To survive in the highly competitive textile and apparel market corporations must be able to be agile and respond quickly to changes in the market.[16] The supply chain business model enables corporations to reduce the costs in responding to market changes. If a corporation operates its own factories then

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[11] Richard Johnstone and Therese Wilson, 'Take Me to Your Employer: The Organizational Reach of Occupational Health and Safety Regulation' (2006) 19 *Australian Journal of Labour Law* 3, 26.
[12] Maria Gillen, 'The Apparel Industry Partnership's Free Labor Association: a Solution to the Overseas Sweatshop Problem or the Emperor's New Clothes?' (2000) 32 *New York University Journal of International Law and Politics* 1059, 1085; Peter Newell and Joanna Wheeler, *Rights, Resources and the Politics of Accountability* (2006) 37-58.
[13] John Ruggie, '*Interim Report*' (The Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises) U N Doc E/CN.4/2006/97 (2006).
[14] Igor Nossar, 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*.
[15] Jamie Peck, 'Outwork and Restructuring Processes in the Australian Clothing Industry' (1990) 3 *Labour and Industry* 2, 302, 306.
[16] Marcia Perry and Amrik S. Sohal, 'Effective Quick Response Practices in a Supply Chain Partnership - An Australian Case Study' (2001) 21 *International Journal of Operations & Production Management* 5/6, 840.

before the corporation can respond to a change in the market that corporation would be forced to alter its production capacity. This could require it to stop existing runs or to purchase new machines. If the corporation has structured its operations using a supply chain business model, then the corporation can simply approach a supplier who can meet the changing needs of the corporation and purchase the products from that supplier.

The mere fact corporations have outsourced work does not mean they take no interest in how the products are produced. While corporations historically demonstrated limited concern for the social impact of how outsourced work is performed, corporations almost always demonstrated sufficient control to ensure quality control.[17]

To be competitive, supply chains require strong integration between the separate organisations. In her doctorate thesis Jeeva focused on developing a general measurement scale for procurement flexibility.[18] She found that inefficiency in Australian supply chains has the potential to greatly decrease the effectiveness of the supply chain business model. One of the interesting findings of this research was that efficiencies were more likely to flow from the bottom of the supply chain up to the consumer/retailer, than from the consumer/retailer down the supply chain. On this basis, retailers have a vested interested in improving the efficiency of business operations lower in the supply chain. These findings are arguably supported by American research performed by Narasimhan and Jayaram, which claims that effective supply chain management models must have strong integration between the supply chain levels.[19] Handfield and Bechtel claim it is crucial for organisations within a supply chain to comprehend the other organisations' needs.[20] To fully understand the needs of organisations within a supply chain, Handfield and Bechtel claim it is essential to have strong cross-organisational links. Groves and Valsamakis's research found the better the integration between retailers and

[17] Nina Ascoly and Ineke Zeldenrust, *Challenges in China: Experiences from 2 CCC Pilot Projects on Monitoring and Verification of Code Compliance* (Clean Clothes Campaign Report, 2003) 7, 8.
[18] Ananda Jeeva, *Procurement Dimensions in the Australian Manufacturing Sector: Flexibility Issues in a Supply Chain Perspective* (PhD Thesis, Curtin University, 2004).
[19] Ram Narasimhan and Jayanth Jayaram, 'Causal Linkages in Supply Chain Management: an Exploratory Study of North American Manufacturing Firms' (1998) 29 *Decision Sciences* 579.
[20] Robert Handfield and Christian Bechtel, 'The Role of Trust and Relationship Structure in Improving Supply Chain Responsiveness' (2002) 31 *Industrial Marketing Management*- 367.

manufacturers, the greater the performance of the supply chain.[21] Dyer, Sung Cho and Chu found successful supply chain relationships existed where manufacturers were actively involved in assisting retailers to differentiate the finished products.[22]

1.1.2 What are the benefits to corporations in adopting the supply chain business model?

Supply chains represent an attractive business model for corporations. Supply chains can provide increased organizational flexibility and reduced costs while substantially reducing corporations' risk. It could be argued that this reduction in risk is one of the most attractive aspects of the supply chain business model. While an effective business controller can often exert substantial economic pressure over parties lower in their supply chains, the operation of the corporate veil means that the effective business controller is not legally liable for the conduct of parties lower in the supply chain. [23]

The corporate veil provides that each company is a legal entity, which is separate from its shareholders and related corporate entities.[24] Companies are generally not liable for the conduct of other companies.[25] As corporate law has not developed concepts of group responsibility, corporations are generally not liable for labour abuses perpetrated by other entities within the same corporate group.[26] This means an effective business controller can often purchase products which were made under sweatshop labour conditions without attracting any liabilities. If the effective business controller operated a factory itself and breached labour conditions itself, then it would be liable for these breaches. Often by outsourcing the labour breaches,

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[21] Gwyn Groves and Vassilios Valsamakis, 'Supplier-Customer Relationships and Company Performance' (1998) 9 *The International Journal of Logistics Management* 51.
[22] Jeffrey Dyer, Dong Sung Cho and Wujin Chu, 'Strategic Supplier Segmentation: the Next Best Practice in Supply Chain Management' (1998) 40 *California Management Review* 57.
[23] The concept of separate legal personality which supports the corporate veil has international acceptance. The separate legal entity principle of corporate law has been accepted by the International Court of Justice in *Barcelona Traction, Light & Power Company (Belgium v. Spain)* where the court advised that international law has been compelled to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. The court accordingly recognised the entity was a separate legal personality from its shareholders; *Barcelona Traction, Light & Power Company (Belgium v. Spain),* 1970 I.C.J. 3; See for discussion: Yaraslau Kryvoi, 'Enforcing Labor Rights against Multinational Corporate Groups in Europe' (2007) 46 *Industrial Relations* 2, 366 .
[24] *Corporations Act 2001* (Cth) s 124.
[25] Sarala Fitzgerald, 'Corporate Accountability for Human Rights Violations in Australian Domestic Law' (2005) 11 *Australian Journal of Human Rights* 1, 33.
[26] Hugh Collins, 'Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration' (1990) 53 *Modern Law Review* 731, 733-734.

the effective business controller can gain the economic benefits associated with the labour breaches without attracting liability for those breaches.

One way corporate groups utilize the corporate veil is through using holding companies and parent companies. Parent companies generally use contractual relationships to keep other companies at arms' length.[27] Where the court finds a company is in fact a subsidiary or related company of the parent or the agent or trustee of the parent, then the parent can be liable for the company's conduct.[28] Companies are only liable where the court finds the related company is carrying on a business as the parent company.[29] For an agency relationship to be established, both the parent company and the related company must have indicated the agency relationship exists, either expressly or by implication from their words and conduct.[30] When determining whether the other company is the agent of the parent company, the court will consider factors such as:

- Does the parent company regard the profits of the other company as the profits of the parent company?[31]
- Does the parent company control the appointment of the board of the other company?[32]
- Does the parent company control more than 50% of the votes on the board?[33]
- Does the parent company control the day to day operations of the other company?[34]
- Is the parent company the only shareholder in the other company?[35] or
- Are the employees of the other company remunerated by the parent company?[36]

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[27] Richard Meeran, 'Liability of Multinational Corporations: a Critical Stage in the UK' in M Kamminga and S Zia-Zarifi (eds), *Liability of Multinational Corporations Under International Law (2000)* 252.
[28] Attorney-*General v Equiticorp Industries Group Ltd (in Statutory Management)* [1996] 1 NZLR 528, 539.
[29] *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567 and *Re FG (Films) Ltd* [1953] 1 All ER 615.
[30] *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd & Bunge Corp* [1967] 2 All ER 353, 358.
[31] *Adams v Cape Industries Plc* [1991] 1 All ER 929 (Slade LJ); *Smith Stone and Knight Ltd v Lord Mayor, Aldermen and Citizens of the City of Birmingham* (1939) 161 LT 371 (Atkinson J).
[32] *Corporations Act* 2001 (Cth) s 46(1)(a)(i); *Spreag v Paeson Pty Ltd* (1990) 94 ALR 679, 711 (Sheppard J).
[33] *Corporations Act 2001* (Cth) s 46(1)(a)(ii) and (iii).
[34] *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); Richard Meeran, 'Liability of Multinational Corporations: a Critical Stage in the UK' in M Kamminga and S Zia-Zarifi (eds), *Liability of Multinational Corporations Under International Law* (2000) 261.
[35] *DHN Food Distributors Ltd v London Borough of Tower Hamlets* [1976] 1 WLR 852, 860-862 (Lord Denning MR and Goff LJ respectively).
[36] *Mario Piraino Pty Ltd v Roads Corporation (No 2)* [1993] 1 VR 130,148.

To constitute a subsidiary, s 46 of the *Corporations Act 2001* (Cth) requires the parent company to either control the composition of the subsidiary company's board, have the ability to control a majority of votes at a meeting of shareholders or be a subsidiary of a subsidiary of the parent company.

It would be extremely rare for an effective business controller to create an agency or subsidiary relationship with another company to which it outsources work in a supply chain. It is easy for a parent company to structure its operation to ensure the corporate veil is not pierced through the establishment of arms length relationships. When the corporate group involves multi-national operations, the ability to pierce the corporate veil is even harder. Ruggie has noted:

> Each legally distinct entity [of the corporate group] is subject to the laws of the countries in which it operates, but the transnational corporate group or network as a whole is not governed directly by international law.[37]

As a consequence, corporations are not generally legally responsible for the conduct of other entities in their supply chains, despite the fact a corporation may have the economic power to dominate the corporate group.

The primary motive for corporations to develop supply chains is profit.[38] From the 1970s, multinational corporations started to outsource production to States with lower labour costs.[39] It is submitted that the supply chain models are regarded by many business groups as a cheaper and more flexible alternative to traditional hierarchical business models.[40] Weller explains that within the metaphor of global garment production in a linear chain formation core firms accrue wealth because as

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[37] John Ruggie, 'Business and Human Rights: the Evolving International Agenda' (2007) 101 *American Journal of International Law* 819, 824.
[38] Christopher Conklin, *Outsourcing United States Manufacturing Jobs: an Assessment of Perspectives*' (MA Thesis, State University of New York, 2007); R Jenkins, R Pearson & G Seyfang (eds), *CorporateResponsibility and Labour Rights: Codes of Conduct in a Global Economy* (2002) ch1; Fernando Merino and Diego Rodríguez, 'Business Services Outsourcing by Manufacturing Firms' (2007) 16 *Industrial and Corporate Change* 6, 1147.
[39] Denis G. Arnold and Laura P. Hartman, 'Moral Imagination and the Future of Sweatshops' (2003) 108 *Business and Society Review* 4, 425.
[40] Hans-Christian Pfohl and Hans Peter Buse, 'Inter-organizational Logistics Systems in Flexible Production Networks: an Organizational Capabilities Perspective′ (2000) 30 *International Journal of Physical Distribution & Logistics Management* 5, 388; Robert Spekman, John Kamauff Jr and Niklas Myhr, 'An empirical Investigation into Supply Chain Management: A Perspective on Partnerships' (1998) 28 *Internal Journal of Physical Distribution & Logistics Management* 630.

buyers in the subcontracting structure, they effectively transfer business risk down the chain, to smaller firms and ultimately to individual workers.[41]
Due to the profitability of the supply chain business model, Cohen and Roussel conclude that supply chains are being increasingly utilised by corporations to maximize profits.[42]

The potential of supply chains to benefit Australian corporations was analyzed by Robertson in his doctorate.[43] Robertson's thesis asked the question, 'How much and in what ways does the integration of supply chain logistics' processes in manufacturing organizations impact upon business performance?'

Robertson's thesis hypothesized that the integration of supply chain logistics' processes, the application of supply chain management principles and the application of human 'social' principles/approaches significantly and positively impact on supply chain and business performance. To test his hypothesis, Robertson developed and tested a survey questionnaire. His survey results found conditional support for his hypothesis.

More broadly, supply chains have been reported to enable multinational corporations to focus upon maximizing sales while reducing the expenses associated with production. Cooney has observed:

> [V]ery many workplaces forming part of buyer-driven commodity chains certainly merit the 'sweatshop' label. Serious labour abuses are common. Basic safety standards are violated, often resulting in severe injury or death.[44]

The anti-sweatshop movement generally claims that corporations spend billions on advertising, receive billions in profits and place substantial pressure on parties lower in the supply chain to continually reduce the costs of production.[45] Arnold and

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[41] Sally Weller, *Fashion' Influence on Garment Mass Production: Knowledge, Commodities and he Capture of Value*' (PhD Thesis, Victoria University, 2004) 27.
[42] Shoshanah Cohen and Joseph Roussel, *Strategic Supply Chain Management* (2005) 9.
[43] Peter Robertson, '*The Impact of Supply ChainPprocess Integration on Business Performance* (PhD Thesis, University of Wollongong, 2006).
[44] Sean Cooney, *Improving Regulatory Strategies for Dealing with Endemic Labour Abuses* (SJD Thesis, Columbia University, 2005) 107.
[45] Play Fair Alliance, *Play Fair the Olympics* (Report, 2004).

Hartman explored how supply chains in manufacturing had become increasingly globalised.[46] They noted the World Bank and the International Monetary Fund encouraged development in developing nations to assist in these States' capacity to utilize their comparative labour cost advantage. The main driver for supply chain globalisation remains the ability to access cheap markets with low regulation.

1.2 Why focus upon outworkers in Australian manufacturing?

While sweatshops are traditionally conceived as factories in developing States, there is a substantial amount of evidence that thousands of workers in developed States work under labour conditions that are unacceptable. While most employees in wealthy States have their right to safety and health protected, workers who work in non-traditional employment are vulnerable, and research demonstrates that many of these work in unsafe conditions. Johnstone, Mayhew and Quinlan discuss the problems with outsourcing in Australia and the United States of America (**USA**).[47] They conclude that outsourcing increases 'the likelihood of multi-employer worksites, corner-cutting, and dangerous forms of work disorganization, as well as situations where the legal responsibilities of employers are more ambiguous and attenuated.'[48] Managing OHS in outsourcing arrangements presents regulators with increased logistical demands and regulatory difficulties, which result in reduced OHS enforcement. Johnstone, Mayhew and Quinlan conclude that outsourcing should be conceptualised as part of 'a broader struggle over the reshaping of work structures and employment relationships to suit employer interests'.[49]

The Australian aspect of this thesis focuses upon the protection afforded to the most vulnerable members of Australian-based supply chains: outworkers. Outworkers are generally defined to include a person who is not the occupier of a factory, who performs manufacturing work on goods, clothing or textiles outside a factory,

[46] Denis G. Arnold and Laura P. Hartman, 'Moral Imagination and the Future of Sweatshops' (2003) 108 *Business and Society Review* 4, 425, S 2.
[47] Richard Johnstone, Claire Mayhew and Michael Quinlan, ' Outsourcing risk? The regulation of occupational health and safety where subcontractors are employed' (2001) 22 *Comparative Labour Law and Policy Journal*, 351.
[48] Ibid, 392.
[49] Ibid, 393.

whether directly or indirectly, for the occupier of a factory or a trader who sells clothing by wholesale or retail.[50]

Outworking has had a long history in Australia. In the 1860s, manufacturers outsourced work to outworkers in order to reduce costs and be competitive.[51] For over a century the special risks associated with home-based employment has had recognition.[52] Traditionally in Australia, outworkers have been protected under federal awards. Nossar, Johnstone and Quinlan noted that every industrial award governing the clothing industry, in every Australian jurisdiction, since 1919 has attempted to govern the protection of home-based outworkers. [53]

Prior to 1987, Australian federal awards prohibited certain conduct and prescribed minimal entitlements. Generally these federal awards were ignored, with prohibited conduct being the norm and outworkers consistently receiving entitlements below that of factory-based workers. In 1987, federal 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.[54]

At present, the precise number of outworkers in Australia and their demography is uncertain. The outworker industry is largely invisible and hard to assess or regulate. Arguably it is difficult for governments to regulate a sector which they cannot even quantify. Reports prepared by Victorian government agencies in 2004 noted that the

[50] *Fair Work Act 1994* (SA) s 5;*Industrial Relations (Ethical Clothing Trades) Act 2001* (NSW) s 3 refers to *Industrial Relations Act 1996* (NSW) sch 1 Cl 1(f); *Industrial Relations Act 1999* (Qld) s 5; *Outworkers (Improved Protection) Act 2003* (Vic) S 3; For a discussion of the Victorian amendments generally see, Colin Fenwick, 'Protecting Victoria's Vulnerable Workers: New Legislative Developments' (2003) 16 *Australian Journal of Labour Law* 198.

[51] Raelene Frances, 'No More Amazons: Gender and Work Process in the Victorian Clothing Trades, 1890-1939' (1986) 50 *Labour History* 98.

[52] 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.

[53] Igor Nossar, 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; *Re Clothing Trades Award* (1987) 19 *IR* 416, 431-5 (Riordan DP); This approach will continue under the Federal Government's Fair Work Bill 2008 (Cth); To see how the Fair Work Bill 2008 (Cth) protects outworkers thorugh the Modern Award system see Clauses 47, 140 and 200 especially.

[54] Igor Nossar, *Proposals for the Protection of Outworkers from Exploitation* (Textile, Clothing and Footwear Union of Australia, 1999).

precise number of outworkers in Australia is disputed.[55] The Victorian report noted that the Australian Tax Office (**ATO**) used a figure of 50 000 outworkers, while the Textile, Clothing and Footwear Union of Australia (**TCFUA**) claimed the number of outworkers was nearer to 329 000.[56] The Queensland government observed that the estimates of how many outworkers were in Australia varied from 50 000 to 330 000.[57] The Queensland government has offered PhD funding in an attempt to clarify the number of outworkers and the reasons why this industry has low compliance with industrial relations laws. In considering the OHS issues associated with outworkers, the Australian Capital Territory estimated there were approximately 329, 000 outworkers in Australia.[58] 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.[59] Lozusic estimates there were between 129 000 and 329 000 outworkers in Australia.[60] While the estimate of outworkers varies greatly, there is little doubt that the outworker industry in Australia includes tens of thousands of workers.

Research indicates that the workers who operate as outworkers are largely made up of immigrant women, who have limited options for alternative employment.[61] They work from their homes, their workplaces are often not notified to any regulatory authority, and as far as regulation goes, these employees are reportedly invisible.[62] Lacking fluent English and having difficulties with cultural assimilation and educational barriers, outworkers have limited options.[63] Christina Cregan interviewed 112 Australian outworkers and found systematic exploitation of recent immigrants.[64] Immigrants with little English were encouraged to borrow money to

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[55] Victorian Office of Training and Tertiary Education,; '*Study Textile, Clothing, Footwear & Leather (TCF&L)* (Priorities Report, 2004). .
[56] Economic Development Committee of Victoria, Inquiry into Labour Hire Employment in Victoria (2006).
[57] 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> at 8 December 2008.
[58] Australian Capital Territory Government, *Occupational Health and Safety Act 1989: Scope and Structure Review* (2005)
[59] New South Wales Department of Industrial Relations, *Behind the Label,,,* NSW Government Clothing Outwork Strategy Issues Paper (1999) 8.
[60] Roza Lozusic, *Outworkers*, New South Wales Parliament Briefing Paper, (2002).
[61] Dangar Research Group, *Do consumers care about clothing outworker exploitation?* (New South Wales Government, Report, (1999); Victorian Government Family and Community Development Committee, '*Inquiry into the Conditions of Clothing Outworkers in Victoria* (2002), ch 4.
[62] Ibid.
[63] 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.
[64] Christina Cregan, *Tales of Despair: Outworker Narrative"* (Department of Management, University of Melbourne, Report, 2002).

purchase sewing machines, and were then forced to continue working to repay the debts. These people had a lack of cultural understanding and English fluency, which 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.[65] Moreover, for many outworkers, the outworking income was the family's sole source of income.[66]

The general structure of outworking renders outworkers vulnerable. As outworkers are often paid low wages, traders recruited people who are less likely to approach regulators. Webber and Weller argued outworker models exploited ethnic and gender divisions within communities.[67] Through targeting recent migrants with limited employment options, supply chains have been able to compel outworkers to work in conditions which were lower than factory-based employees.

Research funded by the Queensland Department of Industrial Relations and performed by the University of Queensland identified the factors which caused outworkers to be so vulnerable to exploitation.[68] 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 dehumanised, immigrants with limited English and were generally economically and culturally vulnerable.

The South Australian government claimed:

> Often a largely invisible workforce, outworkers are one of the most vulnerable groups in the South Australian workforce. The fact that they are outside the conventional industrial relations framework means that they often fall through the cracks.[69]

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[65] Textile, Clothing and Footwear Union of Australia, '*The Hidden Cost of Fashion*' (Report, 1995) 13-14.
[66] Christina Cregan, *Home Sweat Home: Preliminary Findings of the First Stage of a 2-part Study of Outworkers in the Textile Industry in Melbourne* (Department of Management, University of Melbourne, Report, 2001).
[67] Michael Webber and Sally Weller, *Refashioning the Rag Trade: Internationalising Australia's Textiles, Clothing and Footwear Industries* (2001) 291.
[68] Sue Scull, My-Linh Nguyen and Geoff Woolcock, *Vietnamese Outworkers in Queensland: Exploring the Issues* (University of Queensland , Report for the Queensland Department of Industrial Relations, 2004).
[69] Explanatory Note to the *Clothing Outworker Code* (SA), which is supported by the *Fair Work (Clothing Outworker Code of Practice Regulations) 2007* (SA).

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 work-force.[70]

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 employer's premises. This frequently occurs in the homes of outworkers.[71]

As recently as 2008, the Commonwealth government has regarded outworkers as 'vulnerable workers'.[72]

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 Review found outworkers were operating in outworkers' residential lounge rooms and dining rooms, in the outworkers' back yard sheds with concrete floors, tin walls and inadequate tables or space to operate and in garages attached to the outworkers' houses. [73] The isolation associated with home-based work means it is harder for outworkers to discuss their concerns with other employees.[74] Generally, fragmented workforces have less cohesion and are less likely to collectivise.[75]

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[70] (1987) 19 *IR* 416, 421.
[71] [2006] FCA 325, (1).
[72] Supplementary Explanatory Memorandum, Transition to Forward With Fairness Bill 2008 (2008), the Honourable J Gillard MP, [73].
[73] *Pay Equity Inquiry (1997)* NSWIRC 6320.
[74] Asian Women Work & Vietnamese Women's Association of NSW, *Daring to Act:: a Report on the Establishment of a Vietnamese Women Outworkers Network* (2001).
[75] 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; Daniel Clete, *Culture of Misfortune: an Interpretative History of Textile Unionism in the*

As outworkers are often independent contractors,[76] this means they are legally prohibited from collective action. As McCrystal explains:

> Collective bargaining by small business actors, including independent contractors, is subject to the anti-competitive conduct provisions in Pt IV of the … [*Trade Practices Act 1974* (Cth)]. The Australian Competition and Consumer Commission (**ACCC**) can authorise the pursuit of conduct that would otherwise breach Pt IV, but the process is lengthy and involved.[77]

While outworkers are often independent contractors and therefore regarded as a corporate entity, the contingent nature of their work relationship means they remain vulnerable.[78]

The New South Wales Minister for Industrial Relations has argued that the inability of outworkers to collectively bargain meant outworkers required additional protection, above and beyond that of standard workers.[79]

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).[80] This Act has encouraged the concept that outworkers are independent contractors and accordingly do not enjoy the protection afforded to workers under industrial relations laws.

One of the main purposes of outsourcing work to outworkers is to avoid the legal liabilities associated with the direct employment of workers. Even though

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*United States (*2001); I Watson, B Buchanan, I Campbell and C Briggs, *Fragmented Futures: New Challenges in Working Life* (2003).

[76] Sue Scull, My-Linh Nguyen and Geoff Woolcock, *Vietnamese Outworkers in Queensland: Exploring the Issues* (University of Queensland , Report for the Queensland Department of Industrial Relations, 2004) 34 and 36.

[77] Shae McCrystal, 'Collective Bargaining by Independent Contractors: Challenges from Labour Law' (2007) 20 *Australian Journal of Labour Law* 1, 1.

[78] For a discussion of how the shift to contingent work arrangements is having a serious adverse effect on the health and safety of workers see: Michael Quinlan, Claire Mayhew, and Philip Bohle, 'The Global Expansion of Precarious Employment, Work Disorganization, and Consequences for Occupational Health: Placing the Debate in a Comparative Historical Context' (2001) 31 *International Journal of Health Services* 3, 507.

[79] *New South Wales State Wage Case 2006* (2006) 153 *IR* 268, 320.

[80] 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.

outworkers may be controlled by traders, parties higher in supply chains attempt to avoid establishing an employment relationship with outworkers. While other home-based workers, such as teleworkers, are directly employed by an employer and simply perform their employment duties at geographically remote premises,[81] it is submitted that outworkers are generally required to operate as independent contractors.[82] Outworkers are situated at the bottom of manufacturing supply chains and are easily subjected to pressure from parties higher in the supply chains. Johnstone and Wilson explain a typical supply chain:

> major retailers … enter into arrangements with principal manufacturers, which in turn give out orders for the production of clothing goods to small factory sweatshops, which then engaged home-based outworkers.[83]

Scull, Nguyen and Woolcock found effective business controllers often provided the work to a Vietnamese trader who distributed the work.[84] The effective business controller placed these traders under considerable time and cost restraints, which were passed onto the outworkers at the bottom of the supply chain. Where the garments had faults, traders 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.[85] Despite this contention, she agreed the operation of supply chains

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[81] Yehuda Baruch, 'Teleworking: Benefits and Pitfalls as Perceived by Professionals and Managers' (2000) 15 *New Technology, Work and Employment* 1, 34-49; Katherine V.W. Stone, 'Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers' (2006) 27 *Berkeley Journal of Employment and Labor Law* 251, 270; Alladi Venkatesh and Nicholas P. Vitalari, 'Computer-Based Supplemental Work Home' (1992) 38 *Management Science* 12, 1687.

[82] Sue Scull, My-Linh Nguyen and Geoff Woolcock, *Vietnamese Outworkers in Queensland: Exploring the Issues* (University of Queensland , Report for the Queensland Department of Industrial Relations, 2004) 34 and 36.

[83] Richard Johnstone and Therese Wilson, 'Take Me to Your Employer: The Organizational Reach of Occupational Health and Safety Regulation' (2006) 19 *Australian Journal of Labour Law 3*, 26, 27.

[84] Sue Scull, My-Linh Nguyen and Geoff Woolcock, *Vietnamese Outworkers in Queensland: Exploring the Issues* (University of Queensland , Report for the Queensland Department of Industrial Relations, 2004) 33.

[85] Sally Weller, 'Regulating Clothing Outwork: a Sceptic's View' (2007) 49 *Journal of Industrial Relations*, 1, 69, 71; See also, Sally Weller, *Fashion's influence on garment mass production Knowledge, commodities and the capture of value* (PhD Thesis, Victoria University, 2004); 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; Sally Weller, 'Fashion as Viscous Knowledge: Fashion's Role in Shaping Transnational Garment Production' (2007) 7 *Journal of Economic Geography,* 39-66.

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:

A. Brands that sell their products to a consumer market sensitive to the conditions of reduction;
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-maximisation basis.[86]

Weller argued segments (A) and (C) are likely to comply with regulation, while segments (B) and (D) were more likely to attempt to avoid enforcement, and should therefore be the focus of regulation.[87]

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.[88] 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.[89] The practice of requiring outworkers to work during non-standard hours is especially effective in New South Wales and South Australia, as those jurisdictions' OHS Acts require inspections of workplaces to occur at reasonable times or during times work is ordinarily carried on at the workplace.[90]

[86] Sally Weller, 'Regulating Clothing Outwork: a Sceptic's View' (2007) 49 *Journal of Industrial Relations* 1, 69, 71.
[87] Sally Weller, 'Regulating Clothing Outwork: A Sceptic's View' (2007) 49 *Journal of Industrial Relations* 1, 69, 71.
[88] Sue Scull, My-Linh Nguyen and Geoff Woolcock,*Vietnamese Outworkers in Queensland: Exploring the Issue*' (2004) 35.
[89] *Workplace Health and Safety Act 1995* (Qld) S 104(1)(c); however if the entry is under a warrant, the warrant will state times for entry of the workplace: see s 107.
[90] *Occupational Health and Safety Act 1989* (ACT) S 77(3); *Occupational Health and Safety Act 2000* (NSW) s 53(1); *Occupational Health, Safety and Welfare Act 1986* (SA) s 38(2).

While this supply chain structure is not exclusively adopted by retailers, the structure which places the retailer at the top and the outworker at the bottom arguably remains common in Australia.[91]

1.3 Why focus upon international supply chains?

If the liability for labour conditions in Australian-based supply chains was imposed upon parties higher in supply chains, and as a result production costs were increased, then Australian corporations may outsource production to foreign jurisdictions. When there are differences in labour laws across jurisdictions, corporations can elect to move their operations to the jurisdiction with the lowest regulatory standards. In some cases, this has resulted in corporations lawfully violating human rights.[92] The threat of corporations moving manufacturing to jurisdictions with the lowest labour standards has given rise to the 'race to the bottom' economic theory. The race to the bottom theory contends, where two nations trade, the nation with higher labour conditions will be forced to lower them to compete.[93] The race to the bottom theory has a long history and is reflected in the *Treaty of Versailles*, where the treaty recognised that the failure of any country to enforce basic labour conditions would act as an obstacle to other nations seeking to implement higher standards.[94]

Generally, corporations outsource work to factories and jurisdictions which can best serve the corporations' focus of profit maximisation.[95] Bartley explains:

> The global apparel industry is highly mobile. Apparel is produced through long, complex, and geographically dispersed supply chains with multiple layers of

[91] Richard Johnstone, 'Paradigm Crossed? The Statutory Occupational Health and Safety Obligations of the Business Undertaking'(1999) 12 *Australian Journal of Labour Law* 8, 69.
[92] Chuanli Wang, *International Economic Law* (2005) 1-18.
[93] Anita Chan, 'A "Race to the Bottom": Globalisation and China's Labour Standards' (2003) 46 *China Perspectives* 41; Marina Thorborg, 'Chinese Workers and Labor Conditions from State Industry to Globalized Factories: How to Stop the Race to the Bottom' (2006) 1076 *Annals of the New York Academy of Sciences* 1, 893; Li Sheng, 'Low Wage and Low Labor Standards in China: a Substitute Explanation of the "Race to the Bottom"' in Shuming Bao, Shuanglin Lin and Changwen Zhao (eds), *The Chinese Economy after WTO Accession* (2006); Joseph e. Stiglitz, 'conference: The Ninth Annual Grotius Lecture Series: 2007 Grotius Lecture: Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights With Responsibilities' (2008) 23 *American University International Law Review*, 451, 490.
[94] Patrick Macklem, 'Labour Law Beyond Borders' (2002) 5 *Journal of International Economic Law* 605.
[95] Nancy Landrum, *A Quantitative and Qualitative Examination of the Dynamics of Nike and Reebok Storytelling as Strategy* (PhD Thesis, New Mexico State University, 2000).

> contracting out … Crucially, since fixed capital costs are low, and labour is largely unskilled, capitalists can, and do, pick up and move literally overnight …[96]

The race to the bottom occurs when there are two jurisdictions competing for contracts to attract outsourcing contracts from international supply chains.[97] In order to attract corporations, one jurisdiction lowers the labour conditions under which employees work.[98] When the jurisdiction with the higher labour standards loses market share, it responds by lowering its conditions to compete with the rival jurisdiction. This process results in a race to the lowest labour conditions to attract investment. As Yu explained:

> Globalization has helped unleash a seemingly never-ending 'race to the bottom' in wages and working conditions – this term describes vividly how the hyper mobility of capital has exacerbated competitions among countries in retrenching protective labour legislation and social welfare systems, has pitted workers in different countries against each other for ever lower-paid jobs, and has weakened trade unions' power in collective bargaining.[99]

Regardless of the size of the jurisdiction, the race to the bottom places pressure upon jurisdictions to decrease their labour standards.[100] While the strategy of States competing to reduce their labour regulations and thus costs 'could be successful in the short-term, its long-term prospects are doomed by the fact that no state will be able to compete internationally on the basis of labor costs.'[101] It could be argued that the end result will be an overall reduction in labour standards without any State maintaining a competitive advantage.

From a corporation's perspective, market forces place considerable pressure on them to reduce costs in order to maintain market penetration. If a corporation does not

[96] Timothy Bartley, *Certifying Forests and Factories: the Emergence of Private Systems for Regulating Labor and Environmental Conditions* (PhD Thesis, The University of Arizona, 2003) 26.
[97] Ralph Armbruster-Sandoval, *Globalization and Cross-border Labor Solidarity in the Americas: the Anti-sweatshop Movement and the Struggle for Social Justice* (2005) 8 - 9; Ronaldo Munck (ed), *Labour and Globalization: Results and Prospects* (2004) 3-9.
[98] Ann Herbert, *InternationalLabour Standards: Reversing the Race to the Bottom,* (ILO Sectoral Activities Department, Report, 2005) 1 -3.
[99] 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) 1.
[100] Anita Chan, 'A "Race to the Bottom": Globalisation and China's Labour Standards' (2003) 46 *China Perspectives* 41.
[101] Jeffrey M. Hirsch, 'Taking States out of the Workplace' (2008) 117 Yale Law Journal Pocket Part, 225, 228.

continually seek to lower its cost of production, then arguably it could be subject to a competitor gaining market share through social dumping. Social dumping occurs where goods are produced in a State with unacceptable labour conditions which enables the product to be produced at a price which is unnaturally low.[102] When these products are sold in competition with products from jurisdictions which enforce labour standards, the unnaturally low priced products forces product, which are produced under high labour standards out of the market.[103] This phenomenon may occur if Australia signs a Free Trade Agreement (**FTA**) with China. If Australian markets were further opened up to Chinese imports, then vulnerable industry sectors in Australia, such as manufacturing, may decline as corporations outsource work to factories in China where labour conditions, and thus expenses, are considerably lower.[104] If this mass outsourcing of work occurred then this would likely result in simply moving the human rights abuses from Australia to China. As a consequence, if an improvement in the respect for human rights in Australian-based supply chains is sought, in addition to analysing domestic laws it it is necessary to examine vehicles which can improve labour standards in Australian-based supply chains where work is outsourced outside Australia.

1.3.1 How power relationships are different in international supply chains when compared to domestic Australian supply chains

The power relationships in Western-based supply chains which source products from Asian markets are different from Australian domestic supply chains. Similarly to the Australian domestic model, international supply chains have a hierarchy that places workers at the bottom of the chain. Ha-Brookshire examined precisely how Western-based supply chains operated.[105] Ha-Brookshire found Western

[102] T Cordella and I Grilo, *Social Dumping and Delocalization: Is There a Case for Imposing a Social Cl?* (1995).
[103] H Grossman and G Koopmann, 'Social Standards in International Trade: a New Protectionist Wave?' in H Sander, and A Inotai (eds), *World Trade After the Uruguay Round: Prospects and Policy Options for theTtwenty-first Century* (1996).
[104]Richard N. Block, 'Economic Perspectives on International Labor Standards' (2002) 11 *Michigan State University Journal of International Law* 417, 423; Sharan Burrow, *Australia'sSocial and Commercial Engagement with China: What Direction for the Relationship?* (China, Trade Liberalisation and Labour: Racing to the Bottom or Building a Foundation for Labour Rights Symposium, Melbourne, 14 – 15 February 2005); Sally Weller, 'Fashion as Viscous Knowledge: Fashion's Role in Shaping Transnational Garment Production' (2007) 7 *Journal of Economic Geography* 39, 39; Junya Yimprasert and Petter Hveen, *The Race to the Bottom: Exploitation of Workers in the Global Garment Industry* (Norwegian Church Aid Occasional Paper, 2005) 8-9.
[105] Jung Ha-Brookshire, *Capabilities, Competitive Advantages, and Performance of Apparel Import Intermediaries in a Hyper-dynamic Market Environment* (PhD Thesis, The University of North Carolina, 2007).

corporations outsourced work to international workplaces through apparel import intermediaries. After surveying USA corporations, this research found that the stronger the relationship that apparel import intermediaries had with their USA clients and Asian producers, the stronger the performance of the apparel import intermediary.

Asian apparel import intermediaries include corporations which act as import wholesalers, import jobbers, import merchant wholesalers, import agents or brokers, import trading companies, and foreign manufacturer's sales offices or sales branches and any corporation which connects purchasers with Asian factories.[106] These apparel import intermediaries can exercise substantial economic power. As a consequence the power hierarchy in Australian-based supply chains which outsource work to Asia is substantially different from domestic supply chains. Where Australian retailers and traders can often dictate terms to traders and outworkers, Australian corporations are often not in a position to dictate terms to the Asian apparel import intermediaries. Some Asian apparel import intermediaries have substantial market power. For example, one of the largest apparel import intermediaries is the giant, Hong Kong-based Li and Fung. In 2002, Li and Fung Ltd's turnover was US$4,800 million and its operating profit was US$146 million.[107] Another corporation that largely focuses upon being an intermediary between Western purchasers and Asian manufacturers is the Pou Chen Group. In 2002, the Pou Chen Group had a turnover of US$ 1,939 million and an operating profit of US$229 million.[108] The Pou Chen Group now claims to control approximately one-sixth of the world's sports shoe production.[109]

Weller found that a substantial number of Australian corporations rely upon Hong Kong intermediaries' expertise to access clothing manufacturing in China.[110] As a result of this reliance, Weller found that the buyer-led model of supply chains was not accurate for many supply chains that acquire manufactured work from China.

[106] Barbara Dyer, Tallahassee and Jung E. Ha-Brookshire, ''Apparel Import Intermediaries' Secrets to Success - Redefining Success in a Hyper-Dynamic Environment' (2008) 12 *Journal of Fashion Marketing and Management* 1, 51.
[112] Play Fair Alliance , *Play Fair the Olympics* (2004).
[108] Ibid.
[109] Tim Connor and Kelly Dent, *Offside! Labour Rights and Sportswear Production in Asia* (Oxfam Australia, Report, 2006).
[110] Sally Weller, *Fashion's Influence on Garment Mass Production: Knowledge, Commodities and the Capture of Value'* (PhD Thesis, Victoria University, 2004) ch 11.

The Hong Kong intermediaries dominated flows of fashion knowledge and the costs of production.

1.4 Why focus upon supply chains that source products from China?

Australian-based supply chains outsource work to various international jurisdictions. There are five major factors which justify focusing upon Australian-based supply chains which outsource work to China.

Firstly, China is one of the major sources of imported products into Australia. Over 50 per cent of all retail goods sold in Australia have been imported.[111] The Australian Bureau of Statistics (**ABS**) in their 2006 Yearbook stated that in 2004 and 2005, the majority of imported manufactured goods came from the USA, followed by China.[112] The ABS 2006 Yearbook stated that the imports from China increased over 300 per cent from 1998 to 2005. On the presumption this trend continues, this will mean that a substantial number of Australian-based supply chains are sourcing manufactured goods from China.[113]

Secondly, Australia currently has a trade agreement with China, the *Australia - China Trade and Economic Framework 2004*, and has signed a Memorandum of Understanding with the Chinese Ministry of Commerce on the commencement of negotiation of a free trade agreement between Australia and China.[114] At this time, it is impossible to predict how the negotiations with China will progress. It can be observed, however, that negotiations are continuing at the time of writing.[115] The Australian Department of Foreign Affairs has stated in their modelling of the

[111] Australian And New Zealand Banking Group Ltd, *Clothing Wholesalers under Pressure* (ANZ Industry Brief, 2005); Brotherhood of St Laurence, *EthicalThreads: Corporate Social Responsibility in the Australian Garment Industry* (Report, 2007) 2.
[112] Australian Bureau of Statistics, *Yearbook 2006* (2007); for a discussion of the increase in Chinese manufactured goods in global markets see: Peilei Fan, *Made in China: the Rise of Chinese Domestic Manufacturing Firms in the Information Industry* (PhD Thesis, Massachusetts Institute of Technology, 2003).
[113] Commonwealth Department of Foreign Affairs and Trade, *ASEAN: Building an Economic Community* (2006) 19.
[114] *Australia - China Trade and Economic* Framework, ATS 8 (signed on 24 October 2003).
[115] See generally: Department of Foreign Affairs and Trade, *Joint Australia China Free Trade Agreement Feasibility Study* (2005); Department of Foreign Affairs and Trade, *Trade 2006* (2006) ch 6; Department of Foreign Affairs and Trade, 'Australia – China FTA negotiations updates': http://www.fta.gov.au/default.aspx?ArticleID=190 at 3 December 2008; Kevin Rudd, '*Interview - Press Conference, Beijing*' ((10 April 2008): http://www.pm.gov.au/media/Interview/2008/interview_0180.cfm> at 12 December 2008; Kevin Rudd, 'Speech - Advancing Australia's Global and Regional Economic Interests' (26 March 2008): Http://www.pm.gov.au/media/Speech/2008/speech_0145.cfm> at 12 December 2008.

potential benefits of an Australia-China Free Trade Agreement publication and in the joint Australia China Free Trade Agreement Feasibility Study 2004, that such an agreement would increase trade, in areas including manufacturing. This suggests the outsourcing to China is likely to increase into the future.

Thirdly, China has consistently been the world's largest manufacturing exporter.[116] For example, in 2005 Chinese trade in manufactured goods dominated 24 per cent of the world market.[117] It is estimated that China will increase its exports of knitted apparel products by 41 per cent between 2001 and 2010 and its general manufacturing exports to the USA by 55 per cent over that same period.[118]

Fourthly, there has been no substantial investigation focusing upon Australia's human rights obligations for the safety of Chinese-based workers in Australian supply chains.

Fifthly, OHS and corporate social responsibility in the Chinese textile and apparel industries is undergoing substantial transformation. This transformation is caused by the introduction of the China Social Compliance for Textile and Apparel Industry (**CSC9000T**).[119] CSC9000T is a Chinese government-approved initiative. This scheme has built upon corporate social responsibility concepts, internationally accepted standards of auditing and the United Nations Global Compact. This scheme uses Chinese officials to audit and report upon whether Chinese factories are complying with Chinese laws and standards set by this scheme.[120] How this scheme can be used by Western corporations and States to discharge their human rights obligations has not been considered in Western literature and will be analysed in detail later in this thesis.

Based upon the above five reasons this thesis will focus upon Australian based supply chains which outsource work to Chinese factories.

:[116] China Textile and Apparel Industry, *Annual Report on Social Responsibility 2006* (2007) 11.
[117] Ibid.
[118] Nina Ascoly and Ineke Zeldenrust, *Challenges in China: Experiences from 2 CCC Pilot Projects on Monitoring and Verification of Code Compliance* (Clean Clothes Campaign, Report, 2003).
[119] Damien Ma, '*CSR Resources for Your China Business*' (2007) 34 *The China Business Review* 3, 64.
[120] Responsible Supply Chain Association, *About CSC9000*: < http://www.csc9000.org.cn/en/CSC9000T.asd> at 30 December 2008.

1.4.1 Why focus on Chinese Special Economic Zones?

While labour conditions in many Chinese workplaces are arguably lower by Western standards, this thesis will focus upon the health and safety afforded to workers working in Chinese Special Economic Zones (**SEZ**) as it is necessary to identify a manageable sector in China to analyse. SEZs are areas designated by the Chinese government, which manufacture goods that are exported from SEZs to non-Chinese markets.[121] These zones reduce legal regulations and taxes in order to encourage corporations to invest. On the basis that 100 per cent of manufactured goods in SEZs are exported outside China, SEZs are the areas in China which the international community has the strongest justification to be concerned with.

Prior the 1970s, Asian manufacturing factories generally manufactured products for domestic consumption. With the encouragement of major international institutions such as the World Bank and the International Monetary Fund, Asian nations developed SEZs to assist in these States' economic growth.[122] This growth was aimed at increasing China's adopted SEZs, inter alia, to develop economically and to improve the employment prospects of its under-utilized population.[123] The growth in these areas was made possible due to factors which included a substantial lowering of working conditions and the respect for human rights at work.[124] The reduction in regulatory protection led to adverse results for employees.[125] As a result, there is a direct link between the profits of foreign corporations and the labour violations of employees in SEZs.[126]

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[121] Dorsati Madani, '*A review of the role and impact of export processing zones*' (World Bank, Report, 1999) 16.
[122] Denis G. Arnold and Laura P. Hartman, 'Moral Imagination and the Future of Sweatshops' (2003) 108 *Business and Society Review* 4, 425; Weiping Wu, *Pioneering Economic Reform through Promoting Foreign Investment in China's Special Economic Zones*' (PhD Thesis, Rutgers: The State University of New Jersey, 1996) ch 1.
[123] Wei Ge, *Special Economic Zones and the Economic Transition in China* (2000) 11 – 44; Mauricio Jenkins, *Export Processing Zones in Developing Economies: Theoretical and Empirical Considerations* (PhD Thesis, Brandeis University, 2000); Jianxin Huang, *Special Zoning Strategy in the People's Republic of China: State Capacity and Policy Implementation* (PhD Thesis, The University of Tennessee, 1998).
[124] Roi Albert, *Export Processing Zones: Symbols of Exploitation and a Development Dead-end* (2003) 8.
[125] Takayoshi KusagoZafiris, *Export Processing Zones: a Review in Need of Update* (Tzannatos Social Protection Discussion Paper No. 9802, Social Protection Group Human Development Network, the World Bank, 1998) 1 – 16.
[126] David Lott, *Globalization and the Dynamics of Collective Action in Export Processing Zones: a Comparative Analysis of the Nature and Contradictions of Export Processing in Mexico, China, and the United States*' (PhD Thesis, University of Nevada, 2004) 1.

These SEZs have developed into regions where workers' rights are systematically abused.[127] SEZ factory management has reportedly recruited vulnerable workers from regional China and systematically abused these workers' labour rights.[128] One of the major problems with Chinese labour laws is that they are not enforced.[129] The problems of enforcement are magnified in SEZs. The relevant public authorities have reportedly taken little or no action to reduce the widespread abuse of workers' rights.[130] Due to the extreme labour abuses in SEZ factories, some authors have referred to these factories as sweatshops.[131]

The plight of workers in SEZs is magnified by the approach China reportedly has taken to human rights generally. Evidence suggests Chinese workers live in a State which has not always protected human rights. China has not recognised many labour rights. For example, in China, workers have no right to strike as it is understood in Western States.[132] Killion reports that the USA State Department and the European Union General Affairs Council have accused the Chinese government of signing human rights and labour rights treaties and not enforcing them.[133] Chinese authorities have been accused of perpetrating the excessive use of military force against civilians, which has resulted in mass murder, illegal detention of dissidents and other heinous human rights violations.[134] The USA report to the United Nations on China claimed that human rights violations including the denial of the right to change the government; physical abuse resulting in deaths in custody; torture and coerced confessions of prisoners; arbitrary arrest and detention including non-judicial administrative detention; re-education-through-labour; psychiatric detention; and

[127] Anita Chan, 'Labour Standards and Human Rights: the Case of Chinese Workers under Market Socialism' (1988) 20 *Human Rights Quarterly* 886, 897.
[128] Delia Davin, *The Impact of Export- Oriented Manufacturing on Chinese Women Workers* (Report Prepared for UNRISD Project on Globalization, Export-Oriented Employment for Women and Social Policy, 2001); Ching-Kwan Lee, 'Production Policies and Labour Identities: Migrant Workers in South China' in Lo Chin Kin (ed), *China Review 1995* (1995) 384.
[129] Liu Fang, 'International Labor Standards and China's Related Legislation Comparative Study' (2007) 34 *Science and Technology for Development* 67; Gu Xinxin, 'On Improvement of China's Labor and Social Security Legal System' (2006) 26 *Journal of Yancheng Teachers College (Humanities, Social Sciences)* 6, 20.
[130] PlayFair 2008 Campaign, *No Medal for the Olympics on Labour Rights* (Report, 2007) 10.
[131] Maria Gillen 'The Apparel Industry Partnership's Free Labor Association: a Solution to the Overseas Sweatshop Problem or the Emperor's New Clothes?' (2000) 32 *New York University Journal of International Law and Politics* 1059, 1068; Yu Xiaomin, 'Labor Movement under Economic Globalization: Issues, Questions and Theories'(2006) 03 *Sociological Studies* 188.
[132] Sean Cooney, 'Making Chinese Labor Law Work: the Prospects for Regulatory Innovation in the People's Republic of China' (2007) 30 *Fordham International Law Journal* 1050, 1074.
[133] Ulric Killion 'Post-WTO China: Quest for Human Right Safeguards in Sexual Harassment against Working Women' (2004) 12 *Tulane Journal of International and Comparative* Law 201.
[134] Amnesty International China: *Briefing on EU concerns regarding human rights in China* (2005).

extended or incommunicado pre-trial detention.[135] Further violations include a politically controlled judiciary; a lack of due process in certain cases, especially those involving dissidents; monitoring of citizens' mail, telephone and electronic communications; unjust restrictions on freedom of speech and the press; closure of newspapers and journals; and banning of politically sensitive books, periodicals, and films. In addition, there are reportedly restrictions on the freedom of assembly, including detention and abuse of demonstrators and petitioners; restrictions on the freedom of travel, especially for politically sensitive and underground religious figures; severe government corruption; restriction of labour rights, including freedom of association, the right to organize and bargain collectively, and worker health and safety; and forced labour, including prison labour.[136]

1.5 What regulatory vehicles have developed to improve labour conditions in supply chains?

The apparent failure of existing regulations to ensure labour conditions in the supply chain business model resulted in a range of regulatory vehicles emerging. It is beyond this thesis to analyse every proposed or existing model. Therefore, this thesis will focus upon the models that Australia has involvement with, either by virtue of being a member in an international entity or by virtue of Australian Federal or State regulatory responses.

Regulatory interventions proposed by the World Trade Organization, International Labor Organization and the United Nations have been analysed in this thesis due to the potential global impact of interventions supported by these international bodies. At a regional level and State level there has been a number of different regulatory interventions proposed or adopted. This thesis has analysed the most relevant Australian intervention to regulating manufacturing supply chains in the textile and apparel industry and a USA regulatory model which has considerable judicial attention.

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[135] Bureau of Democracy, '*Human Rights, and Labour: Country Reports on Human Rights Practices - People's Republic of China*' (Report, 2006).
[136] Ibid.

1.5.1 Social clauses and the World Trade Organization

The contrast in labour standards between developing and developed States resulted in developed states calling for perceived differences in domestic labour rights to be redressed through multi-national binding agreements through the World Trade Organization (**WTO**). While the low labour costs is a valid comparative advantage for developing States, the use of social dumping (with developing States keeping their production costs unnaturally low through violating labour rights) led developed States to call for barriers to trade involving social dumping.[137] Other authors framed their objections on moralistic grounds. Trebilcock, for example, argued:

> to the extent that core labour standards are appropriately characterised as basic or universal human rights, a linkage between trade policy and such labour standards is not only defensible but arguably imperative …[138]

Dessing argued that without binding labour conditions in trade agreements, international labour rights will not be realised.[139]

Western nations attempted to have social clauses inserted into WTO trade agreements to make the increased trade dependent on improved labour conditions.[140] This resulted in research such as Alam's work, which analysed mechanisms to reduce the comparative advantage gained through States' weak enforcement of domestic labour rights.[141] Alam conducted research to investigate the economic implications of linking trade to minimum wages and occupational safety performances.

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[137] Tito Cordella and I Grilo, 'Social Dumping and Delocalization: Is There a Case for Imposing a Social Cl?' (Discussion Paper,Centre for Operations Research and Econometrics, Louvain, 1995).
[138] Michael Trebilcock, 'Trade policy and labour standards: objectives, instruments, and institutions' (Law and Economics Research Paper No 02-01, Faculty of Law, University of Toronto, 2002) 13.
[139] Maryke Dessing, *The Social Cl and Sustainable Development* (2001) 15-27.
[140] Elisa Alben, 'GATT and the Fair Wage: a Historical Perspective on the Labor-Trade Link' (2001) 101 *Columbia Law Review* 6, 1410-1477; Adelle Blackett, 'Whither Social Cl? Human Rights, Trade Theory and Treaty Interpretation' (1999) 31 *Columbia Human Rights Law Review* 1, 72; Kevin Kolben, 'Note from the Field: Trade, Monitoring, and the ILO: Working to Improve Conditions in Cambodia's Garment Factories' (2004) 7 *Yale Human Rights & Development Law Journal,* 80
[141] Asad Alam, *Labor Standards and Comparative Advantage* (PhD Thesis, Columbia University, 1992).

Authors claim that creating a trade link will increase the working conditions of workers in the developing States.[142] Other authors argue that creating a trade and labour link will only benefit Western employees and not provide increased protections for workers in developing States.[143] Many developing States alleged that developed States were concerned with the international regulation of labour conditions in order to protect the jobs of employees in developed States.[144] In these debates 'typically … the interests of foreign producers are diametrically opposed to those of domestic producers.'[145] This has resulted in some lobby groups and authors calling for labour barriers to protect Western jobs.[146] Chinese authors and the Chinese government regard efforts to link trade and labour rights as protectionism by disguise.[147]

The States which opposed linking trade and labour links argued that developed states were imposing Western standards upon developing States in a form of neo-imperialism.[148] The debate surrounding the international regulation of labour conditions became known as the north-south debate, to reflect the geographical polarization which occurred between the developed and developing States.[149] Northern hemisphere States, represented largely by European States and the USA, argued for linkage. Southern hemisphere States, such as India and African States, opposed linkage and called for increased trade to improve the economic status of Southern workers. The north-south debate has now largely shifted from geographical lines to economic division, with the north including developed States such as Australia and the south, developing States including China.

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[142] See for example, Christian Barry and Sanjay G. Reddy, 'Symposium: Global justice: Poverty, Human Rights, and Responsibilities: Panel 2: Global Justice and International Economic Arrangements: International Trade and Labor Standards: A Proposal for Linkage' (2006) 42 *Cornell International Law Journal* 546, 547; Alisa Dicaprio, 'Are Labor Provisions Protectionist?: Evidence from Nine Labor-augmented U.S. Trade Arrangements' (2004) 26 *Comparative Labor Law & Policy Journal* 1, 31; Johanna Sutherland, 'International Trade and the GATT/WTO Social Cl: Broadening the Debate' (1998) 43 *Queensland University of Technology Law Journal* 43, 83.

[143] See for example, Dexter Samida, 'Protecting the Innocent or Protecting Special Interests? Child Labor, Globalization, and the WTO' (2005) 33 *Denver Journal of International Law and Policy* 411, 433.

[144] Onno Kuik, 'Fair Trade and Ethical Labeling in the Clothing, Textile, and Footwear Sector: the Case of Blue Jeans' (2005) 11 *ILSA Journal of International & Comparative Law* 619, 629.

[145] Frances Chang, 'Arguing Both Sides: Positional Conflicts of Interest in Anti-dumping Proceedings' (2006) 19 *Georgetown Journal of Legal Ethics* 583, 584.

[146] Hillary E. Maki, 'Symposium on the American Worker: Note: Trade Protection vs. Trade Promotion: Are Free Trade Agreements Good for American Workers?' (2006) 20 *Notre Dame Journal of Law, Ethics & Public Policy* 883.

[147] Li-Wen Lin, 'Corporate Social Accountability Standards in the Global Supply Chain: Resistance, Reconsideration, and Resolution in China' (2007) 15 *Cardozo Journal of International and Comparative Law* 321, 350; See also on this point, Thomas Weishing Huang, *Trade Remedies: Law of Dumping, Subsidies and Safeguards in China* (2003) ch 1.

[148] Kevin Kolben, 'The New Politics of Linkage: India's Opposition to the Workers' Rights Cl' (2006) 13 *Indiana Journal of Global Legal Studies* 225.

[149] Baatlhodi Molatlhegi, *Trade and Labour Interface in the Context of Regional Economic Integration: Case of the Southern African Development Community* (SJD Thesis, University of Toronto, 2001).

Griffin, Nyland and O'Rourke discuss the divide between trade unions of developed and developing States.[150] Their research focused upon proposals to link nations' labour conditions with trade benefits through 'social clauses'. Their research indicated that many of the concerns about these clauses were fuelled by factors which were external to the key question of whether such clauses would improve working conditions. The research demonstrated that trade unions across the globe supported the notion of linking trade to working conditions. Despite this support, unions from southern States were concerned that northern States would control the international labour standards' regime which would reduce the capacity of southern States to exercise sovereignty over their own domestic labour conditions.

Efforts to link international trade to international labour rights were dependent upon States being able to reach consensus upon the importance of particular labour rights. Barry and Reddy observe that '[w]hether rights to trade ought to be made in any way conditional on the promotion of labour standards is an issue that currently engenders a great deal of heated disagreement.'[151] Molatlhegi explored the issues concerning opposition to the introduction of social clauses and concluded that the inability of nations to reach consensus on the importance of particular labour rights had resulted in labour rights not being protected internationally.[152]

Ultimately, moves to create substantive labour rights under the WTO mandate have failed. The WTO was created to increase trade and not to protect human rights.[153] The WTO has declared it has no jurisdiction to regulate labour conditions and that the regulation of labour conditions is the province of the ILO.[154] As a consequence. this thesis will not focus in detail upon the role of the WTO in regulating supply chains.

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[150] Gerard Griffin, Chris Nyland and Anne O'Rourke, 'Trade Unions and the Social Cl: a North-South Union Divide?' (Working Paper no 81, Melbourne, National Key Centre in Industrial Relations, Monash University, 2002).
[151] Christian Barry and Sanjay G. Reddy, 'Symposium: Global Justice: Poverty, Human Rights, and Responsibilities: Panel 2: Global Justice and International Economic Arrangements: International Trade and Labor Standards: a Proposal for Linkage' (2006) 42 *Cornell International Law Journal* 546, 546.
[152] Baatlhodi Molatlhegi, *Trade and Labour Interface in the Context of Regional Economic Integration: Case of the Southern African Development Community* (SJD Thesis, University of Toronto, 2001.
[153] Elissa Alben, 'GATT and the Fair Wage: a Historical Perspective on the Labor-Trade Link' (2004) 101 *Columbia Law Review* 1410-1447, 1410.
[154] Sarah H. Cleveland, 'Why International Labor Standards?' in Robert J. Flanagan and William B. Gould IV (eds), *International Labor Standards* (2003) 148-49; Martha Minow, 'Developments in the Law: Jobs and Borders: Legal Tools for Altering Labor Conditions Abroad' (2005) 118 *Harvard Law Review* 2202, 2208.

1.5.2 International Labor Organization protecting labour rights

The ILO is the paramount international institution charged with ensuring that States maintain a regulatory framework which facilitates the protection of labour rights.[155] The ILO was founded in 1919 by the *Treaty of Versailles* and became the first specialised agency of the UN in 1946.[156] The ILO's roles include conducting discussions with governments, employer groups and employee groups, drafting treaties and handling their ratification. As described in chapter 2.4.1 in relation to OHS, the ILO has drafted the main OHS treaties, which have been ratified by a large number of nations, which continue to provide reports to the ILO. The ILO has a substantial amount of credibility in relation to setting OHS standards and vehicles for their enforcement because the ILO has the support of the United Nations, a considerable number of States and employer and employee groups across the globe.

Historically, the ILO has encouraged compliance with labour standards prescribed in conventions through moral persuasion, publicity, shame, diplomacy, dialogue, and technical assistance.[157] While the ILO has traditionally been involved at a macro level, by encouraging nations to establish a regulatory framework in which labour rights can be respected, more recently the ILO has become increasingly directly involved with ensuring labour standards are respected in international supply chains through becoming involved at the micro level.[158] Alston has cautioned that the ILO's move to promote rights at the micro level rather than focusing upon State compliance with treaties at the macro level has the potential to weaken the role of the ILO.[159]

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[155] Faina Milman-Sivan, *Labor rights and globalization: An institutional analysis of the International Labor Organization* (SJD Thesis, Columbia University, 2006).
[156] *Treaty of Peace between the Allied and Associated Powers and Germany* , opened for signatures 28 June 1919,S 1, entered into force for Australia 10 January 1920, part XIII includes the Constitution of the International Labour Organization; United Nations 'Basic Facts About The United Nations' (2004) 49-50.
[157] Daniel S. Ehrenberg, 'From Intention to Action: An ILO-GATT/WTO Enforcement Regime for International Labor Rights' in Lance A. Compa & Stephen F. Diamond (eds), *Human Rights, Labor Rights and International Trade* (1996) 164.
[158] See for example: ILO, 'Supply chain management within the Area of Occupational Safety and Health': <http://www.ilo.org/public/english/protection/safework/li_suppliers/supply/index.htm> at 20 December 2008.
[159] Philip Alston, 'Core Labour Standards' and the Transformation of the International Labour Rights Regime' (2004) 15 *European Journal Of International Law* 457.

Through combining State and corporate involvement, the ILO's expansion into regulating supply chains has arguably improved working conditions for some workers.[160]In a number of projects, the ILO has started linking public and private resources to improve OHS in international supply chains. The ILO's Public Private Partnership Project on Occupational Health and Safety and Supply Chain Management aims 'to improve the overall … [occupational health and safety] knowledge and to advocate best practice through project activities and the social partner network.'[161] This project aims to provide support to parties who are involved with the supply and manufacture of products. The support will take the form of 'Process Optimizing Consultancies in the relevant companies, resulting in OHS Recommendations'.[162] A positive example of how this approach towards supporting suppliers and manufacturers can be evidenced by the ILO's moderate success is their ANKARA Textile Training Project. This project focused on training both workers and managers on issues related to quality, productivity and work- place conditions, with a focus on worker-management relations.[163] Juan Somavia, the Director-General of the ILO, observed:

> The Global Compact and Public Private Partnerships offer an opportunity for business leaders the world over to demonstrate that there are business benefits to integrating social and financial goals, and that there are ways to manage costs or risks associated with this new approach. The end result will demonstrate that promoting decent work, human rights and the environment are all necessary steps toward a world in which markets, interacting with society and its stakeholders, help put poverty and human suffering out of business.[164]

One of the main problems with these purely education-focused projects is that there are limited assurances that OHS conditions actually improve on the ground. One of

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[160] Kevin Kolben, 'Note from the Field: Trade, Monitoring, and the ILO: Working to Improve Conditions in Cambodia's Garment Factories' (2004) 7 *Yale Human Rights & Development Law Journal* 80; Sandra Polaski, 'Combining Global and Local Forces: the Case of Labor Rights in Cambodia' (2006) 34 *WORLD Development* 919, 924; Lejo Sibbel & Petra Borrmann, 'Linking Trade with Labor Rights: the ILO Better Factories Cambodia Project' (2007) 24 *Arizona Journal of International and Comparative Law* 235, 242.

[161] ILO, 'About the Project: 'Better safety and health for suppliers'':
<http://www.ilo.org/public/english/protection/safework/li_suppliers/about/index.htm> at 20 December 2008.

[162] ILO, *Supply Chain Management within the Area of Occupational Health and Safety*
: http://www.ilo.org/public/english/protection/safework/li_suppliers/supply/index.htm 29 January 2008.

[163] ILO, *ANKARA Textile Training Project*:
<http://www.ilo.org/public/english/region/eurpro/ankara/programme/textile.htm> at 21 December2008.

[164] ILO, *Better Health and Safety for Suppliers - A Public- Private Partnership Project*:
<http://www.ilo.org/public/english/protection/safework/li_suppliers/> vat 23 23 December 2008.

the ILO's most dynamic projects, better factories in Cambodia, combines technical support with an auditing programme that provides assurance that labour conditions in factories are improving. The success of this project has been analysed extensively in the literature.[165]

The Better Factories Project has already announced it will expand operations into Jordan, Lesotho, and Vietnam.[166] While the ILO has various other projects attempting to improve OHS standards, the Better Factories Project is the only program that comprehensively targets labour conditions in textile and apparel supply chains. Due to the unique role of the Better Factories Project, this is the ILO's regulatory vehicle which this thesis will analyse in detail.

1.5.3 United Nations Global Compact

Where the ILO has focused on developing private/public relationships, the UN has promoted a project which focused upon increasing corporate accountability through the Corporate Social Responsibility movement. The UN Global Compact (UNGC) provides ten principles that corporations can agree to uphold in their operations. Corporations are then required to provide CSR reports to the UNGC Office, which then publishes these reports on the internet. The main pressure for corporations to join and comply with the reporting requirements is pressure from the CSR movement. It suffices to observe for this chapter that the UNGC has the considerable support of the UN General Assembly. The UN General Assembly on 5 December 2007 unanimously adopted a Resolution which supported the work of the UNGC Office.[167] The UNGC claimed 'with over 4,000 stakeholders from more than 100 countries, it is the world's largest voluntary corporate citizenship initiative'.[168] The UNGC is acclaimed as the 'world's largest and most widely embraced corporate citizenship initiative' and is regarded as one of the former Secretary General's 'most

[165] Kevin Kolben, 'Note from the Field: Trade, Monitoring, and the ILO: Working to Improve Conditions in Cambodia's Garment Factories' (2004) 7 *Yale Human Rights & Development Law Journal* 80.
[166] Ibid, 5.
[167] United Nations General Assembly, 62nd sess, 3 December 2007, Agenda item 61, Res *Towards Global Partnerships*; United Nations Global Compact, 'UN General Assembly Renews and Strengthens Global Compact Mandate' (2007) 12 *Compact Quarterly*.
[168] United Nations Global Ccompact, 'Annual Review 2006' (2007) 2.

significant achievements'.[169] While the number of UNGC participants in Australasia is a negligible 0.72%,[170] the considerable potential of the UNGC will be analysed in detail later in this thesis.

1.5.4 State-based supply chain regulation

The motivation for corporations to become involved in the UNGC is largely the CSR movement. The CSR movement uses the fear of negative publicity and the attraction of positive publicity to encourage corporations to act ethically. This soft law vehicle has attracted increasing attention over the last few decades and has resulted in CSR being regarded as an alternative to hard law vehicles. The expansion and ability of CSR to improve the labour conditions in supply chains will be analysed in subsequent chapters in this thesis.

The lack of compulsion in using the soft law CSR movement has resulted in mandatory CSR vehicles being developed.[171] One model, which has developed from this discussion, is supply chain regulation through mandatory corporate codes. In response to labour violations in supply chains some authors have called for supply chain regulation with 'teeth'. [172] These authors argued that enforceable legal sanctions are necessary to provide corporations unambiguous direction on how they should respond to human rights issues. McInerney has contended that some form of State regulation is necessary as 'voluntary CSR measures should supplement, not supplant, state regulation.'[173] Murphy claims that a 'carrot and stick' approach is essential to motivate multi-nationals to respect human rights.[174] Many authors have argued that the imposition of human rights over corporations will only achieve

[169] Surya Deva, 'Corporate Complicity in Internet Censorship in China: Who Cares for the Global Compact or the Global Online Freedom Act?' (2007) 39 *George Washington International Law Review* 255, 259.
[170] Surya Deva, 'Global Compact: a Critique of the U.N.'s "Public-Private" Partnership for Promoting Corporate Citizenship' (2006) 34 *Syracuse Journal of International Law and Commerce* 107, 136.
[171] Owen E. Herrnstadt, 'Are International Framework Agreements a Path to Corporate Social Responsibility?' (2007) 10 *University of Pennsylvania Journal of Business & Employment Law* 187, 189.
[172] Mark B. Baker, 'Tightening the Toothless Vise: Codes of Conduct and the American Multinational Enterprise' (2001) 20 *Wisconsin International Law Journal* 89, 142;
Lance Compa and Tashia Hinchliffe-Darricarrere, 'Doing Business in China and Latin America: Developments in Comparative and International Labor Law: Enforcing International Labor Rights through Corporate Codes of Conduct' (1995) 33 *Columbia Journal of Transnational Law* 663, 687.
[173] Thomas McInerney, 'Putting Regulation before Responsibility: Towards Binding Norms of Corporate Social Responsibility' (2006) 40 *Cornell International Law Journal* 171, 173.
[174] Sean D. Murphy, 'Essay in Honor of Oscar Schachter: Taking Multinational Corporate Codes of Conduct to the Next Level' (2005) *43 Columbia Journal of Transnational Law* 389, 433.

substantial results if corporations' duties are supported by legal sanctions.[175] Murphy contends that focusing entirely upon either the 'carrot' or the 'stick' will not motivate a substantial number of corporations to respect human rights.[176] Kinley and Tadaki argue corporate codes of conduct will eventually solidify into either domestic or international hard law.[177]

Nossar, Johnstone and Quinlan have argued that existing Australian domestic supply chain regulation should be extended to expressly include OHS.[178] They raised this concept before either of Australia's two jurisdictions with mandatory retail codes were posited. The operation and potential of the existing Australian mandatory retail codes for improving workers' safety at work will be analysed in detail later in this thesis.

There have been other substantial developments in supply chain regulation in Australia but due to the length of this thesis the codes most relevant to the apparel industry have been selected for analysis. One regulatory scheme which is relevant for OHS but has not been covered is the Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005 (NSW).[179] These reforms followed valuable work identifying the link between economic pressure, contingent work and a reduction in workers' OHS.[180]

The operation of extraterritorial laws creates substantial jurisdictional and enforcement difficulties. While various States, including Australia, have a long history of extraterritorial laws, the USA's *Alien Tort Statute* is the oldest, continuing,

[175] David Barnhizer, 'Waking from Sustainability's " Impossible Dream": the Decision- making Realities of Business and Government' (2006) 18 *Georgetown International Environmental Law Review* 595, 661; Christian Aid, *Behind the Mask: the Real Face of Corporate Social Responsibility* (Report, 2004) 3, 56; Ian Smillie, 'Motherhood, Apple Pie and False Teeth' (Occasional Paper No. 10, Partnership Africa Canada, The Diamonds and Human Security Project, 2003); Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment (2nd ed,* 2004)178.

[176] See also: Marius Aalders and Ton Wilthagen, 'Moving Beyond Command-and-Control: Reflexivity in the Regulation of Occupational Health and Safety and the Environment' (1997) *19 Law & Policy* 4, 415.

[177] David Kinley and Junko Tadaki, 'From Talk to Walk: the Emergence of Human Rights Responsibilities for Corporations' International Law' (2004) 44 *Virginia Journal of International Law* 931, 960.

[178] Igor Nossar, 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.

[179] See for discussion: Richard Johnstone, Regulating Occupational Health and Safety in a Changing Labour Market' in Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell (Eds.), *Labour Law and Labour Market Regulation* (2006) chapter 32.

[180] Michael Quinlan, 'Report of Inquiry into Safety in the Long Haul Trucking Industry' (Final report, Motor Accidents Authority of New South Wales, 2001); Michael Quinlan, Richard Johnstone and Claire Mayhew, 'Trucking Tragedies: The Hidden Disaster of Mass Death in the Long Haul Road Transport Industry' in E. Tucker (Ed.), *Working Disasters* (2006) 19; Claire Mayhew and Michael Quinlan, ' Economic pressure, Multi-Tiered Subcontracting and Occupational Health And Safety in Australian Long-Haul Trucking' (2006) 28 *Employee Relations* 3, 212.

extraterritorial law which has been used to regulate multinationals' human rights practices. The considerable body of appellant judgments on this law provides guidance about the potential problems any Australian-based, extraterritorial supply chain regulation would encounter, and will therefore be analysed later in this thesis.

1.6 Structure of research

This thesis hypothesises that Australia is currently breaching its human rights' obligations through failing to adequately regulate workers' safety at work in Australian-based supply chains. This thesis will utilize a doctrinal research methodology to answer the following questions:

1) Do workers have a right to health and safety under human rights law?
2) Is hard law protecting Australian outworkers' and SEZ Chinese factory workers' right to health and safety?
3) Does the corporate social responsibility movement ensure workers right to health and safety?
4) What are possible regulatory interventions to improve the health and safety of workers in Australian based supply chains?

Phase one will argue that Australia is obliged under human rights laws to take reasonably practicable steps to ensure that corporations subject to Australia's jurisdiction, discharge their human rights' obligations. To articulate this hypothesis this thesis will focus upon one labour right being workers' right to safety and health. It is beyond one thesis to analyse all labour rights which are negatively impacted upon by the supply chain business model. Accordingly this thesis has elected to focus upon OHS and acknowledges that all labour rights are interconnected and should be respected.

Phase one will argue that Australia has an obligation to take reasonably practicable steps to ensure workers enjoy their right to health and safety within Australia and that Australian corporations' take reasonably practicable steps to protect this right within those corporations' spheres of influence.

Phase two will analyse whether Australia is currently discharging its obligations to take reasonably practicable steps to ensure the right to safety and health of workers in Australian-based supply chains. Phase two will commence by analysing the current hard law regulatory framework. If existing regulatory models ensured workers' right to safety and health is protected, then Australia will have discharged its human rights' obligations. Chapter 3 will analyse how occupational health and safety (**OHS**) laws protected Australian outworkers. This chapter will argue that outworkers enjoyed substantial formal legal protection, however this regulatory protection is not enforced. As a consequence it is submitted that many outworkers in Australia are working in unsafe working conditions. Chapter 4 will argue that the position of workers in Chinese Special Economic Zones (**SEZ**) to be even more critical. While employees in SEZs have been subjected to intentional suppression by regional councils, labour rights are not being enforced. The failure to enforce OHS laws in Chinese SEZs has resulted in substantial breaches of workers' right to safety and health.

Chapters 5, 6 and 7 will then considere if unregulated, market-driven, corporate social responsibility (**CSR**) can be relied upon to motivate corporations to ensure the safety at work of workers in Australian-based supply chains. Chapter 5 will first demonstrate that corporations in Australia are legally permitted to engage in CSR activities. It will be argued that the largely voluntary approach of this soft law vehicle has led many corporations to either ignore CSR or to inadequately enforce corporate codes. Chapters 6 and 7 will analyse and detail the problems with relying upon CSR to ensure workers' right to safety and health at work is protected. Chapter 6 will involve a analysis of the corporate social responsibility activities and reports of the two largest retailers in Australia and the largest discount retailer. The information for this analysis will be obtained from the internet. These chapters will argue that market driven unregulated CSR is not a viable alternative to hard law regulatory invention.

On this basis existing hard law and soft law vehicles were not ensuring workers' right to safety and health in Australian-based supply chains. Phase three will analyse what additional steps Australia could take to protect workers' right to safety and

health. This phase will identify regulatory options which could improve the operation of the regulatory vehicles discussed in phase two. The models in phase three will be judged as reasonable where the vehicle had a comparatively high probability of enforceability, and where it was expanding the use of existing vehicles. Firstly, phase three considered what regulatory vehicles could be unilaterally introduced by Australia. Unilateral action by a State has the advantage of being comparatively easy to introduce and can avoid the problems of establishing enforcement bodies under international agreements.

Chapter 8 will analyse the possibility of Australia unilaterally introducing a regulatory model to improve the safety of employees in Australian-based supply chains. This chapter will first analyse the mandatory supply chain regulatory models which exist in New South Wales and South Australia. New South Wales and South Australian models impose mandatory obligations upon retailers and traders to document and report on labour conditions in supply chains. While these models do not focus upon OHS it will be submitted that it would be relatively easy to extend these schemes to include OHS conditions and improve the protection of Australian outworkers.

It is submitted, improving the safety of domestic employees is considerably easier than improving the health and safety of employees working in extraterritorial supply chains. The second part of chapter 8 will consider if Australia could use domestic supply chain vehicles to regulate safety at work in extraterritorial supply chains. While such regulations could be introduced, it is argued these laws would be almost impossible to enforce. After analysing World Trade Organization (WTO) problems, this part will analyse the barriers which confronted the USA in enforcing their exterritorial laws. Chapter 8 will argue that Australia should not seek to introduce domestic laws to regulate exterritorial labour conditions but should explore international public regulatory models.

Chapter 9 will analyse the three main public international law vehicles available to Australia to regulate workers' right to safety and health. The United Nations Global Compact (**UNGC**), the ILO and a bilateral agreement between Australia and China.

After analysing the application and potential of these three models it will be argued that Australia should increase its involvement with the UNGC and negotiate with China to seek a bilateral agreement.

1.7 Conclusion

This introductory chapter was divided into five parts. The first part of this chapter introduced the thesis and stated the hypothesis. This part then explained the three phases this chapter was separated into, and how these phases develop the overall argument of this thesis.

The second part of this chapter introduced the supply chain business regulatory model. This part described how corporations adopt the supply chain business model to reduce the costs at which they can acquire products. One way costs in supply chains are kept low is through the use of sweatshops. Rather than attempting to maintain ethical supply chains, Western corporations have been accused of ignoring human rights' and labour rights' abuses in their supply chains.

Parts 3 and 4 justified why chapters 3 and 4 analyse the safety of Australian outworkers and workers in Chinese SEZs. Both of these sets of workers are the most vulnerable in domestic supply chains and international supply chains which extend to China. The final part of this chapter introduced the regulatory vehicles which will be analysed in this thesis.

PHASE 1 – DEVELOPING THE STANDARD

CHAPTER 2

2 Do workers' rights to safety constitute human rights?

2.1 Introduction

To effectively answer whether Australia is discharging its duty to protect workers' right to safety and health it is crucial to identify objective criteria by which Australia's conduct can be judged. The purpose of this chapter is to identify a moral duty against which Australia's and Australian corporations' conduct can be judged. This chapter is divided into three parts.

First this chapter analyses how human rights are developed. In most cases, international human rights laws need to be ratified into domestic legislation to have effect and allow citizens to claim these rights. This part analyses how international human rights are developed by States and the issue of cultural relativism.

Secondly, this chapter will analyze how human rights laws support the development of workers' right to safety and health. This part will analyze existing international human rights instruments, which protect this right, to ascertain whether workers' right to safety and health binds Australia. On the basis that workers' health and safety is not expressly protected under international law, sections 2, 3 and 4 analyze whether the operation of the right to life and work can be combined to provide the basis for the recognition of workers' right to safety and health.

Workers' right to safety and health has been widely protected as a labour right by the International Labor Organization (**ILO**) and by States. There is wide acceptance by States that workers' health and safety must be protected from workplace injuries. Traditionally, human rights at work have not received express protection within the human rights matrix. The last section in part 2 explores the positing of four core labour rights and demonstrates that workers' right to safety and health should be

included within this framework.

The third part of this thesis builds upon the data from the first two parts to define the criteria that will be used to judge Australia and Australian corporations conduct against, in order to test the hypothesis of this thesis.

2.2 How are human rights developed?

2.2.1 How to posit human rights?

This thesis uses a human rights standard to judge Australia's conduct against. In order to utilize human rights laws in this way it is crucial to analyse how the content of these laws are established. Human rights can be established through either a natural law approach or a positivist approach.[181] Natural law and positive law adopt extremely different philosophical approaches to the construction of law.[182] Natural law focuses upon what is good according to a natural or divine reference point, where positive law focuses upon what exists. Passerin D'Entre`ves explained that natural law 'provides a name for the point of intersection between law and morals'.[183] According to natural law theorists, international laws and State-based laws are only valid where they conform to natural laws. St Augustine has famously asked, 'What are States without justice, but robber bands enlarged?'[184] Positive law, in contrast, focuses upon the validity of laws within a legal system. Positivists generally contend that there is no connection between laws and morals and that a legal system is a closed logical system.[185] Where natural law focuses upon what 'ought' (that which is morally desirable), positive law focuses upon what 'is' (that which actually exists).[186]

[181] Mieke Holkeboer, *Rethinking the universal in universal human rights: A hermeneutical approach* (PhD Thesis, The University of Chicago, 2003).
[182] John Finnis, *Natural Law and Natural Rights* (1980) 34.
[183] Alessandro Passerin D'Entre`ves, *Natural Law: An Introduction to Legal Philosophy* (2nd ed, 1970) 116.
[184] Saint Augustine, *City of God* (W. C. Greene trans, 1960) bk 4, iv.
[185] H Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593, 601.
[186] Hans Kelsen, *General Theory of Law and State* (Anders Wedberg trans,, 1949) 39.

While natural law may provide guidance for the establishment of international human rights,[187] the human rights which States recognise and are bound by, are those which appear in treaties and conventions. Therefore, this chapter will focus upon posited human rights.

The positivist's approach to identifying human rights relies upon the consent of States. A State can be bound by a treaty through several methods. The most straight-forward method focuses upon the conduct of the State. If the State has ratified the treaty, once that treaty has commenced operation, then the State will be bound by that treaty.[188] States have different domestic procedures to ratify a treaty, but once ratified, that nation is bound by the terms of the treaty. According to the consent theory of international law, ratification is the clearest way for a State to be bound by international law.[189]

Through participating in international relations, States could be said to impliedly consent to the rules governing the interaction between States. One of these rules enables States to be bound by some laws even though they have not given express consent. Alston explains:

> One of the most important techniques by which innovative approaches become part of international law is through the evolution of customary international legal norms which, although usually not codified in treaty form, have become sufficiently widely accepted in practice that they are arguably binding upon governments despite their

States can be bound by international human rights, even where they have not taken positive action to be bound by the international law. States are bound by international law, regardless of a State's conduct, where the relevant laws constitute customary international law or laws of the *jus cogens*.

The *Vienna Convention on the Law of Treaties* does not explain how customary

[187] For example, the *Cairo Declaration on Human Rights in Islam* is based upon the Islam faith; to this end, the preamble states '*Recognizing the importance of issuing a Document on Human Rights in Islam that will serve as a guide for Member States in all aspects of life*'; For a discussion of how fundamental moral values can provide a basis for rights, see Keith Dowding and Martin Van Hees, 'The Construction of Rights' (2003) 97 *American Political Science Review* 2, 281-293.
[188] Arts 2(b), 11, 12, 13, 14 and 15 of the *Vienna Convention on the Law of Treaties*, 1155 UNTS 331.
[189] Andrew T. Guzmant, 'A Compliance-based Theory of International Law' (2002) 90 *California Law Review*, 1823-1887.

international law is developed.[190] The *Statute of the International Court of Justice* provides, in paragraph 38(1)(b), the International Court of Justice (**ICJ**) will enforce customary international law where there is 'international custom, as evidence of a general practice accepted as law'.[191] This definition includes the key elements of an international customary law that State practice and acceptance of the practice is obligatory or *opinio juris sive necessitatis*.[192]

2.2.2 State practice

To identify what laws constitute State practice for customary international law, the International Court of Justice considers both State practice and what States articulate their practice to be.[193] Customary law is clearest where States have demonstrated, by both conduct and articulation, that the State accepts the terms of an international law.[194] The number of States that must agree to the law for it to constitute a customary law is not fixed. International law requires a general acceptance by States and not uniform acceptance.[195] The ICJ has held the acceptance can be both universal and regional.[196] While positive acceptance is a strong indicator of acceptance, a nation can indicate its acceptance, even through refraining from criticising or rebutting the customary international law. The ICJ has stated customary international law required 'the general toleration of the international community'.[197]

States can establish customary practice either through conduct or through official documents such as treaties or reports under those treaties. Through ratifying a treaty

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[190] Art 38 of the *Vienna Convention on the Law of Treaties* merely states that customary international law can bind States; see for discussion, Nancy Kontou, *Termination and Revision of Treaties in the Light of New Customary International Law* (1995) 135-146.

[191] Statute of the International Court of Justice [1975] ATS 50; This statute should be used to interpret disputes according to Art 36 of the *Charter of the United Nations*, which is enshrined in s 5 of the *Charter of the United Nations Act 1945* (Cth); Art 7 of the *Charter of the United Nations* created the ICJ.

[192] '*opinio juris*'.

[193] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) *(Merits)* [1986] *ICJ Reports* 14, 63–64; Jessica Howard, 'Invoking State Responsibility for Aiding the Commission of International Crimes - Australia, the United States and the Question of East Timor' [2001] 2 M*elbourne Journal of International Law* 1.

[194] Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 *American Journal of International Law*, 757-813; H.W. R.Thirlway, *International Customary Law and its Codification* (1972) 58.

[195] Jordan Paust, 'The Significance and Determination of Customary International Human Rights Law: the Complex Nature, Sources and Evidences of Customary Human Rights' (1995) 25 *Georgia Journal of International and Comparative Law* , 147, 151.

[196] *Asylum Case* (*Colombia v Peru*) [1950] *ICJ Rep* 266, 276.

[197] *Fisheries Case (United Kingdom v Norway) (Judgment)* [1951] *ICJ Reports* 116, 139.

and continually acknowledging the validity of the clauses in those documents which protect rights, these rights can develop into customary international law. For the law to constitute customary international law, it is essential for the custom to be commonly and consistently applied.[198] As it is rare for most nations to be involved in international disputes, the development of customary international law relies heavily upon what States articulate their practice to be.

The establishment of international and regional treaties does not automatically convert those provisions into customary law. Regional human rights conventions only bind those nations within the region. Even though regional agreements only bind States within the region, the acceptance of the rights contained within these conventions can contribute to customary law by demonstrated State practice. Therefore, the acceptance of duties by nations under regional conventions acts as an impetus for the substance of those conventions to develop into customary law. Where sufficient nations accept a law as customary law, whether it is through accepting relevant regional conventions, international conventions or unilateral State practice, it is the acceptance of the rule by States which renders the law a customary law.[199]

To establish *opinio juris,* it is important to demonstrate that States were motivated by a legal duty and not just convenience or tradition.[200] Where a State's ratification is accompanied by action to enforce the terms of the treaty, then *opinio juris* will be generally established.[201]

2.2.3 Jus cogens

If a law is a customary law, it is possible the law may also constitute a law of the *jus cogens*. Article 53 of the *Vienna Convention on the Law of Treaties* defines a law of the *jus cogens*:

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[198] *Fisheries Jurisdiction Case* (*United Kingdom v Iceland*) *(Merits*) [1974] ICJ Rep 3, 50 (Forster, Bengzon, de Arechaga, Singh, and Ruda JJ).
[199] (*Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*) [1969] ICJ Rep 4, 41.
[200] Ibid 44.
[201] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) (*Merits*) [1986] ICJ Rep 14, 99-100.

> A peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as constituting a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[202]

According to the normative hierarchy theory, *jus cogens* contains the highest level of international norms. As 'state immunity is not *jus cogens*, it ranks lower in the hierarchy of international law norms, and therefore can be overcome when a *jus cogens* norm is at stake. The normative hierarchy theory thus seeks to remove one of the most formidable obstacles in the path of human rights victims seeking legal redress',[203] that is, sovereign immunity.

Where a right has been raised to a *jus cogens*, then nations cannot derogate from that law. This approach can be demonstrated by the International Court of Justice's *North Sea Continental Shelf* judgment, where the International Court of Justice held in an 11/6 decision:

> It is characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted; - whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour. Consequently, it is to be expected that when, for whatever reason, rules or obligations of this order are embodied, or are intended to be reflected in certain provisions of a convention, such provisions will figure amongst those in respect of which a right of unilateral reservation is not conferred, or is excluded.[204]

It can be seen that laws of the *jus cogens* are paramount laws and cannot be violated by States, even if States have not consented to be so bound.

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[202] For discussion of this treaty see: Christos Rosenstein-Rozakis, *The Peremptory Norms of General International Law (Jus Cogens) Under the Vienna Convention on the Law of Treaties* (SJD, University of Illinois, Urbana-Champaign, 1978).

[203] Lee M. Caplan, *'*State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*' (2003)* 97 *American Journal of International Law* 741, 742.

[204] *North Sea Continental Shelf Cases, (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) (*1969) ICJ Rep 38-39, para. 3; see discussion in Wolfgang Friedmann, 'The North Sea Continental Shelf Cases--A Critique' (1970) 64 *American Journal of International Law* 2, 229-241.

2.2.4 Are human rights universal or culturally relative?

The criteria developed in chapters 2.3 and 2.4 below will be used to judge Australia's conduct domestically and internationally. Judging Australia's conduct in foreign States raises the problem of reconciling international human rights standards and State sovereignty. This problem is critical where Australia has accepted it should be bound by prescribed standards yet Australia is engaging in conduct within another sovereign State which may not have agreed to be bound by the same standards. This part analyses how these competing interests can be reconciled in a manner which enables this thesis to identify a criteria in chapters 2.3 and 2.4 to judge Australia's conduct against.

Traditionally, national sovereignty was seen as more important than the lives of people in the jurisdictions of other States.[205] Following World War 2 and the atrocities committed during that period, the international community altered its approach, to accept that sovereign States should be held accountable against international norms.[206] The *Charter of the United Nations* was drafted and a Human Rights Commission was established to provide a declaration and treaty on human rights. This process culminated in the *Universal Declaration of Human Rights* (**UDHR**),[207] the *International Covenant on Civil and Political Rights* (**ICCPR**) [208] and the *International Covenant on Economic, Social and Cultural Rights* (**ICESCR**).[209] These three instruments are generally referred to as the *International Bill of Rights*.[210]

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[205] Cherif Bassiouni, 'From Versailles to Rwanda in 75 Years: the Need to Establish a Permanent International Criminal Court' (1997) 10 *Harvard Human Rights Journal*, 11; Kate Brookson-Morris, *Bringing International Criminal Law Home: the Normative Contribution of the International Criminal Court Treaty Regime* (LLM Thesis, University of Toronto, 2005); John Humphrey, *Human Rights and the United Nations: a Great Adventure* (1984); Michael John Struett, *The Politics of Constructing the International Criminal Court* (PhD Thesis, University of California, 2005).
[206] Preamble of the *United Nations Charter* which appears as a Sch in the *Charter of the United Nations Act 1945* (Cth).
[207] *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 71 (1948); '*UDHR*'.
[208] *International Covenant on Civil and Political Rights* (opened for signatures 16 December 1966) ATS 23 (came into force (except Art 41): 23 March 1976, entry into force for Australia (except Art 41): 13 November 1980, Art 41 came into force generally on 28 March 1979 and for Australia on 28 January 1993); '*ICCPR*'.
[209] *International Covenant on Economic, Social and Cultural Rights*, (opened for signatures on 16 December 1966)ATS 5 (entry into force generally: 3 January 1976); '*ICESCR*'.
[210] Penelope Mathew, 'Human Rights' in Sam Blay, Ryszard Piotrowicz, and Martin Tsamenyi, *Public International Law: an Australian Perspective*,(2nd ed, 2005), 262-267.

The preamble of the *UDHR* explains that human rights are a 'common standard of achievement for all peoples and all nations'. Article II of the *UDHR* explains the universal application of human rights by stating:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the State or territory to which a person belongs, whether it is independent, trust, non-self-governing or under any other limitation of sovereignty.

The *ICCPR* and the *ICESCR* both support the notion of universality in their preambles when they state that nations are obliged to give 'universal respect for, and observance of, human rights and freedoms'. These instruments have wide acceptance and this is demonstrated by the number of participants. For example, the UN *Charter* has 142 members admitted in accordance with Article 4 of that *Charter*;[211] the *ICCPR* has 160 participants;[212] 110 States are participants to the *First Optional Protocol to the ICCPR,*[213] and 157 nations are parties to the *ICESCR.*[214]

The concept that certain rights should apply equally to all people has been applied by regional human rights treaties across the world. For example, the concept of universalism has been applied by the *African [Banjul] Charter on Human and Peoples' Rights*,[215] the *American Convention on Human Rights,*[216] the *American*

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[211] United Nations Multilateral treaties deposited with the Secretary-General database, *Charter of the United Nations:* <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterI/treaty1.asp> at 22 December 2008.
[212] United Nations Multilateral treaties deposited with the Secretary-General database, *International Covenant on Civil and Political Rights*: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp> at 20 December 2008
[213] United Nations Multilateral treaties deposited with the Secretary-General database, First optional Protocol to the International Covenant on Civil and Political Rights:
<<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty7.asp> at> at> at 18 December 2008.
[214] United Nations Multilateral treaties deposited with the Secretary-General database, *International Covenant on Economic, Social and Cultural Rights*:
<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty5.asp> at 18 December 2008.
[215] The preamble states this charter gives regard to, inter alia, the *UDHR* and that it supports 'universality'.
[216] The preamble states the convention is drafted 'in accordance with the *UDHR* and that it is to apply to 'everyone'.

Declaration of the Rights and Duties of Man,[217] the *Cairo Declaration on Human Rights in Islam*,[218] the *Charter of Fundamental Rights of the European Union*[219] and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.[220]

Donnelly explains how the theory of universalism operates:

> If human rights are the rights one has simply because one is a human being, as they are usually thought to be, then they are held 'universally,' by all human beings. They also hold 'universally' against all other persons and institutions. As the highest moral rights, they regulate the fundamental structures and practices of political life, and in ordinary circumstances they take priority over other moral, legal, and political claims. These distinctions encompass what I call the moral universality of human rights.[221]

Countering the claim of universalism is the issue of cultural relativism. Cultural relativism is the concept which claims that human rights are relative to each culture. According to Donnelly, cultural relativists fall into three broad camps. Strict cultural relativists claim that there are no universal human rights and that human rights are relative, and thus potentially different, in every culture. Secondly, Donnelly identifies a group of cultural relativists which he labels moderate cultural relativism. Moderate cultural relativists claim that there are a core set of universal human rights. The rights which fall outside this core set of human rights are not universal and can be altered due to cultural differences. Finally, Donnelly identifies a group of cultural relativists which he labelled universalists. Universalists claim human rights are equally applicable in all cultures and all cultural differences are ignored. [222] Some authors have expanded the cultural relativist debate through examining cultural relativism through religion,[223] feminism[224] and communitarianism.[225] Donnelly's

[217] The preamble of the declaration states 'The American States have on repeated occasions recognized that the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality'.
[218] The preamble of the declaration states the declaration is to 'guide all humanity' in their conduct.
[219] The preamble of the charter provides a guide to the rights which are 'indivisible' and apply equally to all peoples in the European Union.
[220] The preamble of the convention approved of the *UDHR* and reaffirmed the signatory nations' 'profound belief in those fundamental freedoms which are the foundation of justice and peace in the world'.
[221] Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd ed, 2003) 1.
[222] Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 *Human Rights Quarterly* 4, 400.
[223] See the discussion in Jason Morgan-Foster, 'A New Perspective on the Universality Debate: Reverse Moderate Relativism in the Islamic Context' (2003) 10 *ILSA Journal of International & Comparative Law* 35, 35-70; Kimberly

approach conveniently incorporates these other conceptualisations of cultural relativism within his linear approach.

Arguably the strongest argument in favour of cultural relativism is that universalism impinges upon State sovereignty. Curran argues the imposition of one culture onto another culture infringes on the imposed-upon State's sovereignty and right to cultural determination.[226] Morgan-Foster contended human rights are conceived by the Western world, and should not be imposed upon other cultures.[227] The argument supporting the link between sovereignty and cultural relativism has been given support through a declaration by Asian States. Forty-nine Asian States have asserted their right to cultural determination through adopting, in Item 8 of the *Bangkok Declaration on Human Rights*:

> [We] recognize that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of International norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds … Human rights must take into account a nation's historical background and culture. Western-based 'International' human rights threaten Asia's right to sovereignty … [228]

Asian States have argued that human rights were established by predominantly Western States and these rights do not always represent cultural diversity.[229] This is one example that O'Sullivan used to argue that the world is becoming increasingly relativist as other cultures assert their rights to be judged against their own values.[230]

Younce Schooley, 'Cultural Sovereignty, Islam, and Human Rights-Toward a Communitarian Revision' (1994) 25 *Cumberland Law Review* 651-720, 678.

[224] Which focuses upon deconstructing the gender bias in culturally relative and internationally recognised human rights.

[225] Which focuses on cultural groups rather national boundaries.

[226] Patrick D. Curran, 'Universalism, Relativism, and Private Enforcement of Customary International Law' (2004) 5 *Chicago Journal of International Law*, 311, 319.

[227] Jason Morgan-Foster, 'A New Perspective on the Universality Debate: Reverse Moderate Relativism in the Islamic Context' (2003) 10 *ILSA Journal of International & Comparative Law* 35, 35-70.

[228] *Bangkok Declaration on Human Rights*, adopted by Asian States, 1993, reprinted in Michael Davies (ed), *Human Rights and Chinese Values: Legal, Philosophical and Political Perspectivs* (1995) 205-209.

[229] Declan O'Sullivan, 'Is the *Declaration of Human Rights* Universal?' (2000) 4 *International Journal of Human Rights* 1, 25.

[230] Ibid.

Steiner and Alston observe that the problem of identifying culturally common norms is a barrier to identifying universal rights.[231] The American Anthropological Association claims human rights must:

> take into full account the individual as a member of the social group of which s/he is part, whose sanctioned modes of life shape his/her behaviour, and with whose fate his/her own is thus inextricably bound.[232]

The approach which provides these cultural differences the greatest recognition is strict cultural relativism.

Strict cultural relativism is the most criticised form of cultural relativism. Effectively, this form of cultural relativism requires every State to accept every other State's version of human rights. To ignore how other States conduct their internal affairs entirely would empower States to excuse gross human rights' violations on the basis these violations were culturally driven and therefore represented the local application of human rights. According to strict cultural relativism, there are no truly universal standards of conduct. Binder observes that strict cultural pluralism degenerates into 'value nihilism and there is no basis on which to prefer social democracy to Nazism or to prefer an Islamic theocracy to a satanic cult'.[233] This approach would weaken the community of nations' ability to condemn rogue States as there would be no universal norms to judge rogue States against. Binder and Weisberg observed that culture is concerned with the representation of persons, populations, and institutions.[234] Differences in cultures can be identified across continents, States and even within nations. The attempt to identify fundamental rights from all these cultures would result in human rights being conceived on the least controversial premise possible.[235] If strict cultural relativism was taken to the extreme, States would have no basis to comment on another State's internal affairs on the basis each State would be entitled to interpret rights according to their respective cultures. It is contended that strict cultural relativism is contrary to the

231 Henry J. Steiner & Philip Alston, *International Human Rights in Context* (2nd ed, 2000) ch 4.
232 The American Anthropological Association, 'Statement on Human Rights' (1947) 49 *American Anthropologist* 539.
233 Guyora Binder, 'Cultural Relativism and Cultural Imperialism in Human Rights Law' (1999) 5 *Buffalo Human Rights Law Review* 211, 216.
234 Guyora Binder and Robert Weisberg, 'Cultural Criticism of Law' (1997) 49 *Stanford Law Review,* 1149, 1154.
235 Grace Kao, *Grounding Human Rights in a Pluralist World: Assessing the Strategies of Minimalism* (PhD Thesis, Harvard University, 2003).

concept underpinning the United Nations *Charter*, the *ICCPR*, the *ICESCR* and the *UDHR*. All of these instruments indicate that States have an obligation to be concerned with the conduct in other States and to take action upon these universal norms in certain circumstances.[236]

This thesis rejects strict cultural relativism on the basis that the community of nations and the UN has rejected this form of cultural relativism. The rejection of strict cultural relativism raises the problem of how universal norms are able to be identified. Even though there are cultural differences between nations, Patent concluded that common ground between cultures can be found so that a core set of human rights can be determined.[237] He used cognitive linguistics to compare what citizens of China and the USA conceive as acceptable and practiced social norms, to social institutions such as the family and the State. He compared the Western conceptualisation of human rights to the Chinese approach of *rénquán*. From this comparison, Patent identified various cultural similarities. The attempt to identify how a State's culture approaches rights in this way is a very complicated process. Cultures continually change and what was a norm can substantially alter in a relatively short period. It would be extremely complicated for the community of nations to continually monitor cultural expectations across all cultures in the globe to identify what rights are truly universal.

The problems in identifying what cultural norms entitle a State to derogate from human rights and where derogation would breach human rights create an almost insurmountable barrier when the number of cultures across the globe, are considered. With hundreds of States and thousands of cultures, what institution or body is in a

[236] For a recent example of the obligation upon States to judge other States against universal values and to take action see: International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (2001); the Responsibility To Protect is also refered to as 'R2P'; see for discussion: Karen Engle, ' "Calling in the Troops": the Uneasy Relationship among Women's Rights, Human Rights, and Humanitarian Intervention' (2007) 20 *Harvard Human Rights Journal* 189; Gareth Evans, 'From Humanitarian Intervention to the Responsibility To Protect' (2006) 24 *Wisconsin International Law Journal* 703; Rebecca J. Hamilton, 'The Responsibility to Protect: from Document to Doctrine-- But What of Implementation?' (2006) 19 *Harvard Human Rights Journal* 289; Peter J. Hoffman and Thomas G. Weiss, *Sword & Salve: Confronting New Wars and Humanitarian Crises* (2006); Thomas G. Weiss, *Military-Civilian Interactions: Humanitarian Crises and the Responsibility to Protect* (2nd ed, 2005)); Thomas G. Weiss, 'R2P after 9/11 and the World Summit' (2006) *26 Wisconsin International Law Journal* 741-760, 743; for arguments against the R2P doctrine, see: Mary Ellen O'Connell, 'Taking *Opinio Juris* Seriously' in Enzo Cannizzaro & Paulo Palchetti (eds), *Customary International Law on the Use of Force* (2005) 28-29.

[237] Jason Patent, *Are These TruthsSself-evident: Language, Culture and Human Rights in the United States and China* (PhD Thesis, University of California, Berkeley, 2003).

position to judge what rights should apply? Arguments such as these led Philips to conclude:

> pro-relativistic arguments are, at best, philosophically trivial and at worst (as a launching point for political action) impotent.[238]

An approach that acknowledges there are some universal norms but still recognises cultural differences, is moderate cultural relativism. Moderate cultural relativism argues that there are universal rights while accepting cultural factors may cause some minor variances in how these rights are applied. Donnelly has argued for the acceptance of some universal values, however, he has also recognised cultural differences:

> If human rights are based in human nature, on the simple fact that one is a human being, and if human nature is universal, then how can human rights be relative in any fundamental way?[239]

Donnelly argued for the acceptance of a form of weak cultural relativism, which acknowledges minor cultural differences but does not permit derogation from fundamental rights to a significant extent.[240] Donnelly argues that the core human rights' instruments, which include, inter alia, the *UDHR*, the *ICCPR* and the *ICESCR,* have universal application, but some cultural differences in the interpretation of these rights should be permitted.[241] In other words, genocide is always contrary to human rights but how a State enforces the right to health potentially could vary based upon cultural grounds, providing the overall right is recognised. Through focusing upon the over-arching right, Donnelly contends that this would reduce the instance of States using human rights to justify cultural imperialism.[242] Through avoiding 'abusive universalism', Donnelly believes human rights will become more internationally recognised and the debate will focus upon enforcing rights and not cultural perspectives on those rights.[243]

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[238] Patrick J. J. Philips, *Investigating Relativism* (PhD Thesis, York University, Canada, 2004) 1.
[239] Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 *Human Rights Quarterly* 4, 400.
[240] Jack Donnelly, 'Human Rights and Human Dignity: an Analytic Critique of Non-Western Human Rights' Conceptions' (1986) 76 *American Political Science Review* 303.
[241] Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly* 2, 281.
[242] Ibid.
[243] Ibid, 306.

Vincent observes that the globe is made up of many cultures, the majority of which are not Western.[244] How universal rights are interpreted in Western and Eastern cultures may differ. Vincent claims that the core set of human rights remains immutable but cultural differences may alter the application of these rights to a limited extend.

A significant problem with moderate cultural relativism is that it requires States to regard another State's breach of a human right as a cultural variable, which excuses the conduct. This requires a State to treat a right as something that can be acceptably breached and not as a non-derogable right. In response to the problems between States with different cultures, Caney promotes the concept of cosmopolitan political morality.[245] He observes that Western society believes the poor and vulnerable should be protected, regardless of the jurisdiction. Adopting a cultural relativist approach to Western cultures would therefore require Western States not to condemn States that contend that their cultures approve of suppressing the poor and vulnerable.[246] As Western States hold this position on poverty, Caney argues this places an obligation upon Western States to take proactive steps to ensure food aid and development, and to ensure other States do not abuse their people's right to food. Caney justifies his position by reference to different philosophical perspectives on human rights, the operation of distributive justice, the operation of political institutions, what constitutes a just war and humanitarian interventions.[247] If Western States do not adopt this position, then they are forced to breach human rights as they conceive it and permit human suffering in order to respect a foreign culture.

If the issue is mass loss of life or a breach of the *jus cogens,* then other States have grounds to ignore any culture that failed to uphold these rights. Identifying where a State should ignore local cultures in favour of its own, is a complicated issue. The removal of the bright line of certainty creates a problem in identifying at what point a State's cultural interpretation of rights becomes a human rights' violation. Permitting States to raise cultural relativism whenever they are accused of breaching

[244]John Vincent, *Human Rights in International Relations* (1987) ch 3.
[245] Simon Caney, 'Cosmopolitan Justice and Cultural Diversity' (2000) 14 *Global Society* 4, 525 .
[246] Ibid; Caney raises 10 arguments against cultural relativism, which are summarized succinctly in his Art, 552-553.
[247] Simon Caney, *Justice Beyond Borders: A Global Political Theory* (2006) 148-262.

human rights provides dictatorships and other States that violate human rights with a strong vehicle to defend their conduct. For these reasons, the international community should hesitate to move away from universalism without a formal process of distinguishing between genuine cultural differences and rogue States using the cover of culture to defend human rights' abuse.

The negative impact of cultural relativism can arguably be demonstrated by the USA's conduct in the 'War on Terror'. The USA claimed it is opposed to torture, however it has used various arguments to authorise torture.[248] Some of these arguments relied on strict cultural relativism. For example, the USA argued that its policy of extraordinary rendition did not violate human rights, even though the prisoners were moved to detention centres in other States and tortured. The USA argued in essence, that while the USA accepted freedom against torture as a human right, the USA had no grounds to condemn another State if that State elected to violate a prisoner's human rights through torture.[249] Even though the right to be free from torture was well established, cultural relativism was used to argue that human rights were not being violated. All States involved recognised that the right to be free from torture was a human right but cultural differences resulted in the right having different application in different States. These different interpretations resulted in some Arab States authorising conduct which was regarded in Western States as torture, on the basis Arab culture did not conceive the conduct as torture.

The application of moderate cultural relativism becomes more complicated when the conduct of non-State actors are considered. While Australia, for example, may accept that a foreign State may apply the right to health to a lower standard than Australia, should Australia permit one of its corporations to exploit this difference to operate its business at a cheaper cost? This problem has become a live issue where Western corporations have performed medical experiments pursuant to ethical standards that would be unacceptable in the West[250] or adopting business practices

[248] Jamie Mayerfeld, 'Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture' (2007) 20 *Harvard Environmental Law Review* 89, 94.
[249] Response of the United States to the U.N. Committee Against Torture, List of Issues to be Considered During the Examination of the Second Periodic Report, 5 May 2006, available http://www.us-mission.ch/Press2006/CAT-May5.pdf 24 December 2008.
[250] David Fidler, '"Geographical Morality" Revisited: International Relations, International Law, and the Controversy over Placebo-Controlled HIV Clinical Trials in Developing Countries' (2001) 42 *Harvard International Law Journal* 299.

that would be regarded in the West as corruption.[251] If a strict or moderate cultural relativistic approach was accepted, then practically corporations would be able to use cultural relativism arguments to justify their violation of human rights and States could excuse their failure to sanction corporations that exploit cultural differences on the grounds they are respecting the other culture's culture.[252] Rather than allowing corporations to use cultural differences to permit human rights abuses to increase profits, it is argued that where a non-State actor operates across two or more jurisdictions, then that actor must not lower its respect for human rights, even if such action is lawful in other jurisdictions.

The *UDHR*, *ICCPR*, *ICESCR* and other major human rights' documents may have cultural limitations; however, the universal application of these documents affords a strong launching platform for critical analysis of international affairs.[253] Based upon the current scheme, Donnelly has concluded:

> Charges that a nation has violated human rights constitute one of the strongest charges which can be made against a nation in international relations.[254]

It is submitted that the issue of cultural relativism is less significant where both States agree upon the same human rights standards. As this thesis is analysing Australian and Chinese conduct it is fortunate that both States have agreed upon the same over-arching standards. Both Australia and China have ratified key conventions that support universalism and the rights that form the basis of this chapter. Australia signed the United Nations *Charter* on 1 November 1945 and China, on 1 September 1945.[255] Australia became bound by the *ICCPR* on 13 November 1980 and by the *First Optional Protocol* on 25 December 1991. China signed the *ICCPR* on 5 October 1988 and the *First Optional Protocol* on 5 October

[251] Padideh Ala'I 'The Legacy of Geographical Morality and Colonialism: a Historical Assessment of the Current Crusade against Corruption' (2000) 33 *Vanderbilt Journal of Transnational Law* 877.
[252] Regional human rights treaties have already resulted in rights having different recognition in different regions: Melissa Robbins, 'Powerful States, Customary Law and the Erosion of Human Rights' (2005) 35 *California Western International Law Journal* 275.
[253] Camilla Elisabeth H. Kjeldsen, 'Legal and Functional Universality' in Kirsten Hastrup (ed), *Human Rights on Common Grounds: the Quest for Universality* (2001) 40.
[254] Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd ed, 2003) 1; For a more recent analysis of the impact human rights conventions have on State conduct, see: Alex Geisinger and Michael Ashley Stein, 'International Law: Rational Choice, Reputation, and Human Rights Treaties: How International Law Works: a Rational Choice Theory' (2008) 106 *Michigan Law* Review,1129.
[255] *Charter of the United Nations Act* 1945 (Cth); United Nations Multilateral treaties deposited with the Secretary-General database, *Charter of the United Nations:* <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterI/treaty1.asp> at 22 December 2008.

1967.[256] In relation to the *ICESCR,* Australia became bound by this convention on 10 March 1976 and China signed this convention on 27 October 1997. [257] In addition, China is a member on the new Human Rights Council, which is the body which will replace the UN Human Rights Committee.[258] The Human Rights Council will become the main UN body that will promote and develop universal human rights.

The fact both Australia and China have signed key human rights instruments does not mean the interpretation of these rights is the same across cultures. Differences in cultural understandings can be fundamental. For example, the Chinese understanding of human rights differs from the understanding of international human rights derived from international law. Civic explains the contrast in perceptions between Chinese and international human rights.[259] Under the *International Bill* of *Rights,* a human right is seen as something that is inalienable and fundamental. Civic explains:

> Human rights in the Chinese cultural context does not mean inherent, inalienable rights owed to the individual by sole virtue of being human and under duty of the state … Instead, the Chinese rights refer to the intricate web of social and political duties of citizens owed to the community at large.[260]

Nathan[261] and Peerenboom [262] explain that three elements of Chinese culture are particularly relevant to Chinese human rights. Firstly, there is the Confucianist and

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[256] *International Covenant on Civil and Political Rights* (opened for signatures 16 December 1966) ATS 23 (came into force (except Art 41): 23 March 1976, entry into force for Australia (except Art 41): 13 November 1980, Art 41 came into force generally on 28 March 1979 and for Australia on 28 January 1993); [256] *First Optional Protocol to the International Covenant on Civil and Political Rights*, (opened for signatures 19 December 1966) ATS 39 (came into force generally on 23 March 1976 and for Australia 25 December 1991); United Nations Multilateral treaties deposited with the Secretary-General database, *International Covenant on Civil and Political Rights*: < http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp> at 20 December 2008 .

[257] *International Covenant on Economic, Social and Cultural Rights*, (opened for signatures on 16 December 1966)ATS 5 (entry into force generally: 3 January 1976); United Nations Multilateral treaties deposited with the Secretary-General database, *International Covenant on Economic, Social and Cultural Rights*: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty5.asp> at 18 December 2008.

[258] Human Rights Council, *Membership of the Human Rights Council*: <http://www2.ohchr.org/english/bodies/hrcouncil/membership.htm> at 1 December 2008.

[259] Melanne Andromecca Civic, 'A Comparative Analysis of International and Chinese Human Rights Law - Universality versus Cultural Relativism' (1995) 2 *Buffalo Journal of International Law* 285, 287.

[260] Ibid 288.

[261] Andrew Nathan, 'Sources of Chinese Rights Thinking' in Randle Edwards, Louis Henkin & Andrew J. Nathan, *Human Rights in Contemporary China* (1986) 125-64.

[262] Randall P. Peerenboom, 'What's Wrong with Chinese Rights?: Toward a Theory of Rights with Chinese Characteristics' (1993) 6 *Harvard Human Rights Journal* 29.

Daoist self-regulating approach of avoiding external regulation of conduct.[263] Secondly, Chinese laws have a history of placing ideology above the rule of law.[264] Thirdly, there is the perception in China that community harmony takes priority over individual interests. As Nathan and Peerenboom explain, Western democracies take the polar opposite approach to these three points: firstly, external laws regulate conduct; secondly, the rule of law is paramount and binds all levels of the executive, legislative, judiciary and the community generally; and thirdly, where the law and community contradict, law takes priority.[265]

Petrick and Rinefort observe that '[f]or more than 2000 years, Imperial China rejected any legal system that was based on external rules.'[266] Formal written laws was regarded as inadequate to serve social needs as 'positive law was viewed as too rigid, externalised and artificial to regulate properly the realities and complexities of social relationships.'[267] Posited law has been engrained for centuries into Chinese culture to represent an inadequate method of governance at high risk. An attempt to introduce an externally regulated positive law system in China centuries ago was abused by the then emperor. Since then, Chinese culture has rejected external laws. The rule of law in Western nations is seen as something positive. In China, 'rule of law' is interpreted to mean *'fazhi'* or 'rule by law'.[268]

Even though there are differences in the implementation of human rights between Chinese and Western cultures it is submitted that there are fewer differences when it

[263] See also Derk Bodde and Clarence Morris, *Law in Imperial China: Exemplified by 190 Ch'ing Dynasty Cases* (1962); Despite the apparent success of any reforms, Petrick and Rinefort claim the Mao cult and tradition of guanxi (connections) continue to encourage a disrespect for external legal regulation: Joseph A. Petrick and Foster C. Rinefort, 'The Challenge of Managing China's Workplace health and safety' (2004) 109 *Business and Society Review* 171, 181; see also on this point: S. Lovett, L. Cummins, and R. Kali, '*Guanxi versus the Market: Ethics and Efficiency*' (1999) 30 *Journal of International Business Studies* 2, 231; Swartout considers both the emic and etic perspectives of guanxi in one urbanizing village in China following China's joining of the WTO, and the associated economic , cultural and legal changes: Jacque Swartout, *Theoretical Perspectives of Guanxi in Dragon Springs Village (*MA, California State University, Fullerton, 2006)

[264] China implemented a five year plan starting in 1999 which has reportedly improved the application of the rule of law: see generally Mei Ying Gechlik, 'Judicial Reform in China: Lessons from Shanghai' (2005) 19 *Columbia Journal of Asian Law* 97; See for discussion: Philip Alston, 'Richard Lillich Memorial Lecture: Promoting the Accountability of Members of the New UN Human Rights Council' (2005) 15 *Florida State University Journal of Transnational Law &* Policy 49; Morton H. Halperin and Diane F. Orentlicher, 'Perspectives on the United Nations Human Rights Council: the New UN Human Rights Council' (2006) 13 *Human Rights Brief* 1; Balakrishnan Rajagopal, 'Lipstick on a Caterpillar? Assessing the New U.N. Human Rights Council through Historical Reflection' (2007) 13 *Buffalo Human Rights Law Review* 7.

[265] See also Melanne Andromecca Civic, 'A Comparative Analysis of International and Chinese Human Rights Law--Universality versus Cultural Relativism' (1995) 2 *Buffalo Journal of International Law* 285.

[266] Joseph A. Petrick and Foster C. Rinefort, 'The Challenge of Managing China's Workplace health and safety' (2004) 109 *Business and Society Review* 296-298.

[267] Ibid.

[268] See also Karen Turner, 'Rule of Law Ideals in Early China?' (1992) 6 *Journal of Chinese Law* 1.

comes to the agreement on the appropriate standards. Through ratifying human rights conventions, China has indicated that the State accepted the status of the rights in those conventions. States may ratify conventions and claim that those conventions should be read subject to cultural differences. As conventions generally have formal procedures for reserving ratification of certain rights within the convention, if a State has not utilised such formal procedures then it can be assumed that a State which has ratified a convention has consented to be held accountable to the rights in that instrument as understood by international law. It is submitted that permitting States to use cultural factors to read down conventions after they have ratified the convention through informal processes unnecessarily weakens the human rights' regime. The signing and ratification of conventions is a formal process and States should adopt a similar formal process if they desire to reduce their levels of compliance.

Both Australia and China have adopted the approach of lodging reservations or withdrawing their ratifications if they desire to alter the binding nature of international labour standards over those jurisdictions. In relation to labour standards, both China and Australia have recognised the ILO's role in setting standards. Both Australia and China are members and have ratified a large number of ILO conventions: Australia has ratified 48 and China has ratified 22.[269] Both Australia and China have also adopted the policy of denouncing and withdrawing their ratifications where they decide they no longer wish to be bound by treaties. To date Australia has denounced eight conventions and China has denounced three conventions.[270] Based upon the conduct of these States it is argued that both Australia and China should be bound by the treaties that they have agreed to be bound and that any cultural factors should be ignored unless those States have

[269] ILO, 'Ratifications: By country: Australia': <http://www.ilo.org/ilolex/english/newratframeE.htm> at 22 December 2008; ILO, *'Ratifications: By country: China*': <http://www.ilo.org/ilolex/english/newratframeE.htm> at 22 December 2008.

[270] Ibid; Australia has denounced: ILO Convention No. 9, *Placing of Seamen Convention,* 1920 (entered into force 23 November 1921 1); ILO Convention No. 15, *Minimum Age (Trimmers and Stokers) Convention, 1921* (entered into force 20 November 1922); ILO Convention No. 21, *Inspection of Emigrants Convention,* 1926 (entered into force 29 December 1927); ILO Convention No. 45, *Underground Work (Women) Convention,* 1935 (entered into force 30 May 1937); ILO Convention No. 63, *Convention Concerning Statistics of Wages and Hours of Work,* 1938 (entered into force 22 June 1940); ILO Convention No. 83, *Labour Standards (Non-Metropolitan Territories) Convention,* 1947 (entered into force 15 June 1974); ILO Convention No. 85, *Labour Inspectorates (Non-Metropolitan Territories) Convention, 1947* (entered into force 26 August 1955); ILO Convention NO. 86, *Contracts of Employment (Indigenous Workers) Convention,* 1947 (entered into force 13 0February 1953); China has denounced: ILO Convention NO. 7, *Minimum Age (Sea) Convention, 1920* (entered into force 27 September 1921); ILO Convention No. 15, *Minimum Age (Trimmers and Stokers) Convention, 1921* (entered into force 20 November 1922); ILO Convention No. 59, *Minimum Age (Industry) Convention (Revised),* 1937 (entered into force 21 February 1941).

formally lodged a reservation of that right with the relevant treaty body. As Australia and China have not entered any reservations concerning conventions on the right to work or OHS this thesis submits that both those States should be held accountable too protect rights in relevant conventions.

2.3 How workers' right to safety and health can be conceived as a human right

This part argues that workers' right to safety and health is protected by human rights laws. First this part demonstrates the considerable support for the right to work and then this part argues that the right to work supports the right to safe work. Then this part analyses human rights conventions which expressly recognise workers' right to safety and health and argue that State conduct supports the notion that workers' safety requires regulatory protection. Finally this part argues that workers' right to safety and health has the same level of paramouncy as other labour rights which have been accepted as human rights. On this basis this part argues that workers' have a right to safety and health under human rights laws.

2.3.1 Right to work

Under human rights law, people have a right to work under just and favourable conditions of work. Article 23 of the *UDHR* provides:

> Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.[271]

This thesis argues that 'just and favourable'conditions of work includes a right to work in healthly and safe conditions. It is argued that working conditions which expose workers to threats to their physical or psychological safety to reduce the costs of production do not constitute 'just' conditions.

[271] Many of these documents have wide acceptance; for example, despite being a declaration, the *UDHR* has such a wide acceptance by nations, that it has been contended that most rights in the *UDHR* constitute customary law: Scott L. Porter, 'The *Universal Declaration of Human Rights:* Does It Have Enough Force of Law to Hold " States" Party to the War in Bosnia-Herzegovina Legally Accountable in the International Court of Justice?' (1995) 3 *Tulsa Journal of Comparative & International Law* 141-182; Penelope Mathew, 'Human rights' in Sam Blay, Ryszard Piotrowicz, and Martin Tsamenyi, *Public International Law: an AustralianPperspective*(2nd ed, 2005) 268- 9.

Article 6(1) of the *ICESCR* provides clear support for article 23 of the *UDHR* through the following provision:

> The States parties to the present covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

It is submitted that the right to work generally has substantial academic and State support. Borghard has argued that the right to work has sufficient acceptance as constituting a human right:

> Despite the struggles with implementation and enforcement, the international community now publicly recognises economic rights as human rights, and the economic right to work is directly applicable to the struggle …'[272]

As Howard and Donnelly observe, without the right to work being realised, no social or economic rights can be realised, as a person without work is unable to participate in the economy.[273] More broadly, Alston claims if economic rights are not realized, people will be denied many of the rights in the *UDHR*.[274]

The intention of the right to work as contained in article 6 of the *ICESCR* to improve people's lives can be demonstrated by the situation in Australia. Australia has a comprehensive social security system that ensures article 11 of the *ICESCR* is upheld. The social security system ensures people do not starve to death and provides the minimal income required for life.[275] To advance in Australia people require more than the social security system. Social security provides an inadequate income stream to give people lifestyle choice, the ability to purchase property, pay for high standard medical care and fully participate in society. People can only fully

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[272] Aleah Borghard, 'Free Trade, Economic Rights, and Displaced Workers: It Works If You Work It' (2006) 32 *Brooklyn Journal of International Law* 161-206, 183..

[273] Rhoda E. Howard and Jack Donnelly, 'Human Dignity, Human Rights, and Political Regimes' (1986) 40 *American Political Science Review* 3, 817.

[274] Philip Alston, 'Making Economic and Social Rights count: a Strategy for the Future' (1997) 68 *Political Quarterly* 2, 188-195

[275] Whether the Australian social security system actually provides adequate support for people is contested, however, this is not relevant for this thesis: Tamara Walsh, *Overruling the Underclass? Homelessness and the Law in Queensland*, (PhD Thesis, Queensland University of Technology, 2005).

participate in communities such as Australia, where people have access to work which provides an income stream that is sufficient to participate in a market economy.[276] The importance of the right to work is supported by authors who assert that without social and economic rights, so-called first generation political rights are substantially weakened.[277]

Customary law is provided credibility through the continual acceptance of the custom by States.[278] The more often a State makes positive steps to accept a rule, the more likely that rule will constitute a custom of that State. While Australia has not introduced the *ICESCR* into Australian law, the Australian government has actively sought to uphold rights within that convention such as the right to work and the right to safe work. According to Australia's Third Periodic Report to the Committee on Economic, Social and Cultural Rights, Australia has introduced a wide variety of government programmes in an attempt to facilitate the universal realisation of the right to work across Australia.[279] This report provides details of how Australia has continually recognised the right to work.

The current Commonwealth Labor government has indicated that improving the employment rate of people from an Aboriginal or Torres Strait Islander background, people with a disability and other vulnerable minority groups is a priority. In the lead-up to the last federal election, the Australian Labor Party stated in their manifesto that 'social disadvantage in Australia is still apparent and enduring'.[280] Labor claimed '[w]orkforce participation is a foundation of social inclusion; it creates opportunities for financial independence and personal fulfilment'.[281] In order to meet their policy objective, Labor 'believes that people with a disability or mental illness who want to work should be encouraged'. Labor has identified discrimination as a major problem for people in this group:

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[276] John Burgess and William Mitchell, 'Unemployment, Human Rights and a Full Employment Policy in Australia' (1998) 4 *Australian Journal of Human Rights* 2, 76-94.
[277] Philip C. Aka, 'Analyzing U.S. Commitment to Socio-economic Human Rights' (2006) 39 *Akron Law Review* 417, 470.
[278] Jack L. Goldsmith and Eric A. Posner, 'A Theory of Customary International Law' (1999) 46 *University of Chicago Law Review* 4, 1113-1173.
[279] Commonwealth Government, *Australia's Third Periodic Report under The International Covenant on Economic, Social and Cultural Rights 1990-1997* (1998) 31-51, http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/da87cf0d8cdb877080256785003 87c12?Opendocument< 1 April 2007.
[280] Julia Gillard MP and Senator Penny Wong, *An Australian Social Inclusion Agenda* (2007).
[281] Ibid 2.

> [M]any find that they encounter a range of barriers that make it harder to gain and keep work. These barriers can be very diverse, including resistance from employers in hiring people with a disability, difficulty accessing appropriate transport, the costs associated with managing a disability, and the unpredictable nature of some disabilities and illnesses … Labor recognises that helping people with a disability or mental illness gain and retain work requires more than changes to welfare rules; it requires a coordinated national effort to tackle the many reasons why people with a disability find participation difficult.[282]

Labor has indicated it will establish a Social Inclusion Board to identify various vehicles to improve these groups' levels of participation within the economic and cultural life of Australia.

In July 2008, Australia reaffirmed its acceptance of the right to work through ratifying the *Convention on the Rights of People with Disabilities*.[283] Through ratification Australia has agreed to uphold the rights protected in this convention, which include:

> States' Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States' Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps …[284]

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[282] Ibid.

[283] *Convention on the Rights of Persons with Disabilities*, adopted by General Assembly resolution A/RES/61/611 in 2006 (entered into force generally 3 May 2008); United Nations, 'Convention & Optional Protocol Signatories & Ratification': <http://www.un.org/disabilities/countries.asp?navid=12&pid=166> at 20 December 2008.

[284] Art 27(1); For a general discussion of the *CRPD* see: Harvard Project on Disability, 'Finding the Gaps: A Comparative Analysis of Disability Laws in the United States' (Report, 2008); Frédéric Mégret, 'The Disabilities Convention Human Rights of Persons with Disabilities or disability rights?' (2008) 30 *Human Rights Quarterly* 2, 494; Tara J. Melish, 'Perspectives on the UN Convention On the Rights of Persons With Disabilities: The UN Convention on Disabilities: Historic process, strong prospects, and why the U.S. should ratify' (2007) 14 *Human Rights Brief*, 37; Michael Ashley Stein, 'Disability human rights' (2007) 95 *California Law Review*, 75.

Based upon Australia's conduct and upon international law, it is argued that Australia is bound to uphold workers' right to work.

*2.3.2 Why the right to work in 'just and favourable conditions' includes a right to work **in** safe conditions*

Academic commentary provides considerable support for the argument that the right to work includes a right to work in safe and healthy conditions. The terminology in the *UCPR*, 'just and favourable conditions of work', could include the right to fair pay,[285] the right to not be unemployed,[286] the right to use work to alleviate poverty,[287] the right to employment for immigrants,[288] the right to decent work for people with disabilities[289] and various other rights associated with industrial conditions. All of the rights that the right to work is argued to support arguably depend upon a safe work environment. Subject to sick leave and workers'compensation laws, workers will not receive pay if they are injured at work and unable to work. Where workers are rendered substantially disabled at work then their ability to avoid unemployment and poverty is substantially reduced. As a consequence without workers right to safety and health being protected workers cannot exercise their right to work.

According to article 31 of the *Vienna Convention on the Law of Treaties*, treaties 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. One thing which is common to all interpretations of the right to work is the person's ability to exercise the right to work to some extent. A person is unable to exercise the right to work without life. The right to life is widely protected by international human rights conventions including the *UDHR*,[290] the *ICCPR*,[291] the

[285] Sally Cowling, William F. Mitchell and Martin J. Watts, 'The Right to Work versus the Right to Income' (2006) 2 *International Journal of Environment, Workplace and Employment* 1, 89 – 113; Miles Goodwin, *The Great Wage Robbery: Enforcement of Minimum Labour Standards in Australia*, (PhD Thesis, University of New South Wales, 200)5; Philip Harvey, 'Basic Income Guarantees and the Right to Work: the Right to Work and Basic Income Guarantees: Competing or Complementary Goals?' (2004) 2 *Rutgers Journal of Law & Urban Policy* 4-49.
[286] John Burgess and William Mitchell, 'Unemployment, Human Rights and a Full Employment Policy in Australia' (1998) 4 *Australian Journal of Human Rights* 2, 76-94.
[287] Nsongurua J. Udombana ,'Social Rights are Human Rights: Actualizing the Rights to Work and Social Security in Africa' (2006) 39 *Cornell International Law Journal* 181-265.
[288] Aleah Borghard, 'Free Trade, Economic Rights, and Displaced Workers: It Works if You Work It' (2006) 32 *Brooklyn Journal of International Law* 161-70.
[289] Arthur O'Reilly, 'The Right to Decent Work of Persons with Disabilities' (Skills Working Paper No 14, ILO, 2003) : < http://www-ilo-mirror.cornell.edu/public/english/employment/skills/disability/download/rightowork.pdf>
[290] *UDHR* art 3.
[291] *ICCPR* art 6.

Genocide Convention,[292] the *American Declaration of the Rights and Duties of Man,*[293] the *American Convention on Human Rights*,[294] the *Charter of Fundamental Rights of the European Union*,[295] the *African [Banjul] Charter on Human and Peoples' Rights*[296] and the *Cairo Declaration on Human Rights in Islam.*[297] The right to life is also protected by Bills of Rights, including the Australian Capital Territory's *Human Rights Act 2004*,[298] Victoria's *Charter of Human Rights and Responsibilities Act 2006,*[299] the United Kingdom's *Human Rights Act 1998,*[300] the *Canadian Charter of Rights*,[301] New Zealand's *Bill of Rights Act 1990*,[302] South Africa's *Bill of Rights*[303] and the *European Convention on Human Rights*.[304] A person's right to life is a right that must be protected if a person is to exercise any human rights.[305]

To ensure workers' right to work is guaranteed requires more than that their right to life is protected. The protection of workers' right to life may be conceived to focus only upon fatal injuries. Workplace health and safety has always been conceived as focusing upon ensuring workers' physical and mental safety at work. The ILO's Safe Work Mandate claims that every year, more than 2 million people die of work-related accidents and diseases and that more than 160 million workers fall ill each year due to workplace hazards.[306] The importance of ensuring workplace health and safety is emphasised by the fact that the difference between many non-fatal and fatal accidents is often a matter of chance. As Bristol explains:

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[292] *Genocide Convention* art 2.
[293] *American Declaration of the Rights and Duties of Man*, OAS Res. XXX, adopted by the Ninth International Conference of American States (1948). Art I.
[294] *American Convention on Human Rights*,
OASTS 36, 1144 UNTS 123, entered into force 18 July 1978, art 4.
[295] *Charter of Fundamental Rights of the European Union*, 2000 OJ (C 364) 2000) (Proclaimed by the European Parliament, the Council and the Commission on 7 December 2000), art2.
[296] *African [Banjul] Charter on Human and Peoples' Rights*, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force 21 October 1986), art 6.
[297] *Cairo Declaration on Human Rights in Islam*, adopted 5 August 1990 by the 19th Islamic Conference of Foreign Ministers (Session of Peace, UN GAOR, World Conf. on Hum. Rts. 4th Sess. Agenda Item 5, UN Doc. A/CONF.157/PC/62/Add.18 (1993),art 2.
[298] *Human Rights Act 2004* (ACT) s 9(1).
[299] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s9.
[300] *Human Rights Act 1998* (UK) art 2.
[301] *Canadian Charter of Rights* art 7.
[302] *New Zealand Bill of Rights Act 1990* (NZ) art 5(1).
[303] *Bill of Rights* (SA) art 11.
[304] *European Convention on Human Rights* art *1*.
[305] Henry Shue, *Basic Right: Subsistence, Affluence, and U.S Foreign Policy* (2nd ed, 1996) , see ch 1.
[306] ILO, 'Safe Work': <h ttp://www.ilo.org/public/english/protection/safework/mandate.htm> at 9 December2008; see also: ILO Safework Department, *My life, My Work, My Safe Work – Managing Risk in the Work Environment*' (Report, 2008).

> [I]t is undoubtedly true that certain non-fatal injury types rarely cause death. Examples include disorders such as sprain/strain injuries of the back, overuse injuries of the limbs, and simple cuts from hand tools. For many other injury circumstances, it is probably just a matter of chance as to whether the affected person is killed, injured or just involved in a near miss.[307]

While clothing manufacturing does not appear on its face as dangerous as mining or construction,[308] research demonstrates the threat to clothing manufacturing workers' physical safety is substantial.[309] Whenever workers work with machines or on production lines, the risk of trauma injuries exists.

OHS risks do not just manifest as trauma injuries. For example, when some textile dyes come in contact with human skin, they can cause vulnerable people to develop dermatitis and other skin conditions.[310] Physical risks associated with exposure to toxins can be fatal. The fact that aromatics have the potential to be carcinogenic was first demonstrated in 1895.[311] Subsequent research on aromatics was significantly advanced in 1974 when, out of 50 tested aromatics, 22 were found to have a carcinogenic role.[312] Some of these conditions develop after a short exposure. Research demonstrates various adverse respiratory conditions within three months[313] or twelve months[314] of commencing work with textiles.

In response to the threat chemicals posed to workers' health, various nations outlawed the use of certain aromatics in manufacturing production.[315] The ILO has

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[307] Timothy Driscoll, *The Epidemiology of Work-related Fatalities in Australia* (PhD Thesis, University of Sydney, 2002) 7.
[308] See for discussion of safety risks in mining: Kevin Brown, *The Legislative History of the Mines Regulation Act 1946* (1999); Neil Gunningham, *Mine Safety : Law, Regulation, Policy* (2007); and for safety risks in construction: Office of the Federal Safety Commissioner, 'Federal Safety Commissioner's 2005-2006 Progress Report: *Achieving World-class Safety in the Australian Building and Construction Industry*' (2006).
[309] An analysis of OHS concerns is performed in detail in chapters 3 and 4.
[310] 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; 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.
[311] 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.
[312] Ibid.
[313] X Wang, L Pan, X Zhang, B Sun, H Dai and E Christiani, 'Follow-up Study of Respiratory Health of Newly-hired Female Cotton Textile Workers' (2002) 41 *American Journal of Industrial Medicine* 2, 111.
[314] Lei-Da Pan, Hong-Xi Zhang, Bi-Xiong, Sun, He-Lian Dai, and David Christiani, 'Lung Function, Airway Reactivity, and Atopy in Newly- hired Female Cotton Textile Workers' (2003) 58 *Archives of Environmental Health* 1, 6.
[315] 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.

been active in attempting to reduce workers' exposure to harmful chemicals, inter alia, through adopting the *Benzene Convention 1971*,[316] the *Occupational Cancer Convention 1974*,[317] the *Working Environment (Air Pollution, Noise and Vibration) Convention 1977*,[318] the *Asbestos Convention*,[319] and the *Chemicals Convention1990.*[320]

People who participate in the manufacture of clothing continue to be exposed to fibre and cotton dust. This dust can cause pulmonary responses, including non-specific respiratory symptoms, decreasing lung function and decreasing airway responsiveness.[321] Exposure to dust has even been connected with high levels of lung cancer in manufacturing workers.[322] Indeed, the cumulative exposure to endotoxins in textile manufacturing has been statistically significantly associated with lung cancer risk.[323]

Workers who work in clothing manufacturing can also have excess risk to other cancers.[324] While some research has not found all workers are subject to an excess risk of exposure,[325] workers who worked as spinners and winders and as machine setters had an excess risk to exposure to bladder cancer.[326] Other research found workers who worked with cotton were more likely to develop cancer than workers

[316] ILO Convention No. 136, *Convention concerning Protection against Hazards of Poisoning Arising from Benzene 1971*, Date of adoption 23 June 1971 (Came into force generally 27 July 1973); ILO Recommendation:R144, *Recommendation concerning Protection against Hazards of Poisoning Arising from Benzene 1971*, date of adoption 23 June 1971.
[317] ILO Convention No. 139, *Convention concerning Prevention and Control of Occupational Hazards caused by Carcinogenic Substances and Agents*, adopted 24 June 1974 (Entered into force 1 June 1976); ILO Recommendation No. 147 ,*Recommendation concerning Prevention and Control of Occupational Hazards caused by Carcinogenic Substances and Agents*, adopted 24 June 1976.
[318] ILO Convention No. 148, *Convention concerning the Protection of Workers against Occupational Hazards in the Working Environment Due to Air Pollution, Noise and Vibration*, adopted 20 June 1977 (Entered into force 11 June 1979).
[319] ILO Convention No. 162, *Convention concerning Safety in the Use of Asbestos (Note*, Adopted 24 June 1986 (Entered into force 16 June 1989).
[320] ILO Convention No. 170, *Convention concerning Safety in the Use of Chemicals at Work*, Adopted 25 June 1990 (Entered into force 4 November 1993).
[321] X Wang, L Pan, C Zhang, B Sun, H Dai and B Christiani, 'A Longitudinal Observation of Early Pulmonary Responses to Cotton Dust' (2003) 60 *Occupational and Environmental Medicine* 2, 115.
[322] 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.
[323] George Astrakianakis, Noah Seixas, Roberta Ray, Janice Camp, Li Gao, Ziding Feng, Wenjin Li, Karen Wernli, E. Dawn Fitzgibbons, David Thomas and Harvey Checkoway, 'Lung Cancer Risk among Female Textile Workers Exposed to Endotoxin' (2007) 99 *Journal of the National Cancer Institute* 5, 357.
[324] George Astrakianakis, Noah Seixas, Janice Camp, David Christiani, Ziding Feng, David Thomas and Harvey Checkoway, 'Modeling, Estimation and Validation of Cotton Dust and Endotoxin Exposures in Chinese Textile Operations' (2006) 50 *Annals of Occupational Hygiene* 50, 573-582.
[325] Lin Fritschi, Ramzan Lakhani and Louise Nadon, 'Cancer Incidence in Textile Manufacturing Workers in Australia' (2004) 46 *Journal of Occupational Health* 6, 493.
[326] C Serra, X Bonfill, J Sunyer, G Urrutia, D Turuguet, R Bastus, M Roque, A Mannetje, and M Kogevinas, 'Bladder Cancer in the Textile Industry' (2000) 26 *Scandinavian Journal of Work, Environment & Health* 6, 476.

who worked with silk.[327] Other research has found exposure to synthetic fibres may pose increased risk of colorectal cancers,[328] exposure to silica dust and endotoxin-contaminated cotton dust has been associated with an increased risk of esophageal cancer and stomach cancer,[329] occupational exposure to small amounts of arylamines in manufacturing has been found to cause a 'strikingly higher' excess risk to workers suffering bladder cancer[330] and long term maintenance work on manufacturing machines and exposure to metals has been found to correlate with an excess risk of exposure to biliary tract cancer.[331] Research demonstrates that the risk from fibres used in textile factories may present workers with a risk similar to that of exposure to asbestos.[332]

The exposure to toxins can have other serious health implications. Research has demonstrated the textile workers' exposure to dust, chemicals and toxins is strongly suspected of causing fertility problems, miscarriages, low birth weight in babies, congenital abnormalities in babies and cancer.[333]

It is submitted that providing workers the right to work without ensuring their right to safety and health results in workers being denied the right to work. Workers who are disabled or killed at work have their right to work denied in the future. This thesis contends that the right to work requires States to ensure workers have access to safe workplaces. It is therefore submitted that workers have a right to safety and health.

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[327] S Fang, C Eisen, H Dai, H Zhang, J Hang, X Wang and D Christiani, 'Cancer Mortality among Textile Workers in Shanghai, China: a Preliminary Study' (2006) 48 *Journal of Occupational and Environmental Medicine* 9, 955.

[328] R. M. Ray, D. L. Gao, K. J. Wernli, E. D. Fitzgibbons, F. Ziding, G. Astrakianakis Anneclaire, J. De Roos, D. B. Thomas, H. Checkoway, 'Colorectal Cancer Incidence among Female Textile Workers in Shanghai, China: a Case-cohort Analysis of Occupational Exposures' (2005) 16 *Cancer Causes and Control* 10, 1177.

[329] Karen Wernli, E Dawn Fitzgibbons, Roberta Ray, Dao Li Gao, Wenjin Li, Noah Seixas, Janice Camp, George Astrakianakis, Ziding Feng, David Thomas and Harvey Checkoway, 'Occupational Risk Factors for Esophageal and Stomach Cancers among Female Textile Workers in Shanghai, China' (2006) 163 *American Journal of Epidemiology* 8, 717.

[330] Ana Fanlo, Blanca Sinues, Esteban Mayayo, Luisa Bernal, Antonia Soriano, Begona Martinez-Jarreta and Enrique Martinez-Ballarin, 'Urinary Mutagenicity, CYP1A2 and NAT2 Activity in Textile Industry Workers' (2004) 46 *Journal of Occupational Health* 6, 440.

[331] Chin-Kuo Chang, George Astrakianakis, David Thomas, Noah Seixas, Janice Camp, Roberta Ray, Li Gao, Karen Wernli, Wenjin Li, Dawn Fitzgibbons, Thomas Vaughan and Harvey Checkoway, 'Risks of Biliary Tract Cancer and Occupational Exposures among Shanghai Women Textile Workers: a Case-cohort Study' (2006) 49 *American Journal of Industrial Medicine* 8, 690.

[332] W Su and Y Cheng, 'Fiber Deposition in the Human Respiratory Tract' (Nora Symposium: Research Makes A Difference, Washington D.C., 18-26 April 2006).

[333] Rebecca Atkins, 'Multinational Enterprises and Workplace Reproductive Health: Extending Corporate Social Responsibility (2007) 40 *Vanderbilt Journal of Transnational Law* 233, 236-237; I Figa-Talamanca, 'Spontaneous Abortions among Female Industrial Workers' (1984) 54 *International Archives of Occupational and Environmental Health* 2, 163.

2.3.3 Express recognition of workers' right to safety and health as a human right?

While workers' right to safety and health can be derived from the right to work, the *ICESCR* and some regional human rights conventions have gone further and expressly recognise and protect workers' right to safety and health. Article 6 of the *ICESCR* arguably protects the right to work while article 7 of the *ICESCR* provides clear support for the right to safe work through the following provision:

> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work, which ensure, in particular:
>
> (b) Safe and healthy working conditions; …

Similar to article 7 of the ICESCR regional conventions support the link between the right to work and safety. For example, the *Charter of Fundamental Rights of the European Union* expressly links an employee's right to work with the worker's right to safety and health.[334] Article 15 protects workers' right to work by stating that 'Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.' Article 31(1) of the Charter then ensures that work is performed in a safe manner – 'Every worker has the right to working conditions which respect his or her health, safety and dignity'. The *African [Banjul] Charter on Human and Peoples' Rights* provides:

> Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.[335]

The *Cairo Declaration on Human Rights in Islam* states:

> Work is a right guaranteed by the State and the Society for each person with capability to work. Everyone shall be free to choose the work that suits him best and

[334] *Charter of Fundamental Rights of the European Union*, 2000 OJ (C 364) 2000) (Proclaimed by the European Parliament, the Council and the Commission on 7 December 2000).
[335] Art 15 of the *African [Banjul] Charter on Human and Peoples' Rights*, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force 21 October 1986).

> which serves his interests as well as those of the society. The employee shall have the right to enjoy safety and security as well as all other social guarantees...[336]

The *ICESCR*, the European *Charter*, the *African [Banjul] Charter* and the *Cairo Declaration on Human Rights in Islam* demonstrate that linking the right to work and safety at work has the acceptance of the 157 ICESCR signatories,[337] the 46 members of the Council of the European Union,[338] the 53 members of the Organization of African Unity[339] and the 45 nations at the 19th Islamic Conference of Foreign Ministers.[340] Arguably workers' right to safety and health cannot be regarded as a universal human right based solely upon the *European Charter*, the *African [Banjul] Charter* and the *Cairo Declaration on Human Rights in Islam*, as these agreements do not represent the consent of the majority of States in the world. To establish a law as customary international law does not require uniform acceptance, but the wider the acceptance, the more likely the rule is to be recognised as customary. This is not to say that uniform acceptance is required. The ICJ's judgment in the *Case Concerning Right of Passage over Indian Territory* demonstrates a customary law can be developed on a regional level, even where only two States recognise the custom.[341]

Over 100 States have recognised the importance of this link and expressly recognised workers' right to safety and health as a human right. While other States have not expressly recognised workers' right to safety and health as a human right, most States in the world have recognised the imperative nature of workers' safety and acted to recognise this right through ratifying relevant international conventions and protecting workers' right to safety and health through domestic legislation.

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[336] Art 13 of the *Cairo Declaration on Human Rights in Islam*, adopted 5 August 1990 by the 19th Islamic Conference of Foreign Ministers (Session of Peace, UN GAOR, World Conf. on Hum. Rts. 4th Sess. Agenda Item 5, UN Doc. A/CONF.157/PC/62/Add.18 (1993).

[337] United Nations Multilateral treaties deposited with the Secretary-General database, *International Covenant on Economic, Social and Cultural Rights*: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty5.asp> at 18 December 2008.

[338] Council of the European Union *'Facts and Figures*': < http://www.coe.int/T/e/Com/about_coe/facts_en.asp> at 21 December2008.

[339] Organization of African Unity 'Establishment and members': <http://www.itcilo.it/english/actrav/telearn/global/ilo/law/oau.htm#Establishment%20and%20members> at 21 December2008.

[340] The 19th Islamic Conference of Foreign Ministers (Session of Peace, Interdependence and Development), CAIRO, ' final communiqué': < http://www.oic-oci.org/english/conf/fm/19/19%20icfm-final-en.htm> at 21 December2008.

[341] *Case Concerning Right of Passage over Indian Territory* (*Portugal v India*) *(Merits)* [1960] ICJ Rep 66, 39; see also *Asylum Case (Colombia v Peru)* [1950] ICJ Rep 266, 276.

2.3.4 States' conduct in protecting workers' right to safety and health

The necessity for workers' safety at work to be protected by statute has a long history.[342] The ILO has asserted employees' safety at work can only be protected where nations enforce robust OHS legislation.[343] The ILO's *Occupational Health and safety and the Working Environment Convention 1981* has been ratified by 53 States,[344] ranging across cultures and regions.[345] These 53 States, through ratifying this Convention, all agree to establish a national policy 'to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable , the causes of hazards inherent in the working environment'.[346] A majority of States in the world have introduced some form of OHS legislation. This chapter does not purport to ascertain the effectiveness or otherwise of these OHS laws. It suffices to observe that a significant number of States have regarded workers' right to safety and health at work as being sufficiently important to enact legislation:[347]

- Africa: Benin,[348] Botswana,[349] Burkina Faso,[350] Cameroon,[351] Comoros,[352] Congo,[353] Ethiopia,[354] Guinea,[355] Kenya,[356] Malawi,[357] Namibia,[358] South Africa,[359] Swaziland,[360] Tunisia[361] and Yemen;[362]

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[342] Richard Johnstone, 'Occupational Health and Safety Prosecutions in Victoria: Historical Study' (2000) 13 *Australian Journal of Labour Law* 113.
[343] *ILO Convention No. 81 concerning Labour Inspection in Industry and Commerce,* open for signatures 11 July 1947 ATS 11 (entered into force for Australia (24 June 1976).
[344] ILO, Convention No. C155 ratifications: <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C155>> at> at 18 December 2008.
[345] ee ILO, 'Convention No 155 Ratifications': <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C155> at 15 December 2008.
[346] Art 4(2).
[347] The list of enactments below is far from exhaustive. For more details refer to the ILO's OHS Legislative Texts: Country Index database, available www.ilo.org.
[348] *Labour Code 1998* (Benin).
[349] *The Factories Act 1973* (Botswana).
[350] *Legislation Covering Occupational Health and Safety 1996* (Burkina Faso).
[351] *Labour Code* (Cameroon).
[352] *Labour Code* 1984 (Comoros).
[353] *Labour Code* - Application measures (11th ed) - Official texts since 9 Aug. 1967 and in effect on 1 May 1984 (Congo).
[354] Proclamation No.42/1993 - Labour Proclamation 1993 (Ethiopia).
[355] *Labour Code of the Republic of Guinea 1988* (Guinea), Book II Working Conditions.
[356] *The Factories (Amendment) Act, 1990* (Kenya).
[357] *Occupational Safety, Health and Welfare Act 1997* (Malawi).
[358] *Regulations No.156 Relating to the Health and Safety of Employees' Work 1997* (Namibia).
[359] *Occupational Health and Safety Act 1993* (South Africa).
[360] *Occupational Health and safety Act 2001* (Swaziland).
[361] *Decree No.96-1001 of 20 May 1996 Concerning the National Council for the Prevention of Occupational Hazards 1996* (Tunisia).
[362] *National Legislation on Occupational Health and Safety 2001* (Yemen).

- Asia: Bangladesh,[363] Cambodia,[364] China,[365] Hong Kong,[366] India,[367] Indonesia,[368] Japan,[369] Korea,[370] Malaysia,[371] Mongolia,[372] Thailand[373] and Vietnam;[374]
- Europe: Austria,[375] Belarus,[376] Belgium,[377] Bulgaria,[378] Croatia,[379] Cyprus[380] Czechoslovakia,[381] Denmark,[382] Estonia,[383] Finland,[384] France,[385] Germany,[386] Greece,[387] Hungary,[388] Iceland,[389] Ireland,[390] Italy,[391] Latvia,[392] Lithuania,[393] Macedonia,[394] Netherlands[395] Norway,[396]

[363] *The Factories Act 1965* (Bangladesh).
[364] *Labour Code 1997* (Cambodia).
[365] *Classification of Accidents Causing Casualties to Enterprise Staff and Workers 1988* (PRC); *Labour Law of the People's Republic of China 1994* (PRC); *Law of the People's Republic of China on Work Safety 2002* (PRC); *Management Regulations for Examining the Safety Techniques of Workmen in Particular Posts 1986* (PRC); *Regulations on Safety in the Use of Chemicalsat Work 1996* (PRC); *Rules for Dust Control in Compounding Workshops of the Rubber Industry 1988* (PRC); *Rules for the Investigation and Analysis of Accidents Causing Casualties Among Enterprise Staff and Workers 1988* (PRC); *Specifications for Duct Control in Batch House of Glass Manufacturers 1988* (PRC); *Statistical Standard for Economic Losses from Injuries or Fatal Accidents of Enterprise Staff and Workers 1988* (PRC); *The Regulations for Trade Union Inspections on Occupational Health and Safety 1997* (PRC).
[366] *Occupational Health and Safety Ordinance* No.39 of 1997 (Hong Kong).
[367] *The Factories Act 1948* (India).
[368] *Labour Legislation 1988* (Indonesia).
[369] *Act No.45 of 21 May 1999 amending the Industrial Health and safety Law 1999* (Japan).
[370] *Enforcement Regulations for Industrial Health and Safety Act* (Korea).
[371] *Occupational Health and Safety Act 1994* (Malaysia).
[372] *Labour Law 1995* (Mongolia).
[373] Notification of the Ministry of Labour and Social Welfare Re: Working Safety of Employees 1997 (Thailand).
[374] *Labour Code 1994* (Vietnam).
[375] *General Ordinance for Worker Protection 1983* (Australia); *General Ordinance for Machine Safety 1983* (Australia).
[376] *Decree No.30 of 15 Jan. 2004 on the Investigation and Registration of Occupational Accidents and Diseases* (Belarus).
[377] Measures aimed at reinforcing prevention in connection with the welfare of workers during the performance of their work 2003 (Belgium).
[378] *Minimum Requirements for Healthy and Safe Working Conditions in Workplaces and in the Use of Working Equipment 1990, Ordinance 1999* (Bulgaria).
[379] *Act No.1575 of 14 July 2003,* to amend and supplement the *Act on Occupational Safety* (Croatia).
[380] *Health and Safety Work Act 1996* (Cyprus).
[381] *Labour Code 1975* (Czechoslovakia).
[382] *Notification of the Working Environment Act 1999* (Denmark).
[383] *Occupational Health and Safety Act 1999* (Estonia).
[384] *Labour Protection 2002* (Finland).
[385] Decree No.2001-1016 of 5 Nov. 2001, concerning the creation of a document on the evaluation of hazards for the health and safety of workers, as foreseen by Article L.230-2 of the *Labour Code*, and modifying the *Labour Code* (Part 2: Decrees by the Council of State) 2001 (France); Decree No.2003-546 of 24 June 2003 issued in application of Art. L.241-2 of the *Labour Code* and modifying the *Labour Code* (2nd part: Decrees by the Council of State) 2003 (France).
[386] Law of 7 Aug 1996, on the introduction of measures to encourage improvements in the health and safety of workers at work - *Law on Occupational Safety and Health 1996* (Germany).
[387] *Establishment and Operation of Health and Safety Services 1999* (Greece).
[388] Joint Ordinance 3/2002 (of 8 Feb.) of the Minister of Social Affairs and the Family and of the Minister of Health, concerning the minimum health and safety requirements of workplaces 2002 (Hungary).
[389] *Act on occupational health and safety 1980* (Iceland).
[390] *Safety, Health and Welfare Work (General Application) (Amendment) Regulations, 2001* (Ireland).
[391] Legislative Decree No.626 of 19 Sep. 1994 - Implementation of eight EEC Directives concerning the improvement of workers' health and safety in the workplace 1994 (Italy).
[392] *Regulation No.125/2002 on Requirements for Labour Protection in Workplaces 2002 (Latvia).*
[393] *Law No.I-266 on Labour Protection 1993* (Lithuania).
[394] *Safety Work 1998* (Macedonia).
[395] *Working Conditions Act 1998* (Netherlands).
[396] *Act No.4 of 4 February 1977, Respecting Workers' Protection and the Working Environment 1995* (Norway).

Poland,[397] Portugal,[398] Russia,[399] Spain,[400] Switzerland,[401] Ukraine[402] and the United Kingdom;[403]

- Middle East: Bahrain,[404] Egypt,[405] Iran,[406] Israel,[407] Lebanon[408] and Saudi Arabia;[409]
- North America: Canada,[410] Mexico[411] and the USA;[412]
- South America: Barbados,[413] Bolivia,[414] Brazil,[415] Chile,[416] Colombia,[417] Costa Rica,[418] Ecuador,[419] Dominica,[420] El Salvador,[421] Guatemala,[422] Honduras,[423] Nicaragua[424] and Uruguay;[425] and
- South Pacific: Fiji,[426] New Zealand,[427] Papua New Guinea,[428] Samoa,[429] Solomon Islands[430] and Vanuatu.[431]

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[397] Order No.974 of 1 Dec. 1998 of the Minister of Labour and Social Policy, to introduce the obligation to apply certain Polish standards in the field of occupational safety and hygiene 1998 (Poland).
[398] *Decree-Law Creating a Programme for the Adaptation of Occupational Safety, Hygiene and Health Services, and Defining the Corresponding Legal Framework 2002* (Portugal).
[399] *Directive and Regulation No.12 of 14 March 1997, on the Conduct of Workplace Assessments with Respect to Working Conditions 1997* (Russia).
[400] *Prevention of Occupational Hazards Act 2003* (Spain).
[401] *Prevention of Occupational Accidents and Diseases Ordinance 1999* (Switzerland).
[402] *Workers' Protection Act 1992* (Ukraine).
[403] *Corporate Manslaughter and Corporate Homicide Act 2006* (UK); *Health and Safety Work Act 1974* (UK).
[404] Amiri Legislative Decree No.23 of 1976, to promulgate a Labour Code for the private sector 1976 (Bahrain).
[405] Order No.55 of the Minister of State for Manpower and Training, concerning necessary measures for ensuring occupational health and safety in the workplace 1983 (Egypt).
[406] *Labour Law 1993* (Iran).
[407] *Work Safety Ordinance (New Version) 1970* (Israel).
[408] Decree No.4917 of 24 March 1994, modifying the classification of dangerous, unhealthy and uncomfortable establishments 1994 (Lebanon).
[409] *Regulations for Rules and Procedures for Implementation of the Occupational Hazards Branch and Implementing Decisions 1985* (Saudi Arabia).
[410] *Canadian Occupational Health and Safety Law 1983* (Canada Federal); *Occupational Health and Safety Act 1988* (Alberta); *Occupational Environment Regulations 1974* (British Columbia); *Workplace health and safety Regulation 1988* (Manitoba); *Occupational Health and Safety Act 1985* (New Brunswick); *Occupational Health and Safety Act 1978* (Newfoundland); *Occupational Health and Safety Regulations 1989* (North West Territories); *Occupational Health and Safety Act 1986* (Nova Scotia); *Occupational Health and Safety Act and Regulations for Industrial Establishments 1991* (Ontario); *Occupational Health and Safety Act Regulations 1987* (Prince Edward Island); *Act No.133 - Act Modifying the Act Respecting Occupational Health and Safety and Other Legislative Measures 2003* (Quebec); *Occupational Health and Safety Act 1993* (Saskatchewan); *Occupational Health and Safety Regulations 1988* (Yukon).
[411] *Federal Labour Law 1995* (Mexico).
[412] *Occupational Health and Safety Law 2002* (USA).
[413] *Factories Act 1982* (Barbados).
[414] *General Law Concerning Health, Occupational Safety and Welfare 1990* (Bolivia).
[415] *Occupational Safety and Occupational Medicine 1983* (Brazil).
[416] Decree No.1907, establishing the national legal basis for conventions No.42, 103, 115, 136, 156, 159 and 162 of the International Labour Organization 1998 (Chile).
[417] Decree of 20 Oct. 2000 creating an Intersectorial Commission for the Protection of Workers' Health (Colombia).
[418] *Occupational Health and Safety Management System Standards 2000* (Costa Rica).
[419] *Consolidation of the Labour Code 1997* (Ecuador).
[420] *Employment Safety Act 1982 (*Dominica).
[421] *Labour Code 1997* (El Salvador).
[422] *General Regulations on Occupational Health and Safety 1957* (Guatemala).
[423] *General Regulation for the Prevention of Occupational Accidents and Diseases 2002* (Honduras).
[424] *Ministerial Standard on Basic Health and Safety Measures on Workplaces 2001* (Nicaragua).
[425] *Act No.16.074 on Occupational Accidents and Diseases 1989* (Uruguay).
[426] *Health and Safety Work Act 1996* (Fiji).
[427] *Health and Safety in Employment Act 2002* (New Zealand).
[428] *Industrial Safety, Health and Welfare Act 1961* (Papua New Guinea).
[429] *Occupational Health and Safety Act 2002* (Samoa).

The standard identified in this chapter will be used to analyse Australia's conduct. Accordingly it is relevant to determine how Australia has regulated OHS. Australian workplaces have been regulated by OHS laws since before Australia was federated. In 1788, British settlers (who were subject to British laws) landed in Australia on the First Fleet. In that year, the British Parliament enacted the *Regulation of Chimney Sweepers Act 1788* (UK) and later the *Health and Morals of Apprentices Act 1802* (UK). When colonial Parliaments were established, they enacted OHS laws that largely mirrored the United Kingdom OHS laws.[432] The first Australian health and safety laws appeared in the 1873 Victorian factory legislation.[433] Since those early OHS laws, Australian Parliaments have continued to increase the regulatory protection afforded to workers.[434] Currently, all Australian jurisdictions impose OHS duties upon parties who can impact upon workplace health and safety and punish non-compliance with these laws.[435] Under the current OHS legislative regime, all jurisdictions, but for Tasmania, expressly provide the objects of their OHS statutes within the enactment themselves. The objectives of the legislation unanimously focus upon ensuring workplace health and safety.[436] In all Australian jurisdictions' OHS statutes impose OHS duties upon people who can impact upon workplace health and safety. For example, the duties require employers,[437] employees,[438] self-employed persons,[439] designers, manufacturers, suppliers of plant

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[430] *Safety Work Act 1982* (Solomon Islands).
[431] *Health and Safety Work Act 1986* (Vanuatu).
[432] Richard Johnstone, 'Occupational Health and Safety Prosecutions in Victoria: Historical Study' (2000) 13 *Australian Journal of Labour Law* 113.
[433] Ibid.
[434] Ibid.
[435] Ron McCallum, 'The Role of the Criminal Law in 21st Century Australian Occupational Health and Safety Regulation' (2005) *Australian Mining and Petroleum Law Association Yearbook* 184.
[436] *Occupational Health and Safety Act 1989* (ACT) s 2; *Occupational Health and Safety Act 2000* (NSW) s 3; *Workplace Health and Safety Act 1995* (Qld) s 7; *Occupational Health, Safety and Welfare Act 1986* (SA) s 3; *Occupational Health and Safety Act 2004* (Vic) s 2; *Occupational Health and Safety Act 1984* (WA) s 5; *Workplace Health and Safety Act 2007* (NT) s 3.
[437] *Occupational Health and Safety Act 1989* (ACT) s 27; *Occupational Health and Safety Act 2000* (NSW) s 8; *Occupational Health and Safety Act 2004* (Vic) s 20-23; *Occupational Health, Safety and Welfare Act 1986* (SA) s 19; *Occupational Health and Safety Act 1984* (WA) s 19; *Workplace Health and Safety Act 1995* (Qld) s 28; *Workplace Health and Safety Act 1995* (Tas) s 9; *Workplace Health and Safety Act 2007* (NT) s 55.
[438] *Occupational Health and Safety Act 1989* (ACT) s 30; *Occupational Health and Safety Act 2000* (NSW) s 9; *Occupational Health and Safety Act 2004* (Vic) s 25; *Workplace Health and Safety Act 1995* (Tas) s 16; *Occupational Health and Safety Act 1985* (Vic) s 25; *Occupational Health, Safety and Welfare Act 1986* (SA) s 21; *Occupational Health and Safety Act 1984* (WA) s 20; *Workplace Health and Safety Act 1995* (Qld) s 35; Workplace Health and Safety Act *2007* (NT) s 59.
[439] *Occupational Health and Safety Act 1989* (ACT) s 31; *Occupational Health and Safety Act 2000* (NSW) s 11; *Occupational Health and Safety Act 2004* (Vic) s 24; *Occupational Health, Safety and Welfare Act 1986* (SA) s 22; *Occupational Health and Safety Act 1984* (WA) s 21; *Workplace Health and Safety Act 1995* (Qld) s 29; *Workplace Health and Safety Act 1995* (Tas) s 13; *Workplace Health and Safety Act 2007* (NT) s 55(2).

and substances[440] and controllers of workplaces[441] to take reasonably practicable steps to reduce workplace risks which those parties control.

It is clear that workers' right to safety and health has considerable support from both the human rights and industrial jurisdictions. It is submitted that this wide support for workers' right to safety and health imposes a moral duty upon Australia to protect this right. Traditionally, labour rights have not attracted the same moral force as human rights. To increase the moral force of labour rights in international relations it is argued that the international community should recognise labour rights as human rights. This move places additional moral pressure upon Australia to ensure workers' right to safety and health is protected.

2.3.5 Why workers' right to safety and health should be included within the four core labour rights

In order to increase the recognition of human rights at work, the ILO, and more recently, the United Nations Global Compact (**UNGC**) have propounded four fundamental labour rights as human rights.[442] These core labour rights are freedom of association and the right to organise,[443] freedom from forced labour and the abolition of forced labour,[444] freedom from discrimination and equal remuneration,[445]

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[440] *Occupational Health and Safety Act 1989* (ACT) s 32-35; *Occupational Health and Safety Act 2000* (NSW) s 11; *Occupational Health and Safety Act 2004* (Vic) s 30; *Occupational Health, Safety and Welfare Act 1986* (SA) s 24; *Occupational Health and Safety Act 1984* (WA) s 23; *Workplace Health and Safety Act 1995* (Qld) s 32; *Workplace Health and Safety Act 1995* (Tas) s 14; *Workplace Health and Safety Act 2007* (NT) s 56(2)(b).

[441] *Occupational Health and Safety Act 1989*(ACT) s 29; *Occupational Health and Safety Act 2000* (NSW) s 10; *Occupational Health and Safety Act 2004* (Vic) s 26; *Occupational Health and Safety Act 1984* (WA) s 22; *Occupational Health, Safety and Welfare Act 1986* (SA) s 23; *Workplace Health and Safety Act 1995* (Qld) s 30; *Workplace Health and Safety Act 1995* (Tas) s 13; *Workplace Health and Safety Act 2007* (NT) s 56(2)(a).

[442] The ILO *Declaration on Fundamental Principles and Rights Work*, adopted June 1998 by the General Conference of the ILO during its Eighty-sixth Session which was held Geneva, concerns the four labour rights, but omits OHS; see impact generally on labour rights: Phillip Alston and James Heenan, 'Shrinking the International Labour Code: An Unintended Consequence of the 1998 ILO *Declaration on Fundamental Principles and Rights Work*?' (2004) 36 *New York University Journal of International Law* 221; The UN's Global Compact adopted the same labour rights: United Nations Procurement Div - The Global Compact <http://www.un.org/Depts/ptd/global.htm> 2 may 2007; Surya Deva, 'Global Compact: a Critique of the U.N.'s " Public-Private" Partnership for Promoting Corporate Citizenship' (2006) 34 *Syracuse Journal of International Law and Commerce* 107, 115.

[443] ILO Convention No. 87, *Freedom of Association and Protection of the Right to Organise Convention 68 UNTS 17, ATS 3* (entered into force generally 4 July 1950 (entered into force for Australia 28 February 1974);
ILO Convention No. 87, *Freedom of Association and Protection of the Right to Organise Convention 68 UNTS 17, ATS 3* (entered into force generally 4 July 1950.

[444]ILO Convention No. 105, *Abolition of Forced Labour Convention*, 320 UNTS 291 (entered into force generally 17 January 1959) (entered into force for Australia 7 June 1961); ILO Convention No. 29, *Convention concerning Forced or Compulsory Labour* 39 UNTS 55 (entered into force generally 1 May 1932) (entered into force for Australia 2 January 1933).

[445] ILO Convention No. 111, *Discrimination (Employment and Occupation) Convention*, 362 UNTS 31 (entered into force generally 15 June 1960) (entered into force for Australia 15 June 1974); ILO Convention No. 100, *Equal*

and a minimum age for employment and the elimination of child labour.[446] The process that led to these four rights being elevated above other rights at work was not based on the merit of the rights protected, but on political expediency. In criticising the process of elevating the four core labour rights, Alston and Heenan note that 'many labor rights activists (and scholars) involved in the core standards' debate have been content to justify core standards by reference to human rights norms contained in various international texts including the UN's International Human Rights Covenants, while generally failing to comment on the highly selective nature of this grounding or the fact that various clearly-recognised human rights are simply omitted from the list of what is now deemed fundamental or core'.[447] It is beyond this thesis to analyse in detail the merits or otherwise of the approach of identifying core labour rights. It is submitted that workers' right to safety and health is equally as important as the existing four core labour rights and should be included expressly as a core labour right. Elevating workers' right to safety and health to the core labour rights, would increase the recognition of this right within existing ILO and UNGC programs and the moral imperative of the right which Australia's conduct is judged against in this thesis.

In order to demonstrate that workers' right to safety and health should be elevated to the core labour rights, this chapter will analyse the four core labour rights and demonstrate that OHS is essential if these rights are to be realised. The rights of freedom of association, freedom from forced labour, freedom from discrimination and abolition of child labour all seek to improve employees' working conditions.

The right to freedom of association and the right to organise are intended to prevent employers or governments from interfering with employees' right to elect to join a trade union.[448] The focus of this right enables the employees to engage in voluntary

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Remuneration Convention, 165 UNTS 303 (entered into force 23 May 1953) (entered into force for Australia 10 December 1975).

[446] ILO Convention 182, *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, 38 ILM 1207 (1999) (entered into force 19 November 2000).

[447] Philip Alston and James Heenan 'Shrinking the International Labor Code: an Unintended Consequence of the 1998 ILO *Declaration on Fundamental Principles and Rights at Work*?' (2004) 36 *New York University School of Law* 221, 254-255.

[448] Often nations manipulate this right: e.g. China forces all employees to join government-controlled trade unions, which generally act in the government's interests rather than employees' interests: Ronald C. Brown, 'China's Collective Contract Provisions: Can Collective Negotiations Embody Collective Bargaining?' (2006) 16 *Duke Journal of Comparative & International Law* 35.

negotiations on either an individual or collective basis.[449] When employees collectively negotiate with employers, the employees have increased power to protect their interests, including their safety.[450] The ability for collective action by employees to impact on safety is recognised in Australian law where the *Workplace Relations Act 1996* (Cth) permits employees to strike whenever there is a risk to safety.[451]

Workers' right to be free from forced labour is the modern equivalent of preventing slavery.[452] The *Convention Concerning the Abolition of Forced Labour* makes specific reference to the connection between forced labour and slavery and requires the State to ensure the 'complete abolition' of forced labour.[453] The right to be free from discrimination and the right to equal remuneration entitle workers to be free from being subjected to distinctions, exclusions or preferences made on the basis of the workers' race, colour, sex, religion, political opinion, national extraction or social origin.[454] The *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* requires States to take 'immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency'.[455] States are obliged to take positive action to eliminate employment that endangers children's safety or involves children in slavery-type practices or drug trafficking.[456]

It is argued that the point at which all these four core labour rights are critical is when a violation of the right impinges upon the workers' physical safety. Without

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[449] Toby Merchant, 'Recognizing IlO Rights to Organize and Bargain Collectively; Grease in China's Transition to a Socialist Market Economy' (2004) 34 *Western Reserve Journal of International Law*223, 243.

[450] See generally, Filip Dorssemont, *The Legal Status of Representative Trade Unions: On the Complicated Relation between the Legal Status of Trade Unions and the Right to Collective Action*' (PhD Thesis, Universitaire Instelling Antwerpen Belgium, 2001).

[451] *Workplace Relations Act 1996* (Cth) S 420(1)(g) permits employees to strike where they believe on reasonable grounds that there is an imminent risk to their health or safety. If employees abuse this right and strike where there is no risk then they will face prosecution. See for example: *Cruse v CFMEU and anor* (2007 FMCA 1873; This right is not extended to outworkers or other independent contractors who have their ability to withdraw work collectively prohibited by pt IV of the *Trade Practices Act 1974* (Cth): see chapter 1.2 of this thesis.

[452] For example, bonded labour is regarded as modern slavery: Tobias Barrington-Wolff, 'The 13th Amendment and Slavery in the Global Economy' (2002) *102 Columbia Law Review* 973, 991-992.

[453] ILO Convention No 105 arts 1 and 2.

[454] ILO Convention No 111 art 1(1).

[455] ILO Convention No 182 art 1.

[456] ILO Convention No 182 art 3.

Many nations have failed to prevent even bonded labour and other extremely abusive forms of child labour: Rie Debabrata, *No Time to Play: Social, Economic and Legal Dimensions of Child Labour Practices in India* (PhD Thesis, University of Essex United Kingdom, 2002); Mahmood Hussain, *Three Essays on Child Labour, International Trade, and Economic Growth(* PhD Thesis, University of Colorado, 2000).

downgrading the importance of the other four labour rights, it could be argued that no rights can be enjoyed unless workers' right to safety and health is protected. The Full-Belly thesis argues people can only worry about their political rights when their belly is full.[457] The Centrality thesis holds that the right to life is the central human right on which all other rights are contingent. Shue adroitly observes that without life, a person cannot enjoy any other human right.[458]

As a result of workplace accidents, millions of employees are being prevented or inhibited from exercising their other human rights. For example, if employers do not manage the occupational health and safety of manufacturing employees, those employees could potentially lose their lives or limbs at work, develop cancer or suffer fertility problems. Where factories are cleaner and expose employees to lower amounts of toxins and dust, then research indicates the medical impact upon workers is reduced.[459] For example, the alteration in the toxins used in aerosols has considerably reduced the instance of adverse health outcomes with their use[460] and the use of specialised air conditioning systems can increase extraction of toxic dusts.[461]

While the negative consequences which flow from a breach of the four core labour rights can be partially reversed in the future through compensation and/or a change in laws, where workers' right to safety and health is violated then the results may be irreversible. The implications of a breach of workers' right to safety and health can even have cross-generational implications. Feitshans observes '[t]he sound of freedom that resonates from civil and political rights rings hollow to a newborn who has … lost a parent due to an occupational accident, or whose parents are debilitated by occupational disease, or who may suffer personal injury due to the effects of a parent's workplace exposure to mutagens'.[462]

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[457] See however, Rhoda Howard, 'The Full-Belly Thesis: Should Economic Rights Take Priority over Civil and Political Rights? Evidence from Sub-Saharan Africa' (1983) 5 *Human Rights Quarterly* 4, 467; Howard disputes the validity of the Full-Belly thesis, contending people are prepared to make sacrifices to obtain political rights.
[458] Henry Shue, *Basic Right: Subsistence, Affluence, and U.S Foreign Policy (*2nd ed, 1996) ch 1.
[459] U Latza, M Oldenburg and X Baur, 'Endotoxin Exposure and Respiratory Symptoms in the Cotton Textile Industry' (2004) *59 Archives of Environmental Health* 10, 519.
[460] P Gregersen, U Klixbuell, P Skanning and P Jacobsen, 'Outbreak of Respiratory Distress after Exposure to Textile Proofing Spray with Fluorpolymer - Effective Toxicovigilance through a Poison Center', (European Association of Poisons Centers and Clinical Toxicologists XXVI International Congress, Prague (Czech Republic), 19-22 April 2006).
[461] M Stueble, 'The Clean Spinning Mill' (1991) *American Textiles*.
[462] Ilise L. Feitshans, 'Is There a Human Right to Reproductive Health?' (1998) 8 *Texas Journal of Women & Law* 93, 94-95; see also Rebecca Atkins, 'Multinational Enterprises and Workplace Reproductive Health: Extending Corporate Social Responsibility' (2007) 40 *Vanderbilt Journal of Transnational Law* 233, 235-237.

The importance of workplace health and safety can be demonstrated through analyzing how breaches of the four core labour rights operate in practice. Various reports have accused China of breaching workers' human rights. An analysis of these allegations demonstrates that the point at which a breach of the four core labour rights becomes irreversible is where workers' right to safety and health is not protected.

2.3.5.1 Right to freedom of association

The USA government's report on China's human rights practices to the United Nations in 2005 has detailed substantial violations of employees' right to freedom of association. In 2005, employees in China were reported to have no freedom of association.[463]

The All-China Federation of Trade Unions was the sole employee association. This union was directly controlled by the Chinese Communist Party. In 2004, employees from the Tieshu Textile Factory engaged in trade union activity which was not sanctioned by the All-China Federation of Trade Unions.[464] The employees who were involved were sentenced to long prison terms.

An employee who has had his/her right to freedom of association violated retains the ability to join a union in the future if the Chinese government's policy alters. Safety violations over the 2005 period resulted in126 760 workplace fatalities.[465] There were 15 accidents which killed 30 or more employees. The employees who were killed through OHS violations no longer have the capacity to enjoy any rights, while the employees who had their right to freedom of association violated have the capacity to subsequently join unions.

[463] Bureau of Democracy, Human Rights, and Labour Country Reports on Human Rights Practices - People's Republic of China (2006), S 2(b), *Freedom of association*; (2005 Report).
[464] Ibid S 6(a)
[465] Ibid S 6(e)

2.3.5.2 Right to freedom from forced labour

In 2005, forced labour in Chinese penal institutions or Lagai was reported to be common.[466] Many of the people in these penal institutions were allegedly convicted of crimes related to peaceful anti-government political activity.[467] The people working in penal institutions are sent to forced labour camps for years at a time.[468] The conditions in these prison factories are extremely dangerous and the safety standards have been compared with Nazi concentration camps.[469] Chinese prison-labour products are allegedly exported to western markets, including Australia.[470] The Chinese government reportedly acted to prevent the export of products which were manufactured by prison labour. The USA and Chinese governments first signed a memorandum of understanding in 1992, and signed an implementing statement of cooperation in 1994, to prevent products produced by Chinese prisoners being exported to the USA.[471] At the end of 2004, only three cases were closed and a large number of complaints remained unresolved. The Chinese government refused to exclude products produced by employees forced to work in the Laogai system, which is translated as reform or re-education institutions, from the agreement.

While being forced to work for an employer is a deprivation of liberty, there is the possibility the unlawful detention will end. Where an employee's OHS is violated resulting in death, the deceased employee no longer has the capacity to enjoy human rights. Research indicates that workers' right to safety and health has been violated in these prison factories. For example, in 2001, 39 forced labour employees were killed in Chinese prison factories.[472]

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[466] Ibid S 6(c).
[467] Robert Beiesky, 'Falun Gong & Re-Education through Labor: Traditional Rehabilitation for the " Misdirected" to Protect Societal Stability within China's Evolving Criminal Justice System' (2004) 17 *Columbia Journal of Asian Law* 147.
[468] Ping Yu, *Administrative Model v. Adjudication Model: the Impact of Administrative Detention in the Criminal Process of the People's Republic of China* (PhD Thesis, University of Washington, 2006).
[469] Melissa Pearson Fruge, 'The Laogai and Violations of International Human Rights Law: Mandate for the Laogai Charter' (1998) 38 *Santa Clara Law Review* 473, 473.
[470] Commonwealth, *Parliamentary Debates*, House of Representatives, 7 March 2005 (Mr. Danby Melbourne Ports).
[471] Bureau of Democracy, Human Rights, and Labour: Country Reports on Human Rights Practices- People's Republic of China, 2005 Report, S 6(c).
[472] Bureau of Democracy, Human Rights, and Labour: Country Reports on Human Rights Practices - People's Republic of China (2003), S 6(c); 2002 Report.

2.3.5.3 Right to be free from child labour

In China, articles 58, 64 and 65 of the *Labour Law 1994* (PRC) and executive decrees prohibit child labour. Child labour is harmful to children's education and development.[473] While child labour may reduce children's development, there is the possibility of subsequent education and training to remedy the injustices caused by child labour. If the child dies at work, then there is no possibility of remedying the injustice caused by the labour violation.

A number of children have been reportedly killed in workplace accidents in China. For example, children in an elementary school in Jiangxi Province, in 2001, were reported to have worked on manufacturing fireworks.[474] In March 2001, an explosion at the school factory killed 42 people, mostly children workers.[475] The USA Bureau of Democracy report alleges Chinese authorities only took action against the school when the parents of the children caused the issue to be covered in the media.[476]

Children were allegedly widely employed at the Lihua Textile Factory in Shijiazhuang, Hebei province.[477] In 2005, five teenage girls died of asphyxiation in the factory dormitories due to the inhumane, and ultimately fatal, standards of ventilation.[478] The USA Bureau of Democracy report cites NGO evidence that claims two of the teenage girls were placed in coffins while they were still alive, in an attempt to hide the fact that the factory employed child labour.

2.3.5.4 Right to be free from discrimination

Minorities in China are reportedly discriminated against. The native population of Xizang, or Tibet, regards it as a sovereign State which was illegally invaded by

[473] Mahmood Hussain, *Three Essays on Child Labor, International Trade, and Economic Growth* (PhD Thesis, University of Colorado, 2000) ch 3.
[474] Bureau of Democracy, Human Rights, and Labour: Country Reports on Human Rights Practices - People's Republic of China (2004), S 6(c) *Status of Child Labor Practices and Minimum Age for Employment*; (2003 Report).
[475] Ibid.
[476] Ibid.
[477] Bureau of Democracy, Human Rights and Labour: Country Reports on Human Rights Practices- People's Republic of China: 2005 Report, S 6(d).
[478] Ibid.

China in 1950.[479] In 2005, Tibetan employees in Tibet were allegedly discriminated against by the Chinese administration.[480] Evidence demonstrates that Tibetan employees are not able to obtain certain appointments and receive lower wages than Chinese employees.

While the discrimination is unpleasant for Tibetan employees, discrimination pales next to the loss of life. In order to suppress nationalism and resistance in Tibet, Chinese forces are accused of adopting brutal tactics. In October 2005, a Tibetan monk was reported to have been murdered when he refused to denounce the exiled Dalai Lama while he was working under forced labour conditions.[481]

2.4 What obligations are created by the operation of workers' right to safety and health?

The first two parts of this chapter have demonstrated that workers have a right to safety and health. This chapter will now explore how workers' right to safety and health is realized and who has obligations to uphold this right. This part will define the criteria that will be used to judge States' and corporations' conduct in this thesis.

2.4.1 What are States' domestic obligations to protect workers' right to safety and health?

Arguably states are most able to protect human rights where the conduct is engaged in within a State's own geographical territorial jurisdiction.[482] How should Australia domestically protect workers' right to safety and health? As part of the right to a safe workplace, Spieler identified the right to information, the right to be free from retaliation for raising safety concerns or refusing imminently dangerous work, and

[479] See generally, Tsering Shakya, *The Dragon in the Land of Snows: A History of Modern Tibet Since 1947* (1999) ch 2, 33-52.
[480] Bureau of Democracy, Human Rights and Labour: Country Reports on Human Rights Practices- People's Republic of China: 2005 Report, S on Tibet.
[481] Ibid.
[482] In a federation such as Australia, the federal State has the obligation to ensure all governments within the federation comply with the State's international obligations: *Germany v United States of America* [2001] ICJ Rep 466 at 508.

the right to work in an environment reasonably free from predictable, preventable, serious risks.[483]

The difficulty with Spieler's approach is that every sub-right which flows from the overall right to safety and health at work requires individual justification. Once workers' right to safety and health is established as a human right, then this right will have universal application and increased moral force. Rather than expanding the debate, and perhaps weakening the force of the central argument that workers' right to safety and health is a human right, it is submitted that the OHS rights developed by the ILO should be recognised as forming the basis of workers' right to safety and health. The ILO is the main source of international labour laws, having established 40 conventions and recommendations concerning OHS.[484] These conventions have wide acceptance by States. The ILO's main OHS convention, the *Convention Concerning Occupational Safety and Health and the Working Environment,* has 53 ratifications, including ratifications by Australia and China.[485]

Arguably the *Convention Concerning Occupational Safety and Health and the Working Environment* provides an internationally accepted standard by which to judge OHS laws.[486] Article 3(c) of the *Convention Concerning Occupational Safety and Health and the Working Environment* extends the protection to 'all places where workers need to be or to go by reason of their work and which are under the direct or indirect control of ' the employee's employer. Article 4 requires all nations to have OHS laws, which 'shall' seek to 'prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable , the causes of hazards inherent in the working environment'. This convention states that OHS laws must ensure workplace health and safety

[483] Emily Spieler, 'The Case for Occupational Health and Safety as a Core Worker Right' in James Gross (ed), *Workers' Rights as Human Rights* (2003), ch 4.
[484] ILO, 'International Labor Standards by subject, < http://www.ilo.org/ilolex/english/subjectE.htm#s12> at 15 December 2008.
[485] ILO, 'Convention No. 155 Ratifications': <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C155 April 2008; See also: Decision of the Standing Committee of the National People's Congress on adopting the '*Convention of Occupational Health and Safety and Working Environment*' in 1981 2006 (PRC); Michel Servais, Patrick Bolle, Mark Lansky, Christine L. Smith, *Rethinking Work for the 21st Century* (2007); N Valticos, 'The International Labour Organization - Its Contribution to the Rule of Law and the International Protection of Human Rights' (1968) 9 *Journal of the International Commission of Jurists* 2, 3.
ILO Convention No. 155 *Convention Concerning Occupational Health and Safety and the Working Environment,* open for signatures 11 August 1983 (2005) ATS 11) (entered into force generally on 11 August 1983 ; entered into force for Australia on 26 March 2005).

through imposing duties upon all parties who can control occupational risks. In particular, article 16 provides:

> employers shall be required to ensure that, so far as is reasonably practicable, the workplaces, machinery, equipment and processes under their control are safe and without risk to health.

The *Convention Concerning Occupational Health and Safety and the Working Environment* does not limit safety to the traditional employment relationship. Article 4 requires States to develop a coherent national policy on occupational safety and health which 'shall be to prevent accidents and injury to health arising out of, linked with, or occurring in the course of work, by minimising, so far as is reasonably practicable , the causes of hazards inherent in the working environment.' According to article 6, this State policy must 'indicate the respective functions and responsibilities in respect of occupational safety and health and the working environment of public authorities, employers, workers and others'.

The ILO has other conventions concerning aspects of OHS, for example, a convention ensuring machinery has adequate guards[487] and a convention ensuring workplaces are free from dangerous noise, vibrations and pollution.[488] Generally, the conventions which protect specific aspects of OHS aim to ensure the overall objective contained in the *Occupational Health and Safety Convention* is realised.

In addition to requiring States to create laws which require employers to take reasonably practicable steps to minimise risks to health and safety from their operations, the *Convention Concerning Occupational Health and Safety and the Working Environment* requires States to inspect workplaces to ensure employers are meeting those duties.[489] Where employers are not discharging their duties, States have an obligation to impose 'adequate penalties'.[490] This model of supporting OHS duties with the threat of punishment has been adopted by most, if not all,

[487] ILO Convention No. 119, *Guarding of Machinery Convention* 1963, entered into force 21 April 1965.
[488] *Convention concerning the Protection of Workers against Occupational Hazards in the Working Environment Due to Air Pollution, Noise and Vibration*, ILO Convention No. 148, entered into force 11 July 1979.
[489] *Occupational Health and Safety Convention* art 9(1).
[490] *Occupational Health and Safety Convention* art 9(2).

jurisdictions enacting OHS legislation.[491] The regulatory approach to defining the duty, when a breach attracts a penalty, and how to impose these duties has developed over the 20th and 21st centuries.[492] This substantial body of material provides significant guidance on how to interpret workers' right to safety and health.

How these ILO duties have been applied by States has continued to develop. Early OHS laws relied heavily upon specification standards to enforce OHS duties.The specification standards approach to OHS regulation imposed strict rules upon parties and punished any non-compliance. In the most influential OHS reports of all time,[493] Lord Robens recommended OHS laws should not rely upon specification standards provisions but should adopt general OHS duties.[494] These general OHS duties would be imposed on all parties who can impact on safety at the workplace.

Following the Robens Report, most western, industrialised States introduced general OHS duties which are supported by command and control duties and specification standards where appropriate.[495] General OHS duties place increased obligations upon parties at the workplace to self-regulate and seek out risks. Johnstone explained:

> The general duty provisions have been introduced to ensure that the principal parties involved in all work processes are subjected to a range of interlocking and overlapping duties requiring them to do all that is reasonably practicable to ensure that work is carried out in a way that is safe, and without risks to health.[496]

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[491] See chapter 2.3.4 of this thesis.
[492] Richard Johnstone, 'Occupational Health and Safety Prosecutions in Victoria: Historical Study' (2000) 13 *Australian Journal of Labour Law* 113; John Nowe, 'Deregulation of Labour Relations in Australia: Toward Command and Control' (Working Paper No 34, University of Melbourne, Centre for Employment and Labour Relations Law, 2005) 6; David Walters, 'Workplace Arrangements for OHS in the 21st Century' (Working Paper No 10, National Occupational Health and Safety Commission, 2003) 2.
[493] David Walters, 'Workplace Arrangements for OHS in the 21st Century' (Working Paper No 10, National Occupational Health and Safety Commission, 2003) 2.
[494] Committee on Health and Safety Work UK, 'Robens Report' (1972) 410; See also: A Ogus, *Regulation: Legal Form and Economic Theory* (1994) 245-256; Robert Baldwin, 'After Command and Control', in Keith Hawkins (ed), *The Human Face of Law: Essays in Honour of Donald Harris* (1997); Sean Cooney, 'Command and Control in the Workplace: Agreement-Making under Work Choices' (2006) 16(2) *Economic and Labour Relations Review* 147.
[495] Elizabeth Bluff and Richard Johnstone, 'The Relationship Between 'Reasonably Practicable' and Risk Management Regulation' (2005) 18 *Australian Journal of Labour Law* 3, 1; Chris Maxwell, *Occupational Health and Safety Act Review* (Victorian Government, Report, 2004), 100.
[496] Richard Johnstone, 'Paradigm Crossed? The Statutory Occupational Health and Safety Obligations of the Business Undertaking' (1999) 12 *Australian Journal of Labour Law* 8, 15.

The obligations imposed by these general duties articulate circumstances where general duties are owed. This does not create an overall obligation to ensure every stage of a corporation's operations are safe.[497]

General OHS duties do not simply describe the desired outcome. The general OHS duties do not describe the technical steps required to ensure safety or define a prescribed outcome. The General OHS duty is a form of management-based control as it requires people to consider OHS in planning and executing work activities.[498] This form of duty is arguably the best form to maximise the change in corporate behaviours and maximise workplace health and safety.

OHS laws often adopt different regulatory models to support general OHS duties. For example, where regulators can specify specific steps which should be taken to minimise the risk to safety and technological advances are unlikely to impact on the risk management process, regulators could impose specification standards.[499] Specification standards define the precise steps people need to take to discharge their OHS duties.[500] Providing a person follows these steps strictly, they will discharge their OHS duties. Where the industry is subject to technological change, then regulators may elect to adopt performance-based standards. Performance-based standards require a person to meet a specific OHS outcome and enable the duty holder to find innovative approaches to meet this target.[501] Under this system, innovation, negotiation and self-monitoring are the primary approach to regulation, with punitive enforcement as a default option.[502]

All the OHS regulatory models briefly mentioned here are effective in the appropriate circumstances. Indeed, to be successful, many OHS regulatory systems will utilize a range of these approaches in the one workplace. For example, a general

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[497] Elizabeth Bluff and Neil Gunningham, 'Principle, Process, Performance or What? New Approaches to OHS Standards' Setting' (Working Paper No 9, ANU National Research Centre for Occupational Health and Safety Regulation, 2003) 9.

[498] For a discussion of management-based controls see: Cary Coglianese and David Lazer, 'Of General Interest: Management-Based Regulation: Prescribing Private Management to Achieve Public Goals' (2003) 37 *Law & Society Review*, 691.

[499] Chris Maxwell, *Occupational Health and Safety Act Review* (Victorian Government, Report, 2004) 100.

[500] Elizabeth Bluff and Neil Gunningham, 'Principle, Process, Performance or What? New Approaches to OHS Standards' Setting' (Working Paper No 9, ANU National Research Centre for Occupational Health and Safety Regulation, 2003) 6.

[501] Ibid 11.

[502] David M. Trubek, 'Narrowing the Gap? Law and New Approaches to Governance in the European Union: New Governance and Legal Regulation: Complementarity, Rivalry, and Transformation' (2007) 13 *Columbia Journal of European Law* 539, 541.

provision may impose a general duty upon the employer and a specification provision could require employers to provide lifting machines for all heavy lifting. Identifying the most appropriate regulatory approach to the imposition of OHS duties depends upon the industry and the level of technological advancement of the enforcement agencies. Identifying the most effective approach to OHS across Australian-based supply chains would require a detailed analysis of standards which is beyond this thesis. When analysing Australia's domestic obligations, this thesis will only ask whether Australia has imposed OHS duties upon all parties who can impact upon outworkers' safety and whether those OHS duties are enforced.

The imposition of OHS duties upon people is a largely meaningless exercise unless those laws are effectively enforced. It is submitted that effective enforcement does not always equate to a model which only punishes non-compliance. Regulators have recognised that responding to every breach of OHS with punishment can create a culture of hostility which causes employers to attempt to avoid detection rather than discharge their duties.[503] Incentives alone, however, cannot ensure OHS. Gunningham has observed that even with incentive-based OHS regulatory models, 'some form of persuasion by coercion by means of law remains a necessary condition'.[504]

Ayres and Braithwaite have combined both incentives and punishments in their widely supported regulatory enforcement pyramid model.[505] The regulatory enforcement pyramid model provides incentives for parties who attempt to comply with their duties and punishment for those who intentionally or wilfully negligently fail to discharge their duties. The pyramid presumes the majority of people will be at the bottom of the pyramid, voluntarily complying with their duties. In the middle of the pyramid are supportive schemes to assist people to comply with their duties. At the top of the pyramid are legal sanctions for the small number of people who fail to discharge their OHS duties satisfactorily. The enforcement pyramid represents an

[503] Richard Johnstone and Neil Gunningham, *Regulating Workplace health and safety: Systems and Sanctions* (1999) 112.
[504] Neil Gunningham, 'Integrating Management Systems and Occupational Health and Safety Regulation' (1999) 26 *Journal of Law and Society* 2, 192.
[505] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1995) 19-53.

understanding that regulators should determine how effective parties are regulating themselves prior to escalating interventions to impose legal sanctions.[506]

Underlying the enforcement pyramid is the threat of adverse legal sanctions. The enforcement pyramid involves a carrot and stick approach where the stick remains a crucial aspect of the model.[507] Johnstone argues:

> At the heart of the enforcement pyramid is a paradox – the greater the capacity of the regulator to escalate to the top of the pyramid, and the greater the available sanctions at the top of the pyramid, the more duty holders will participate in co-operative activity at the lower regions of the pyramid.[508]

The top of the enforcement pyramid is premised on the basis legal sanctions will deter corporations from non-compliance with OHS duties. Where the enforcement pyramid's carrots do not motivate compliance, then arguably the fear of the stick remains the only way to force compliance.[509]

Under the regulatory pyramid there is no requirement for the punishment to take a particular form. The punishment can be represented by hard law punishments, such as fines or enforceable undertakings, or could be represented by soft law, such as corporate social responsibility. The new governance models, with their focus on decentred' regulation and regulatory nodes may also provide vehicles to motivate compliance with prescribed standards.[510] The crucial aspect of any regulatory framework is the potential to deter people from non-compliance.

The deterrent theory 'assumes that crime is a rational, decision-making process in which potential offenders weigh the costs and benefits associated with an illegal

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[506] John Braithwaite, *Restorative Justice and Responsive Regulation* (2002) 299*;* Richard Johnstone and Rick Sarre, 'Regulation : Enforcement and Compliance' (Working Paper, Australian Institute of Criminology, 2004) 11.
[507] Paul Teague, 'New Employment Times and the Changing Dynamics of Conflict Resolution Work: the Case of Ireland' (2006) 28 *Comparative Labor Law and Policy Journal*, 587..
[508] Richard Johnstone 'From Fiction to Fact - Rethinking OHS Enforcement' (Working Paper No 11, ANU National Research Centre for Occupational Health and Safety Regulation, 2003) 17.
[509] Neil Gunningham, 'Occupational Health and Safety Regulation: Two Paths to Enlightenment' (1998) 19 *Comparative Labor Law & Policy Journal* 547, 571.
[510] Scott Burris, Michael Kempa, and Clifford Shearing, 'Changes in Governance: A Cross-Disciplinary Review of Current Scholarship' (2008) 41 *Akron Law Review*, 1.

act.'[511] If the anticipated costs are greater than the anticipated rewards, individuals will choose not to engage in the prohibited behaviour.[512] While it is always difficult to assume individuals act rationally, it has been argued that corporations are more likely to act rationally in their best economic interests.[513] The deterrent theory has developed from the theories of Beccaria and Bentham.[514] While these theories have developed, for many people, the decision whether or not to commit an offence is a rational decision.[515] Unlike other criminal offences, OHS offences are often committed as a business decision. For example, an employer may decide to reduce costs by reducing expenditure on safety. Accordingly, the deterrent impact of OHS duties will be effective providing the legal sanction is sufficient to deter people from breaching them. If the legal sanction is insufficient, then this will substantially reduce the deterrent impact of OHS duties.[516] Accordingly, ILO standards will be examined to determine whether Australian legislation imposes OHS duties upon parties who can impact on domestic outworkers' safety and whether, if such duties exist, those duties are enforced.

2.4.2 Do corporations have obligations to protect workers' right to safety and health?

Traditionally, human rights obligations have vested only over States. Under this approach, human rights have been conceived within the public international law rubrics. Based upon the Westphalia system of international law, the individual has no standing under international law.[517] Blackstone explains international law placed duties and liabilities upon States.[518] The States would place duties and liabilities upon individual citizens and, where appropriate, represent individual citizens'

[511] Tuncay Durna, *Madd,,' Drunk Driving, and Deterrence: the Impact of State Laws on Individual Attitudes and Behaviour*' (PhD Thesis, Kent State University, 2005).
[512] Suzanne Briscoe, '*Deterrence, Punishment Severity and Drink-driving*' (PhD Thesis, University of New South Wales, 2005) 11; for a discussion of the role of general and specific deterrents for OHS, see Boland J in *Inspector Gill v Qantas Airways Ltd* [2005] NSWIR Comm 326, (25); Backman J in *Workcover Authority (NSW) (Inspector Gill) v Liana Park Pty Ltd* (2006) 157 *IR* 42, 430.
[513] John Braithwaite and Gilbert Geis, 'On Theory and Action for Corporate Crime Control' (1982) 28 *Crime and Delinquency* 292, 302; S Tombs, 'Law, Resistance and Reform: Regulating Safety Crimes in the UK' (1995) 4 *Social and Legal Studies* 343, 356.
[514] Jack Gibbs *Crime, Punishment and Deterrence* (1975) 5.
[515] Gary Becker, 'Crime and Punishment: an Economic Approach' (1968) 76 *Journal of Political Economy* 6, 169.
[516] [516] New Zealand Ministry of Justice, *Review of Monetary Penalties in New Zealand* (2000).
[517] Andrew Clapham, *Human Rights in the Private Sphere* (1993) 3-4.
[518] William Blackstone, *Commentaries on the Laws of England 68* (1769); Richard N. Block, 'Economic Perspectives on International Labor Standards' (2002) 11 *Michigan State University Journal of International Law* 417; J Collier, 'Is International Law a Part of the Law of England?' (1989) 38 *International and Comparative Law Quarterly* 4, 924.

interests under international law. All individuals' rights and obligations flowed through the nation state. This approach became known as 'vertical' human rights.[519] Ratner and Burleson explain how the traditional vertical approach is applied to international business:

> For the corporations, the relationship with the citizenry became a matter of getting the best terms out of the employment contract. The citizenry's human rights were the government's responsibility, not theirs.[520]

Under vertical human rights, all human rights obligations are imposed upon States and not over private citizens.

Arguably modern human rights were initially intended to vest equally over public and private actors. There is nothing in the *International Bill of Rights* which demonstrates corporations should not have human rights directly imposed upon them. Paust observed the *UDHR* focuses upon granting rights universally to all peoples.[521] The *UDHR* does not restrict the obligation to enforce those rights only to States. The Preamble of the *UDHR* proclaimed the *UDHR* 'as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society … shall strive …' to promote the rights protected in the *UDHR*. Robinson and Vieira de Mello have argued the term 'organ' was drafted to include both public and private organs of society, thus corporations are bound under the *UDHR*.[522] Henkin has observed:

> At this juncture, the *Universal Declaration* may also address multinational companies. … The *Universal Declaration* is not addressed only to governments. It is 'a common standard for all peoples and all nations.' It means that 'every individual and every organ of society shall strive--by progressive measures . . . to secure their universal and effective recognition and observance among the people of member states.' Every individual includes juridical persons. Every individual and

[519] Stephen Gardbaum, 'The " Horizontal Effect" of Constitutional Rights' (2003) 122 *Michigan Law* Review 387.
[520] Steven R. Ratner and Albert Sidney Burleson, 'Corporations and Human Rights: a Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 143, 446, 147.
[521] Jordan Paust, 'The Other Side of Right: Private Duties under Human Rights Law' (1992) 5 *Harvard Human Rights Journal* 51, 53.
[522] Mary Robinson, 'The Business Case for Human Rights' in *Visions of Ethical Business, Financial Times Professional* (1998) 14; Sergio Vieira de Mello, 'Human Rights: What Role for Business?' (2003) 2 *New Academy Review*1, 19.

> every organ of society excludes no one, no company, no market, no cyberspace. The *Universal Declaration* applies to them all...[523]

It is, however, rare for corporations to have direct obligations under international law.[524]

While the conceptualisation of human rights through vertical international law excluded corporations, it is submitted that international law is increasingly recognising non-State actors such as corporations.[525] States altered the status of corporations through imposing human rights obligations upon corporations under international law. Effectively, States used their power under the vertical conceptualisation of human rights law to impose obligations horizontally on corporations under international law. These obligations are imposed horizontally because corporations are not full juridical entities under international law. Under vertical human rights, every State has the capacity to alter international law and has the power to be heard by virtue of their status as a sovereign State. In contrast, corporations have no rights under international law, except those rights and obligations which are defined by States.[526] As States have imposed limited rights and obligations over corporations under international law, to the extent of those rights and obligations, corporations can be regarded as juridical entities under international law.[527]

The notion that corporations can be bound under human rights is not a new concept. As early as the 1930s, the German government suggested principles of State responsibility should apply to corporations, where those corporations are discharging sovereign rights.[528] The German government of the time felt corporations should be

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[523]Louis Henkin, 'Human Rights: The *Universal Declaration* and the Challenge of Global Markets' (1999) 25 *Brooklyn Journal of International Law* 17, 24-25.
[524] Carlos M. Vazquez, 'Direct vs Indirect Obligations of Corporations under International Law' (2005) 43 *Columbia Journal of Transnational Law* 927, 927.
[525] Philip Alston, 'The " Not-a-cat" Syndrome: Can the International Human Rights Regime Accommodate Non-state Actors?' in Philip Alston (ed), *Non-State Actors and Human Rights* (2005) ch 1; Gregory T. Euteneier, 'Towards a Corporate " Law of Nations": Multinational Enterprises' Contributions to Customary International Law' (2007) 82 *Tulane Law Review* 757, 757.
[526] [526] Carlos M. Vazquez, 'Direct vs Indirect Obligations of Corporations under International Law' (2005) 43 *Columbia Journal of Transnational Law,* 927, 930.
[527] Robert Alexy, *Theory of Constitutional Rights* (Julian Rivers trans, 2002 ed) 351.
[528] For a discussion, see Andrew Clapham, 'The Obligations of States with Regard to Non-State Actors in the Context of the Right to Health' *(*Health and Human Rights Working Paper Series No 3, 2004).

held accountable to the principles of State responsibility where the government authorised a private railway company to retain a private police force.

The liability of corporations under international law obtained wide recognition following World War II. During World War II, a number of corporations provided the Nazi regime material support to commit war crimes and to prosecute the Nazis' holocaust against Jews and other minorities.[529] During the Nuremberg Trials, corporations such as Krupp were held to be criminal enterprises for assisting the Nazis' illegal activities.[530] These convictions have promoted the concept that corporations are subject to international standards.[531] Stephens has observed:

> Today, the abuses of the Holocaust are contributing to the development of new approaches to human rights accountability...[532]

International human rights institutions have demanded that corporations have human rights duties. The United Nations Committee on Economic, Social and Cultural Rights stated:

> All members of society - individuals, families, local communities, non-governmental organisations, civil society organizations, as well as the private business sector, have responsibilities in the realization of the right to adequate food.[533]

The UN Human Rights Sub-Commission went so far as to argue that binding obligations should be imposed over multinational corporations.[534] Ultimately, this

[529] Edwin Black, *IBM and the Holocaust: the Strategic Alliance between Nazi Germany and America's Most Powerful Corporation* (2001); Anita Ramasastry, Stefan A. Riesenfeld, Symposium 2001: Corporate complicity: 'From Nuremberg to Rangoon: an Examination of Forced Labour Cases and Their Impact on the Liability of Multinational Corporations' (2002) 20 *Berkeley Journal of International Law* 91, 93.
[530] William Manchester, *The Arms of Krupp* (2003) 625 – 658.
[531] Andrew Clapham, 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court' in Menno T. Kamminga and Saman Zia-Zarifi (eds), *Liability of Multinational Corporations* (2000) 166-171.
[532] Beth Stephens, Stefan A. Riesenfeld, Symposium 2001: 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20 *Berkeley Journal of International Law* 45, 46; see also: Anthony Cassimatis, *Human Rights Related Trade Measures under International Law* (2007) ch 2.
[533] United Nations Committee on Economic Social and Cultural Rights, General Comment 12, *The Right to Adequate Food* (Art. 11), May 12 1999, [20].
[534] United Nations Sub-Commission on the Promotion and Protection of Human Rights Norms, on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.

resulted in the non-binding UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.[535]

The call to hold corporations accountable against international human rights has developed to a point where the community of nations has now prescribed non-binding norms that corporations are expected to uphold.[536] The UN's *Global Compact* represents one of the most significant developments in defining international human rights duties over corporations. The *UNGC* involves corporations accepting the obligation to incorporate the *UNGC*'s principles into their operations and to report on their efforts to uphold these principles.[537] While the *UNGC* does not consider employees' safety at work,[538] the *UNGC* does indicate the trend towards placing obligations directly over corporations under international law. Deva has argued that the *UNGC* represents

> a deviation in the generally state-centric nature of international law: it not only reflected the growing influence of non-States' actors such as multinational corporations … in international law making, but might also be interpreted as an incremental step towards their recognition as subjects of international law.[539]

Kinley and Tadaki observe that placing the responsibility for human rights entirely upon States can cause injustice to occur.[540] Certain developing States do not have the economic power to resist the pressure from large multinational corporations. Even where developing States have such power, the developing States' ruling elite may prefer to exploit their citizens to enhance profits. In these circumstances, it is not a matter that corporations have no impact on human rights, rather they have the power to positively influence developing States' human rights policies.[541] Penovic

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[535] Mark D. Kielsgard, 'Unocal and the Demise of Corporate Neutrality' (2005) 36 *California Western International Law Journal,*185, 198.
[536] Larry Cata Backer, 'Multinational Corporations, Transnational Law: the United Nations Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law' (2006) 37 *Columbia Human Rights Law Review* 287, 389.
[537] Surya Deva, 'Global Compact: a Critique of the U.N.'s "Public-Private" Partnership for Promoting Corporate Citizenship' (2006) 34 *Syracuse Journal of International Law and Commerce* 107.
[538] United Nations Procurement Div - The Global Compact <http://www.un.org/Depts/ptd/global.htm> 2 may 2007.
[539] Surya Deva, 'Global Compact: a Critique of the U.N.'s " Public-Private" Partnership for Promoting Corporate Citizenship' (2006) 34 *Syracuse Journal of International Law and Commerce*107, 109.
[540] David Kinley and Junko Tadaki, 'From Talk to Walk: the Emergence of Human Rights Responsibilities for Corporations International Law' (2004) 44 *Virginia Journal of International Law* 931, 938.
[541] Jordan Paust, 'The Significance and Determination of Customary International Human Rights Law: the Complex Nature, Sources and Evidences of Customary Human Rights' (1995) 25 *Georgia Journal of International and*

observes States are obliged under international law to comply with human rights.[542] This enforcement can require States to place human rights obligations upon their natural and legal citizens. Clapham observes:

> [C]orporations have to respect the human rights of everyone and refrain from any activity that represents an abuse of those rights …. The obligation to protect human rights means that corporations have some obligations to use their influence to protect all persons from threats to their [rights].[543]

Paust contends nearly all human rights instruments provide 'express or implied recognition of private duties' and the real issue is 'what sorts of duty correspond to what sorts of right in what context'.[544] It has become common for both nations and authors to use human rights to critically analyse corporate conduct. For example, Ferrer has argued that multinational corporations are bound by human rights to uphold human rights, regardless of the jurisdiction they operate in.[545] The concept that corporations are required to uphold human rights is having increasing acceptance. Indeed, in many jurisdictions, the obligation on corporations has been realised through enforceable human rights.[546] For example, Ratner explores moves to have corporations directly obliged to protect the environment, prevent bribery and refrain from anti-competitive conduct.[547] Under European laws, corporations are liable for human rights' violations.[548] Further support for the horizontal application of human rights can be found in national Bills of Rights and Constitutions.

Comparative Law, 147, 162; See a further discussion in: Jordan Paust, 'The Other Side of Right: Private Duties under Human Rights Law' (1992) 5 *Harvard Human Rights Journal* 51.

[542] Tania Penovic, 'Undermining Australia's International Standing: The Failure to Extend Human Rights Protections to Indigenous Peoples Affected by Australian Mining Companies' Ventures Abroad' (2005) 11 *Australian Journal of Human Rights* 1, 71.

[543] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (2006) 231.

[544] Jordan Paust, 'The Significance and Determination of Customary International Human Rights Law: the Complex Nature, Sources and Evidences of Customary Human Rights' (1995) 25 *Georgia Journal of International and Comparative Law*, 147, 162; See a further discussion in: Jordan Paust, 'The Other Side of Right: Private Duties under Human Rights Law' (1992) 5 *Harvard Human Rights Journal* 51.

[545] Joaquin Ferrer, *Globalization: Ethical Evaluations and Implications for Corporate Social Responsibility of Transnational Corporations* (PhD Thesis, Loyola University, 2005).

[546] Doreen McBarnett, 'The New Corporate Accountability: Corporate Social Responsibility beyond Law, through Law, for Law' in D McBarnet, A Voiculescu and T Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (2007) ch 1.

[547] Steven R. Ratner, 'Corporations and Human Rights: a Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 443, 480-482.

[548] Olivier de Schutter, 'The Accountability of Multinationals for Human Rights Violations in European Law' in Philip Alston (ed), *Non-State Actors and Human Rights* (2005) 7.

While State Bills of Rights and Constitutions do not have universal application, these instruments are the paramount legal instruments in these jurisdictions. When these instruments protect rights, it is argued this reflects the importance of these rights in the jurisdictions. Using this reasoning, South Africa, Ireland and Canada all regard the imposition of human rights' obligations over corporations as fundamental.

The South African *Bill of Rights 1996* expressly incorporates the principle of horizontality in section 8, where it expands the application of the constitutional rights to both natural and juristic persons.[549]

In Ireland, human rights directly bind private actors, as well as government.[550] Irish courts have developed a constitutional tort action, in which private actors can prosecute a suit against other private actors for violating human rights. Justice Walsh explained, 'If a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who infringed that right.'[551]

The Canadian Supreme Court in *Retail, Wholesale & Dep't Store Union v Dolphin Delivery Ltd,* interpreted the Supremacy Clause in the *Canadian Charter of Rights and Freedoms 1982* to hold the *Charter* applied to the common law.[552] The Supremacy Clause is found in s 52(1), which states: '[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.' Section 32 however, was interpreted to limit the *Charter* to acts which involve government action. Private litigation between citizens relying upon the common law alone would, therefore, be immune from *Charter* obligations.[553]

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[549] To see how the *Bill of Rights 1996* (South Africa) has developed, see generally: Lynn Berat, 'Constitutional Court Profile-The Constitutional Court of South Africa and Jurisdictional Questions: In the Interest of Justice?' (2005) 3 *International Journal of Constitutional Law* 39; and Lourens W H Ackermann, 'The Legal Nature of the South African Constitutional Revolution' (2004) *New Zealand Law Review* 633.
[550] Andrew Clapham, *Human Rights in the Private Sphere* (1993) ch 10.
[551] Walsh J in *Meskell v Coras Iompair Eireann* [1973] IR 121, 133; see also *Hosford v John Murphy & Sons* [1987] IR 621, 626, where Costello J supported the constitutional tort action in similar words; see for discussion Stephen Gardbaum, 'The " Horizontal Effect" of Constitutional Rights' (2003) 122 *Michigan Law Review* 387, 397
[552] [1986] 2 SCR 573, 592; see for discussion, Stephen Gardbaum, 'The " Horizontal Effect" of Constitutional Rights' (2003) 122 *Michigan Law Review* 387, 464, 398-401.
[553] [1986] 2 SCR 573, 603.

Private citizens are bound by the *Charter* where the litigation involves the interpretation of a statute.[554] Anderson justifies this shift towards horizontal rights, as well as vertical rights, through explaining that private actors are increasingly performing services which were previously the province of public authorities.[555] In addition, jurisprudence has altered to accept procedural protections are not always sufficient to ensure constitutional rights. In limited circumstances, material alterations, which may impact on private actors, can be necessary.[556]

While the rights against corporations may not be legally enforceable, it is arguably clear from the *UNGC*, from the conduct of nations, and from academic writings that corporations should be seen as having moral obligations to uphold human rights within their domestic and international spheres of influence. International discourse has arguably now shifted from whether a corporation's complicity in human rights' abuse is sufficient to constitute a breach, to defining where a corporation's action constitutes complicity in human rights' abuse.[557]

2.4.3 What obligation do corporations have to protect workers' right to safety and health under the complicity principle?

To effectively answer whether Australia is discharging its duty to protect workers' right to safety and health it is crucial to first define corporations' duties. Chapter 2.4.4 will then analyse Australia's obligation to ensure corporations' discharge these human rights obligations. As explained in chapter 1.1.2, generally when a corporation outsources manufacturing work to other corporate entities, the corporation which outsources the work is not legally liable for the labour conditions under which the products are produced. Under the complicity principle, a corporation's moral duties cover more circumstances than a corporation's strict legal duties.[558] The complicity principle only recognises the corporate veil to the extent

[554] *Re Blainey and Ontario Hockey Ass'n* [1986] 26 DLR (4th) 728.
[555] Gavin W. Anderson, 'Social Democracy and the Limits of Rights' Constitutionalism' (2004) 17 *Canadian Journal of Law and Jurisprudence* 31, 33.
[556] Ibid 36, 42.
[557] For a discussion of how the complicity principle operates against Yahoo!, Microsoft, Google, and Cisco for their operations in China see: Surya Deva, 'Corporate Complicity in Internet Censorship in China: Who Cares for the *Global Compact* or the *Global Online Freedom Act*?' (2007) 39 *George Washington International Law Review* 255, 280-282..
[558] Denis Arnold, 'Moral Reasoning, Human Rights, and Global Labor Practices' in Laura Hartman, Denis Arnold and Richard Wokutch, *Rising Above Sweatshops* (2003); Denis G. Arnold and Laura P. Hartman, 'Moral Imagination and

that corporate layers impact upon parties' *mens rea*. In other words, a corporation which outsources work to a corporation which violates human rights, will be liable for that human rights' abuse, where the outsourcing corporation is complicit in the abuse.[559] It could be argued that the duty of people not to be complicit in human rights' abuses has been accepted under international law for a considerable time.[560] For example, article 3 of the 1948 *Genocide Convention* provides that conspiracy to commit genocide and complicity in genocide are crimes.[561]

The UN General Assembly has accepted the complicity principle and provided direction where a person will be complicit. The *UNGC Principles* state in Principles 1 and 2:

> 1. Corporations should support and respect the protection of internationally proclaimed human rights … within their sphere of influence
> 2. Corporations should make sure that they are not complicit in human rights' abuses.

Clapham and Jerbi explain that these first two principles impose duties upon corporations firstly to ensure corporations do not abuse human rights in their operations and secondly, take reasonably practicable steps to ensure corporations are not complicit in others' human rights' violations.[562] When introducing the *UNGC* to business leaders, Kofi Annan explained:

> You can uphold human rights and decent labour and environmental standards directly, by your own conduct of your own business … You can at least make sure your own employees, and those of your subcontractors, enjoy those rights.[563]

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the Future of Sweatshops' (2003) 108 *Business and Society Review* 4, 425; Paul A. Davidsson, 'Legal Enforcement of Corporate Social Responsibility within the EU' (2002) 8 *Columbia Journal of European Law* 529.

[559] Rebecca DeWinter, 'The Anti-Sweatshop Movement: Constructing Corporate Moral Agency in the Global Apparel Industry' (2001) 15 *Ethics & International Affairs* 99.

[560] Steven R. Ratner and Albert Sidney Burleson, 'Corporations and Human Rights: a Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 143, 446, 501.

[561] *Convention on the Prevention and Punishment of the Crime of Genocide* (Open for signatures 9 December 1948) ATS 2 (Entry into force for Australia and generally: 12 January 1951).

[562] Andrew Clapham and Scott Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses' (2001) 24 *Hastings International and Comparative Law Review* 339, 341.

[563] 'Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in address to World Economic Forum in Davos' (1999) UN Press Release SG/SM/6881.

On the basis the *UNGC* principles are based on the *UDHR,* the principles which are reflected in the *UNGC,* in effect, re-state existing international law obligations. As a result, Principles 1 and 2 effectively re-state corporations' existing obligations under the horizontal conceptualisation of international human rights law.

The *Global Compact* provides guidance on how corporations should satisfy the complicity principle. The *Global* Compact defines three circumstances where a corporation can be complicit in a human rights' abuse. [564] According to the *UNGC*, a corporation can be liable for complicity through either direct, indirect or silent complicity.

Direct complicity requires a corporation to have intentionally participated in furthering a human rights' abuse where the corporation has 'knowledge of foreseeable harmful effects'.[565] The application of direct complicity has been applied by the UN Security Council when the Security Council enacted the *Statute of the International Criminal Tribunal for the Former Yugoslavia* and *Statute of the International Criminal Tribunal for Rwanda*.[566] Both of these statutes provided a person was liable where s/he 'planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution' of one of the prescribed offences.[567] Criminal complicity under these provisions has been interpreted to exist where a person's 'participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident'.[568] Arguably it is relatively uncontroversial to provide that corporations are liable where they are directly complicit in human rights' abuses.[569]

Indirect complicity does not require a positive act by corporations. If a corporation participates in a 'business climate' which violates human rights, then by participating

[564] United Nations Global Compact, *Guide to the Global Compact: a Practical Understanding of the Vision and Nine Principles* (2002) 24.
[565] Andrew Clapham and Scott Jerbi, 'Categories of Corporate Complicity in Human Rights' Abuses' (2001) 24 *Hastings International and Comparative Law Review* 339, 342.
[566] Art 7(1) of the *Statute of the International Criminal Tribunal for the Former Yugoslavia*, Security Council Resolution 808 (1993), U.N. SCOR, 48th Sess. U.N. Doc. S/25704 (1993); Art 6(1) of the *Statute of the International Criminal Tribunal for Rwanda*, in S.C. Res. 955, U.N. SCOR, 49th Sess. 15, U.N. Doc. S/INF/50 (1994).
[567] Ibid.
[568] *Prosecutor v Tadic*, Case No IT-94-I-T, para 692 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).
[569] Stefan A Riesenfeld, Symposium 2001: Corporate complicity: Anita Ramasastry, 'From Nuremberg to Rangoon: an Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations' (2002) 20 *Berkeley Journal of International Law* 91, 98.

in that climate a corporation is complicit in the abuse.[570] A corporation will be liable for indirect complicity where it 'knowingly benefit[s] from human rights' abuses'.[571] Indirect complicity is often premised on the basis that once a corporation knowingly benefits from a breach, then the corporation should be held to be complicit under human rights laws.[572] This form of complicity has been levelled against corporations which outsource work to factories where the outsourcing corporation strongly suspects employees will have their human rights violated. Clapham explains:

> Examples of beneficial complicity could also include a company that receives financial incentives in an Export Processing Zone where the government prohibits unions; a company that purchases materials from a supplier that is committing gross human rights' violations; and a company that tolerates working conditions detrimental to worker health in its supply chain.[573]

Indirect complicity is capable of being levelled at any corporation which knows work at a particular factory breaches human rights, but nevertheless outsources work to that factory.

Indirect complicity requires a corporation to have some knowledge of human rights' abuses by corporations within their sphere of influence. Silent complicity focuses upon whether the corporation should have made proactive efforts to determine if human rights' abuse was occurring within their sphere of influence.[574] A corporation is silently complicit where it fails to raise 'the question of systematic or continuous human rights' violations in its interactions with the appropriate authorities'.[575] This proactive obligation to perform due diligence will vary for each corporation, depending upon its 'sphere of influence'.

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[570] Amnesty International and Pax Christi International, *Multinational Enterprises and Human Rights* (Report, 2000) 51.
[571] Andrew Clapham and Scott Jerbi, 'Categories of Corporate Complicity in Human Rights' Abuses' (2001) 24 *Hastings International and Comparative Law Review* 339, 347.
[572] Human Rights Watch, *The Enron Corporation: Corporate Complicity in Human Rights' Violations* (Report, 1999) 105.
[573] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (2006) 221; see also A. P. Ewing, 'Understanding the *Global Compact Human Rights Principles*' in UNGC Office & Office of the High Commissioner for Human Rights, *Embedding Human Rights in Business Practice* (2004) 29-42.
[574] Andrew Clapham and Scott Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses' (2001) 24 *Hastings International and Comparative Law Review* 339, 396, 347-348.
[575] United Nations Global Compact, *Guide to the Global Compact: a Practical Understanding of the Vision and Nine Principles* (2002) 24; see for discussion, Ilias Bantekas, 'Corporate Social Responsibility in International Law' (2004) 22 *Boston University International Law Journal* 309, 330.

The International Council on Human Rights Policy has argued that a corporation's obligation to take proactive conduct increases with its commercial capacity to motivate other corporations to discharge their human rights obligations.[576] To avoid silent complicity, it is submitted that retailers and other corporations are required to make efforts, in accordance with their respective economic power, to ensure human rights are recognised in factories to which work is outsourced.[577] Even though silent complicity may not be sufficient to create a legal obligation, it is clear there is now a moral obligation upon business to exercise their influence to advance human rights within their sphere of influence.[578]

The complicity of a corporation is not contingent upon a corporation's ability to control the person performing the human rights' abuse. A corporation's liability is imposed when a corporation knows or suspects products they intend to purchase were manufactured in circumstances which violated workers' right to safety and health. The importance of reading the silent complicity principle widely can be demonstrated by what would occur if the principle was read narrowly. If the silent complicity principle was read narrowly, and corporations required actual knowledge or control to attract human rights duties, then corporations could avoid any duty through simply actively ensuring they remain ignorant of human rights' abuse. In effect, this would validate a corporation outsourcing work to a corporation which violated human rights, providing the corporation which outsourced work ensured it remained ignorant of the abuse. To avoid corporations claiming ignorance as an excuse, the silent complicity principle under international human rights law requires corporations to take a reasonable amount of proactive steps to ensure they do not outsource work to corporations which breach human rights.

2.4.4 What obligations do States have to ensure corporations subject to their jurisdiction satisfy the complicity principle?

[576] International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (2000) 140.
[577] Richard T. De George, *Business Ethics* (1999) 524; David Kinley and Junko Tadaki, 'From Talk to Walk: the Emergence of Human Rights Responsibilities for Corporations International Law' (2004) 44 *Virginia Journal of International Law* 931, 965.
[578] Mary Robinson, *Report of the United Nations High Commissioner for Human Rights to the 56th Session of the General Assembly*, UN Doc. A/56/36/2001, 28 September 2001.

Arguably corporations have a moral obligation to take reasonably practicable steps to ensure they are not directly, indirectly or silently complicit in human rights' abuse within their domestic and international spheres of influence. Does the imposition of duties upon corporations create any additional obligations upon States? Paust has observed that one of the issues surrounding corporations' obligations under international human rights law is how the extension of obligations over corporations will impact on 'public responsibility'.[579] The imposition of human rights' obligations over corporations to ensure they are not complicit in human rights' abuses means corporations have human rights' obligations which were previously exclusively the province of States. The fact that human rights' obligations have been imposed over corporations does not mean States' human rights' obligations have decreased because corporations also have obligations to ensure the same rights. Clapham and Jerbi explain:

> The boundaries of what is expected from business, and what a State is obliged to do under international law, cannot be neatly drawn. It must be stressed, however, that governments do still possess wide powers over - and primary responsibility for - the well-being of their citizens and for the protection of human rights.[580]

The fact States horizontally impose obligations upon corporations under international law arguably does not mean States have their obligations under vertical international law reduced. States impose obligations on corporations to enable States to discharge their human rights' obligations. Where the operation of horizontal rights ensures the protection of human rights, then States have discharged their obligations. Conversely, if the imposition of horizontal rights fails to ensure rights, then States will be liable to find alternative means to ensure those human rights are protected. Ruggie concludes:

> [T]he State duty to protect against non- State abuses is part of the international human rights regime's very foundation. The duty requires States to play a key role

[579] Jordan Paust, 'The Significance and Determination of Customary International Human Rights Law: the Complex Nature, Sources and Evidences of Customary Human Rights' (1995) 25 *Georgia Journal of International and Comparative Law*, 147, 162; See a further discussion in: Jordan Paust, 'The Other Side of Right: Private Duties Under Human Rights Law' (1992) 5 *Harvard Human Rights Journal* 51.
[580] Andrew Clapham and Scott Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses' (2001) 24 *Hastings International and Comparative Law Review* 339.

> in regulating and adjudicating abuse by business enterprises or risk breaching their international obligations.[581]

As a result it is argued that the operation of horizontal rights assists States to discharge their human rights' obligations, but it does not enable States to avoid their human rights' obligations.[582]

It is submitted that as States remain the paramount actors under international law and thus all corporations' rights and obligations flow through States. Rather than reducing States' obligations, the operation of imposing horizontal obligations upon corporations may actually increase States' obligations. Generally, States' human rights' obligations are limited to territory the State controls. For example, article 2 of the *ICCPR* provides that through ratification, all States undertake 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'.[583] Article 2(2) requires Australia to introduce laws to ensure the rights contained in the *ICCPR* are protected and article 2(3) requires Australia to ensure there is a judicial remedy if such a right is breached. These obligations upon States have been read widely to include some exterritorial obligations. The International Court of Justice has read article 2 widely. In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, (Advisory Opinion)* the court advised:

> This provision can be interpreted as covering only individuals who are both present within a State's territory and subject to that State's jurisdiction. It can also be construed as covering both individuals present within a State's territory and those outside that territory but subject to that State's jurisdiction.[584]

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[581] John Ruggie, *Interim Report* (The Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. E/CN.4/2006/97, 2006); John Ruggie, 'Business and Human Rights: the evolving international Agenda' (2007) 101 *American Journal of International Law* 819; John Ruggie, *Business and Human Rights: Mapping International Standards of Responsibility and Accountabilityfor Corporate Acts*' (Report of the Special Representative of the United Nations Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 2007); John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights* (Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises to the Human Rights Council Eighth session, 7 April 2008) 27-50.

[582] Peter Newell and Jedrzej George Frynas,'Beyond CSR? Business, Poverty and Social Justice: an Introduction' (2007) 28 *Third World Quarterly* 4, 669.

[583] See for general discussion: Sarah Joseph, Jenny Schultz and Melissa Castan, *International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2004) 679 and 752.

[584] [2004] ICJ 136, 178-79.

The UN Committee has supported the concept that States have extraterritorial human rights' obligations.[585] Kamchibekova has concluded that '[i]t seems that human rights bodies have accepted the possibility of extraterritorial state responsibility'. The extraterritorial obligations of States under international law can be further evinced by the 'effects doctrine'. The 'effects doctrine' extends a State's extraterritorial obligation to any conduct which is performed outside the State which is intended to have an impact within the State.[586] Further evidence of the extraterritorial obligations of States can be demonstrated by the International Law Commission's *Draft Articles on Responsibility of States for Internationally Wrongful Acts*.[587] The *Draft Articles on Responsibility of States for Internationally Wrongful Acts* do not impose any territorial limitation upon States' obligations.[588] It is clear States' legal obligations under international human rights law are not restricted to the State's own geographical territories.

One manifestation of States' extraterritorial duties concerns the conduct of corporations. It could be argued that States have a moral obligation to ensure corporations operating within their jurisdiction are not directly, indirectly or silently complicit in human rights' abuse. The extension of corporations' human rights duties has resulted in an increase in States' moral obligations. States have increasingly imposed human rights' obligations over how corporations manage their international supply chains.[589] While corporations cannot impact upon the vertical conceptualisation of human rights and bind States, States, through extending corporations' obligations, may in turn extend States' obligations. The horizontal imposition of human rights' obligations upon corporations effectively extends the obligations of States, to all the international and national activities of corporations operating in their jurisdiction.[590] Through imposing non-binding extraterritorial human rights' obligations over corporations, it could be argued that States have effectively extended their own obligations.

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[585] Damira Kamchibekova, 'State Responsibility for Extraterritorial Human Rights Violations' (2007) 13 *Buffalo Human Rights Law Review* 87, 145.
[586] Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (9th ed, 1992) 459-460.
[587] *Statute of the International Law Commission*, G.A. Res. 174 (II).
[588] Rick Lawson, 'Out of Control. State Responsibility and Human Rights: Will the ILC's Definition of the "Act of State" Meet the Challenges of the 21st Century?' in M. Castermans-Holleman (ed.), *The Role of the Nation-State in the 21st Century* (1998) 96.
[589] Pall A. Davidsson, 'Legal Enforcement of Corporate Social Responsibility within the EU' (2002) 8 *Columbia Journal of European Law* 529, 531, 534.
[590] Magdalena Bexell, *Exploring Responsibility: Public and Private in Human Rights Protection* (PhD Thesis, Lunds Universitet (Sweden), 2005).

A number of jurisdictions have acted to regulate the exterritorial affairs of corporations within their jurisdictions. Examples of this can be found in Europe, the USA and Australia. The European Parliament has recognised that European States have a responsibility to regulate for European-based corporations dealing in developing States. In 1999, the European Parliament passed a resolution calling for a legally-binding framework for regulating European transnational corporations operating in developing countries. While the European Commission has not adopted this mandatory model,[591] the European Commission has adopted a voluntary code and individual European nations have developed voluntary regulatory frameworks to encourage corporations to engage in ethical conduct.[592]

The USA has recognised it has an obligation to attempt to prevent its corporations from using sweatshops.[593] In 1997, the Clinton administration reached an agreement with the Apparel Industry Partnership for an industry-wide code, aimed at preventing child labour and sweatshop conditions generally in supply chains.[594] The most recent USA government involvement in international supply chain regulation has occurred through the Sweatfree Procurement movement. This movement was started by the City of Maine, and requires all corporations which supply products to the public bodies associated with the City of Maine, not to have acquired those products from domestic or international sweatshops.[595] Similar laws have now been introduced in other states, including California,[596] Pennsylvania,[597] Portland,[598] New Jersey [599] and San Francisco .[600]

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[591] Yaraslau Kryvoi, '*Enforcing Labor Rights against Multinational Corporate Groups in Europe*' (2007) 46 *Industrial Relations* 2, 366; Pall Davidsson, 'Legal Enforcement of Corporate Social Responsibility within the EU' (2002*)* 8 *Columbia Journal of European Law* 529.

[592] European Commission, *Communication From The Commission Concerning Corporate Social Responsibility: a Business Contribution To Sustainable Development* (2002); For a summary of the United Kingdom's regulatory framework see Commonwealth Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value*' (Report, 2006) 6.17.4 and 6.17.5.

[593] For a discussion of various regulatory vehicles proposed and implemented in the USA see: Mark B. Baker, 'Promises and Platitudes: Toward a New 21st Century Paradigm for Corporate Codes of Conduct?' (2007) 23 *Connecticut Journal of International* Law 123, 150-162.

[594] Heidi S. Bloomfield, ' "Sweating" the International Garment Industry: A Critique of the Presidential Task Force's Workplace Codes of Conduct and Monitoring System' (1999) 22 *Hastings International and Comparative Law Review* 567, 576-577.

[595] *Administrative Procedures and Services Regulation* (City of Maine), Part 4, Subchapter I-B, State Purchasing Code of Conduct for Suppliers.

[596] *An Act to amend S 6108 of the Public Contract Code, Relating to Public Contracts 2003* (California, SB 578).

[597] *Executive Order for Sweat-free Apparel Procurement 2004* (Pennsylvania).

[598] *Sweat-free Procurement Ordinance* for the City of Portland.

[599] *Sweat-free Procurement Rules 2006* (New Jersey).

[600] *The Sweatfree Contracting Ordinance of the City and County of San Francisco, 2005.*

Australia has acted to regulate Australian-based corporations' international affairs through signing the OECD *Guidelines for Multi-National Enterprises* (2000). The OECD *Guidelines* provide voluntary guidance for corporations in their international affairs.[601] The OECD *Guidelines* are addressed and approved by Organization for Economic Co-operation and Development (**OECD**) member countries and non-member adhering countries. Australia is an OECD member nation. At the OECD Ministerial Council Meeting in Paris in 2000, the OECD *Guidelines* were revised and adopted, binding Australia to the *Guidelines*.[602]

In relation particularly to Australian corporations engaging in violations overseas, Australia has reportedly one of the most robust applications of the OECD *Guidelines for Multi-National Enterprises*.[603] The OECD *Guidelines* were first created in 1976 and revised in 2000. They concern areas ranging from bribery, environmental and consumer protection, taxation to employment. The employment aspects of the *Guidelines* reflect the ILO Core Values and ILO treaties on OHS.[604] Multinational corporations are required to encourage their suppliers and sub-contractors to comply with the OECD *Guidelines*.[605]

The OECD *Guidelines* are enforced by member nations using 'National Contact Points' (**NCP**). The OECD Watch's *5 Years On*: *a Review of the OECD Guidelines and National Contact Points*, observes many nations do not publicise their NCPs and do not afford parties who complain about corporate conduct, natural justice. In contrast, the Report commends the Australia's NCP, claiming:

> The Australian NCP has been proactive in promoting the *Guidelines* in an environment where an absence of specific instances could have easily 'lulled' the

[601] Sean Cooney, *Improving Regulatory Strategies for Dealing with Endemic Labour Abuses* (SJD, Columbia University, 2005) 155-158.
[602] For a criticism of the OECD *Guidelines for Multi-National Enterprises* (2000) see: John Ruggie, '*Protect, Respect and Remedy: a Framework for Business and Human Rights*' (2008) (Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises to the Human Rights Council Eighth session, 7 April 2008, 46).
[603] OECD Watch, *5 Years On: a Review of the OECD Guidelines and National Contact Points* (Holland, Centre for Research on Multinational Corporations, 2005).
[604] *OECD Guidelines for Multi-National Enterprises* (2000) part IV; Sean Cooney, 'A Broader Role for the Commonwealth in Eradicating Foreign Sweatshops?' [2004] 28 *Melbourne University Law Review* 291.
[605] *OECD Guidelines for Multi-National Enterprises* (2000) part II S 10.

> NCP into a false sense of security about the CSR practices of Australian companies and resulted in a low or non- existent profile for the NCP and the *Guidelines*.[606]

While the OECD *Guidelines* may have had a limited impact on multinational corporations based in Australia,[607] Australia's acceptance of the OECD *Guidelines* demonstrates a practice of attempting to impose human rights standards (including workers' right to safety and health) over the international operations of Australian-based corporations.

2.5 Conclusion

Whether Australia is discharging its obligation to protect workers' right to safety and health can only be answered once a criteria has been developed to judge Australia's conduct against. This chapter has developed the standard by which Australia and corporations subject to Australia's jurisdiction will be assessed in this thesis. This chapter was divided into 3 parts. The first part analysed how human rights are established by the international community through State conduct. This part then analysed how Australia should respond to the issue of cultural relativism. This section concluded that Australia should judge its conduct and the conduct of corporations subject to its jurisdiction using internationally accepted human rights standards.

The second part of this chapter demonstrated that workers' right to safety and health constituted a human right which morally bound Australia. This part examined how the *African [Banjul] Charter on Human and Peoples' Rights*, the *Cairo Declaration on Human Rights* and the *Charter of Fundamental Rights of the European Union* expressly protects workers' right to safety and health as a human right. Most States and human rights conventions do not expressly provide employees human rights protection for their health and safety. While workers' right to safety and health does not have extensive recognition, the right to work is widely supported. To ensure the right to work can be exercised, it is necessary to ensure workers' right to safety and health. If workers' safety is not ensured, then workers could be fatally wounded in

[606] Ibid 27, 28.
[607] Sean Cooney, 'A Broader Role for the Commonwealth in Eradicating Foreign Sweatshops?' [2004] 28 *Melbourne University Law Review* 291, 315-316.

workplace accidents and prevented from exercising their rights. A large number of States have recognised the importance of workplace health and safety and have introduced legislation to protect workers' right to safety and health. While Australia may not be legally bound under international human rights law to protect workers' right to safety and health, the number of States which have recognised this right and acted to protect this right demonstrates that workers' right to safety and health arguably has moral force which binds Australia.

The third part of this chapter analysed how workers' right to safety and health is protected. This part argued that States are bound under vertical human rights to ensure all human rights are protected within their territorial jurisdiction. This obligation requires Australia to take reasonably practicable steps to ensure that there are adequate legal vehicles to protect workers' right to safety and health and that these laws are adequately enforced. The precise nature of the standards which must appear in these laws has been comprehensively defined by the ILO in widely adopted treaties.

This part then argued that human rights' obligations are now imposed on non-State actors such as corporations. What conduct these obligations require corporations to perform can be defined by reference to the complicity principle. The complicity principle essentially requires corporations to take reasonably practicable steps to ensure they are not directly, indirectly or silently complicit to human rights' abuses occurring within their spheres of influence. The imposition of human rights' obligations upon non-State actors has occurred by States extending obligations under international law horizontally, directly over corporations. The conduct by States to regulate corporations' conduct extraterritorially has arguably extended States' human rights' obligations. While States are primarily concerned with human rights' abuses within their territory, the conduct by States to regulate corporations' extraterritorial conduct has arguably created an obligation to take reasonably practicable steps to ensure that corporations subject to States' jurisdiction discharge their obligations under the complicity principle.

PHASE 2 – EXISTING REGULATORY VEHICLES

CHAPTER 3

3 How do Australian Occupational Health and Safety laws protect outworkers?

3.1 Introduction

Australian-based clothing manufacturing supply chains involve work being performed domestically in Australia and in overseas factories. This chapter develops the core focus of this thesis by judging whether Australia is discharging its obligations as posited in chapters 2.4.1 and 2.4.4 to ensure workers' right to safety and health. Chapter 1.2 explained that outworkers are the most vulnerable workers in the Australian manufacturing industry. Chapter 2.4.1 and 2.4.4 explained that Australia has a moral obligation to take reasonably practicable steps to ensure workers' right to safety and health is protected within its territorial jurisdiction and that corporations subject to Australia discharge their obligations under the complicity principle. In order to discharge this duty, States have an obligation to impose OHS duties upon parties who can impact on workplace health and safety and to take reasonably practicable steps to enforce sanctions for a breach of these laws. This chapter will analyse how Australian OHS laws extend protection to outworkers in theory and in practice and will argue that Australia is not taking reasonably practicable steps to enforce OHS laws which protect outworkers.

This chapter is divided into four parts. The first part analyses the operation of general OHS duties. Secondly, this chapter analyses which parties in domestic supply chains attract OHS duties for the safety of outworkers. Historically, outworkers received no OHS protection by virtue of the fact outworkers were regarded as self-employed, independent contractors rather than employees. Legislative reforms in most Australian jurisdictions have not altered this position. It will be shown that Victoria is the only jurisdiction to provide outworkers express OHS protection. This part will

analyse how other OHS duties may be read widely to provide outworkers OHS protections.

After establishing who has OHS duties to protect outworkers, the third part of this chapter will analyse how OHS laws are enforced. Finally this chapter will analyse primary research reports to indicate whether or not OHS laws in Australia are ensuring outworkers right to safety and health. Ultimaely this chapter will argue that Australian OHS laws are not providing outworkers legal protection and as a consequence their workplace safety and health is suffering.

3.2 General duties in Australian OHS laws

OHS Acts in all Australian jurisdictions impose general OHS duties upon classes of people who impact on safety at the workplace. All OHS Acts specifically define which classes of people have duties. This includes groups such as employers,[608] employees,[609] self-employed persons,[610] designers, manufacturers, suppliers of plant and substances,[611] people conducting a business or undertaking[612] and controllers of workplaces.[613] Rather than imposing a general duty upon any person who can influence workplace health and safety, these Acts specifically define the class of persons who have OHS duties. Historically these duties were all imposed upon people in standard employment relationships. This has resulted in outworkers historically receiving limited protection under OHS laws.[614]

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[608] *Occupational Health and Safety Act 1989* (ACT) s 27; *Occupational Health and Safety Act 2000* (NSW) s 8; *Occupational Health and Safety Act 2004* (Vic) s 20-23; *Occupational Health, Safety and Welfare Act 1986* (SA) s 19; *Occupational Health and Safety Act 1984* (WA) s 19; *Workplace Health and Safety Act 1995* (Qld) s 28; *Workplace Health and Safety Act 1995* (Tas) s 9; *Workplace Health and Safety Act 2007* (NT) s 55.

[609] *Occupational Health and Safety Act 1989* (ACT) s 30; *Occupational Health and Safety Act 2000* (NSW) s 9; *Occupational Health and Safety Act 2004* (Vic) s 25; *Workplace Health and Safety Act 1995* (Tas) s 16; *Occupational Health and Safety Act 1985* (Vic) s 25; *Occupational Health, Safety and Welfare Act 1986* (SA) s 21; *Occupational Health and Safety Act 1984* (WA) s 20; *Workplace Health and Safety Act 1995* (Qld) s 35; Workplace Health and Safety Act *2007* (NT) s 59.

[610] *Occupational Health and Safety Act 1989* (ACT) s 31; *Occupational Health and Safety Act 2000* (NSW) s 11; *Occupational Health and Safety Act 2004* (Vic) s 24; *Occupational Health, Safety and Welfare Act 1986* (SA) s 22; *Occupational Health and Safety Act 1984* (WA) s 21; *Workplace Health and Safety Act 1995* (Qld) s 29; *Workplace Health and Safety Act 1995* (Tas) s 13; *Workplace Health and Safety Act 2007* (NT) s 55(2).

[611] *Occupational Health and Safety Act 1989* (ACT) s 32-35; *Occupational Health and Safety Act 2000* (NSW) s 11; *Occupational Health and Safety Act 2004* (Vic) s 30; *Occupational Health, Safety and Welfare Act 1986* (SA) s 24; *Occupational Health and Safety Act 1984* (WA) s 23; *Workplace Health and Safety Act 1995* (Qld) s 32; *Workplace Health and Safety Act 1995* (Tas) s 14; *Workplace Health and Safety Act 2007* (NT) s 56(2)(b).

[612] *Workplace Health and Safety Act 1995* (Qld) ss 28 and 29.

[613] *Occupational Health and Safety Act 1989*(ACT) s 29; *Occupational Health and Safety Act 2000* (NSW) s 10; *Occupational Health and Safety Act 2004* (Vic) s 26; *Occupational Health and Safety Act 1984* (WA) s 22; *Occupational Health, Safety and Welfare Act 1986* (SA) s 23; *Workplace Health and Safety Act 1995* (Qld) s 30; *Workplace Health and Safety Act 1995* (Tas) s 13; *Workplace Health and Safety Act 2007* (NT) s 56(2)(a).

The general duty provisions are drafted using a similar approach in all Australian jurisdictions but for New South Wales and Queensland. In all jurisdictions excluding New South Wales and Queensland a general duty requires the duty holder to take all reasonably practical steps to ensure workplace health and safety. With limited exceptions the OHS acts enables duty holders to find a way to discharge this duty. The Victorian *Occupational Health and Safety Act* 2004 (Vic) s 20 for example states:

> (1) To avoid doubt, a duty imposed on a person by this Part or the regulations to ensure, so far as is reasonably practicable, health and safety requires the person—
>
> (a) to eliminate risks to health and safety so far as is reasonably practicable; and
>
> (b) if it is not reasonably practicable to eliminate risks to health and safety, to reduce those risks so far as is reasonably practicable.
>
> (2) To avoid doubt, for the purposes of this Part and the regulations, regard must be had to the following matters in determining what is (or was at a particular time) reasonably practicable in relation to ensuring health and safety—
>
> (a) the likelihood of the hazard or risk concerned eventuating;
>
> (b) the degree of harm that would result if the hazard or risk eventuated;
>
> (c) what the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk;
>
> (d) the availability and suitability of ways to eliminate or reduce the hazard or risk …
>
> (e) the cost of eliminating or reducing the hazard or risk.

Unlike all other OHS regimes the Queensland *Workplace Health and Safety Act 1995* (Qld) s 24 requires people to comply with any regulation or ministerial notices that prescribes a way of ensuring workplace health or safety. If there is a code of practice, then a person can elect to either follow the code or adopt another way that

gives the same level of protection against the risk, taking reasonable precautions and exercising proper diligence. Where there are no regulations, ministerial notices or codes of practice then a person discharges their OHS duties in Queensland using the general duty approach similar to New South Wales.

The main difference between the OHS statutes in New South Wales and Queensland and the OHS statutes in other Australian jurisdictions is the way the jurisdictions approach the issue of the reasonableness of the conduct.[615] Every OHS Act provides that a person will only be liable for an OHS breach where they have failed to take a step to ensure safety, which was reasonably practicable to take. In some jurisdictions this forms part of the offence provision and in other jurisdictions this appears as a defence. The provisions prescribing employers' duty for employees[616] and employers' duties for non-employees[617] in the Commonwealth, the Australian Capital Territory, the Northern Territory, South Australia, Tasmania, Victoria and Western Australia include the reasonable reasonablness in the offence provision. As a consequence the Crown has the onus of proving beyond a reasonable doubt that an employer failed to take a reasonably practicable step to ensure the safety of employees. In contrast, New South Wales and Queensland incorporate reasonably practicable as a defence, which is judged on the balance of probabilities.[618]

Reasonableness here differs from the common law test of reasonableness.[619] In *Slivak and Another v Lurgi*, Gaudron J observed that OHS reasonableness differed from negligent reasonableness in two aspects.[620] Firstly, the duty is not to avoid the risk of only foreseeable risks. OHS duties require duty holders to ensure the safety of all risks, even if they are not foreseeable. Secondly, the duty is not to take

[615] For a discussion of the interaction between risk management and reasonablness see: Elizabeth Bluff and Richard Johnstone, 'The Relationship Between 'Reasonably Practicable' and Risk Management Regulation' (2005) 18 *Australian Journal of Labour Law* 3, 1.
[616] See above S 3.3.1.
[617] See above S 3.3.4.
[360] S21(1) of the *Occupational Health and Safety Act 2004* (Vic).
[618] *Occupational Health and Safety Act 2000* (NSW) s 28(b); *Workplace Health and Safety Act 1995* (Qld) s 37(1); For a discussion of the difference between the civil onus being raised by the defence in raising a defence and the criminal onus when the prosecution is proving a case see: *Shannon v Comalco Aluminium Ltd* (1986) 19 IR 358, 359; *Drake Personnel Ltd t/as Drake Industrial v Workcover Authority of NSW (Inspector Ch'ng)* (1999) 90 IR 432, 457.
[619] *Dinko Tuna Farmers Pty Ltd v Markos* [2007] SASC 166, [42], [43] (Gray J, with Layton J and Kelly JJ concurring).
[620] *Slivak and Another v Lurgi (Australia) Pty Ltd and Another* (2001)177 ALR 585, 598-599; Gaudron J was in the minority.

reasonable care as in negligence reasonableness, but to take reasonably practicable steps to reduce the risk.[621]

How these general duties and reasonableness tests can operate across supply chains has been discussed in numerous cases.[622] In *ACR Roofing*, Nettle JA held the party higher in the supply chain will have an OHS duty where it is reasonably practicable for them to reduce a risk to health and safety.[623] Nettle JA stated:

> The question of what is reasonably practicable is a matter of fact and degree in each case. It will depend on a number of factors so far as concerns operations carried out by independent contractors; what is reasonably practicable for a large organization employing safety officers or engineers contracting for the services of a small contractor on routine operations may differ markedly from what is reasonably practicable for a small shopkeeper employing a local builder on activities on which he has no expertise. The nature and gravity of the risk, the competence and experience of the workmen, the nature of the precautions to be taken are all relevant considerations.[624]

Nettle JA observed that ACR did not have the requisite skills to direct James Cranes over the citing of the crane or the method of lifting. If ACR had informed James Cranes about any special risks that ACR was aware of, then ACR would have discharged its OHS duties.[625] His Honour observed that ACR knew the requirements of safety mesh. ACR would not have allowed its employees to work on the roof without the safety mesh. ACR knew how to install the safety mesh and recognised it had a duty of care to its employees not to allow them to work until the safety mesh was installed. In those circumstances, Nettle JA held ACR owed the same duty of

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[621] Callinan J agreed with the majority, however his Honour commented in similar terms to Gaurdron J, that the OHS duty of reasonableness was higher than the negligence standard of reasonableness, (2001) 177 ALR 585, 607; Gleeson CJ, Gummow and Hayne JJ dismissed the appeal without commenting on this point.

[622] See for examples: *Auckland City Council v NZ Fire Service* [1996] 1 NZLR 330 337-338, per Gallen J; *Austin Rover Ltd v Inspector of Factories* [1990] 1 AC 619, 627, 635-636 (Lord Goff); *Drake v Workcover (NSW)* (1999) 90 IR 432, 456 (Wright J P, Walton J VP and Peterson J concurring); *Edwards v National Coal Board* [1949] 1 KB 704, 712 Asquith LJ); *Inspector Cooper v Kwik-Seal Pty Ltd and anor* [2006] NSWIRComm 48, (129); *Inspector Dall v Brambles Australia Ltd* [2006] NSWIRComm 213; *Inspector Vierow v Linddales Pty Ltd* [2007] NSWIRComm 255, [33] (Boland J); *Jayne v National Coal Board* [1963] 3 All ER 220, 224; Shannon v Comalco Aluminium Ltd (1986) 19 IR 358, 362; *Marshall v Gotham Co Ltd* [1954] AC 360 377 (Lord Keith of Avonholm); *St Hilliers Contracting Pty Ltd v Workcover Authority of NSW* [2007] NSWIRComm 39; *The Crown in Right of State of New South Wales* (Department of Education and Training) v O'Sullivan (2005) 143 IR 57, [42] (Wright J P, and Cavanaugh and Boland JJ);*Workcover Authority (NSW) (Inspector Mayo-Ramsay) v Maitland City Council* (1998) 83 IR 362, 381; *Workcover Authority (NSW) v Kellogg (Aust) Pty Ltd* (No. 1) (1999) 101 IR 239, 259; *Workcover Authority of NSW (Inspector Mayo-Ramsay) v Maitland City Council* (1998) 83 IR 362, 381 (Hill J).

[623] (2004) 11 VR 187, 213, 214 (Nettle JA).

[624] (2004) 11 VR 187, 213.

[625] (2004) 11 VR 187, 213.

care to the sub-sub-contractor's employees whom ACR had engaged through a sub-contractor. ACR had knowledge of the risk and the expense in preventing the risk by ordering work to stop was minimal, when compared to gravity of the risk.

To determine what is reasonably practicable, courts will balance the nature, likelihood and gravity of the risk to safety occasioning the offence with the costs, difficulty and trouble necessary to avert the risk.[626] In utilizing this test, courts adopt an objective approach. As Walton J VP in *Workcover Authority of NSW (Inspector Byer) v Cleary Bros (Bombo) Pty Ltd* explained, when determining what was reasonably practicable:

> An objective determination must be made as to what measures were reasonably practicable in the circumstances of the case. This determination is not restricted to the state of knowledge of the defendant or to the measures, if any, which the defendant had contemplated.[627]

Lord Reid explained: that if a precaution is practicable it must be taken, unless in the whole circumstances that would be unreasonable.[628]

The main issue for outworkers is not the operation of the OHS duties but having some form of OHS protection. If parties who can negatively impact upon outworkers' workplace health and safety do not have OHS duties to take reasonable steps to ensure safety then outworkers are likely to work in unsafe conditions. The most important is who has OHS duties for outworkers' workplace health and safety?

3.3 Who has OHS duties to protect outworkers?

[626] *Coltness Iron Co v Sharp* [1938] AC 90, 94 (Lord Atkin); *McCarthy v Coldair Ltd* [1951] 2 TLR 1226, 1228 (Denning LJ), 1230 (Hodson LJ); *Auckland City Council v NZ Fire Service* [1996] 1 NZLR 330, 338 (Gallen J); *Slivak v Lurgi (Australia) Pty Ltd* (2001) 75 ALJR 481, 599 (Gaudron J); *Dinko Tuna Farmers Pty Ltd V Markos* [2007] SASC 166, [38] (Gray J, with Layton J and Kelly JJ concurring).
[627] *Workcover Authority of NSW (Inspector Byer) v Cleary Bros (Bombo) Pty Ltd* (2001) 110 IR 182, 204.
[628] *Marshall v Gotham Co Ltd* [1954] AC 360, 373.

3.3.1 Do OHS laws expressly protect outworkers?

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

Firstly, 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.

Secondly, even for workers formally protected by the traditional regulatory framework, the mechanisms for the enforcement of these protections have been inadequate.

Thirdly, an overarching deficiency has been the absence of any relevant, formal, legal obligations on the major retailers, who effectively control the Australian clothing supply chains. This has provided an economic context in which the different parties competing further down the supply chains can only survive commercially by reducing their costs, most notably the costs of complying with formal legal obligations.[629]

In order to redress the general industrial exploitation of outworkers' labour conditions, legislative amendments have altered the trader/outworker relationship. From a purely commercial relationship, outworker reforms now deem traders to be employers of outworkers who work for them for certain laws. Unfortunately most jurisdictions in Australia have not deemed outworkers to be the employees of employers for OHS. This has only occurred in Victoria and to a limited extent in the Australian Capital Territory.

Unlike outworkers in all other Australian jurisdictions, outworkers in Victoria are expressly provided OHS protection. Section 4 of the *Outworkers (Improved Protection) Act 2003* (Vic) states 'a person who engages an outworker is an

[629] Igor Nossar, 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, 166-167.

employer'. Section 4 of the *Outworkers (Improved Protection) Act 2003* (Vic) deems outworkers employees for the purposes of statutes, including the *Outworkers (Improved Protection) Act 2000* (Vic) and the *Occupational Health and Safety Act 2004* (Vic).[630] Once the person who hires the outworker (usually a trader or retailer) is deemed to be the employer of the outworker, then that person is to provide the outworker the same OHS protection that person would provide their employee. This means that outworkers in Victoria will have a deemed employer who 'must, so far as is reasonably practicable, provide and maintain' for the outworker 'a working environment that is safe and without risks to health.'[631]

Section 21(2) of the Occupational Health and Safety Act 2004 (Vic) provides a guide to what is expected from employers under s 21(1). Employers must:

(a) provide or maintain plant or systems of work that are, so far as is reasonably practicable, safe and without risks to health;

(b) make arrangements for ensuring, so far as is reasonably practicable, safety and the absence of risks to health in connection with the use, handling, storage or transport of plant or substances;

(c) maintain, so far as is reasonably practicable, each workplace under the employer's management and control in a condition that is safe and without risks to health;

(d) provide, so far as is reasonably practicable, adequate facilities for the welfare of employees at any workplace under the management and control of the employer;

(e) provide such information, instruction, training or supervision to employees of the employer as is necessary to enable those persons to perform their work in a way that is safe and without risks to health.

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[630] *Outworkers (Improved Protection) Act 2003* (Vic) s 4(2). There were two attempts in Victoria to extend expressly industrial manslaughter protection to outworkers. The Crimes (Workplace Deaths and Serious Injuries) Bill 2001 (Vic) and the Crimes (Workplace Deaths and Serious Injuries) Bill 2002 (Vic) attempted to introduce industrial manslaughter provisions which would have extended the definition of 'worker' to include outworkers. Both of these Bills, however, were not enacted: See for discussion: Victorian Law Reform Commission, Criminal Liability for Workplace Death and Serious Injury in the Public Sector, Report (2002) 1.2;V see also Victoria, the Second Reading Debate on the Crimes (Workplace Deaths and Serious Injuries) Bill 2001 (Vic), Legislative Council, 29 May 2002, 1288-1335. The Bill was defeated 27 votes to 12. See also, the Second Reading Debate on the Crimes (Workplace Deaths and Serious Injuries) Bill 2002 (Vic), Legislative Assembly, 14 May 2002, 1407-1432.

[631] *Occupational Health and Safety Act 2004* (Vic) s 19 contains the employers general OHS duties to ensure employees health and safety.

The scope of retailers and traders OHS duties for outworkers in Victoria has not been tested in court. While there are no OHS cases specifically on outworkers there are OHS cases concerning employees which can provide a guide to what is expected from retailers and traders who hire outworkers in Victoria.

For the purposes of imposing OHS duties, the fact that outworkers work on different premises than retailers and traders is immaterial. As the trader is regarded as the employer of the outworker, then the outworker is regarded as no different from a standard employee who works off site at the direction of their employer. Generally employers' OHS duties arise due to the employment relationship and not to the employers' physical proximity to their workers. In *Wesche v Vancrete Pty Ltd,* the employee was responsible for driving a truck to a worksite.[632] The truck was carrying a load of pipes, for which the employer was not responsible. The customer was responsible for loading and unloading the pipes. The employer's only obligation was to provide the means of transport. When the employee had parked the truck on the customer's workplace, the customer's employees began to unload the pipes. The pipes were unloaded in an unsafe way and they rolled off the truck. The truck driver was standing next to the truck and was fatally injured by the pipes. The customer and the employer were both charged under the relevant OHS laws.

The employer argued he did not have control of the worksite or of the loading or unloading of the pipes. President Hall held the employer did have sufficient control to impact on safety. The employer could have instructed his employee to stand well clear of the truck when customers were unloading the load and could have required the customer to provide the employer details of how they intended to load and unload the truck. The fact the employer 'chose to sit on' his hands could not be used to reduce the scope of the employer's duty or his liability.[633]

Employers' OHS duties are non-delegable. This means retailers or traders cannot delegate their OHS duties to outworkers, even if practically, outworkers manage their own OHS. The duty at all times remains that of the retailer or trader. This principal can be evinced from delegations in the labour-hire industry. In relation to labour-

[632] *Wesche v Vancrete Pty Ltd* [2005] QIC 6.
[633] *Wesche v Vancrete Pty Ltd* (2005) 178 QGIG 150.

hire employees, the labour-hire employer contracts with a host employer to have the labour-hire's employee work on the host employer's premises. Courts have found both parties to this relationship continue to owe OHS duties, despite any contractual arrangements to the contrary. The seminal case in this area is *Drake Personnel Ltd t/as Drake Industrial v Workcover Authority of NSW (Inspector James Sweeney)*.[634] In this case, a labour-hire employer had contracted with a host employer for the labour-hire's employee to work on the host employer's site. The host employer instructed the labour-hire employer that the employee would only work on one particular machine. The labour-hire employer assessed the risks and training on this machine. The host employer subsequently directed the employee to work on another machine, on which the labour-hire employer had not performed a risk assessment. The employee was subsequently injured on the second machine. The labour-hire employer argued it had no control over the employee when the host employer directed the employee to work on a different machine and should have the scope of its OHS duties reduced. The Full Bench of the New South Wales Industrial Relations Commission held the fact the labour-hire employer sent its employees to work in another entity's workplaces did not 'obviate, or diminish, the obligation of the employer under' the relevant OHS Act.[635]

The fact that traders may have limited access to the actual site where outworkers are working, does not enable traders to avoid their OHS obligations for their deemed employees' overall system of work. OHS duties require positive steps to ensure duties are discharged. This conclusion is supported by the circumstances where employers have employees working on premises the employer does not control. Where employers have limited access to their employees' work area, this does not diminish their OHS duties. For example, in *Inspector Gill v Liana Park Pty Ltd* a labour-hire employer directed its employees to work inside a QANTAS freight terminal.[636] Due to security restrictions, the employer was only able to gain access to the QANTAS terminal approximately once every six months. The employer discussed overall safety at the workplace with QANTAS, but this did not discharge

[634] *Drake Personnel Ltd t/as Drake Industrial v Workcover Authority of NSW (Inspector James Sweeney* (1999) 90 IR 432.
[635] (1999) 90 IR 432, 455.
[636] *Inspector Gill v Liana Park Pty Ltd* [2006] 157 IR 425.

its OHS duties. The court held the employer had special responsibilities to ensure the system of work was safe.

The QANTAS-supervised system of work was faulty. The employer's employees were permitted to wear inappropriate clothing which, combined with an inadvertent act of another employee, resulted in an employee suffering injuries. The employer argued it had no access to its employees on a day- to-day basis, and the contract delegated all responsibility for such OHS supervision to QANTAS. Backman J held:

> ... it is no answer on the part of the defendant to contend that it could not properly assess and supervise its workers at the freight terminal because of security issues and restricted access or that the host employer had sole responsibility for worker safety... In the defendant's situation it was therefore incumbent upon it, in the absence of being able to provide direct day-to-day supervision to ensure, by appropriate contact with the host employer, that its employees were adequately supervised, for example by ensuring that they wore correct clothing while on the job.[637]

As the deemed employers of outworkers, traders are required by their OHS duties as employers to take reasonably practicable steps to ensure their outworkers/deemed employees' safety at work. The fact outworkers operate on remote premises and control their own system of work is largely immaterial. Employers who outsource work to Victorian outworkers are required to take proactive conduct to ensure outworkers' right to safety and health is protected. It is submitted that the reforms in Victoria provide outworkers substantial formal protection by requiring the party that directly provides outworkers work to ensure workplace health and safety.

In all other Australian jurisdictions outworkers receive substantially less or no OHS protection. the *Crimes (Industrial Manslaughter) Act 2003* (ACT) commenced operation on 1 March 2004 and expressly includes legislative protection for outworkers. Section 49A of the post-reform *Crimes Act 1900* (ACT) adopts a wide definition of 'worker' and enables prosecutions for industrial manslaughter. While the *Crimes Act 1900* (ACT) expressly extends OHS to outworkers, as this is a general criminal statute, prosecutions under this statute are less likely as the special

[637] (2006) 157 IR 425, 429.

rules pertaining to interpreting OHS statutes do not apply. Furthermore, the *Crimes Act 1900* (ACT) only imposes duties for outworkers where there has been a fatal injury. As it would be virtually imposible for a trader to be prosecuted for the manslaughter of an outworker the deterrent impact of these laws is almost non-existent.

Outside Victoria and the Australian Capital Territory no jurisdiction in Australia expressly protects outworkers' OHS. There are other deeming laws which may provide a vehicle which reforms could use to impose OHS duties.

The *Industrial Relations (Ethical Clothing Trades) Act 2001* (NSW) deems any person who is not the occupier of a factory, who performs any work in the clothing trades or the manufacture of clothing products outside a factory, whether directly or indirectly, for the occupier of a factory or a trader, to be an employee of the occupier or trader.[638] Even though occupiers or traders are not outworkers' actual employers, the Act deems they are outworkers' apparent employers. The statutory creation of an apparent employment relationship attracts all the legal rights and obligations of a standard employment relationship under the *Industrial Relations Act* 1996 (NSW) act but this does not include OHS.[639] The imposition of industrial duties is provided support through the New South Wales Ethical Clothing *Trades Extended Responsibility Scheme* which is discussed below in this thesis at chapter 8.2.
Amendments to the *Fair Work Act 1994* (SA) were modelled on adaptations of the New South Wales scheme.[640]

The *Industrial Law Reform (Fair Work) Act 2005* (SA) introduced amendments to the *Fair Work Act 1994 (SA).*[641] The *Industrial Law Reform (Fair Work) Act 2005* (SA) came into operation on 16 May 2005. This Act defines a contract of employment to include the situation, inter alia, where a person contracts work to an

[638] S 3 of the *Industrial Relations (Ethical Clothing Trades) Act 2001* (NSW) refers to sch 1, Cl 1(f) of the *Industrial Relations Act 1996* (NSW).
[639] New South Wales Legislative Council General Purpose Standing Committee, *Serious Injury and Death in the Workplace* (2004) 12.62.
[640] Igor Nossar, *Proposals for Protection of Outworkers in South Australia* (Textile, Clothing and Footwear Union of Australia, 2002).
[641] Part 2 of the *Industrial Law Reform (Fair Work) Act 2005* (SA).

outworker, 'even though the contract would not be recognised at common law as a contract of employment'.[642] Rawling observes that the South Australian model

> moves supply chain regulation further away from regulating employment and closer to the regulation of contracts in general. Significantly, such regulation imposes labour law protections in the context of purely commercial contractual arrangements.[643]

The protection to outworkers is provided additional support by the South Australian *Outworker (Clothing Industry) Protection Code* which is discussed below at chapter 8.2. Importantly this scheme does not provide outworkers any OHS protections.

Queensland and Tasmania also deem outworkers to be employees for the purposes of some industrial conditions but do not extend this protection to OHS duties. When the *Industrial Relations Act 1999* (Qld) was first enacted, it defined an outworker as an employee, and defined employers to be the employers of outworkers who worked for their undertaking.[644] Following reviews in 2000,[645] the *Industrial Relations Act 1984* (Tas) was amended, so outworkers were deemed employees of people who retained them.[646]

The way in which legislatures have acted to address the exploitation of outworkers has differed across jurisdictions. At this point, it is sufficient to observe that only Victoria and the Australian Capital Territory provide outworkers any express OHS protection and that only Victoria provides outworkers general OHS protection.

3.3.2 Can the extension of OHS duties in Victoria result in retailers having OHS duties for outworkers?

As discussed in the previous section the Victorian *Outworkers (Improved Protection) Act 2003* (Vic) imposes OHS duties upon traders for the safety of outworkers. This

[642] S 4(d) of the *Fair Work Act 1994* (SA); for an example of where this provision was used to deem a taxi driver an employee see: *Waite v Des's Cabs Pty Ltd* [1995] SAIR Comm 157.
[643] Michael Rawling, 'A Generic Model of Regulating Supply Chain Outsourcing' in Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell (eds), *Labour Law and Labour Market Regulation* (2006) 520-541, 534.
[644] *Industrial Relations Act 1999* (Qld) Sch 5; see definition of 'employee' and 'employer', sch 5(2)(f).
[645] Legislative Council Select Committee, Parliament of Tasmania, *Industrial Relations Bill 1999 (Tas)* (2000).
[646] *Industrial Relations Act 1984* (Tas) s 3.

section will discuss whether these provisions can be read to impose duties upon retailers as well upon traders. The *Outworkers (Improved Protection) Act 2003* (Vic) expressly excludes retailers from part 2, division 2 of the Act. Part 2, division 2 of the *Outworkers (Improved Protection) Act 2003* (Vic) concerns unpaid wages. While retailers are exempted from unpaid wages, retailers are not exempted from part 2, division 1 of this Act, which provides outworkers are employees for the purposes of the *Occupation Health and Safety Act 2004* (Vic). Due to the construction of this Act, retailers are not immune from having OHS duties for outworkers.

The fact retailers are not immune from OHS duties for outworkers does not mean they will attract OHS duties for outworkers. Based upon recent case law from the OHS provisions concerning principles' duties for the health and safety of independent contractors means it is possible that the trader/outworker relationship will result in retailers having OHS duties for outworkers.

Deemed employment relationship indicates that OHS duties for outworkers could be imposed upon parties higher in corporate structures. TThe phrase which enabled a head contractor to attract OHS duties for every employee of the head contractor's sub-contractors, sub-sub-contractors and sub-sub-sub-contractors centred on the phrase in the Victorian OHS Act:

> [T]he duties of an employer … extend to an independent contractor engaged by the employer, and any employees of the independent contractor, in relation to matters over which the employer has control …[647]

Similarly to the deemed employment relationship for the principal/contractor relationship, the deemed employer provision for the trader/outworker relationship uses the term 'engaged' in Victoria in substantially the same manner:

> a person who engages an outworker is an employer[648]

[647] *Occupational Health and Safety Act 2004* (Vic) S 21(3)(b).
[648] *Outworkers (Improved Protection) Act 2003* (Vic) S 4(1)(b).

The similar use of the term 'engaged' in both these sections means that judicial interpretation of the term 'engaged' in the principal/contractor relationship can arguably be utilized as a guide to how courts may interpret the term 'engaged' in the trader/outworker relationship.

The Victorian Court of Appeal judgment in *R v ACR Roofing Pty Ltd* provides the greatest support for the expansion of OHS duties across the corporate veil and up the supply chain.[649] *R v ACR Roofing Pty Ltd* arose from the construction associated with Peter Gibson Developments' expansion on its commercial building. Peter Gibson Developments contracted with ACR to erect and install the roof and safety mesh on the extension. The relevant OHS laws provided that work could not commence on the roof until safety mesh had been completely installed. Before ACR had completed erecting all the safety mesh, ACR realised it did not have the capacity to complete all aspects of the contract. ACR contracted with Associated Rigging to move the roofing material onto the roof of the extension. Associated Rigging in turn sub-contracted this job to James Cranes. James Cranes hired a dogman employee, who stood on the roof directing the operation of James Cranes' crane. At a point in the operation when the dogman had physical contact with the crane, the crane touched power lines. The dogman received an electrical shock, which caused him to fall from the roof to his death. The issue before the Victorian Court of Appeal was, inter alia, did ACR have OHS duties towards the employee of ACR's contractor's sub-contractor for the failure to install the safety mesh?

The Victorian Court of Appeal adopted an expansive reading of the term 'engaged by' to find ACR had engaged James Cranes, even though practically speaking, ACR had engaged Associated Rigging and Associated Rigging had engaged James Cranes.[650] Nettle JA held, with Vincent and Ormiston JJA agreeing:

> 'engagement' is not limited to privity of contract with the employer. It includes the engagement of a contractor under a contract with the employer and also the

[649] *R v ACR Roofing* (2004) 11 VR 187.
[650] See for further discussion: Caroline Scott, 'Recent Cases: Extending Employers' Duties for the Workplace health and safety of Contractors' (2005) 18 *Australian Journal of Labour Law* 6.

> engagement of a contractor under a sub-contract with some other party in relation to matters over which the employer has control.[651]

Nettle JA held the adoption of the term 'engaged' was not intended to introduce 'contractual privity' into the application of the OHS Act. Rather his Honour held 'the adoption of the expression "engaged by" appeared to have been grounded in an intention to give statutory recognition to the common law that where contractors are engaged to do work which might as readily have been done by employees, the employer has an obligation to prescribe a safe system of work for the benefit of the independent contractors'.[652]

Ormiston JA agreed with the wide reading of 'engaged' and held:

> [T]he word 'engaged' has not been lightly used and has been seen by Parliament to have a different meaning from 'employ' may be seen from subs (4)(c) of the same section where the expression 'employ or engage persons … In its context the natural meaning of the word 'engage' is 'to secure or obtain the services of", whether or not there be a direct payment to that person for those services. Of course, as in the present case, there is ordinarily some payment to somebody for the obtaining of the services, but that is not essential, so long as there is some form of 'control'.[653]

This judgment was appealed to the High Court but special leave was refused.[654]

In relation to the *ACR* Roofing case Scott has observed:

> In determining the question of engagement, the court demonstrated little regard for the layers of contractual relations that may exist. In effect, this judgment provides an almost limitless scope for s 21(3) in spite of any constraint that may be brought through the concept of control.[655]

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[651] *R v ACR Roofing* (2004) 11 VR 187, 207 and 208.
[652] (2004) 11 VR 187, 207.
[653] *R v ACR Roofing* (2004) 11 VR 187 189.
[654] *ACR Roofing Pty Ltd v R* (unreported, HC of A (Melb), McHugh and Hayne JJ, 11 March 2005).
[655] Caroline Scott, 'Recent Cases: Extending Employers' Duties for the Workplace health and safety of Contractors' (2005) 18 *Australian Journal of Labour Law* 6, 15.

Based upon the wide reading of engaged in *R v ACR Roofing Pty Ltd* it is likely that retailers and contractors who utilize the services of Victorian based outworkers attract general OHS duties to take reasonably practicable steps to ensure those outworkers' health and safety.

3.3.3 Can the general deeming provisions in the OHS act be extended to include outworkers?

The Victorian OHS regime is the only jurisdiction to expressly provide outworkers OHS protection. The next two sections will analyse the OHS acts in other Australian jurisdictions to determine if outworkers may be able to obtain OHS protection through other OHS duties.

While no other Australian jurisdiction expressly imposes OHS duties upon people who engage outworkers some jurisdictions do provide a wide definition of worker which includes independent contractors. This section will analyse if the extension of employers OHS duties for independent contractors can be read to provide outworkers OHS protection.

Some jurisdictions impose no OHS duties over employers for principle contractors and others have very limited provisions. For example, in Queensland sections 13 and 31 of the *Workplace Health and Safety Act 1995* (Qld) limits principle contractors duties to principle contractors in construction work.[656] In Tasmania employers only have OHS duties for contractors under s 9(5) of the *Workplace Health and Safety Act 1995* (Tas) while the contractor is working 'at the employer's workplace'. As outworkers are working from premises not controlled by traders the Tasmanian provisions provide outworkers no protection. The only Australian jurisdictions (excluding Victoria) which potentially provide outworkers protection under the deeming contractor provisions are the OHS acts in Western Australia and South Australia. The provisions which require employers to ensure the health and safety of non-employees in Queensland and the Northern Territory also have the capacity to impose OHS duties over retailers and traders for outworkers. The application of the

[656] Section 28 of the *Workplace Health and Safety Act 1995* (Qld) may provide protection but this will be analysed in the next section on employers' OHS duties for non-employees.

relevant Queensland and Northern Territory provisions will be analysed in the next section.

Both the Western Australian and South Australian provisions have the potential of providing outworkers OHS protection. The Western Australian *Occupational Safety and Health Act* 1984 (WA) s 23D deems independent contractors to be the employees of principle contractors or any person 'engaged' by the contractor to perform the work where the principle contractor 'has the capacity to exercise control'. This deeming provision means, that for the purposes of the *Occupational Safety and Health Act* 1984 (WA) s 19, will deem there to be an employment relationship if a retailer or trader engages outworkers as independent contractors to perform work.

Outworkers may also receive protection under s 4(2) of the *Occupational Health, Welfare and Safety Act 1986* (SA). This provision deems any person who is 'engaged to perform work for another person' to be an employee of that person. The Full Court of the South Australian Industrial Relations Commission in *Fielders Steel Roofing Pty Ltd v Moore* read 'engaged' widely.[657] In this case a person argued he should have no OHS duty towards an injured labour hire employee, on the basis he had not engaged the employee but the labour contractor. The court held OHS duties were not contingent upon privity of contract. McCusker J observed:

> [T]he word 'engaged' does not have a particular meaning in law. It does not describe a legal category. It is a term of common usage and does not necessarily import the existence of a contract. In ordinary parlance its meaning includes to 'take on' or 'obtain the services of'.[658]

Adopting a similarly wide reading, Gilchrest J held:

> There is every reason to assume that Parliament intended s 19 to not only cover persons directly employed by the employer but those employed by others for whom one could reasonably expect the employer to owe a duty to provide a safe working

[657] *Fielders Steel Roofing Pty Ltd v Moore* [2004] SAIRC 62; Parsons J concurred with the judgments of McCusker and Gilchrest JJ.
[658] [2004] SAIRC 62, [5].

> environment, safe systems of work, plant and substances in safe condition, and such information, instruction, training and supervision as are reasonably necessary to ensure that such a person is safe from injury and risk to health.[659]

Similar to the Western Australian section, s 4(2) of the South Australian act however limits principle contractors OHS duties 'to matters over which the principal has control or would have control but for some agreement to the contrary between the principal and the contractor.' As the issue of control forms part of the duty section the prosecution will have the onus of proving that the principle had the requisite control. As retailers usually source products through traders it may be difficult to demonstrate retailers have sufficient control. While traders may be found to have sufficient control, there remains the problem of proving the steps were reasonably practical. Based on the foregoing analysis it is arguable that independent contractor deeming provisions in South Australia and Western Australia do provide outworkers some legal protection.

3.3.4 Can employers' obligation for non-employees result in retailers and traders having OHS duties for outworkers?

This section will analyse whether provisions which impose OHS duties upon employers for non-employees can be used to impose OHS duties upon traders or retailers for outworkers. There has been no case which has held that employers' OHS duties for non-employees can be used to impose duties upon traders or retailers for outworkers. This part will analyse whether the imposition of such duties could be viable within the existing statutory regimes. The High Court of Australia has observed that OHS duties have a history of increasing the burden upon employers:

> In order to improve workplace health and safety, employers are now required to comply with safety standards which, only 20 years ago, would have been seen as imposing an onerous, even an absurd, burden on employers.[660]

[659] [2004] SAIRC 62, [69].
[660] *Bankstown Foundry Pty Limited v Braistina* (1985) 160 301, 307; See application in *Boral Transport Ltd v Whitehead & Ors* [2001] NSWCA 395, [45].

All Australian OHS Acts impose some OHS duties upon employers for the safety of non-employees.[661] Generally, OHS duties are only imposed where there is a contractual relationship between the OHS duty holder and the person benefiting from the protection. For example, the standard employer/employee OHS duty requires there to be a formalized relationship. Employers' OHS duties for non-employees is not limited by contractual relationships. Indeed, employers' OHS duties for non-employees expressly requires employers to ensure the health and safety of, in the Northern Territory, the safety of 'workers and others', in Queensland, the employers' employees and 'any other person', in Tasmania, people 'other than an employee of the employer', in Victoria, 'persons other than employees' and in Western Australia, any 'person, not being … an employee of the employer'.

The OHS Acts in the Australian Capital Territory, the Commonwealth, New South Wales and Tasmania limit the employers duty to where the non-employee is at the employer's workplace or near the employer's workplace.[662] As home-based outworkers work from their domestic homes or in workplaces geographically separate from employers, employers in these jurisdictions will not attract OHS duties for outworkers as non-employees.

The Queensland, Northern Territory, South Australian, Victorian and Western Australian provisions are the widest as they do not build the OHS duty around the employers' workplace or undertaking. As these provisions focus upon imposing OHS obligations beyond the traditional employment relationship and ensuring employers do not endanger contractors or the public at large through the operation of their undertaking, these provisions will be broadly interpreted and could be extended to provide outworkers OHS protection.[663]

The *Occupational Health, Safety and Welfare Act* 1986 (SA) s 22(2) provides that employers are required to ensure the health and safety of non-employees while they are at the employer's place of work and 'while the other person is in a situation

[661] Helen C. Lingard and Steve Rowlinson*, Occupational Health and Safety in Construction Project Management* (2005) 49-52.
[662] *Occupational Health and Safety Act 1989* (ACT) s 38; *Occupational Health and Safety Act 1991* (Cth) s 17; *Occupational Health and Safety Act 2000* (NSW) ss 8(2) and 9(1);*Workplace Health and Safety Act 1995* (Tas) s 9(3).
[663] Breen Creighton and Peter Rozen, *Occupational Health & Safety Law in Victoria,* (3rd ed, 2007) 110-114; Richard Johnstone and Therese Wilson, 'Take Me to Your Employer: The Organisational Reach of Occupational Health andSafety Regulation' (2006) 19 *Australian Journal of Labour Law* 3, 37.

where he or she could be adversely affected through an act or omission occurring in connection with the work of the employer …'. While the first part of the test limits employers duties to work on premises managed by the employer the second part of this test places no geographical limitation upon employers' OHS duties. As a consequence this duty could be extended to protect outworkers.

The recently enacted Northern Territory act provides an extremely wide definition of 'worker' which could arguably include outworkers. The *Workplace Health and Safety Act 2007* (NT) s 55(1) requires employers 'to ensure, as far as reasonably practicable, that workers and others are not exposed to risks to health or safety arising from the employer's business'. Clearly this provision could impose OHS duties over traders to manager outworkers health and safety. The ability to vest OHS duties higher in supply chains over retailers is rendered possible by the extended definition of worker in s 4. Section 4 of the *Workplace Health and Safety Act 2007* (NT) extends the definition of 'worker' to include 'a contractor or sub-contractor', 'an employee of a contractor or sub-contractor' or 'an employee of a labour hire company who has been assigned to work for the employer'. This wide definition of worker combined with the operation of s 55 arguably creates the situation where OHS duties can be imposed over retailers where outworkers are hired to work as part of employers' business.

The Victorian and Western Australian provisions both arguably have the potential of extending to include outworkers. The Victorian *Occupational Health and Safety Act* 2004 (Vic) s 23 requires employers to ensure 'so far as is reasonably practicable, that persons other than employees of the employer are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer.' In Western Australia the *Occupational Safety and Health Act 1984* (WA) in s 21 provides that the employer must ensure that a person is not placed at risk due to work 'undertaken … by the employer or any employee of the employer'.

The Queensland legislation builds the OHS duty around the operation of the employer's undertaking. The Queensland *Workplace Health and Safety Act* 1995 (Qld) imposes very general obligations upon employers to ensure workers' health and safety. There are limited duties imposed upon principle contractors in s 31

which would provide outworkers no protection. The provisions in the Queensland act which may provide outworkers protection are found in sections 28 and 29. These provisions do not impose duties upon people in the traditional employer/employee relationship but imposes the duty when a person is in charge of an undertaking. Section 28(1) provides:

> A relevant person … who conducts a business or undertaking has an obligation to ensure the workplace health and safety of the person, each of the person's workers and any other persons is not affected by the conduct of the relevant person's business or undertaking.

The duties in ss 28 and 29 are not limited to workplaces controlled by an employer. It is arguable that ss 28 and 29 could be read to impose OHS duties upon parties who use outworkers as part of their undertaking.

There is a two-step test to determine if an employer is liable for the OHS of non-employees. The tribunal will need to be convinced beyond a reasonable doubt that first, the employer was operating an undertaking and second, the risk arose out of that undertaking.[664] If this duty were to provide outworkers' protection, it would be necessary to establish that the trader's or retailer's undertaking included the outworking operations. Once outworking is held to form part of a trader's or retailer's undertaking, then arguably any risk which arose from the outworking would almost certainly arise from the undertaking of the trader or retailer. The most difficult element in providing outworkers' protection under the employers' OHS duty to non-employees is establishing that work performed by outworkers at outworkers' domestic residences forms part of traders' or retailers' undertakings.

The term 'undertaking' has been interpreted broadly.[665] Providing a third party's conduct provides the employer financial gain then there is a high probability that the

[664] *Mainbrace Constructions Pty Ltd v Workcover Authority (NSW)* (2000) 102 IR 84, 93 (Wright J P, Walton J VP and Hungerford J).
[665] *Tsougranis v Workcover Authority (NSW) (Inspector Carmody) (No 2)* (2006) 154 IR 58, 66, 74 (Wright and Staff JJ).

third party's conduct will be held to fall within the employer's undertaking.[666] The fact the work is performed at the outworker's domestic residence does not prevent the work forming part of an employer's undertaking. In *Workcover Authority of New South Wales (Inspector Kenneth George Martin) v Edmond Hubert Kuipers and Civil Services Pty Ltd*, the fact the work was performed in a domestic residence did not prevent an employer having OHS duties for non-employees.[667] According to the Victorian Supreme Court, the term 'undertaking'

> is broad in its meaning. In my view such a broad expression has been used deliberately to ensure that the section is effective to impose the duty it states ... The word must take its meaning from the context in which it is used. In my view it means the business or enterprise of the employer … and the word 'conduct' refers to the activity or what is done in the course of carrying on the business or enterprise. A business or enterprise, including for example that conducted by a municipal corporation, may be seen to be conducting its operation, performing work or providing services at one or more places, permanent or temporary and whether or not possessing a defined physical boundary. The circumstances must be as infinite as they may be variable.[668]

In addition to working on remote premises, according to the research in chapter 1.2, many outworkers are also independent contractors with their own Australian Business Numbers. The existence of additional corporate layers does not prevent the application of these OHS duties. Employers can have duties to non-employees, even where the OHS risk to the non-employees is created by an independent contractor hired by the employer. On this point the New South Wales Industrial Relations Commission held:

> Although the work being performed at the time of the accident may have been the direct responsibility of a sub-contractor, who had engaged direct employees to assist in performing such work, that does not detract from the overall concept of an

[666] *Canberra Stereo Public Radio Inc v Australian Broadcasting Tribunal and Anor* (1984) 6 FCR 456, 470-471 (Sheppard J); *Morais v The Minister for Immigration, Local Government and Ethnic Affairs* (1995) 54 FCR 498, [12] - [13] (Kiefel J); *Syndicate Club Pty Ltd v Queensland* [2003] QSC 104, [63] (Philippides J).
[667] [2004] NSWIRComm 393 (Schmidt J); in this case the prosecution failed as there was no proof the undertaking was for gain.
[668] *Whittaker v Delmina Pty Ltd* (1998) 87 IR 268 (Victorian Supreme Court), 280-281 (Hansen J).

> undertaking being conducted by … [the employer] of which the work in question forms part.[669]

The House of Lords has adopted an expansive interpretation of what constitutes the employers' 'undertaking':

> The question, as it seems to me, is simply whether the activity in question can be described as part of the employer's undertaking. In most cases, the answer will be obvious.[670]

In this case the employer's undertaking was operating a chemical plant. The House of Lords held that '[a]nything which constituted running the plant was part of the conduct of' the undertaking.[671] The House of Lords held that the hiring of a sub-contractor to clean a tank during the plant's annual shut-down constituted part of the employer's undertaking.

In *R v Mara* the extent of an employer's undertaking was determined by reference to the employer's strategy.[672] If an employer outsources the cleaning of their factory over the weekend and a sub-contractor's employee was injured, then this injury could fall within the undertaking of the employer.[673]

To date, there has been no case where a trader or retailer has been prosecuted or convicted with failing in their OHS duty to outworkers as non-employees. Academic writing indicates such a duty is owed. Johnstone has noted:

> Home-based independent contractors might also come within the scope of the employer and self-employed person's duty to non-employees. [As a consequence] [t]here would appear to be no difficulty in the application of the relevant OHS provisions extending to home-based employees.[674]

Workcover Authority (NSW) v Techniskil-Namutoni Pty Ltd [1995] NSWIRComm 127, 128 (Cahill ACJ).
[670] *R v Associated Octel Co Ltd* [1996] 4 All ER 846, 1547-1549 (Lord Hoffmann, deliving the judgment of the House of Lords).
[671] Ibid.
[672] *R v Mara* [1987] 1 WLR 87, 90-91 (Parker LJ).
[673] Ibid.
[674] Richard Johnstone, 'Paradigm Crossed? The Statutory Occupational Health and Safety Obligations of the Business Undertaking' (1999) 12 *Australian Journal of Labour Law* 8, 70-71.

When exploring the operation of employers' duties for non-employees in the equivalent United Kingdom legislation, James, Johnstone, Quinlan and Walters concluded that employers' OHS duties for non-employees 'can oblige employers to have regard to issues of health and safety arising from the activities of those undertaking supply chain activities on their behalf'.[675] This thesis concludes that retailers and traders may owe general OHS duties for outworkers in Queensland, Northern Territory, South Australia, Victoria and Western Australia but until this issue is clarified judicially or legislatively the regulatory impact of these provisions will have little or no practical effect.

Following a review of OHS laws in Australia in late 2008 and early 2009 various reforms have been proposed.[676] The first OHS report considered, inter alia, if a primary duty of care should be imposed upon people who conduct a business or undertaking and how OHS acts can better meet the challenges of changing work relationships.[677] In addition the report considered that the duty should not be limited to 'a workplace'. Recommendation 3 of the first report recommends uniform OHS laws across Australia which imposes a duty of care provision 'on all persons who by their conduct may cause, or contribute in a specified way, to risks to the health or safety of any person from the conduct of a business or undertaking'. This recommendation does not limit the proposed duty to premises under the employer's control which means this duty would likely provide outworkers OHS protection if implemented.

3.4 Enforcing OHS duties

3.4.1 How courts interpred OHS duties to maxmise safety

For centuries, courts have interpreted OHS laws as broadly as possible, to maximise the deterrent effect of OHS duties on ensuring safety at work. Even though OHS duties are criminal duties, the interpretation of provisions imposing OHS duties are

[675] Phil James, Richard Johnstone, Michael Quinlan and David Walters, 'Regulating Supply Chains to Improve Health and Safety' (2007) 36 *Industrial Law Journal* 163

[676] Robin Stewart-Crompton, Stephanie Mayman and Barry Sherriff, 'National Review into ModelOccupational Health and Safety Laws: First Report (The Workplace Relations Ministers' Council, 2008); Robin Stewart-Crompton, Stephanie Mayman and Barry Sherriff, 'National Review into ModelOccupational Health and Safety Laws: Second Report (The Workplace Relations Ministers' Council, 2009).

[677] Robin Stewart-Crompton, Stephanie Mayman and Barry Sherriff, 'National Review into ModelOccupational Health and Safety Laws: First Report (The Workplace Relations Ministers' Council, 2008) Chapter63 analysed the primary duty

not interpreted the same way as other provisions imposing criminal duties. Generally, penal statutes are construed in favour of the person charged.[678] Where a provision imposing a criminal liability is ambiguous, courts will generally interpret that statute in favour of the person subject to the offence.[679] OHS statutes are remedial criminal statutes, created for the benefit of employees and the community.[680] As a consequence, courts interpret OHS statutes as broadly as possible, in order to afford the greatest protection to human life.[681] When courts interpret OHS statutes as broadly as possible, there develops an inherent conflict between providing the benefit of safe workplaces to employees and the community, and the penal consequences faced by OHS duty holders.[682] The High Court of Australia considered how to interpret statutes with beneficial and penal purposes in *Waugh v Kippen*.[683] In *Waugh v Kippen*, the High Court of Australia applied Isaac J in *Bull v Attorney-General for New South Wales*[684] and accepted they must give the relevant OHS statute the widest possible interpretation as it was intended to protect human life.[685]

The object of OHS Acts is to protect safety. Courts must interpret OHS provisions, as far as possible, to maximise safety.[686] Therefore, even though a breach of OHS duties constitutes a criminal offence, the standard rules about interpreting criminal provisions are subrogated to the underlying safety maximisation purpose of OHS.[687]

The focus upon maximising safety is supported by the fact that a breach of an OHS duty is an absolute offence. An offence is an absolute offence if the accuser's

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[678] *Sillery v R* (1981) 180 CLR 353, 359 (Murphy J).
[679] *Beckwith v R* (1976) 135 CLR 569, 576 (Gibbs J); *Brott v R* (1992) 173 CLR 426, 437-8 (Deane J); *Deming No 456 Pty Ltd v Brisbane Unit Development Corp Pty Ltd* (1983) 155 CLR 129, 145 (Mason, Deane and Dawson JJ); *R v Adams* (1935) 53 CLR 563, 567-8 (Rich, Dixon, Evatt and McTiernan JJ).
[680] *R v A C R Roofing Pty Ltd* (2004) 11 VR 187, 203.
[681] *Bull v Attorney-General* (NSW) (1913) 17 CLR 370, 384 (Isaacs J); *Commissioner of State Revenue (Vic) v Royal Insurance Australia Lt* (1994) 182 CLR 51, 98 (Dawson J); *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 528 (Gummow J); *ICI Australia Operations Pty Ltd v Workcover Authority of New South Wales* (2004) 60 NSWLR 18, 83 (McColl JA, with Mason P and Meagher JA concurring); *Barry Edward McDonald (t/as B.E. McDonald Transport) v Girkaid Pty Ltd & 4 Ors; Robert Bryce & Co Ltd v Girkaid Pty Ltd & 4 Ors; Hudson Resources Pty Ltd & 5 Ors v Robert Bryce & Co Ltd* (2004) Aust Torts Reports 81-768, 349 (McColl JA with Beazley JA and Young CJ concurring).
[682] *Chandler & Co v Collector of Customs* (1907) 4 CLR 1719, 1735 (O'Connor J).
[683] (1986) 160 CLR 15.
[684] (1913) 17 CLR 370; *Goodes v General Motors Holden Pty Ltd* [1972] VR 386.
[685] (1986) 160 CLR 156, 164-165.

[686] *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249, 261-262 (*D*awson, Toohey and Gaudron JJ).
[687] *R v ACR Roofing Pty Ltd* (2004) 11 VR 187, 203 (Nettle JA, with whom Vincent and Ormiston JJA concurred).

culpability is not contingent upon the prosecution establishing *mens rea*.[688] In *Dairy Farmers Co-Operative Ltd v Azar*, the High Court of Australia held the employer's duty to cover all the dangerous parts of the machinery was an absolute obligation.[689] The milk crater was found to be a dangerous machine, thus the employer had an absolute liability to fence it .[690]

The simple fact that employees are exposed to risks to their health and safety can be sufficient to enliven an offence. In *Haynes v CI & D Manufacturing Pty Ltd*, the Full Bench of the Industrial Court of NSW held OHS offence provisions are

> ... concerned with failures to ensure the health and safety of persons at workplaces in terms, inter alia, of 'risks' thereto; thus, the sections, even absent any actual accident causing death or bodily injury, nevertheless comprehend the commission of an offence where … [there is a] relevant 'detriment to safety'.[691]

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 some minor OHS risks.[692] 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. More recently the Queensland Court of Appeal in *Bourk v. Power Serve P/L & Anor* effectively held that if an employee is injured at work then their employer is likely to be held liable under OHS laws:

> Under … [the *Workplace Health and Safety Act 1995* (Qld)] the employer's duty to ensure the employee's safety is absolute. It is not expressed as a duty to supply equipment, advice, training, conditions, or assistance of a particular type or at all.

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[688] *Mousell Brothers Ltd. v. London and North-Western Railway Company* (1917) 2 KB 836, 845 (Atkin J); Atkin J's approach was applied by the High Court of Australia in *R v Australasian Films Ltd* (1921)29 CLR 195, 214; *Goodes v General Motors Holden Pty Ltd* [1972] VR 386, 389 (Adam J).

[689] *Dairy Farmers Co-Operative Ltd v Azar* (1990) 170 CLR 29, 297.

[690] See also: *Drake Personnel v Workcover Authority of NSW* (1999) 90 IR 432, 452.

[691] *Haynes v CI & D Manufacturing Pty Ltd* (1994) 60 IR 149, 15.

[692] *Paparella v Kerry Logistics (Australia) Pty Ltd* [2006] SAIRC 54.

> Subject to the operation of … [the Act] if an employee … is injured through the failure of a piece of necessary safety equipment provided to him by his employer there is a breach of the obligation … The employer has failed to ensure the safety of the employee. Causation is established. If the employee's safety had been ensured, the employee would not have been so injured.[693]

3.4.2 The role of the Government in enforcing OHS in Australia

In all Australian jurisdictions OHS laws are investigated and prosecuted by public agencies:[694] in New South Wales by a public agency and relevant trade unions.[695] It is submitted that the largest problem facing the enforcement of outworkers OHS conditions is identifying the safety and health breaches. Nossa, Johnstone and Quinlan have analysed the geographical limitations restricting enforcement activity in detail.[696] Essentially the main problem is that outworkers work at in workplaces which are often difficult to find and form part of the outworker's residential dwelling. In addition the flexible working times of these workers means inspectors have substantial difficulties in first finding the outworkers places of work and secondly in entering the workplace at a time where work is being performed. In addition to these problems inspectors are only permitted to enter workplaces which are in residential dwellings with either the occupiers permission or a search warrant.[697] While in other jurisdictions inspectors can enter workplaces that employers are required to maintain[698] or where plant and equipment is located.[699]

As mentioned in chapter 1 of this thesis there are potentially hundreds of thousands of outworkers in Australia. In effect this means there is potentially over a hundred thousand individual outworker workplaces in Australia. The number of inspectors to

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[693] *Bourke v. Power Serve P/L & Anor* [2008] QCA 225, (32) (Muir JA with Keane JA (1) and Fraser JA (37) concurring).
[694] *Occupational Health and Safety Act 1989* (ACT) 188; *Occupational Health and Safety Act 2004 (Vic)* s 130; *Occupational Health, Safety and Welfare Act* 1986 (SA) s 58; *Occupational Safety and ealth Act 1986*(WA) s 52; *Workplace Health and Safety Act 1995* (Qld) s 164; *Workplace Health and Safety Act 1995* (Tas) s 55; *Workplace Health and Safety Act 2007* (NT) s80.
[695] *Occupational Health and Safety Act 2000* (NSW) s 106; Who is permitted to prosecute OHS breaches is currently under review: see for discussion Robin Stewart-Crompton, Stephanie Mayman and Barry Sherriff, 'National Review into ModelOccupational Health and Safety Laws: Second Report (The Workplace Relations Ministers' Council, 2009) 334-447.
[696] Igor Nossar, 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.
[697] Occupational Health and Safety Act 1989 (ACT) s 74;*Occupational Health and Safety Act 2000* (NSW) s 57; Occupational Health and Safety Act 2004 (Vic) s 107; *Workplace Health and Safety Act 1995* (Qld) s 104; *Workplace Health and Safety Act 1995* (Tas) s 36; *Workplace Health and Safety Act 1995* (NT) s 67.
[698] *Occupational Safety and Health Act 1986* (WA) s43.
[699] Occupational Health, Safety and Welfare Act 1986 (SA) s 38.

identify the workplaces and inspect premises is relatively small. In 2006/2007 there was a total of 1051 inspectors in Australia to investigate all workplaces in all industries.[700] The extreme difficulties in successfully identifying and prosecuting a breach means the deterrent effect of Australian OHS protection of outoworkers is substantially diminished.

If a retailer or trader was successfully prosecuted for an OHS breach of an outworker the legal sanction would depend on the seriousness of the breach and the consequence of the breach. In Australia a breach of an OHS duty can attract prison if there has been a death,[701] or fines or enforceable undertakings.[702] A search of reported and electronically available cases demonstrate that there has been no prosecution of a retailer or trader for failing to ensure an outworker's health and safety. As a consequence the deterrent quality of any legal sanctions is virtually non-existent. The regulatory pyramid requires enforcement and the threat of punishment to be effective. As some jurisdictions impose no OHS duties for the safety of outworkers or are failing to enforce those duties, it is arguable that Australian OHS laws are failing to ensure the health and safety of outworkers.

3.4.3 Can contract be used to avoid OHS duties?

While OHS duties are not currently being enforced against retailers or traders there exists contractual arrangements which retailers and traders can adopt to entirely negate the impact of any legal sanction. This section will analyse the legality of such contractual arrangements.

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[700] Robin Stewart-Crompton, Stephanie Mayman and Barry Sherriff, 'National Review into ModelOccupational Health and Safety Laws: Second Report (The Workplace Relations Ministers' Council, 2009), 787.

[701] Nicolee Dixon, Karen Sampford and Renee Giskes, *Industrial Manslaughter,* Queensland Parliamentary Research Brief (2006) 11-14; it is important to note directors are not deemed to have breached these provisions by virtue of the company they direct committing an OHS breach. The director must be personally at fault and thus they attract personal liability: see for discussion: Neil Foster, 'Personal Liability of Company Officers for Corporate Occupational Health and Safety Breaches: s 26 of the *Occupational Health and Safety Act* 2000 (NSW)' (2005) 18 *Australian Journal of Labour Law* 2, 3; In addition to OHS liabilities company officers can face liability in tort for workplace accidents: Neil Foster, 'Personal Civil Liability of Company Officers for Company Workplace Torts' (2008) 16 *Torts Law Journal* 1, 20; Ron McCallum, Peter Hall, Adam Hatcher and Adam Searle, *Workplace Death, Occupational Health and Safety Legislation*, New South Wales Upper House Report (2004); Tasmania Law Reform Institute, *Criminal Liability of Organizations* Issues Paper No 9 (2005.); The Senate Employment, Workplace Relations and Education Legislation Committee, Parliament of Australia, *Provisions of the Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005* (2005).

[702] An enforceable undertaking involves the regulator and a person agreeing that the person will be subject to a agreed fine if they fail to successfully discharge their undertaking: Robin Stewart-Crompton, Stephanie Mayman and Barry Sherriff, 'National Review into ModelOccupational Health and Safety Laws: Second Report (The Workplace Relations Ministers' Council, 2009) 202-; Richard Johnstone and Michelle King , 'A Responsive Sanction to Promote Systematic Compliance? Enforceable Undertakings in OHS Regulation' (Working Paper 58, NRCOHSR, 2008).211.

Laws which enable parties to contract out of their OHS duties adopt the polar opposite approach to traditional OHS laws. Where OHS laws attempt as far as possible to ensure workplace health and safety, enabling a party to contract out of all OHS duties entirely negates the remedial impact of those OHS duties contracted out of. If a person contracts out of an OHS duty, then that person has no duty to ensure workplace health and safety. OHS laws have been imposed upon principals and traders as Parliaments have determined these parties can impact on workplace health and safety. If these parties can then elect to contract out of their OHS duties, it is submitted then parties who can control a risk to health and safety will have no obligation to manage that risk.

One of the major problems with enabling one party to contract out of its OHS duties is that the party who contracts out of the duty is likely to be the more powerful party. If there is a contract between two parties, and the contract enables one party to shift all OHS duties to the other contracting party, it is highly probable that in relationships where there is a distinct power imbalance, then the weaker party of the relationship will be burdened with the OHS duties. One of the main reasons OHS duties have been introduced over the parties in fractured employment is to redress the power imbalance and the inability of some vulnerable parties to ensure safety. If parties could contract out of OHS, it is probable the parties who most need the OHS protection would likely lose the protection. This could have detrimental effects for individual contractors, outworkers, outworkers' families and the public.

In relation to principal/contractor OHS duties, the Commonwealth, South Australia and Victoria OHS Acts approve of principals being able to contract out of their OHS duties. The Commonwealth, South Australian and Victorian principal deemed employer sections enables the principals to contract out of their OHS duties for contractors, through permitting the principals to limit the matters over which they have control through an express agreement which limits the principal's control, or in Victoria, through 'any agreement excluding OHS duties, in the Commonwealth, an 'express provision excluding OHS duties.[703] All other jurisdictions in Australia refuse to enable principals to contract out of their OHS duties.

[703] *Occupational Health and Safety Act 1991* (Cth) S 16(4); *Occupational Safety and Welfare Act 1986* (SA) s 4(2); *Occupational Health and Safety Act* (Vic) s 21(3)(b).

In the Australian Capital Territory, New South Wales, Tasmania and the Northern Territory, the OHS enactments do not enable principals to contract out of their OHS duties, therefore the standard position that a person cannot contract out of his/her OHS duties applies. The Western Australian OHS Act goes even further. The Western Australian section 23D(6) provides that a 'purported waiver by a contractor of a right that arises directly or indirectly under' the duty provision 'is void'.

While principals can contract out of their OHS duties in some jurisdictions, there are no equivalent provisions enabling traders or retailers to contract out of their OHS duties for outworkers. The Draft Occupational Health and Safety Amendment Bill 2006 (NSW) was proposed to insert a section 27A into the *Occupational Health and Safety Act 2000* (NSW) which 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).[704] Section 27A (2) would have enabled deemed employers to avoid most of their OHS duties for their outworkers. Section 27A(2) would have limited deemed employers' duty to OHS obligations 'in relation to matters over which the employer has control or would have control if not for any agreement purporting to limit or remove that control'. This draft Bill was never introduced into Parliament, so presumably the government of the day determined this clause was inappropriate.

Unless there is express statutory support to enable a person to contract out of OHS duties, where a person attempts to contract out of OHS duties, courts are prepared to set aside contractual arrangements and ensure the effect of OHS duties are not negatized. For example, a person who has an OHS duty imposed on him/her cannot delegate the discharge of this duty through contract. In *R v Commercial Industrial Construction Group Pty Ltd* the court explained, that if a person has an OHS duty imposed upon his/her, if they fail to discharge that duty they are liable.[705] In this case, the employer attempted to argue it should not be liable as the breach was

[704] S 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, 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).
[705] *R v Commercial Industrial Construction Group Pty Ltd* (2006) 14 VR 321, 328.

caused by an experienced supervisor. The court however held the duty was the employer's and could not be delegated.[706]

Hold harmless clauses are one of the main vehicles that parties in supply chains use to attempt to redistribute liabilities which flow from workplace accidents.[707] Hold harmless clauses are clauses which are inserted into contracts to shift the consequences for OHS non-compliance away from an offender. Hold harmless clauses provide that one party will hold another party free from any harm associated with the contract. Usually these contracts are used in labour hire or sub-contracting, where the weaker party agrees to hold the stronger party free from any harm which may flow from a criminal or civil breach involving the weaker party.[708] For the stronger parties in supply chains, hold harmless clauses afford a way to limit their liabilities. If a trader, for example, hired a person under a contract of service, and that person was injured, then the trader could have criminal OHS liabilities and civil liabilities. If the trader in that example outsourced work to an outworker, and the outworker agreed to hold harmless the trader from any liabilities, if the trader or the outworker was involved in an accident, then the outworker would be required to indemnify the trader for their liabilities. As hold harmless clauses would enable the person who is responsible for the OHS breach to avoid the effect of all non-custodial legal sanctions if enforced, hold harmless clauses have the potential to nullify the deterrent aspect of OHS laws.

Hold harmless clauses are arguably the antithesis to the deterrent effect of OHS laws. Where imposing OHS duties upon principals and traders imposes sanctions upon parties who have control over OHS risks, hold harmless clauses arguably seek to achieve the polar opposite. Hold harmless clauses seek to avoid or partially negate the sanctions associated with OHS laws, and thus in effect provide the party protected from OHS penalties no incentive to comply with their OHS duties. Johnstone and Quinlan observed that hold harmless clauses are particularly common

[706] See also, *Linework Ltd v Department of Labour* [2001] 2 NZLR 639, 645.
[707] L Brennan, N Valos and K Hindle, *On-hired Workers in Australia: Motivation and Outcomes* (Occasional Research Report, Melbourne, RMIT University, 2003).
[708] Richard Johnstone, Claire Mayhew and Michael Quinlan, 'Outsourcing Risk? The Regulation of Occupational Health and Safety Where Subcontractors are Employed' (2001) 22 *Comparative Labor Law & Policy Journal* 351, 385.

with inter-jurisdictional contracts.[709] Johnstone and Quinlan found regulators claimed the main reason parties entered into agreements with hold harmless clauses was to defeat the intent of 'general duty provisions in OHS legislation or at least obfuscate legal responsibilities in the eyes of the parties in ways that would make enforcement more difficult, even if the contracts cannot formally shift liability under OHS legislation'.[710]

Hold harmless clauses for OHS duties have been opposed by governmental reports and legislation. The Victorian Economic Development Committee prepared a report on independent contractors, where they recommended the banning of hold harmless clauses.[711] This report heard evidence that many labour hire agencies had good OHS compliance levels, however the report noted evidence presented by the Victorian Workcover Authority indicated the labour hire industry generally had a higher than average workplace injury rate and the frequency of compensation claims was particularly high for blue collar labour hire workers, when compared to standard blue collar workers.[712] The Victorian Economic Development Committee held the existence of hold harmless clauses perverts the regulatory framework of the OHS Act and consequently, such clauses should be banned.[713] The Victorian government in response has agreed that hold harmless clauses run contrary to the purposes of OHS legislation and will consider options to ban them.[714]

In the Australian Capital Territory, hold harmless clauses are already rendered void by s 222 of the *Occupational Health and Safety Act 1989 (ACT)*, which states:

> A term of any agreement or contract that purports to exclude, limit or modify the operation of this Act is void.

The first Australian judgment to consider the operation of a hold harmless clause for an OHS breach was *Inspector Steven Jones v Walker Group Constructions Pty*

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[709] Richard Johnstone and Michael Quinlan 'The OHS Regulatory Challenges Posed by Agency Workers: Evidence from Australia' *(2006) 28 Employee Relations* 3, 273.
[710] Ibid.
[711] Economic Development Committee of Victoria, *Inquiry into Labour Hire Employment in Victoria* (2006).
[712] Ibid, see Chapter 4.
[713] Ibid 4.5.2.2.
[714] Victorian Government, *Government Response to the Recommendations contained in the Economic Development Committee Inquiry into Labour Hire Employment in Victoria* (2006) <http://www.ecruiting.com.au/ohsalert/200602/06response.doc> 6 Dec 2006> at 12 December 2008.

Ltd.[715] In *Inspector Steven Jones v Walker Group Constructions Pty Ltd*, Walker Group was the principal on a construction site. Walker Group contracted with Garry Denson Metal Roofing and with JB Metal Roofing Pty Ltd to complete roofing works. An industrial inspector performed an audit and provided Walker Group with two improvement notices which concerned the contractors' work. The notice concerning JB Metal required its work safe plan to be altered so that it complied with statutory standards and the other notice required Garry Denson to provide safe access to the roof. Work continued without the required improvements occurring and a subsequent visit by the Workcover inspector identified this breach. The inspector, inter alia, fined Walker Group for failing to comply with the notices.

Walker Group had a hold harmless clause which provided that it would be indemnified for any financial liabilities for an OHS breach involving the contractors. On the enforceability of this clause, Cavanaugh J stated:

> It must be emphasised no employer can contract out of its obligations under the Act. … It is in defiance of an employer's absolute statutory obligation under the Act.[716]

The law generally enables parties to structure their commercial affairs without interference. The nature of OHS duties however, results in hold harmless clauses for OHS duties being unenforceable. OHS statutes are remedial statutes and accordingly are read as widely as possible to afford the maximum protection to human life.[717] When interpreting OHS duties, courts must have regard to the objects of OHS Acts.[718] The objectives of the legislation unanimously focus upon ensuring employee safety and reducing the risk to employees and the community through punishing non-compliance with criminal sanctions.[719]

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[715] *Inspector Jones v Walker Group Constructions Pty Ltd* [2006] NSWIRComm 11.
[716] [2006] NSWIRComm 11, [35].
[717] *Bull v Attorney-General (NSW)* (1913) 17 CLR 370, 384 (Isaacs J); *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, 98 (Dawson J); *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 528 (Gummow J); *ICI Australia Operations Pty Ltd v Workcover Authority of New South Wales* (2004) 60 NSWLR 18, 83 (McColl JA); *Barry Edward McDonald (t/as B.E. McDonald Transport) v Girkaid Pty Ltd & 4 Ors*; *Robert Bryce & Co Ltd v Girkaid Pty Ltd & 4 Ors; Hudson Resources Pty Ltd & 5 Ors v Robert Bryce & Co Ltd* (2004) *Aust Torts Reports* 81-768, [349] (McColl JA).
[718] Breen Creighton and Peter Rozen, *Occupational Health & Safety Law in Victoria(3rd ed,* 2007) 32-36.
[719] *Occupational Health and Safety Act 1989* (ACT) s 2; *Occupational Health And Safety Act 2000* (NSW) s 3; *Occupational Health and Safety Act 2004* (VIC) s 2; *Occupational Health, Safety and Welfare Act 1986* (SA) s 3; *Occupational Health and Safety Act 1984* (WA) s 5; *Workplace Health and Safety Act 1995* (Qld) s 7; *Workplace Health and Safety Act 2007* (NT).

Contracts which hinder the enforcement of a public right are generally regarded as unenforceable, on the grounds they are contrary to public policy in preventing contracts which pervert the administration of justice.[720] The public has an interest in the effective enforcement of laws attracting criminal sanctions.[721] Contracts which limit or stifle prosecutions therefore, are contrary to the public interest in the effective administration of justice. For example, a contract which attempted to stifle a prosecution against a father and daughter was held to be unenforceable on public policy grounds.[722] Similarly, a contract which agreed to ensure criminal proceedings against a person's son would be discontinued was void due to public policy grounds.[723] While there may be some ability to stifle a prosecution which breaches a private right such as assault, where the breach impacts on a public right however, there is no scope for a contract which limits the administration of justice.[724]

It is submitted that if traders were permitted to contract out of their OHS duties towards outworkers, the negative result upon safety would place outworkers and third parties at risk. Generally, the law refuses to enforce a contract which has a negative consequence on public rights. While the risk to safety may arise between private individuals, a breach of OHS is not enforced as a private right, but a public right enforced by public agencies.[725] Indeed, people are excluded from bringing a private action for a breach of OHS by the OHS statutes in the Australian Capital Territory, New South Wales and Victoria.[726]

Hold harmless clauses are not totally ineffectual. While hold harmless clauses for OHS liabilities are unenforceable, hold harmless clauses which seek to redistribute liabilities for civil breaches have been held to be enforceable. The operation of hold harmless clauses for civil liabilities demonstrate the negative effect hold harmless clauses would have upon the regulatory impact of OHS if they were able to be used

[720] *Taylor v Burgess* [2002] 29 Fam LR 167, [188].
[721] *Callaghan v O'Sullivan* [1925] VLR 664.
[722] *Clegg v Wilson* (1932) 32 SR (NSW) 109.
[723] *Public Service Employees Credit Union Co-op Ltd v Campion* (1984) 56 ACTR 39.
[724] *Kerridge v Simmonds* (1906) 4 CLR 253; *Indonesia Ltd v Grellman* (1992) 35 FCR 515; *Louis Vuitton Malletier SA v Design Elegance Pty Ltd* (2006) 149 FCR 494.
[725] Although union prosecutions are also permitted in some jurisdictions: see for discussion: Workcover NSW, *Review of the Occupational Health and Safety Act 2000* (Report, 2006) 8.9.
[726] *Occupational Health and Safety Act 1989* (ACT) S 223; *Occupational Health and Safety Act 2000* (NSW) s 32; *Occupational Health and Safety Act 2004* (Vic) s 34.

to avoid OHS liabilities. In *Thomas v Sydney Training & Employment Limited*, a hold harmless clause was upheld which required one party to hold harmless another party for all Workcover and common law liabilities which flowed from the labour contract.[727] Similar to hold harmless clauses in OHS, hold harmless clauses in civil law can arguably enable a party which is responsible for a risk to workplace health and safety to avoid liability. For example, in *Action Engineering Pty Ltd v Press & Anor*, BHP had a hold harmless clause with Action Engineering, in which BHP would be indemnified for all damages flowing from a civil breach.[728] This case arose out of an accident which occurred when a contractor was working with BHP employees on a BHP coke oven. The contractor and a BHP supervisor had inspected the job and failed to identify the relevant risk.[729] Due to the nature of the risk, the contractor was not in a position to identify the risk and was not contributory negligent.[730] Despite not being contributory negligent for the accident, BHP claimed it could enforce its agreement with the contractor which required the contractor to indemnify BHP for all liabilities which flowed from the relationship.

The South Australian Full Court of the Supreme Court held BHP was able to enforce its hold harmless clause for damages flowing from the civil breach.[731] It was immaterial that BHP was the only party who was in the position to have prevented the breach. In effect, the operation of the hold harmless clause enabled BHP to avoid all civil liability for a breach it had caused. As negligence is aimed at compensating a person for a loss rather than preventing breaches, the court was prepared to uphold the hold harmless clause.

3.5 Are OHS duties to protect outworkers enforced?

The central question in this thesis requires Australia to provide outworkers regulatory protection and to enforce that protection. The previous part determined that Australia provided outworkers adequate formal protection and this part will now ask the crucial question of whether these laws are sufficiently enforced. It is submitted

[727] *Thomas v Sydney Training & Employment Limited & Anor* [2002] NSWSC 970, (204), (205); Cooper AJ held however, this did not extend to cover legal expenses.
[728] *Action Engineering Pty Ltd v Press & Anor* [2006] SASC 207.
[729] [2006] SASC 207, (17).
[730] [2006] SASC 207, (8), (19).
[731] [2006] SASC 207, (34).

that Australian OHS laws substantially degrade the deterrent quality of OHS duties and legal sanctions by failing to enforce these duties and impose these sanctions.

As there are no reported cases on outworkers' OHS protection to analyse, the remainder of this part compares deemed employer traders' OHS duties to primary reports which indicate traders are failing to take steps to ensure outworkers' right to safety and health is being realized. Traders are the focus in this part as the protection afforded to Victorian outworkers deeming them to be the employer of people who hire them is the most express OHS protection in Australia. This section will analyse the protection outworkers would receive if they were the employee of traders and then analyse published primary reports to determine if outworkers in Australia are having their health and safety protected.

3.5.1.1 Risk assessments

Arguably one of the main ways in which OHS duties are discharged is through the risk management process. Process risk management broadly consists of three steps of hazard identification, risk assessment and risk control.[732] Once traders are deemed to be the employer of outworkers, then traders will be required as an employer to perform risk assessments.[733] Risk assessments are essential to the effective discharge of OHS duties, as without risk assessments employers are not cognisant of all the risks which face their employees.[734] Deemed employers cannot successfully take steps to manage all relevant risks, until the deemed employer has performed a risk assessment of the outworkers' work environment and circumstances. This is because it is virtually impossible to manage a risk until the nature, cause and seriousness of a risk is known.

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

[732] Chris Maxwell, *Occupational Health and Safety Act Review*, Victorian Government Report (2004) 694.
[733] Richard Johnstone, *Occupational Health and Safety Law and Policy* (2nd ed, 2004) 25-27.
[734] Michael Tooma , *Tooma's Annotated Occupational Health and Safety Act 2004* (2005) 99-100, 108.

> In Queensland if there is a regulation, ministerial notice or code of practice describing the way to ensure safety the person with the OHS duty must either adopt that prescribed way or identify all hazards, assess the risks that may result because of the hazards, develop methods to control the risk, implement those controls and evaluate the effectiveness of those controls.[735]

In New South Wales, an employer is required to perform a risk assessment where the old risk assessment is no longer current, or whenever there is a change to work systems to which the old risk assessment relates.[736]

Similar obligations appear in the Northern Territory,[737] South Australia,[738] Tasmania[739] and Western Australia.[740] In those jurisdictions which do not expressly require employers to perform risks assessments, this duty is implied by the operation of the OHS acts. For example, s 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',[741] or 'reduce those risks so far as is reasonably practicable'.[742] In determining what is 'reasonably practicable', s 20(2) presumes parties are aware of all risks which the party 'ought reasonably to know' about.[743] In effect, this presumption compels parties to take proactive steps to ensure they are aware of safety risks in the workplace.[744] A party which fails to take such proactive steps will have breached its duty through simply failing to take proactive steps to reduce the risks to safety.

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[735] *Workplace Health and Safety Act 1995* (Qld) S 26,S 27,S 27A.
[736] *Occupational Health and Safety Regulations 2001* (NSW) Cl 12.
[737] *Workplace Health and Safety Act* 2007 (NT) S 55(3).
[738] *Occupational Health, Safety and Welfare Regulations 1995* (SA) Reg 1.3.3.
[739] *Workplace Health and Safety Regulations 1998* (Tas) Regs 5 and 18.
[740] *Occupational Health and Safety Regulations 1996* (WA) Reg 3.1.
[741] S 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: reg 203 of the *Occupational Health and Safety (Prevention of Falls) Regulations 2003* (Vic); with the risk of asbestos: reg 202 of the *Occupational Health and Safety (Asbestos) Regulations 2003* (Vic); where employees are manually handling hazardous materials: reg 7 of the *Occupational Health and Safety (Manual Handling) Regulations 1999* (Vic); where employees are exposed to lead: reg 210 of the *Occupational Health and Safety (Lead) Regulations 2000* (Vic); where employees work in confined spaces: reg 13 of the *Occupational Health and Safety (Confined Spaces) Regulations 1996* (Vic).
[742] *Occupational Health and Safety Act 2004* (Vic) S 20(1) (b).
[743] *Occupational Health and Safety Act 2004* (Vic) S 20(2) (c).
[744] See Chris Maxwell, *Occupational Health and Safety Act Review,*Victorian Government, Report,(2004) 108-110.

The proactive OHS duty requires continual vigilance from employers to identify possible risks to employees. These risks can be created by the system of work or by the inadvertence of employees.[745] In *Workcover Authority (NSW) v Atco Controls Pty Ltd (No. 1)* the court held:

> [E]mployers 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.[746]

Unlike standard employers, trader deemed employers are not on the same premises as the outworkers. Does this prevent traders from being able to maintain constant vigilance and abundant caution over outworkers' workplace health and safety? It is submitted the proactive OHS duty is not contingent upon the employer's ability to micro manage the employee. The proactive OHS duty arises due to the 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 correctly assess the risks. The task of risk assessment and management can be delegated to outworkers, but the legal duty to ensure safety always remains the trader's. For employers, the duty to assess the risks always remains the duty of the employer and not that of the employee.[747] In *Short v Lockshire Pty Ltd*, the injured employee was using a grinder to cut the baffles out of a stainless steel tank.[748] 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

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[745] *Brooker v Foreman Pty Ltd* (2006) QIC 54; *Knight v Tabcorp Holdings Ltd* [2008] QSC 282, [24] per Cullinane J; *Paparella v Lexaid Pty Ltd* (2006) SAIRC 23, (31), (32); *Parker v Q-Comp* (2007) QIC 25; *Workcover Authority of NSW v Main Lighting Pty Ltd* (1995) 200 IR 248, 257.
[746] (1999) 101 IR 239, 257.
[747] *Workcover Authority (NSW) v Kellogg (Aust) Pty Ltd (No. 1)* (1999) 101 IR 239; *Workcover Authority (Insp Barnard) v Rail Infrastructure Corp* (2001) 109 IR 209, 211-212.
[748] *Short v Lockshire* [2000] QIC 62.

Practice which dictated what the system of work required. The employer did not attempt to suggest it had complied with the Code. On the contrary, the employer argued it 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 about alternative safer approaches of performing tasks, employees readily identified alternative safer approaches of completing the task. The employer had no system of instructing employees in relation to how work should be performed safely and did not perform spot checks to ensure work was being conducted safely. As a consequence, the employer was guilty for failing to ensure its employees' safety.

The proactive duty requires employers to take into consideration the subjective factors of all the surrounding circumstances of the workplace.[749] The fact the risk is not easy to detect does not exculpate the employer:

> [T]he 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 … [an event] will put persons at risk. This would have necessitated a much closer consideration of the potential risks, the detriment to safety would have become evident and appropriate action could have been taken to eliminate the risk.[750]

The proactive duty requires employers to do more than just identify risks which are obvious or which warning signals have identified.[751] For traders to discharge their

[749] [2000] QIC 62.
[750] *Inspector Green v The Crown in the Right of the State of NSW (Department of Commerce)* [2004] NSWIR Comm 64, [20] (Bolan J).
[751] *Ferguson v Nelmac Pty Ltd* (1999) 92 IR 188.

OHS duty, they must take proactive steps such as training outworkers and performing spot checks. While the employers' OHS duty to identify risks imposes a high 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 a proactive duty where the risks are real or appreciable, and not merely speculative.[752] 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.[753] Practically, for employers, establishing a risk was not foreseeable or was speculative can be 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.[754] The employer directed the employee to keep away from the area, but did not enforce its direction. The employee re-entered the trench and the trench collapsed. The court 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.[755]

The proactive nature of OHS laws was emphasised in December 2008 by the Victorian Government through introducing the Occupational Health and Safety Amendment (Employee Protection) Bill 2008 (Vic) This Bill is focused upon protecting workers who raise safety concerns through various measures including by enabling workers to sue their employers for any discrimination arising from the worker raising a safety concern. The worker will have one year after becoming aware of alleged discrimination to apply to the Magistrates Court, where the employer will bear the onus of proving they did not discriminate.

Despite not controlling an outworker's workplace it is arguable that trader deemed employers could take steps to manage the system of work. Trader deemed employers could use the results of a risk assessment to ensure that the outworkers, for example, use sewing machines which have correct guards, ensure the workplace

[752] *McBride v The Queen* (1966) 115 CLR 44, 49-50; *Jiminiez v The Queen* (1992) 173 CLR 572, 579; these High Court of Australia cases concerned statutory culpable driving offences, however the principles are transferable for OHS offences.
[753] *Workcover Authority of New South Wales (Inspector Childs) v Kirk Group Holdings Pty Ltd & Anor* [2004] 135 IR 166, 209 (Vice-President Walton J).
[754] [2005] NSWIRComm 201.
[755] [2005] NSWIRComm 201, (79) (Staff J).

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, traders can make outworkers' workplaces safer. Williams analysed how employers can make workplaces safer.[756] Through providing comfortable safety equipment and information, employers can substantially increase the level of safety at workplaces. Similarly to employers, if traders ensured outworkers had guards on their machines, ergonomically sound work stations[757] or provided them with advice on safe lighting, ventilation,[758] protective clothing[759] and noise,[760] then traders would presumably improve outworkers' safety at work.

Research has indicated that despite outworkers working in dangerous working conditions, traders do not seek to manage the OHS risks faced by outworkers. This research found a large number of OHS concerns with outworkers' work stations and with the inadequacy of safety equipment. In separate reports, 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.[761] Some outworkers' work stations reportedly have electrical hazards. Hepworth found outworkers worked on poorly installed industrial machines, using inadequate domestic electric power sources.[762] The inadequacy of outworkers' work stations was aggravated by the overall work environment. The Commonwealth Senate

[756] Warwick Williams, *Barriers to Occupational Noise Management* (PhD Thesis, University of New South Wales, 2007).
[757] D Kisilak, D Golob and S Franc, 'Using the Ergonomic Principles in Workplace Design in Clothing Production' (2007) 47 *Sigurnost* 2, 117; J Nasel Saraji, S Mosavi, S Shahtaheri and M Pourmahabaclian, 'Surveying Risk Factors Featuring Upper Extremity Musculoskeletal Disorders by Ocra Method in a Textile Factory' (2005) 3 *Journal of School of Public Health & Institute of Public Health Research* 4.
[758] Zackary Berger, W Rom, J Reibman, M Kim, S Zhang, L Luo and George Friedman-Jimenez, 'Prevalence of Workplace Exacerbation of Asthma Symptoms in an Urban Working Population of Asthmatics' (2006) 48 *Journal of Occupational and Environmental Medicine*, 833 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; John Lange, Giuseppe Mastrangelo, Hugo Fedeli, Ragnar Rylander and 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; 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 E Christiani, 'Follow-up Study of Respiratory Health of Newly-hired Female Cotton Textile Workers' (2002) 41 *American Journal of Industrial Medicine* 2, 111.
[759] 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; 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.
[760] F Angrilli and V Cossalter, 'Noise of Rotating Yarn in Textile Machines' (1984) 22 *Noise Control Engineering Journal* 2, 48-52.
[761] Senate Economics References Committee, Parliament of Australia, *Outworkers in the Garment Industry* (1996) ch 3; *Pay Equity Inquiry* (1997) NSWIRC 6320.
[762] A Hepworth, 'Pink Collar Sweat Shops' Refractory Girl' (1994) *Australia, A Women's Studies Journal* 54.

Economic References Committee, Asian Women at Work, the New South Wales Pay Equity Review and Chang found outworkers work at work stations which had inadequate lighting.[763] This lighting was sufficiently poor to constitute an OHS risk. Sculland Nguyen found most outworkers surveyed indicated they had installed lighting they felt was adequate.[764] Whether the outworkers' lighting was in fact adequate in this study is uncertain, as there is no indication whether or not the outworkers were cognisant of lighting levels required by OHS laws.

The Commonwealth Senate Economic References Committee found some outworkers' work stations were excessively noisy.[765] In addition to lighting and noise concerns, Chang found outworkers' work stations had inadequate climate control which was sufficiently extreme to create an OHS concern.[766]

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.[767] Chang found outworkers involved with preparing products for sale wore inadequate protective clothing, and thus were exposed to bleaches and dyes.[768] As a consequence, many outworkers suffered from skin conditions, such as dermatitis. This research indicated traders continue to allow their outworkers and their outworkers' children to operate in dangerous work environments. None of these reports provided evidence that traders had taken proactive action to minimise the risks to outworkers' health and safety.

3.5.1.2 Provision of training

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[763] *Pay Equity Inquiry* (1997) NSWIRC 6320; Senate Economics References Committee, Parliament of Australia, *Outworkers in the Garment Industry* (1996) ch 3; Seaja Chang, *Seamstress: a Report on the Health Issues of Women Workers in the Textile, Clothing and Footwear Industries* (2000).

[763] *Pay Equity Inquiry* (1997) NSWIRC 6320; Senate Economics References Committee, Parliament of Australia, *Outworkers in the Garment Industry* (1996) ch 3; Seaja Chang, *Seamstress: a Report on the Health Issues of Women Workers in the Textile, Clothing and Footwear Industries* (2000).[763]

[764] Sue Scull, My-Linh Nguyen and Geoff Woolcock, *Vietnamese Outworkers in Queensland: Exploring the Issues*, University of Queensland , Report for the Queensland Department of Industrial Relations (2004) 54-55.

[765] Senate Economics References Committee, Parliament of Australia, *Outworkers in the Garment Industry (*1996) ch 3.

[766] Seaja Chang, *Seamstress: a Report on the Health Issues of Women Workers in the Textile, Clothing and Footwear Industries* (2000).

[767] *Pay Equity Inquiry* (1997) NSWIRC 6320.

[768] Seaja Chang, *Seamstress: a Report on the Health Issues of Women Workers in the Textile, Clothing and Footwear Industries* (2000).

It is submitted that one of the easiest OHS risks to manage is outworkers' OHS training. While it may be difficult for traders to manage their outworkers' daily OHS risks, it is arguably relatively easy for a trader 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, traders 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 discharge their duties safely.[769] Traders cannot just rely upon outworkers' self-training or common sense. Employers must ensure employees have adequate training. For example, in *Workcover Authority of New South Wales v Claude Van Den Bruggen t/as Dolphin Antenna Service*, a self-employed person recruited an employee to assist with the installation of television antennas.[770] 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 on 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 employee's fatal injury.[771] The court held the employer was not entitled to rely upon its employee's common sense and limited training to conduct a risk assessment, and the OHS duty remained that of the employer.[772] As the employer did not discharge its OHS duty, the employer was liable.[773]

Even where the activity is obviously dangerous, if the employer has failed to train the employee, the employer will in most cases be liable. In *Paul Bradley Waltham v Cairns Synergy Electrical Pty Ltd*, the employee demonstrated a lack of common sense by walking on dangerously fragile and unsupported roofing.[774] Regardless of

[769] *Occupational Health and Safety Act 1989* (ACT) S 37; *Occupational Health and Safety Act 1991* (Cth) s 16(2)(e); *Occupational Health and Safety Act 2000* (NSW) s 8; *Occupational Health and Safety Act 2004* (Vic) s 21; *Occupational Health, Safety and Welfare Act 1986* (SA) s 19; *Occupational Health and Safety Act 1984* (WA) s 19(1)(b); *Workplace Health and Safety Act 1995* (Qld) s 29; *Workplace Health and Safety Act 1995* (Tas) s 9; *Workplace Health and Safety Act 2007* (NT) s 57(1)(b).
[770] *Workcover Authority of New South Wales (Inspector Mayell) v Claude Van Den Bruggen t/as Dolphin Antenna Service* [2007] NSWIRComm 193.
[771] [2007] NSWIRComm 193, (38), (39).
[772] [2007] NSWIRComm 193, (44) (Staunton J).
[773] For another case where an employer's failure to train an employee resulted in a fatility and an employer being prosecuted see: *Inspector Davidson v St Mary's Tyre Service (NSW) Pty Ltd* [2008] NSWIRComm 226.
[774] *Paul Bradley Waltham v Cairns Synergy Electrical Pty Ltd* [2007] QIC 19.

the employee's conduct, the employer had not provided the employee training or adequate supervision. President Hall held that the duty of employers is to ensure their employees' OHS. The employer's 'obligation is not discharged by engaging experienced staff and trusting them to care for themselves'.[775] Even though the employee was found to be blameworthy, as the employer had failed in its OHS duty, the blameworthiness of the employee was immaterial to the guilt of the employer.[776] 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.[777] Employees in the manufacturing industry require training in, inter alia, ergonomics, the correct use of machines and of lifting materials. An example of how OHS risks can arise occurred in *Inspector Hopkins v Byron McIntyre D & R Henderson Pty* Ltd.[778] In this case, an employer had not instructed the employee in the correct way to make alterations to the machine. The employee was adjusting a machine with an automatic cutting device. Due to the incorrect approach, his finger was amputated. The employer had argued it had a guard in place and it was unaware employees had breached its policy by removing it. The court held the employer should have been more proactive in determining the safety of its machines and was convicted.

Where the employees' 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 out of a washing machine.[779] The basket weighed approximately 30 kilograms. The employer had provided the employee no instruction on the correct lifting technique. The employee suffered a back injury. The employer pleaded guilty and was fined.

Research has shown that traders often do not provide outworkers sufficient training. Most participating outworkers in a New South Wales Pay Inquiry alleged they had

[288] Ibid.
[775] [2007] QIC 19, (289).
[776] Ibid.
[777] *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 ACR Roofing Pty Ltd* [2004] VSCA 215; *Wesche v Vancrete Pty Ltd* [2005] QIC 6.
[778] *Inspector Hopkins v Byron Mcintyre* [2003] NSWCIMC 86.
[779] [2002] NSW Industrial Magistrates Court, (Unreported, 21 May 2002).

no initial or ongoing training.[780] 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.[781] Scull, Nguyen and Woolcock did not report on any traders who had provided their outworkers OHS training.

As outworkers work from their domestic premises, there is a real threat that children may enter the workplace or become involved in outworking operations. Despite this threat, traders are reported to provide no training to parents or to children of outworkers about how to manage workplace risks. While Scull, Nguyen and Woolcock found contradictory evidence as to whether or not children were involved in outworking operations,[782] 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.[783]

The Commonwealth Report recounted a TCFUA case study where an 8 year old boy was found to be helping his outworker mother to keep up with the demand.[784] The New South Wales Industrial Relations Commission's Pay Equity Inquiry heard evidence that 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.[785] The New South Wales Briefing Paper concluded that one of the most undesirable results of outworking was unpaid child labour.[786] The Victorian government concluded that the involvement of children in the outworking industry is

[780] *Pay Equity Inquiry* (1997) NSWIRC 6320.
[781] Sue Scull, My-Linh Nguyen and Geoff Woolcock, *Vietnamese Outworkers in Queensland: Exploring the Issues*, University of Queensland, Report for the Queensland Department of Industrial Relations (2004) 42.
[782] Ibid 31.
[783] Senate Economics References Committee, Parliament of Australia, *Outworkers in the Garment Industry* (1996) 55.
[784] Ibid, see generally ch 4.
[785] *Pay Equity Inquiry* [1998] NSWIRComm 205.
[786] Roza Lozusic, *Outworkers* (New South Wales Parliament Briefing Paper, 2002).

common.[787] The report provided an example of an 11 year old Victorian girl who worked 3 to 5 hours on every school day, and all day on weekends ironing the facings, sewing simple hems and general sewing using a sewing machine.[788] The evidence indicates that while children are not involved in every outworking operation, the fact that there is an estimated 329 000 outworkers in Australia means 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 without their safety being regulated.

3.6 Conclusion

Australian based supply chains may outsource manufacturing work to workplaces in Australia or foreign jurisdictions. Due to the mobility of supply chains as described in chapters 1.1 and 1.3 above to assess if Australia is discharging its obligation to protect workers' right to safety and health it is essential to analyse hard law protections in both Australia and foreign workplaces. This chapter has focused on the domestic safety protection afforded to one of the most vulnerable parties in the Australian clothing manufacturing industry: outworkers. To ensure workers' right to safety and health, chapter 2.4.1 argued that Australia has a moral obligation to take reasonably practical steps to impose OHS duties upon parties who can impact on outworkers' safety and to enforce sanctions against a breach of those duties. This chapter concludes that Australia is largely discharging its duty to impose OHS duties upon parties who can impact on outworkers' safety; however, more could be done to ensure all States within Australia provide express protection. While Australia is largely compliant on the imposition of OHS duties, in respect of enforcement, Australia has a poor record of ensuring these OHS duties are enforced.

This chapter analysed Australian OHS laws, protection of outworkers in four parts. The first part of this chapter considered the operation of general duties under Australian OHS laws. OHS laws are the major vehicle used by Australia to ensure workplace health and safety. Despite the importance of OHS, traditionally outworkers have received virtually no OHS protection. Legislative reforms in a

[787] Victorian Government, *Children Work? The Protection of Children Engaged in Work Activities: Policy Challenges and Choices for Victoria*' Issues Paper (2001) 13-27.
[788] Ibid, case study 2.

majority of Australian jurisdictions have created a deemed employment relationship between traders and outworkers in order to improve the regulatory protection of outworkers. As explored in part two these reforms have only improved the OHS protections of outworkers in Victoria. While some limited protection is afforded to outworkers in the Australian Capital Territory and that a wide reading of other OHS duty provisions may provide outworkers some protection, it is arguable that most jurisdictions in Australia provide outworkers no OHS protections.

The third part of this chapter analysed how OHS laws are enforced in Australia. Even if outworkers received OHS protection in Australia there is likely to remain problems with enforcement under the current regime. The final part of this chapter reviewed primary research and demonstrated that outworkers in Australia are not enjoying their right to safety and health.

CHAPTER 4

4 How do Chinese Occupational Health and Safety laws protect workers in Special Economic Zones?

4.1 Introduction

This part develops the core focus of this thesis by analysing workplace health and safety of workers in Chinese factories working at the bottom of Australian based supply chains. This thesis judges Australia's conduct against the criteria as posited above in chapter 2.4.4. As the People's Republic of China (**China**) is a sovereign State, Australia has no jurisdiction to alter directly Chinese labour laws or their enforcement. Australia can, however, regulate how corporations subject to Australia's jurisdictions conduct their affairs. Chapter 2.4.3 explained how the complicity principle imposes an obligation upon corporations to ensure human rights are respected within their spheres of influence. Chapter 1.3.1 explained that the export of products from Chinese factories is often dominated by massive Asian corporations. As a result, many Australian corporations may not be in a position to force Chinese factories to agree to factory inspections and social audits. As a consequence, many Australian corporations may have limited information to enable them to determine whether or not products they are supplied are made in sweatshops. Where a corporation in Australia is aware of reliable information that indicates that their suppliers may operate sweatshops, then the Australian corporation has a moral obligation to attempt either to verify the allegations or seek to source the products from an alternative supplier. According to this reasoning, Australian corporations' obligations under the complicity principle is enlivened when they have actual or constructive knowledge that factories they source products are likely to be breaching their workers' right to safety and health. This chapter will therefore focus upon demonstrating that factories in Special Economic Zones (**SEZ**) have such a notorious reputation that Australian corporations who purchase products from such factories should be aware that there is a reasonably high prospect that they may be purchasing

sweated products. This part develops the core focus of this thesis by establishing a regulatory gap in the safety afforded to Chinese based workers in Australian supply chains. Subsequent chapters will analyse soft law and hard law vehicles to identify possible responses to improve the OHS of workers in Chinese SEZs.

This chapter will be divided into three parts. The first part will briefly consider what OHS duties are imposed upon Chinese enterprises. Rather than focusing in detail on the potential problems associated with how these duties are imposed, this part will analyse the difference between workers' legal protections and the enforcement of those laws.

The second part explores the contrast between laws which regulate Chinese workplace conditions and laws which established SEZs. While Chinese labour laws were generally created for purposes which include the protection of workers' safety, SEZs were established with the purpose of attracting investment by reducing the application of Chinese laws generally, which included the reduction of labour laws.[789] Part three will analyse existing primary research to determine the level of OHS safety violations occurring in SEZs. This chapter will consider whether Australian corporations which source products from Chinese SEZ can be held to have constructive knowledge that there is a reasonably high risk that those factories maybe violating their workers' human rights.

4.2 OHS in China generally

China's first OHS statute was proclaimed within a few years of the foundation of the People's Republic of China.[790] Initially, the *Common Program of the Chinese People's Political Consultative Conference 1949* (PRC)[791] and the subsequent *People's Republic of China Constitution 1954 (PRC)* both provided limited OHS

[789] The focus of Chinese public policies has altered from focusing upon Communism to focusing upon profit maximisation: Carsten Holz, 'The Impact of Competition and Labor Remuneration on Profitability in China's State-owned Enterprises' (2002) 11 *Journal of Contemporary China* 32, 515; Antoine Kernen, 'State Employees Face an Uncertain Future: the Predicament in North-East China' (2002) 40 *China Perspectives* 21; Dorothy Solinger, 'Labour Market Reform and the Plight of the Laid-off Proletariat' (2002) 170 *China Quarterly* 304.
[790] Liu Chaojie and Fu Gui, 'A Review of Occupational Health and Safety Legislation in China' (2006) 57 *Labor Law Journal* 4, 238.
[791] *Common Program of the Chinese People's Political Consultative Conference 1949* (PRC) Art 32.

protection to Chinese workers.[792] China's first comprehensive industrial relations law was the *Labour Law of the People's Republic of China 1994* (PRC) which commenced on 1 January 1995.[793] This law required all employers to comply with minimum standards.[794] This law introduced increased OHS standards for construction projects and hazardous jobs.[795] The only safety provision which is substantially relevant to the safety at work of textile and apparel manufacturing employees is the restriction on working hours. Article 36 of the *Labour Law of the People's Republic of China 1994* (PRC) states no Chinese worker shall work more than 8 hours per day and no worker shall work on average more than 44 hours per week. Working hours have been recognized as a crucial safety issue.[796] If workers work excessively long hours and become fatigued, then the risk of an accident is drastically increased. Where employees are operating machines, the threat of fatigue is magnified. An employee who is fatigued can suffer micro-sleeps. Micro-sleeps occur when employees are fatigued and result in periods of sleep which last between one and five seconds.[797] If the employee is operating moving machinery a five second period of inattention could result in a substantial accident.

If an employer does not comply with the minimal OHS provisions of *the Labour Law of the People's Republic of China 1994* (PRC), then art 56 entitles workers to refuse to perform the work. Article 25, however, enables employers to dismiss workers if they breach any work rule, so in effect, employers can find an alternative ground to dismiss an undesirable worker. Where an employer breaches any of the safety provisions in the *Labour Law of the People's Republic of China 1994* (PRC), the governments above the county level are charged with enforcing the law.[798] While the *Law of the People's Republic of China 1994* (PRC) can provide workers some

[792] *People's Republic of China Constitution 1954* (PRC) Art 91.
[793] Yunqiu Zhang, 'Law and Labour in Post-Mao China' (2005) 14 *Journal of Contemporary China* 44, 525.
Labour Law of the People's Republic of China 1994 (PRC) Art 2.
[795] *Labour Law of the People's Republic of China 1994* (PRC) Arts 53 and 54.
[796] William Atkinson, 'Employee Fatigue: the New Epidemic' (2000) 41 *Transportation & Distribution* 10, 81; Josh Cable, 'Managing the Body's Time Clock in the 24-7 Economy' (2005) 67 *Occupational Hazards* 12, 28; ILO Sectoral Activities Programme, *The Evolution of Employment, Working Time and Training in the Mining Industry*' (Report for discussion at the Tripartite Meeting on the Evolution of Employment, Working Time and Training in the Mining Industry, Geneva, October 2002); Sean Kilcarr, 'The Silent Killer' (2002) 97 *Fleet Owner* 2, 48; A F Merry and G R Warman, 'Fatigue and the Anaesthetist' (2006) 34 *Anaesthesia and Intensive Care* 5, 577; Mark Sabourin, 'Sleeping on the Job' (1998) 14 *OH & S Canada* 4, 32; Nancy J. Wesensten, 'Effects of Modafinil on Cognitive Performance and Alertness during Sleep Deprivation' (2006) 12 *Current Pharmaceutical Design* 20, 2457; Drugs may provide some temporary relief to fatigue but sleep is the only option to recover from fatigue: Uri Eliyahu, Shai Berlin, Eran Hadad, Yuval Heled and Daniel S Moran, 'Psychostimulants and Military Operations' (2007) 172 *Military Medicine* 4, 383.
[797] Nancy J. Wesensten, 'Effects of Modafinil on Cognitive Performance and Alertness during Sleep Deprivation' (2006) 12 *Current Pharmaceutical Design* 20, 2457.
[798] *Labour Law of the People's Republic of China 1994* (PRC) Arts 85 and 86.

OHS protections, ultimately this is not a specific OHS statute but a general industrial relations statute.

After 21 years of drafting, China introduced its first specialised OHS law in the *Law of the People's Republic of China on Work Safety 2002* (PRC).[799] This law commenced on 1 November 2002 and arguably represented an important step in workplace health and safety in China. This legislation binds all people engaged in production and operations within China.[800] China has subsequently introduced specialised occupational safety laws for the production of dangerous chemicals,[801] coal mines,[802] construction,[803] offshore petroleum operations[804] and fireworks and firecrackers for private use.[805] As no specialised OHS laws have been promulgated for textile and apparel manufacturing, enterprises in these industries are regulated by the *Law of the People's Republic of China on Work Safety 2002* (PRC).

Articles 3 and 17 of the *Law of the People's Republic of China on Work Safety 2002 (PRC)* impose a general duty upon production and operation units to ensure work safety. It is submitted that on paper, the articles of the *Law of the People's Republic of China on Work Safety 2002* (PRC) reflect ILO standards as explained in chapter 2.4.1 of this thesis. Article 17 requires the person in charge of the production and operation units to develop safety policies, to guarantee these policies are implemented and to proactively seek out and eliminate risks to workplace health and safety. To increase safety at the workplace production and operation units must provide safety training to managers and workers.[806]

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[799] Art 97 prescribed the commencement date; for general discussion of the introduction of this law see: Liu Chaojie and Fu Gui, 'A Review of Occupational Health and Safety Legislation in China' (2006) 57 *Labor Law Journal* 4, 238.
[800] the *Law of the People's Republic of China on Work Safety 2002* (PRC) Art 2.
[801] *Implementing Measures of the Production Safety Permit System for Dangerous Chemicals Manufacturing Enterprises 2004* (China State Administration of Work Safety and the State Administration for Coal Mine Safety Supervision); Notice on Issuing *Guidelines on Safety Evaluation of Manufacturing Enterprises of Dangerous Chemicals (Trial Implementation)* 2004 (China State Administration of Work Safety).
[802] Art 1 of the *Implementation of Economic Penalties relating to Illegal Behaviors against Work Safety 2003* (China State Administration of Work Safety and the State Administration of Coal Mine Safety) limits this regulation to coal mines.
[803] *Interim Provisions on Administration of Use of Personal Labour Protection Articles for Construction Workers 2007* (China Ministry of Construction); *Several Opinions on Accelerating Development and Reform of Construction Industry 2005* (China Ministry of Construction; National Development and Reform Commission; Ministry of Finance; Ministry of Labour and Social Security; Ministry of Commerce; State-owned Assets Supervision and Administration Commission of the State Council).
[804] *Provisions on Offshore Petroleum Work Safety 2006* (State Administration of Work Safety).
[805] Art 2 of the *Regulations on Work Safety License 2004* (China State Council) expands the licensing system to enterprises engaged in mining, construction and production of dangerous chemicals, fireworks and firecrackers for personal use.
[806] *Law of the People's Republic of China on Work Safety 2002* (PRC) Arts 20 and 21.

Production and operation units have extensive obligations in regards to managing risks caused by systems and machinery. Firstly, production and operation units are required to place conspicuous safety warnings wherever there are serious potential hazards.[807] Production and operation units also have an obligation to provide their workers with safety equipment which meets prescribed standards, and to train workers in the use of such equipment.[808] Production and operation units must periodically check for operational safety, records must be kept and obsolete equipment must be scrapped.[809] When a new system is introduced, then the risks must be identified, managed and training performed.[810] Even where the workplace has not altered, people in charge of production and operation units have an obligation to periodically perform safety audits, to reduce health risks and keep records of this process.[811]

Overall, the *Law of the People's Republic of China on Work Safety 2002* (PRC) purports to recognise workers' safety at work as a right.[812] If production and operation units fail to ensure their workers' safety, then arts 46 and 47 empower workers to refuse to perform unsafe work and production and operation units are prohibited from penalizing workers who raise safety concerns. Workers who raise safety concerns are protected against vilification and from any economic loss as a result of raising safety concerns. The ability of workers to stop work due to safety concerns was provided additional support when the Chinese government posited the *regulation for the implementation of Labor Contract Law of China 2008* (PRC). Article 18(12 of the *regulation for the implementation of Labor Contract Law of China 2008* (PRC) provides that workers can lawfully dissolve employment contracts where their 'employer gives orders in violation of the safety regulations or forces the worker to risk [their] … life'. Despite this legal protection Balzano argued that 'in actuality, however, little relief has been afforded to workers, who decide to use the civil law to solve their problems'. Instead, a worker who sues may not only

[807] *Law of the People's Republic of China on Work Safety 2002* (PRC) Art 28.
[808] *Law of the People's Republic of China on Work Safety 2002* (PRC) Art 37.
[809] *Law of the People's Republic of China on Work Safety 2002* (PRC) Art 29.
Law of the People's Republic of China on Work Safety 2002 (PRC) Art 22; see also *regulation for the implementation of Labor Contract Law of China 2008* (PRC) Art 16.
[811] *Law of the People's Republic of China on Work Safety 2002* (PRC) Art 38.
[812] *Law of the People's Republic of China on Work Safety 2002* (PRC) Art 6.

lose the suit, but may also lose her job or face retribution from her employer'.[813] This arguably reflects the most substantial problem with Chinese labour laws: Enforcement.

Where production and operation units fail to discharge their obligations under the *Law of the People's Republic of China on Work Safety 2002* (PRC) Arts 9 and 13 of that Act charge the State Council's administrative department in charge of work safety and regional councils with enforcing the laws through punitive sanctions.[814]

Arguably, the major problem with Chinese OHS laws is that they are not enforced effectively.[815] While local governments are charged with enforcing OHS laws, the number of inspectors to enforce labour laws is inadequate to the task. There are over 3000 inspectorates with over 45 000 inspectors charged with inspecting over 3 000 000 enterprises.[816] Cooney observes that the '[t]he quantity of labour inspectors may well be inadequate to implement the law systematically across the country.'[817] Zhong-bin and Qin-yun have argued that China lacks a comprehensive plan to enforce labour laws and the fragmented and disorganized approach of thousands of inspectorates is resulting in extremely poor enforcement of labour laws.[818]

Authors have criticized the detail of China's OHS laws.[819] While this analysis is valuable this chapter argues that reforming the existing protections will not achieve substantive results unless OHS laws are enforced. This chapter will analyse and critique the extent to which Chinese OHS laws are under-enforced. It is asubmitted that one of the main reasons Chinese OHS laws are poorly enforced is due to the economic focus of these OHS laws. The fact Chinese labour laws in China were

[813] John Balzano, 'Criminal Liability for Labour Safety Violations in the People's Republic of China' (2004) 3 *Washington University Global Studies Law Review* 503, 510.
[814] Similar to OHS other labour conditions are enforced by labor administrative departments of the local people's governments at or above the county level: see for example *regulation for the implementation of Labor Contract Law of China 2008 (PRC) A*rt 36.
[815] Gu Xinxin, 'On Improvement of China's Labor and Social Security Legal System' (2006) 26 *Journal of Yancheng Teachers College (Humanities, Social Sciences)* 6, 20.
[816] Zhongguo Falu Nianjian, *Law Yearbook of China* (2003) 45; Toshiki Kanamori and Zhijun Zhao, *Private Sector Development in the People's Republic of China* (Asian Dev Bank Inst, Report, 2004) 24; both cited in Sean Cooney, 'Making Chinese Labor Law Work: the Prospects for Regulatory Innovation in the People's Republic of China' (2007) 30 *Fordham International Law Journal* 1050, 1066.
[817] Sean Cooney, 'Making Chinese Labor Law Work: the Prospects for Regulatory Innovation in the People's Republic of China' (2007) 30 *Fordham International Law Journal* 1050, 1066.
[818] Zhang Zhong-bin and Sun Qin-yun, 'Analysis of Laws, Regulations and Standards in Area of Occupational Health' (2007)3 *China Academy of Safet,y Science and Technology* 4, 55.
[819] Liu Fang, 'International Labor Standards and China's Related Legislation Comparative Study' (2007) 34 *Science and Technology for Development* 67.

largely implemented to satisfy European and American governments' demands and were not primarily introduced with the intent to protect Chinese workers. *The Law of the People's Republic of China on Work Safety 2002* (PRC) has followed a trend in China of regarding workers' workplace health and safety as important, inter alia, as this can improve economic growth:

> This Law is hereby enacted in order to strengthen supervision over work safety, to prevent and reduce work safety accidents, to guarantee people's life and property safety, and to hasten the economic development.[820]

While art 39 of the *Law of the People's Republic of China on Work Safety 2002* (PRC) specifically requires production and operation units to fund adequately safety training and physical protection, the blending of safety and economic considerations has reportedly resulted in confusion over whether economic interests or safety concerns take priority.

Chinese culture places a high priority on life,[821] however Chinese culture also provides that community harmony and benefits take priority over individual interests.[822] As a consequence, the communal interest of economic development appears to take priority over workers' right to safety and health. This economic focus of Chinese OHS laws has been identified as a substantial barrier to the enforcement of Chinese labour laws.[823] Bin-Xin has explored the debate in China whether workers' right to safety and health should be conceived as an individual right or whether the right to safety and health should be supported because it increases overall productivity.[824]

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[820] *Law of the People's Republic of China on Work Safety 2002* (PRC) Art 1.

[821] Russell Kirkland, 'Enhancing Life? Perspectives from Traditional Chinese Value-systems' (2008) 36 *Journal of Law,Medicine & Ethics* 1, 26.

[822] Perry Keller (ed), *Chinese Law and Legal Theory* (2000) ch 6, 14; Andrew Nathan, 'Sources of Chinese Rights Thinking' in Randle Edwards, Louis Henkin & Andrew J. Nathan (eds), *Human Rights in Contemporary China* (1986) 125-64; Randall P. Peerenboom, 'What's Wrong with Chinese Rights?: Toward a Theory of Rights with Chinese Characteristics' (1993) 6 *Harvard Human Rights Journal* 29.

[823] Leong Liew, 'What Is To Be Done? WTO, Globalisation and State-Labour Relations in China' (2001) 47 *Australian Journal of Politics and History* 1, 39; Eng Chen, 'Between the State and the Labour: the Conflict of Chinese Trade Unions' Double Identity in Market Reform' (2003) 176 *The China Quarterly* 1006; Niklas Egels-Zande, 'Suppliers' Compliance with MMNC's Code of Conduct: Behind the scenes of Chinese Toy Suppliers' (2007) 75 *Journal of Business Ethics* 45.

[824] Sun Bing-Xin, 'Value Perspective on the Rights of Occupational Safety' (2007) 21 *China Contemporary Law Review* 5, 125.

The debate continues in China whether national economic interests or individual safety should take priority.[825] Chaojie and Gui claim that the idea that safe workplaces will enable enterprises to increase their profitability is a dangerous presumption to put in statute.[826] They report that some regional councils have interpreted the legislation's overall purpose is to maximise profits and accordingly, some regional councils have focused on economic growth rather than safety. In a highly competitive environment, every enterprise is pressured to keep its production costs low and each regional council is pressured to attract manufacturing contracts In these circumstances, it is not surprising that regional councils are biased in favour of production and operation units[827] and do not rigorously enforce labour laws.[828]

If Chinese public agencies fail to ensure workers' right to safety and health, are trade unions more effective at protecting this right? Where regional councils fail to enforce labour laws and employers order workers to work in unsafe conditions, then trade unions have little power to intervene. Even where the State-controlled union attempts to advocate for workers' interests, union officials may only request the production or operation units to stop work, but the union cannot interfere with the unit's prerogative to order workers to work in dangerous conditions.[829] Cooney observes:

> As for industrial sanctions, there is no right to strike in China, even when there is a life-endangering hazard in the enterprise.[830]

Without regulatory protections, workers are effectively forced to rely upon their own bargaining power to ensure they are not forced to work in unsafe working conditions.

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[825] In other areas, individual rights have been substantially suppressed to ensure national economic goals: Martha M. Hopkins, 'Olympic Ideal Demolished: How Forced Evictions in China Related to the 2008 Olympic Games Are Violating International Law' (2006) 26 *Houston Journal of International Law* 155.
[826] Liu Chaojie and Fu Gui, 'A Review of Occupational Health and Safety Legislation in China' (2006) 57 *Labor Law Journal* 4, 238.
[827] Aaron Halegua, 'Getting Paid: Processing the Labor Disputes of China's Migrant Workers' (2008) 26 *Berkeley Journal of International Law* 1, 254, 266.
[828] John Balzano, 'Criminal Liability for Labour Safety Violations in the People's Republic of China' (2004) 3 *Washington University Global Studies Law Review* 503, 510; Joseph A. Petrick and Foster C. Rinefort, 'The Challenge of Managing China's Workplace health and safety' (2004) 109 *Business and Society Review* 171.
[829] Art 24 of the *Trade Union Law* PRC).
[830] Sean Cooney, 'Making Chinese Labor Law Work: the Prospects for Regulatory Innovation in the People's Republic of China' (2007) 30 *Fordham International Law Journal* 1050, 1074.

Workers in China are not lawfully allowed to collectivise.[831] Pursuant to Chinese laws, there are no independent trade unions. Workers who have attempted to form unions have been beaten, murdered and imprisoned by the Chinese government. Even where western multinational corporations have attempted to enable workers to collectivise, this has made virtually no practical difference to workers . For example, Yu found even though Reebok had required its supplier factories in China to introduce worker representation, the unions which were introduced were controlled by management and banned from taking any confrontational industrial action by Chinese laws.[832] As a consequence, these trade unions did not afford workers any independent representation.

Without collectivisation, each worker must bargain independently with factory managers. Often, workers are employed on consecutive short-term contracts which provide workers no stability and enable employers to terminate workers at will.[833] If an individual worker refuses work or complains, then production or operation units are in a position to dismiss the worker, withhold wages and easily replace the worker. Cooney observes:

> China's extraordinary economic success is marred by widespread labour abuses, epitomized by the manufacturing sweatshop staffed by ill-treated workers migrating from China's hinterland. [834]

4.3 OHS in Special Economic Zones

The problems with the enforcement of Chinese labour laws are magnified in China's SEZ. SEZs are regions which are established to facilitate cheap and tax free export of products from the host State to foreign States. Every product produced in the SEZ must be exported outside China or is subject to special taxes to be transported outside

[831] See this thesis, chapter 2 .3.6.1.
[832] 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) 176-185.
[833] Charles Kernaghan, Jonathann, Giammarco, Barbara Briggs, Alexandra Hallock and Tomas Donoso, *Thomas & Friends Goes to China* (National Labor Committee (USA), Report, 2007) 3.
[834] Sean Cooney, 'Making Chinese Labor Law Work: the Prospects for Regulatory Innovation in the People's Republic of China' (2007) 30 *Fordham International Law Journal* 1050, 1054.

the Zone into China.[835] Where Chinese labour laws were generally established with the purported intent to increase workers' rights at work, SEZs were established with the express intent of reducing workers' labour rights in order to reduce the costs of production. This means SEZs were established with the express intent of providing an industrial environment where production and operation units could abuse workers' human rights to enable employers to increase their competitive edge.[836]

The reduction in labour conditions is intended to reduce the costs of production and increase foreign investments into the host State.[837] If a State has a large pool of unemployed workers and the State cannot provide these workers' support, SEZs can stimulate economic development.[838] While SEZs may have been justifiable in a State which had a large excess labour pool that the host State could not provide sustenance for, SEZs cannot be justified in a wealthy State. Prior to the development of SEZs, China was under-developed. Following the introduction of SEZs, China has attracted substantial investments.[839] China is now the dominate State in the world for manufacturing of textiles and apparel.[840] China has extremely large factory runs, expertise in rapid turn around, and is regarded as the market leader in mass production lines.[841] Arguably, China continues to operate SEZs, not to stimulate foreign investment in China, but to keep production costs unnaturally low by exploiting certain groups of workers' human rights. Rather than rejecting this claim, officials and employers who exploit workers argue that if they do not unnaturally keep costs low then they will lose contracts to factories which are prepared to abuse workers' rights.[842]

The intermingling of economic concerns with labour rights is one of the major problems in the enforcement of labour laws in SEZs. There is a large number of

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[835] *Regulations on Special Economic Zones in Guangdong Province 1980* (PRC) Art 9.
[836] ILO, *Labour and Social Issues Relating to Export Processing Zones* (Report for discussion at the Tripartite Meeting of Export Processing Zones-Operating Countries, Geneva, 1998).
[837] Madani Dorsati, *A Review of the Role and Impact of Export Processing Zones* (World Bank Report, 1998).
[838] Mauricio Jenkins, *Export Processing Zones in Developing Economies: Theoretical and Empirical Considerations* (PhD Thesis, Brandeis University, 2002), 1.
[839] Wei Ge, *Special Economic Zones and the Economic Transition in China* (1999) 109-140; Jung-Dong Park, *The Special Economic Zones of China and Their Impact on Its Economic Development* (1997) 165-178; Weiping Wu, *Pioneering Economic Reform through Promoting Foreign Investment in China's Special Economic Zones* (PhD Thesis, Rutgers, The State University of New Jersey 1996) ch1.
908 Jonathan Story, 'China: Workshop of the World?' (2005) 3 *Journal of Chinese Economic and Business Studies* 2, 95.
[841] Ibid.
[842] Tim Connor and Kelly Dent, *Offside! Labour Rights and Sportswear Production in Asia* (2006) Oxfam Australia, 4.

SEZs established across China. This part will examine the regulatory framework for the Shenzhen and Guangdong SEZs. The Shenzhen SEZ was one of China's first SEZs and continues to attract substantial foreign investments.[843] The Guangdong SEZ is one of the largest and economically most substantial SEZs in China.[844] The Shenzhen and Guangdong SEZs were created to encourage foreign and internal investment to build factories in the SEZ.[845] Factories in the SEZs are required by law to comply with Chinese labour laws.[846] Laws in the SEZ are, however, enforced in Shenzhen by the Labour Administration Departments of the Municipal People's Government or the District People's Government of Shenzhen, and in Guangdong by the Guangdong Provincial Committee for the Administration of Special Economic Zones.[847] If a SEZ regional council enforced labour laws strictly, then it is probable that factories in that SEZ would lose production contracts to other SEZs.

SEZ regional councils have very little incentive to enforce labour rights.[848] As China is not a democracy, workers in SEZs cannot vote in a different administration. Furthermore, a cultural divide has developed between workers and factory management and SEZ officials.[849]

When SEZs were established, factories in these zones targeted internal migrants who had no other employment opportunities.[850] Quickly, a class divide was established between the urban-based management class and the internal migrant worker class.[851] Cooney claims this social stratification has resulted in the establishment of

[843] *Regulations of Shenzhen Special Economic Zone on Laborers 1993* (PRC) replaced *Regulations of Shenzhen Special Economic Zone on Laborers 1988* (PRC); Haishan Liu, *China's Special Economic Zones: From Shenzhen to Shanghai: a New Path to Industrialization, Urbanization, Globalization andMmodernization* (PhD Thesis, New School University, 2005); Yihong Jiang, *Analyzing Urban Competitiveness of Chinese Cities* (PhD Thesis, University of Hong Kong, 2007).

[844] 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) 145.

[845] *Regulations of Shenzhen Special Economic Zone on Laborers 1993* (PRC) Art 1; *Regulations on Special Economic Zones in Guangdong Province 1980* (PRC) Art 1.

[846] *Regulations of Shenzhen Special Economic Zone on Laborers 1993* (PRC) Art 7; *Regulations on Special Economic Zones in Guangdong Province 1980* (PRC) Art 2.

[847] *Regulations of Shenzhen Special Economic Zone on Laborers 1993* (PRC) Art 9; *Regulations on Special Economic Zones in Guangdong Province 1980* (PRC) Art 23.

[848] Anita Chan and Hongzen Wang, 'The Impact of the State on Workers' Conditions: Comparing Taiwanese Factories in China and Vietnam' (2004) 77 *Pacific Affairs* 4, 629.

[849] Jaesok Kim, *The Cultural Encounters in a Chinese Sweatshop: Transnational Movement of South Korean Enterprises and the Creation of Borderland Factory Regime* (PhD Thesis, Harvard University, 2007); Pun, 'Women Workers and Precarious Employment in Shenzhen Special Economic Zone, China' (2004) 12 *Gender and Development* 2.

[850] Marina Thorborg, 'Where Have All the Young Girls Gone, Chinese Fatal Daughter Discrimination in a Comparative Perspective' (2005) 56 *China Perspectives.*

[851] Xiangming Chen, *Some Social Aspects of China's Special Economic Zones as a Development Strategy: Capitalist Means to Socialism*' (PhD Thesis, Duke University, 1988).

substantial social prejudices.[852] The Chinese government quickly moved to formalize this internal discrimination.[853] China developed a system to control the movement of internal workers. This meant people who wished to move from the country to work in the city were forced to obtain a permit.[854] Without this permit on them at all times, the internal migrant could be arrested by the police and deported back to the country. Employers in China were reported to have held internal migrants' travel permits and wages to ensure their workers do not leave their work. Under this arrangement, if a worker left the factory's premises, then the worker ran the risk of losing their job, their back wages and being deported. Workers in such a situation had limited capacity to leave their job, no matter how dangerous the working conditions. Chan's research into the Chinese footwear industry indicates the widespread use of the permit system to exploit workers in 'poorly ventilated' workplaces, with toxic glues, 'where workers are provided with neither gloves nor masks'.[855] In addition to her own research, Chan cites a letter from over 20 workers to a Chinese government-controlled trade union newspaper, in which workers explain their appalling working conditions. Prior to publication, the letter's accusations were investigated by the Chinese government officials who found them accurate and permitted the letter's publication:

> Dear Comrade Editor:
>
> We are staff and workers of Guangdong's Zhaojie Footwear Company. The company docks our pay, deducts and keeps our deposits, beats, abuses, and humiliates us at will.
>
> Zhaojie Company is a joint venture. It sends people to Sichuan, Henan, and Hunan Provinces to recruit workers. Even children under 16 are their targets.
>
> Those of us who came from outside the province only knew we had been cheated after getting here. The reality is completely different from what we were told by the recruiter. Now even though we want to leave, we cannot because they would

[852] Sean Cooney, *Improving Regulatory Strategies for Dealing with Endemic Labour Abuses* (SJD, Columbia University, 2005), 247-253.
[853] This permit system has subsequently been partially repealed.
[854] Ho kou or Registered Permanent Residence.
[855] Anita Chan, 'Labour Standards and Human Rights: the Case of Chinese Workers under Market Socialism' (1998) 20 *Human Rights Quarterly* 886, 897.

> not give us back our deposit and our temporary residential permit, and have not been giving us our wages. This footwear company has hired over 100 live-in security guards, and has even set up teams to patrol the factory. The staff and workers could not escape even if they had wings. The only way to get out of the factory grounds is to persuade the officer in charge of issuing leave permits to let you go. A Henan worker wanted to resign but was not allowed to by the officer. So he climbed over the wall to escape, but was crushed to death by a passing train. Although it means forfeiting the deposit and wages and losing their temporary residential permits, each year about 1,000 workers somehow leave this place.
>
> Being beaten and abused are everyday occurrences, and other punishments include being made to stand on a stool for everyone to see, to stand facing the wall to reflect on your mistakes, or being made to crouch in a bent knee position.
>
> The staff and workers often have to work from 7 a.m. to midnight. Many have fallen sick. ... It is not easy even to get permission for a drink of water during working hours.
>
> Signed.[856]

Chan claims this letter 'embodies most kinds of labour rights violations that' commonly occur in Chinese factories.[857] Abuse, OHS violations and suppression of workers occurs in factories across China, despite who owns the factory. Zhao Minghua and Theo Nichols provide details of abuse against workers in Chinese government-owned and operated factories.[858]

Migrant workers are seen as outsiders, do not always speak the local language, and have limited knowledge of the local legal system and/or limited protection by the legal system. Chan explores the exploitation suffered by Chinese workers in export processing zones. She explores the OHS issues faced by Chinese workers, including a prohibition on drinking and going to the toilet, public humiliation and

[856] Ibid.
[857] Ibid.
[858] Zhao Minghua and Theo Nichols, 'Management Control of Labour in State-owned Enterprises: Cases from the Textile Industry' (1996) 36 *China Journal* 1.

physical assaults, locking of workers' sleeping dormitories at night with no fire escapes, and various other OHS breaches. Chan provides outcomes to many of the violations she follows. In some cases, she reports the OHS breaches resulted in the imposition of fines, however other cases she details only resulted in apologies from the production or operation units, or no action at all. She explains that often workers' damages awards are never paid.[859]

Davin reports workers in Chinese export processing zones are mostly between the ages of 16 and 25, single women and internal migrant workers from rural regions.[860] These women have no social network to assist them, are often forced to work up to 16 hour days, 7 days a week.[861] Davin reports that women who refuse to perform excessive overtime are dismissed. Lee reports women factory workers are forced to work excessively long hours and are prevented from attending to physical necessities such as drinking water or going to the toilet.[862] The problems in Chinese SEZs have resulted in these factories being referred to as sweatshops.[863] This sweatshop label has been supported by substantial primary research which has reported widespread and systematic safety violations and virtually no enforcement of labour laws by regional councils.[864]

Due to the failure of regional councils to enforce labour laws, SEZ factories must decide to either comply with labour laws or reduce their competitive advantage or breach workers' rights. Research indicates that SEZ factories have a track record of focusing upon maximising profits and not ensuring workers' rights.[865] The excess

[859] See also on the isolation of Chinese internal migrants: Lawrence Cox, 'Religious, Economic and Social Disenfranchisement for China's Internal Migrant Workers' (2007) 8 *University of Hawaii Asian-Pacific Law & Policy Journal* 370, 371.
[860] Delia Davin, *The Impact of Export-Oriented Manufacturing on Chinese Women Workers* (Report Prepared for UNRISD Project on Globalization, Export-Oriented Employment for Women and Social Policy, 2001).
[861] A Knox, *Southern China: Migrant Workers and Economic Transformation* (Report, Catholic Institute for International Relations, 1997) 35; Shen Tan, 'The Relationship between Foreign Enterprises, Local Governments, and Women Migrant Workers in the Pearl River Delta' in Loraine and Yaohui Zhao (eds), *Rural Labour Flows in China* (2000) 292, 302.
[862] Ching-Kwan Lee, 'Production Policies and Labour Identities: Migrant Workers in South China' in Lo Chin Kin (ed), *China Review 1995* (1995) 384.
[863] Maria Gillen, 'The Apparel Industry Partnership's Free Labor Association: a Solution to the Overseas Sweatshop Problem or the Emperor's New Clothes?' (2000) 32 *New York University Journal of International Law and Politics* 1059, 1068; Yu Xiaomin, 'Labor Movement under Economic Globalization: Issues, Questions and Theories' (2006) 03 *Sociological Studies* 188.
[864] 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) 58.
[865] Wen Bingzhou, Niu Zhen Xi, 'Social Responsibility and International Competitiveness of Modern Corporations' (2007) 127 *Northwestern Industrial University Journal* 12, 46.

labour pool in China's SEZs has historically been massive. SEZ factories have relied upon this massive labour pool to replace injured workers or workers who have resigned. In the last few years, an estimated 150 million to 200 million internal migrants have moved to Chinese cities seeking work.[866] This massive migration of rural workers to cities has resulted in a large surplus of unemployed, low-skilled and financially vulnerable people.[867] This has enabled SEZ factories to replace easily injured workers or the few workers who are able to escape the SEZ factories. The exploitation of workers in SEZs has drawn Chinese domestic reactions. One interesting development is that the millions of internal migrants are starting to elect not to migrate to SEZs to seek factory work. Chan reports this problem has resulted in some improvements in terms and conditions at work.[868]

The reduction in the labour pool places pressure upon employers to either attract recruits or retain the existing workers. Chinese management styles are extremely authoritarian when compared to Australian management styles and focus upon controlling workers via negative stimulus.[869] The USA's National Labor Committee provides an example of where a worker was verbally abused for working too slowly. When the worker attempted to explain his position, factory management assaulted the worker and immediately fired him.[870] The combination of Chinese management techniques and a shrinking labour pool has resulted in many Chinese production and operation units attempting to decrease their workers' ability to resign, rather than attempting to attract workers by improving labour conditions. For example, production and operation units are reportedly electing to reduce workers' skills in order to reduce turnover:

> The turnover rate is high in China. Owners fear that if they train their workers, once trained, the workers will pick up and leave in search of better jobs and pay.[871]

Refraining from developing their workers' skills is probably the most innocent

[866] PlayFair 2008 Campaign, *No Medal for the Olympics on Labour Rights* (Report, 2007) 25 – 29.
[867] ILO, *In Asia, Informal Work Shifts but Remains Massive* (Asian Employment Forum, Beijing, 13-15 August 2007).
[868] Anita Chan, 'Recent Trends in Chinese Labour Issues - Signs of Change' (2005) 57 *China Perspectives*, 23.
[869] Anita Chan, *China's Workers under Assault* (2001) ch 3, 4; these chapters provide case studies of verbal abuse, corporal punishments and murder.
[870] Charles Kernaghan, Jonathan Giammarco, Barbara Briggs, Alexandra Hallock and Tomas Donoso, *Olympic Sweatshop: Speedo Production in Chin*a (National Labor Committee (USA), Report, 2007) 23.
[871] Ibid 27.

worker retention strategy adopted by production and operation units.

To retain workers, production and operation units have adopted a range of strategies to punish workers who seek to resign. This can be demonstrated by the way production and operation units impose economic obstacles upon workers who attempt to tender their resignations. Unless workers first obtain their supervisor's permission to resign and secondly, wait four weeks from obtaining that approval to terminate their employment, workers will be fined one week's wages for utilizing the 'fast resignation' process.[872] In addition to being fined, once workers tender their resignation, they are generally not offered any overtime work, which further increases the economic burden on workers who are attempting to change employment.[873]

The legal ability of workers to resign was assisted by the adoption of the *Zhonghua Renmin Gongheguo Laodong Hetong Fa*, or in English, the *Labour Contract Law 2007* (PRC), which commenced operations on 1 January 2008.[874] On paper,[875] art 9 of the *Labour Contract Law 2007* (PRC) prohibits employers from utilizing bonded labour.[876] Until recently, one of the most insidious encumbrances upon workers terminating their employment was the bonded labour system.[877] The bonded labour system required workers to pay a bond for the employer when they entered into the employment relationship.[878] Article 9 of the *Labour Contract Law 2007* (PRC) may prevent employers from utilizing bonded labour, but it does not prevent employers from adopting other economic arrangements which have substantially the same effect of bonded labour.

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[872] China Labor Watch, *Investigations on Toy Suppliers in China; Workers Are Still Suffering* (Report, 2007) 33.
[873] PlayFair 2008 Campaign, *No Medal for the Olympics on Labour Rights* (Report, 2007) 25-29.
[874] *Labor Contract Law* 2007 (PRC) adopted at the 28th Session of the Standing Committee of the Tenth National People's Congress on 29 June 2007; see for discussion: Sean Cooney, Sarah Biddulph, Li Kungang and Ying Zhu, 'China's New Labour Contract Law: Responding to the Growing Complexity of Labour Relations in the PRC' *(2007) 30 University of New South Wales Law Journal* 3.
[875] For the problems associated with the enforcement of command and control style laws in China see: Sean Cooney, 'Making Chinese Labor Law Work: the Prospects for Regulatory Innovation in the People's Republic of China' (2007) 30 *Fordham International Law Journal* 1050, 1082-1083.
[876] The *Worksafety Act 2002* (PRC) used the term 'production and operation units' where the *PRC Labour Contract Law 2008* (PRC) adopts the term 'employer'.
[877] Anita Chan, 'Labor Standards and Human Rights: the Case of Chinese Workers under Market Socialism' (1998) 20 *Human Rights Quarterly* 886; Anita Chan, 'Globalization, China's Free (read bonded) Labour Market and the Chinese Trade Union' (2000) 6 *Asia Pacific Business Review* 3, 260.
[878] Sean Cooney, 'Making Chinese Labor Law Work: the Prospects for Regulatory Innovation in the People's Republic of China' (2007) 30 *Fordham International Law Journal* 1050, 1073.

The aspect of bonded labour which restricted workers' employment mobility was the loss of money if the worker moved jobs. Employers are now prohibited from accepting such payments as a bond, however there is no law preventing employers from requiring workers to pay the same amount of money to receive training from the employer. China Labour Watch reports that workers are required to agree to reimburse their employer for the cost of providing the worker training, if the worker resigns their employment within one year.[879] In the case investigated by Chinese Labour Watch, the employer enforced its right to payment for training, even where the employer failed to provide the training. In other cases, workers are forced to pay upfront for training that they never receive.[880] In essence, forcing workers to reimburse employers for non-existent training is arguably a bond by another name. Even where workers receive the training, this training reportedly focuses upon managerial policies rather than contributing to workers' safety or providing the workers' value for money.[881]

4.4 Primary research of OHS in Special Economic Zones

The failure of regional councils to enforce OHS laws and the propensity of SEZ factories to ignore safety risks is arguably well documented in primary research. Through analysing research findings from independent primary research projects into working conditions in factories in Chinese SEZs this part contributes to the overall focus of this thesis by determining how Australia is obliged to act. If the level that Chinese OHS laws are enforced is especially poor then according to the criteria developed above in chapter 2.4.4, Australia has an obligation to find regulatory vehicles to reduce the instances of Australian corporations benefiting from this abuse. While the research methods vary slightly, all of these reports involve interviews with factory workers and inspections of factory premises where possible. The sample sizes and methodologies of these reports provide valid and reliable

[879] China Labor Watch, *Investigations on Toy Suppliers in China; Workers Are Still Suffering* (Report, 2007) 2.
[880] The National Labor Committee, *Another Wal-Mart Bargain: Made in China* (2007): http://www.nlcnet.org/Art.php?id=503 at 26 December 2008.
[881] Charles Kernaghan, Jonathann Giammarco, Barbara Briggs, Alexandra Hallock and Tomas Donoso, *Making Barbie, Thomas & Friends, and Other Toys for Wal-Mart: the Xin Yi Factory in China* (Report, National Labor Committee, 2007) 11.

results. These research reports demonstrate that OHS laws in Chinese SEZs are not being enforced.

Research demonstrates Chinese regional councils substantially fail to enforce labor laws.[882] This thesis is focusing upon safety violations in Chinese SEZ factories which can be attributed with Australian supply chains through the complicity principle, as defined in chapter 2.4.3 of this thesis. For factories in China to come within Australian corporations' spheres of influence there must be a nexus between factories in China and Australian retailers or suppliers. The global nature of supply chains means that Australian corporations may source products directly from overseas factories (including Chinese SEZ factories) or source products from intermediary corporations or branded corporations which source products from SEZ factories. An example of how three major Australian retailers' source products from suppliers who deal directly with the factories in China will be analysed in chapter 6.3.3 of this thesis. Oxfam Australia has analyzed how Australian retailers source products from global supply chains including Nike, Reebok, Ubro, Puma, New Balance, Speedo and other brand names' supply chains.[883] The complicity principle requires Australian corporations to manage human rights within their sphere of influence. As a consequence, the fact it is a Hong Kong intermediary or a USA corporation which sources the products from the Chinese factory does not alter Australian corporations' obligation to take reasonably practicable steps to ensure human rights are not abused within their spheres of influence.

When sourcing products from suppliers or factories, Australian corporations should take steps to ascertain whether or not those products were produced in a sweatshop. If there is a high probability that the products were produced in a sweatshop, then the Australian corporation should take additional steps to ensure the products were not produced in dangerous conditions or take other action to reduce the instances of human rights' abuse. Primary research demonstrates that where products were produced in Chinese SEZs, there is a high probability that the products were produced in unsafe conditions. This creates an obligation on

[882] PlayFair 2008 Campaign, *NoMedal for the Olympics on Labour Rights* (Report, 2007) 10.
[883] Tim Connor and Kelly Dent, *Offside! Labour Rights and Sportswear Production in Asia* (Oxfam Australia, Report, 2006) S 3.1.

Australian corporations to actively manage their supply chains within their spheres of influence and on Australia to take reasonably practicable steps to ensure Australian corporations comply with the complicity principle.

The vesting of this obligation is contingent upon safety violations in Chinese SEZs being well-documented in research. The USA National Labor Committee has concluded:

> On paper the laws are there, but … they mean nothing, as every law is blatantly violated. … Clearly these workers are seen as a cheap commodity, expendable, and not worth investing in.[884]

If workers attempt to protest against labour violations to regional councils, they are reportedly either ignored, receive unjust decisions or punished.[885] Students and Scholars against Corporate Misbehavior provide an account of what happens where workers attempt collectively to raise concerns about their labour conditions.[886] After workers raised concerns about the egregious labour conditions, factory management punished the workers. Some workers were detained by the local police without charge and the regional council ignored workers' concerns and supported management's position. This research uniformly demonstrates that regional councils focus upon upholding managerial prerogative rather than enforcing labour laws.

As OHS laws are not enforced in SEZs, arguably factory management adopts practices that substantially endanger workers' right to safety and health. Noise, dust and fumes are serious concerns in numerous SEZ factories.[887] Matel reports that one of their suppliers provided workers no noise protection in an extremely noisy factory which resulted in hearing loss.[888] Students and Scholars against Corporate

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[884] Charles Kernaghan, Jonathan Giammarco, Barbara Briggs, Alexandra Hallock and Tomas Donoso, *Olympic Sweatshop: Speedo Production in China* (National Labor Committee (USA), Report, 2007) 26.
[885] Mary Gallaghe, 'Use the Law as Your Weapon!: The Rule of Law and Labor Conflict in the PRC' in Neil Diamant, Stanley Lubman and Kevin O'Brien (eds), *Engaging the Law in China: State, Society, and Possibilities* (2005); Isabelle Thireau and Hua Linshan, 'One Law, Two Interpretations: Mobilizing the Labor Law in Arbitration Committees and in Letters and Visitors' Bureaus' in Neil Diamant, Stanley Lubman and Kevin O'Brien (eds), *Engaging the Law in China: State, Society, and Possibilities* (2005).
[886] Students and Scholars against Corporate Misbehavior, *Wal-Mart's Sweatshop Monitoring Fails to Catch Violations: the Story of Toys Made in China for Wal-Mart* (Report, 2007) 25.
[887] China Labor Watch, *Investigations on Toy Suppliers in China; Workers Are Still Suffering* (Report, 2007) 3.
[888] Cited in: Charles Kernaghan, Jonathan Giammarco, Barbara Briggs, Alexandra Hallock and Tomas Donoso, *Making Barbie, Thomas & Friends, and Other Toys for Wal-Mart: the Xin Yi Factory in China* (Report, National Labor Committee, 2007) 36.

Misbehavior report that ventilation in inspected factories is ineffectual, and that heat and fumes in most departments are dangerously high.[889] The only department which has sufficient cooling is the department which has machines which are sensitive to heat.

China Labour Watch reported that despite toxic fumes, workers were not provided safety masks or equipment unless Western factory inspectors were present. [890] Playfair reported similar findings to China Labour Watch.[891] Playfair interviewed a large number of SEZ workers and reported numerous violations, including failing to provide safety masks or ventilation in high dust work area or safety gloves when working with dyeing agents.[892] Some of the dyeing agents that workers handled without gloves caused workers to develop sores on their hands which caused intense pain during work, and when workers attempted to shower or wash dishes at home. Playfair was able to visibly inspect workers' open sores. The National Labour Committee reported even more alarming OHS practices. The National Labour Committee reported workers were forced to work with highly corrosive toxic chemicals with no masks, gloves or other safety protections.[893] Exposure to these chemicals causes workers to have breathing difficulties and if 'a drop of these chemicals touches their skin, the skin immediately begins to burn and fester'.[894]

The failure to provide safety equipment also causes less dramatic injuries. The Playfair Alliance has reported that workers are forced to work for 13 hours per day sitting on a hard wooden stool performing repetitive actions.[895] The poor ergonomics has resulted in skeletal and muscular injuries.

In addition to failing to provide workers with safety equipment, Chinese SEZ factories reportedly fail to ensure machinery has adequate guards.[896]

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[889] Students and Scholars against Corporate Misbehavior, *Looking for Mickey Mouse's Conscience: a Survey of the Working Conditions of Disney Factories in China* (Report, 2005) 29.
[890] China Labor Watch, '*Investigations on Toy Suppliers in China; Workers are Still Suffering* (Report, 2007) 3.
[891] PlayFair 2008 Campaign, *No Medal for the Olympics on Labour Rights* (2007) 19, 20.
[892] Ibid.
[893] Charles Kernaghan, Jonathan Giammarco, Barbara Briggs, Alexandra Hallock and Tomas Donoso, *Olympic Sweatshop: Speedo Production in China* (National Labor Committee (USA), Report, 2007) 26.
[894] Ibid.
[895] PlayFair 2008 Campaign, *No Medal for the Olympics on labour rights* (2007) 20.
[896] China Labor Watch, '*Investigations on Toy Suppliers in China; Workers Are Still Suffering* (Report, 2007) 25.

Despite the fact workers are working on dangerous machines with inadequate safety equipment, reports indicate workers receive virtually no OHS training.[897] The National Labour Committee reports:

> New workers operating dangerous machinery are not provided any training and must learn as they go, which has resulted in several serious accidents each year. [898]

The CSR movement has pressured Chinese SEZs to provide the appearance that they provide workers' OHS training. China Labor Watch reports that rather than training workers, factory management simply forces workers to sign a form to say they have received training.[899]

The critical problems with OHS in Chinese SEZs are aggravated by the fact most workers are working under extreme fatigue. Excessively long working hours has become synonymous with Chinese SEZs. As noted above, Chinese law prescribed a 44 hour week. A survey conducted by the Guangdong Province Department of Labour and Social Security found approximately 26 million internal migrant workers work between 10 and 14 hours per day and about half of these workers did not have a day off per week.[900] Matel reports that one of the factories which supplied them products for over seven years had workers working seven days per week, up to 80 hours per week and some daily shifts up to 17 hours.[901] The Playfair Alliance reports workers work up to 13 hours per day, seven days per week (not including rest breaks, if any) and work between 300 hours and 356 hours per month, depending on the factory.[902] China Labour Watch reports workers work between 10 and 14 hours per day, seven days per week in the busy season.[903] The National Labour Committee

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[897] Students and Scholars against Corporate Misbehavior, *Looking for Mickey Mouse's Conscience: A Survey of the Working Conditions of Disney Factories in China* (Report, 2005) 13.
[898] The National Labor Committee (USA), *Another Wal-Mart Bargain: Made in China* (2007): < http://www.nlcnet.org/Art.php?id=503.
[899] China Labor Watch, *Investigations on Toy Suppliers in China; Workers Are Still Suffering* (Report, 2007) 7.
[900] Report cited in: Marina Thorborg, 'Chinese Workers and Labor Conditions from State Industry to Globalized Factories. How to Stop the Race to the Bottom' (2006) 1076 *Annals of the New York Academy of Sciences* 1, 893.
[901] Cited in: Charles Kernaghan, Jonathan Giammarco, Barbara Briggs, Alexandra Hallock and Tomas Donoso, '*Making Barbie, Thomas & Friends, and Other Toys for Wal-Mart: the Xin Yi Factory in China*' (Report, National Labor Committee, 2007) 36.
[902] PlayFair 2008 Campaign, *No Medal for the Olympics on Labour Rights* (2007) 22-24; see also Play Fair Alliance, *Play Fair the Olympics* (Report, 2004) where employees are reported to work up to 18 hours per day in some factories, 7 days per week.
[903] China Labor Watch, *Investigations on Toy Suppliers in China; Workers Are Still Suffering* (Report, 2007) 3.

reported workers regularly work 15½ hour days, seven days per week.[904] On some occasions, workers are forced to work 24 hour shifts and face fines if they refuse to work because they are exhausted.[905] Chan claims that in extreme cases, workers in SEZs can be forced to work a total of 48 hours straight and work up to 120 hours per week.[906] Students and Scholars against Corporate Misbehavior claim some factories work their workers over 80 hours per week.[907] In one report, the National Labour Committee reports workers are forced to work between 12 and 16 hours per day, seven days per week and can work months without receiving permission to take a day's rest.[908]

If workers are 10 minutes late starting work, they are docked 30 minutes' wages. If workers take a day off from their seven day a week schedule without permission, then the worker will be docked three days' wages.[909] The National Labour Committee provides a typical example where a worker working on a compression machine worked a 21½ hour day.[910] During this working day, which was almost three times the Chinese prescribed eight hour working day, the worker was forced to complete a compression of their machine every six seconds. Considering workers suffering fatigue can suffer micro-sleeps up to 5 seconds,[911] where workers can continue to perform tasks unconsciously, this is an extremely high-risk working environment.

The results of the dangerous OHS conditions on workers can be evinced by the large number of people in the factories around SEZs with amputations and crush injuries.[912] Students and Scholars against Corporate Misbehavior provide examples

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[904] Charles Kernaghan, Jonathan Giammarco, Barbara Briggs, Alexandra Hallock and Tomas Donoso, *Olympic Sweatshop: Speedo Production in China* (National Labor Committee (USA), Report, 2007) 19.
[905] Ibid.
[906] Jenny Wai-ling Chan, 'Gender and Global Labor Organizing: Migrant Women Workers of Garment Industry in South China' (Paper presented at the Sweatshop Watch and Marianas Fund of the Tides Foundation Conference, Colorado, 8-9 May 2005), presenting research gathered with the Chinese Working Women Network.
[907] Students and Scholars against Corporate Misbehavior, *Wal-Mart's Sweatshop Monitoring Fails to Catch Violations: the Story of Toys Made in China for Wal-Mart* (Report, 2007) 12.
[908] Charles Kernaghan, Jonathann Giammarco, Barbara Briggs, Alexandra Hallock and Tomas Donoso, *Thomas & Friends goes to China* (Report, National Labor Committee, 2007) 3.
[909] China Labor Watch and the National Labor Committee (USA), *Blood and Exhaustion: Behind Bargain Toys Made in China for Wal-Mart and Dollar General* (Report, 2005) 7.
[910] Charles Kernaghan, Jonathan Giammarco, Barbara Briggs, Alexandra Hallock and Tomas Donoso, *Olympic Sweatshop: Speedo Production in China* (National Labor Committee (USA), Report, 2007) 16.
[911] Nancy J. Wesensten, 'Effects of Modafinil on Cognitive Performance and Alertness during Sleep Deprivation' (2006) 12 *Current Pharmaceutical Design* 20, 2457.
[912] Students and Scholars against Corporate Misbehavior, *Looking for Mickey Mouse's Conscience: a Survey of the Working Conditions of Disney Factories in China* (Report, 2005) 25-27.

of where the ability of workers to come into contact with machines has resulted in serious injuries and fatalities.[913]

Fire safety at manufacturing factories has often attracted substantial attention due to the massive loss of life which can occur in a factory fire. For example, the Thailand Kader Toy Factory fire is the worst factory fire in history.[914] It eclipsed the 1911 New York Triangle Shirtwaist Factory fire in New York for numbers of fatalities. The Kader Toy Factory produced goods for western corporations, including Disney and Mattel. On 10 May 1993, a fire was detected in a section of the factory but workers were ordered to continue working. The fire spread. Fire alarms were not sounded until the building was engulfed in fire. There were very few open safety exits which prevented many workers from leaving the building. The lack of safety in the Kader Toy Factory resulted in the deaths of 188 workers and over 500 serious injuries. Fortunately, China has not suffered a well-publicized fire disaster, however research demonstrates that such a disaster is possible. The Playfair Alliance reports that many Chinese SEZ factories leave stacks of flammable fabrics in factories and have inadequate fire extinguishers.[915] Workers often receive no fire training and generally, fire safety is a low priority for factory management.

4.5 Conclusion

China's approach to enforcing workers' labour rights is arguably culturally driven. In the West, workers' labour rights are regarded as individual rights which are generally not subject to derogation for communal interests. Chapter 2.2.4 of this thesis explored how universal rights can be interpreted differently in different cultures. Chapter 2.2.4, however, observed that multinational corporations and States should not lower their standards in order to increase profits. While China may be able to justify its lower labour standards to defend its own State conduct, Australian corporations have obligations under the complicity principle not to take advantage of the lower labour conditions. This means if Chinese SEZ factories are within Australian corporations' spheres of influence, then Australian corporations

[913] Ibid.
[914] Fiona Haines, *Globalization and Regulatory Character: Regulatory Reform after the Kader Toy Factory Fire* (2005).
[915] PlayFair 2008 Campaign, *No Medal for the Olympics on Labour Rights* (Report, 2007)19.

and Australia have an obligation to take reasonably practicable steps to ensure human rights are enforced.

This chapter has demonstrated that workers working in Chinese SEZ factories often have their right to safety and health violated. Australian corporations which trade with factories in Chinese SEZs have constructive knowledge that there is a high probability that these factories breach labour conditions. The core question of this thesis asks whether Australia is complying with its human rights obligation to protect workers' right to safety and health. The complicity principle requires Australian corporations to take reasonably practicable steps to ensure human rights are enforced in their spheres of influence and Australia has an obligation to take steps to ensure Australian corporations take such steps. Where breaches are reportedly extremely wide- spread, this imposes an obligation upon Australia to take steps to ensure Australian corporations are not acquiring sweated labour. The remainder of this thesis will explore what vehicles are available to Australian corporations and Australia to discharge their obligations discussed in chapters 2.4.1 and 2.4.4.

CHAPTER 5

5 Is the complicity principle reflected in Australian corporate law?

5.1 Introduction

To determine whether Australia is discharging its duty to protect workers' right to safety and health it is important to consider the application of all major regulatory vehicles. Chapters 3 and 4 have analysed the effectiveness of existing hard law regulation. Chapters 5, 6 and 7 will consider the effectiveness of the major soft law vehicle impacting on Australian based supply chains. Chapters 2.4.1 and 2.4.4 argued that Australia has an obligation to take reasonably practicable steps to ensure human rights are protected domestically and to ensure Australian corporations discharge their obligations under the complicity principle. The complicity principle as explained in chapter 2.4.3 requires Australian corporations to take reasonably practicable steps to ensure human rights are protected within their spheres of influence both domestically and extraterritorially. This requires Australia to find vehicles through which it can regulate corporate conduct domestically and extraterritorially. Chapter 3 argued that Australian domestic laws were not ensuring workers' right to safety and health at work and were breaching Australia's obligation to ensure rights domestically, reasonably practicable, then argued that Australian corporations and Australia could not rely upon Chinese public agencies to protect workers' right to safety and health. This means that where Australian corporations' spheres of influence extend to Chinese factories then Australian corporations have an obligation to take reasonably practicable steps to protect workers right to safety and health. According to chapter 2.4.4 Australia has a corresponding duty to take reasonably practicable steps to ensure that Australian corporations discharge their obligations under the complicity principle. The remainder of phase two will analyse whether existing soft law vehicles offer an avenue through which Australia and Australian corporations can discharge their domestic and extraterritorial human rights' obligations.

This chapter will determine whether Australian corporate law provides a regulatory framework which permits and facilitates corporations discharging their obligations

under the complicity principle. The main vehicle through which the complicity principle is conceived in Australia is through the Corporate Social Responsibility (**CSR**) movement. The CSR movement uses corporations' desire for a public image to motivate them to act ethically. This chapter will commence by defining precisely what is meant by the term CSR. The second part of this chapter will analyse the circumstances in which Australian corporate law permits directors to make business decisions based upon ethical motivations. The premise of CSR is that it is profitable for corporations to act ethically. The third part of this chapter analyses how corporations' primary focus remains profit making and how this focus can effectively interact with the CSR movement.

5.2 What is the corporate social responsibility movement?

CSR is a difficult concept to define. The Australian Commonwealth Parliamentary Joint Committee on Corporations and Financial Services notes:

> Recognizing that corporate responsibility is a multi-faceted concept the committee makes no attempt to reach a conclusive definition.[916]

Adopting a similar approach, the Commonwealth Corporations and Market Advisory Committee stated:

> At this stage of its consideration, the Advisory Committee does not propose a particular definition of corporate social responsibility that may limit its review. In essence, the focus is on the way in which the affairs of companies are conducted, and the ends to which their activities should be directed, with particular reference to the environmental and social impact of corporate conduct.[917]

[916] Commonwealth Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Responsibility: Managing Risk and Creating Value* (Report, 2006) [2.15].
[917] Commonwealth Corporations and Market Advisory Committee, *Corporate Social Responsibility* (Discussion Paper, 2005) [1.1].

The European Commission has defined CSR to include a concept whereby companies decide voluntarily to contribute to a better society and a cleaner environment. [918]

CSR theory argues that a corporation is successful where it is mindful of the impact its conduct has upon the corporation's stakeholders and society at large.[919] This thesis defines CSR to include all corporate activities, which on their fact, appear to be focused upon benefiting society rather than maximising corporat profits.

The theory behind CSR is that corporations are not isolated entities. Pursuant to CSR, corporations have an ethical obligation to advance the position of all their stakeholders. Even though corporations do not always have legal obligations to society at large, this theory provides that corporations have obligations to act responsibly towards people affected by their activities. Currently, the law permits corporations to externalise the negative impact of their conduct to the community. CSR aims to reverse this position, so society is not required to pay the price for corporations' conduct. [920]

The main objective of CSR is to reduce the focus on profit maximisation and turn corporate attention to include the consideration of social justice issues. CSR pressure upon directors to act ethically will be ineffective unless Australian law permits directors to focus upon maximising social justice issues over profits.

The CSR movement has been based on collective action by a collection of various groups interested in promoting ethical business conduct. Groups such as ethically-motivated non-governmental organisations, some religious institutions and private citizens, have placed pressure on corporations to act socially responsible.[921] For

[918] European Commission, *Promoting a European Framework for Corporate Social Responsibility* (Green Paper, 2001) 4.
[919] Shawn L. Berman, Andrew C. Wicks, Suresh Kotha, Thomas M. Jones, 'Does Stakeholder Orientation Matter? The Relationship between Stakeholder Management Models and Firm Financial Performance' (2002) 42 *Academy of Management Journal* 5, 488.
[920] Thomas Donaldson, 'Fundamental Rights and Multinational Duties' in Tom Beauchamp and Norman Bowie (eds), *Ethical Theory and Business* (1997) 107.
[921] C. K. Prahalad, Michael E. Porter and Charles Handy, *Harvard Business Review on Corporate Responsibility* (2003) Harvard Business School, 7-64.

example, for a considerable amount of time, non-governmental organisations have attempted to pressure industry and retailers not to exploit Australian outworkers.[922]

The Brotherhood of Saint Laurence has adopted a strong campaign to improve the conditions in Australian-based supply chains. They have combined a marketing campaign with the practical example of demonstrating how ethical supply chains can operate, by successfully managing their own international supply chain, ensuring work is performed under ethical labour conditions.[923] While the labour standards in supply chains remain a concern,[924] CSR has placed pressure on corporations to appear to act ethically.[925]

5.3 Are corporations permitted to engage in corporate social responsibility at all?

To determine whether Australia can use CSR as a soft law regulatory vehicle it is first essential to determine whether Australia's hard law regulation of corporations permits directors to engage in CSR. If an Australian corporation is presented with the opportunity to engage lawfully in morally repugnant activities, what grounds do directors have for electing to act morally? For example, it is lawful for a corporation in Australia to outsource work to a foreign factory, even if the Australian corporation knows the work will be performed by children in extremely hazardous circumstances. While this conduct may be contrary to International Labour Organization Conventions, human rights law and Australian domestic laws, outsourcing work to international sweatshops is not unlawful under Australian laws.

Unlike natural persons, corporations' powers are prescribed by statute and common law, the corporation's constitution and obligations under contract. Corporations are managed by directors who are obliged by sections 180 and 181 of the *Corporations*

[922] Dangar Research Group, *Do consumers Care about Clothing Outworker Exploitation?* (New South Wales Government Report, 1999); Roza Lozusic, *Outworkers* (Briefing Paper, Parliament of New South Wales, 2002).
[923] Sean Cooney, 'A Broader Role for the Commonwealth in Eradicating Foreign Sweatshops?' [2004] 28 *Melbourne University Law Review* 291.
[924] Phil James, Richard Johnstone, Michael Quinlan and David Walters, 'Regulating Supply Chains to Improve Health and Safety' (2007) 36 *Industrial Law Journal* 163.
[925] Tim Connor and Kelly Dent, *Offside! Labour Rights and Sportswear Production in Asia* (Oxfam Australia, Report, 2006).

Act 2001 (Cth) to manage the corporation in the best interests of the company. Section 181 requires directors to exercise their power and duties:

A. in good faith in the best interests of the corporation; and
B. for a proper purpose.

The *Corporations Act 2001* (Cth) requires directors to act in the best interest of the company. Baxt has explained:

> A general proposition can be put forward: the director's obligations are to the company. The director must look to that body when carrying out the various obligations or when exercising various powers.[926]

Whether or not directors are empowered to engage in non-profit making activities depends upon the corporation's purposes. There are generally two broad types of corporations: for-profit corporations and not-for-profit corporations.

Pursuant to the *Corporations Act 2001* (Cth), corporations do not have to be primarily for profit. If a corporation is established for a charitable purpose, s 150 of the *Corporations Act 2001* (Cth) provides not-for-profit corporations with special benefits. Pursuant to s 150, these corporations must state their intent is charitable, act in the public interest and they cannot pay their members dividends.[927] While the *Corporations Act 2001* (Cth) anticipates corporations may not always act for profits, corporations which are not-for-profit are a very different entity from the standard profit-driven corporation.

The *Corporations Act 2001* (Cth) does not state expressly whether or not a for-profit corporation can engage in non-profit-making activities.[928] The *Corporations Act 2001* (Cth) does enable a corporation to limit the directors' powers in the corporation's constitution.[929] Since the *Corporate Law Simplification Act 1998*

[926] Bob Baxt, *Duties and Responsibilities of Directors and Officers* (18th ed, 2005) 183.
[927] Paul Harpur, 'Charity Law's Public Benefit Test: Is Legislative Reform in the Public Interest?' (2003) 3 *QUT Law & Justice Journal* 422.
[928] Andrew Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach' (2008) 29 *Sydney Law Review* 577, 577.
[929] *Corporations Act 2001* (Cth) s 135(2).

(Cth), replaceable rules have appeared in the various corporate regulatory statutes. Prior to the introduction of the replaceable rules, every corporation required Articles of Association and a Memorandum of Association. Replaceable rules replace the need for most corporations to have a constitution at all. Section 141 of the *Corporations Act 2001* (Cth) provides a table of all the replaceable rules in the current enactment. They cover all aspects of corporate governance, and most relevantly, define directors' powers. Section 198A of the *Corporations Act 2001* (Cth) simply states directors have all the powers of the corporation, subject to the corporation's constitution. As the replaceable rules are intended to simplify corporate governance, it is common for most corporations not to limit the powers of directors in the constitution.[930] For most corporations, the powers of directors are only limited by the *Corporations Act 2001* (Cth) and the general law.

As directors have all the powers of a corporation, it is important to determine whether the corporation has the power to engage in non-profit making conduct. Section 124(1) of the *Corporations Act 2001* (Cth) enables a corporation to act in the same way as a person. This section states, 'A company has the legal capacity and powers of an individual both in and outside this jurisdiction. A company also has all the powers of a body corporate…'

The Commonwealth Parliamentary Joint Committee on Corporations and Financial Services Report notes sections 180 and 181 'are sensible provisions which allow investors to invest in a company on the understanding that the company directors will manage the company in the interests of its shareholders'.[931] The Parliamentary Report agreed that shareholders should have confidence that directors will use the corporation's resources 'for the benefit of the company, and not for other purposes'.[932]

The Commonwealth Parliamentary Joint Committee on Corporations and Financial Services found the theories surrounding CSR ranged from the extreme view that directors were prohibited from engaging in any conduct which is not strictly profit-

[930] Stephen Bottomley, *The Constitutional Corporation: Rethinking Corporate Governance* (2007) 20, 47; John Farrar, *Corporate Governance in Australia and New Zealand* (2002) 43.
[931] Commonwealth Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Responsibility: Managing Risk and Creating Value* (Report, 2006) [4.4].
[932] Ibid.

making, and the enlightened self-interest approach which provided that the link to profits could be more nebulous.[933] The Committee suggested, while profits remained the underlying focus of corporations, the link between profits and socially responsible conduct does not need to be immediately apparent:

> The enlightened self-interest interpretation of directors' duties acknowledges that investments in corporate responsibility and corporate philanthropy can contribute to the long term viability of a company even where they do not generate immediate profit.[934]

The Committee argued there were broadly two motivators for corporations to engage in socially responsible conduct.[935] Firstly, acting unethically may place a corporation at substantial financial risk if community and legal standards develop, and conduct which is currently lawful subsequently gives rise to civil liability. The second broad reason focused upon community expectations and corporate image. The Committee argued that where a corporation's image is diminished, then the corporation's profits will diminish.

While the Committee argued corporations were permitted to engage in socially responsible conduct, the Committee observed that some Australian directors had argued that they had no right to participate in above compliance activities as corporations should always focus upon profits. The Parliamentary Report observes a range of opinions of directors.[936] Some directors assert they are prohibited from engaging in any conduct which does not directly create wealth for the company. At the other end of the spectrum are directors who believe acting socially responsibly is always in the best interest of the company. The uncertainty surrounding whether directors have the power to engage in CSR is not new.

In order to clarify that corporations were permitted to engage in socially responsible conduct, the federal government introduced the Corporate Code of Conduct Bill

[933] Ibid 4.11.
[934] Ibid 4.32.
[935] Ibid 3.4 – 3.8.
[936] Ibid 4.11.

2000 (Cth).[937] The Corporate Code of Conduct Bill 2000 (Cth) required corporations, inter alia, to promote the health and safety of its employees,[938] not to benefit from forced labour,[939] not to benefit from the labour of children under 14 years of age[940] and not to dismiss workers for reasons of illness or accidents.[941] The Bill explained in further detail how these standards should be met. For example, clause 12 explained that if a corporation was operating in a jurisdiction which had lower occupational health and safety standards than Australia, then the Australian corporation should not lower its standards to take advantage of the lower standards. This principle has had a long history of acceptance. In the eighteenth century, this principle was called geographical morality, and was used to indict Governor General Hastings for his conduct while managing Bengal.[942] Multinational corporations have recently been judged against this same principle.[943]

This principle, has not entered Australian law. When the Commonwealth Parliament's Parliamentary Joint Statutory Committee on Corporations and Securities was considering the Corporate Code Bill 2000 (Cth), the committee did not 'subscribe' to the view that Australian corporations should be prevented from lowering their safety standards when they conducted operations in foreign jurisdictions.[944] The Committee concluded that 'attempting to legislate' to ensure, inter alia, Australian corporations maintain occupational health and safety standards was a 'fundamental defect in the Bill'.[945] The Committee took the view that labour standards were a sovereign matter and that OHS was 'clearly a matter for the foreign jurisdiction'.[946] Unfortunately, the Committee did not consider the limitations on Australia's domestic OHS. At the time of the proposed Bill, principal contractors could largely avoid OHS responsibilities for OHS breaches in their Australian-based

[937] For a discussion of why Australia, the United Kingdom and the United States of America introduced Bills enabling corporations to engage in corporate social responsibility see: Adam McBeth, 'A Look at Corporate Code of Conduct Legislation' (2004) 33 *Common Law World Review* 3, 222.
[938] Corporate Code of Conduct Bill 2000 (Cth) cl 8.
[939] Corporate Code of Conduct Bill 2000 (Cth) cl 9(1).
[940] Corporate Code of Conduct Bill 2000 (Cth) cl 9(2).
[941] Corporate Code of Conduct Bill 2000 (Cth) cl 9(3).
[942] P Marshall (ed), *Writings and Speeches of Edmund Burke: India: the Launching of the Hastings Impeachment 1786-1788* (1991) 346.
[943] Padideh Ala'I, 'The Legacy of Geographical Morality and Colonialism: a Historical Assessment of the Current Crusade against Corruption' (2000) 33 *Vanderbilt Journal of Transnational Law 877*; David Fidler, ' "Geographical Morality" Revisited: International Relations, International Law, and the Controversy over Placebo-Controlled HIV Clinical Trials in Developing Countries' (2001) 42 *Harvard International Law Journal* 299.
[944] Commonwealth Parliamentary Joint Statutory Committee on Corporations and Securities, Parliament of Australia, *Report on the Corporate Code of Conduct Bill 2000* (2001) [4.33].
[945] Ibid.
[946] Ibid [4.32].

supply chains. On another point, the Committee did note that to 'be effective, responsibility must be extended down the supply chain'.[947] Ultimately, the Bill was not passed, and the status of CSR was not altered. As a consequence there are arguably directors in Australia who are operating on the assumption that they are not permitted to engage in non-profit making activities.

While statute provides limited express support for CSR, corporate regulation affords more support. The Australian Stock Exchange Corporate Governance Council, in its *Principles of Good Corporate Governance and Best Practice Recommendations,* provides, in principle 10, that directors should consider stakeholder interests. The recommendation links the corporation's interest in CSR back to corporate profits.

Companies have a number of legal and other obligations to non-shareholder stakeholders such as workers, clients/customers and the community as a whole. There is growing acceptance of the view that organizations can create value by better managing natural, human, social and other forms of capital.

This does not compel corporations to actually take stakeholders interests into account. The Australian Stock Exchange Listing Rule 4.10 merely requires corporations to either comply with the Recommendations, or explain in their annual reports why they have elected not to comply.[948] Arguably the focus is on informing investors, and not on ensuring compliance with socially responsible conduct standards.[949] The Corporations and Market Advisory Committee held:

> [I]t is a matter for the commercial judgment of directors to determine what social interests to consider in particular situations and how to manage, balance, or prioritise them.[950]

While there is limited express legal support authorising corporations to engage in socially responsible conduct, there is sufficient support to conclude directors are

[947] Ibid [21].
[948] For further discussion see: James McConvill and John Bingham, 'Comply or Comply: the Illusion of Voluntary Corporate Governance in Australia' (2004) 22 *Company & Securities Law Journal* 208.
[949] See for discussion: Commonwealth Corporations and Market Advisory Committee, *Corporate Social Responsibility* (Discussion Paper ,2005) [2.5].
[950] Commonwealth Corporations and Market Advisory Committee, *Corporate Social Responsibility* (Discussion Paper, 2005) [1.3.2], [1.4].

authorised to direct the corporation to engage in conduct which is not strictly profit-making. On this basis, corporations such as Coles Myer and Woolworths have devoted corporate resources to auditing the labour conditions in factories in their supply chains.[951] These retailers have no legal obligation to audit the labour conditions in these factories owned and operated by unrelated corporate entities, often in foreign jurisdictions, but are motivated to engage in this socially ethical conduct on the basis these audits will attract ethical customers and assist in developing a positive corporate image.

5.4 How does a corporation decide which social justice cause to assist?

It could be argued that corporations do not have a history of acting ethically. Corporations do not have a history of devoting substantial corporate resources to moral causes.[952] Corporations have benefited from slavery, colonialism and have a track record of maximising profits at the expense of human rights.[953] The shareholder primacy theory of corporate law provides corporations are legal entities created to make profits for the shareholders.[954] Berle was one of the first authors to define the shareholder primacy theory.[955] Berle explained that shareholders invest their property with a corporation with the specific purpose of making money. Under this model, the corporation is similar to a trustee. The corporation must put the shareholders' property to the purpose for which it has been entrusted to the corporation, and for no other purpose. Jones, Marshall, Mitchell and Ramsay observe that:

> The 'shareholder primacy' view of the corporation seems to have emerged from the idea that directors (and the professional managers who give effect to the corporate strategy) are essentially 'agents' for the shareholders, and consequently are under a

[951] Coles Myer, *Corporate Social Responsibility Report* (2006); Woolworths Group PLC, *Corporate Social Responsibility Report 2006-2007* (2007).
[952] Daniel Litvin, *Empires of Profit: Commerce, Conquest and Corporate Responsibility* (2003) 11.
[953] Ilias Bantekas, 'Corporate Social Responsibility in International Law' (2004) 22 *Boston University International Law Journal* 309, 309.
[954] Milton Friedman, 'The Social Responsibility of Business Is to Increase Profits' in Scott B. Rae and Kenman L. Wong (eds), *Beyond Integrity: a Judeo-Christian Approach to Business Ethics* (1996) 241-245; Lisa M. Fairfax, 'The Impact of Stakeholder Rhetoric on Corporate Norms' (2006) 31 *University of Iowa Journal of Corporation Law* 675-732.
[955] Adolf A. Berle, 'For Whom Corporate Managers Are Trustees: a Note' (1932) 45 *Harvard Law Review* 1365, 1367.

> fundamental obligation to manage the company in the interests of the shareholders.[956]

The interests of the company are usually regarded by courts as those of the company's shareholders.

Lantos argues that any expenditure on ethical undertakings which does not maximise corporate profits is immoral, as directors have no authority to use the shareholders' investment for non-profitable undertakings.[957]

While shareholder theory may appear extreme in its pure form, it is submitted that the shareholder primacy theory has been gaining increasing support since the 1970s.[958] The share holder primacy principle is premised on the fact that corporations benefit society through being successful.[959] Davidsson explains this theory:

> The traditional view is that a corporation that meets this goal has a beneficial impact on the community where it is based by creating new jobs and by enhancing its economic welfare.[960]

While corporations provide some benefits to society through conducting their operations, the shareholder primacy theory in its purest form can result in substantial harm to the community. Pursuant to this model, corporations seek to externalise all expenses away from the corporation and towards the community. This means social, cultural, environmental and other expenses are not paid by the corporation, but by the community.[961] Bakan has posited the corporation as a psychopath, which acts entirely for its own benefit. Similar to a natural person psychopath, corporations act

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[956] Meredith Jones, Shelley Marshall, Richard Mitchell and Ian M. Ramsay, *Company Directors' Views Regarding Stakeholders* (Research Report No 1, University of Melbourne, 2007) 3.
[957] Geoffrey P. Lantos, 'Ethicality of Altruistic Corporate Social Responsibility' (2002) 19 *Journal of Consumer Marketing* 3, 205, 232.
[958] Ronald Chen and Jon Hanson, 'The Illusion of Law: The Legitimating Schemas of Modern Policy and Corporate Law' (2004) 103 *Michigan Law Review* 1, 37.
[959] Edwin M. Epstein, 'The Good Company: Rhetoric or Reality? Corporate Social Responsibility and Business Ethics Redux' (2007) 44 *American Business Law Journal* 207, 214.
[960] Paul A. Davidsson, 'Legal Enforcement of Corporate Social Responsibility within the EU' (2002) 8 *Columbia Journal of European Law* 529, 531.
[961] Ian B. Lee, 'Corporate Law, Profit Maximisation, and the "Responsible" Shareholder' (2005) 10 *Stanford Journal of Law, Business & Finance* 31, 37-38..

entirely in their own self-interest and do not respond to the pain of others, unless the pain of others can further the corporation's self- interests.[962]

Arguably corporations are designed to maximise their returns as far as the law permits.[963] Horrigan explains:

> [F]inancially-based shareholder focus . . . 'allows the corporation to externalise the costs of maximising stock prices onto everyone except the stockholders; that includes employees, the environment, consumers, suppliers and the community at large'.[964]

If forests are cut down, if workers are forced to endure violations to their labour rights or if social problems occur, some theorists argue the corporation's only concern remains profit maximisation.[965]

There is a body of literature claiming corporations place profits before human rights.[966] In this framework, why do corporations take steps to appear socially responsible? It is argued corporations will respect human rights where it is profitable to respect human rights.[967] The operation of a business results in positive and negative consequences. For example, positive consequences can include returns on profits, the production of goods and the employment of employees. Negative consequences can include the risk that invested capital will not provide returns, environmental impacts, and injuries to workers. The pure form of shareholder primacy enables a corporation to externalise all negative consequences to society at large. Due to this externalisation process, corporations externalise all expenses away from the corporation and towards the community. This means social, cultural, environmental and other expenses are not paid by the corporation, but by the

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[962] Joel Bakan, *The Corporation: the Pathological Pursuit of Profit and Power* (2004) 60-84.
[963] John Armour, Simon Deakin and Suzanne J. Konzelmann, 'Shareholder Primacy and the Trajectory of UK Corporate Governance' (2003) 41 *British Journal of Industrial Relations* 3, 531.
[964] Bryan Horrigan, 'Fault Lines in the Intersection between Corporate Governance and Social Responsibility' (2002) 25 *University of New South Wales Law Review* 515, 550.
[965] Marjorie Kelly and William Grieder, *The Divine Right of Capital: Dethroning the Corporate Aristocracy* (2002) 29-40.
[966] Naomi Klein, *No Space, No Choice, No Jobs, No Logo: Taking Aim at the Brand Bullies* (2002) 439-436; Thom Hartmann, *Unequal Protection: the Rise of Corporate Dominance and the Theft of Human Rights* (2004) 136-156; Karl Schoenberger, *Levi's Children* (2001) 1-5.
[967] Laura P. Hartman, Ken Block, Richard E. Wokutch and Denis G. Arnold, *Rising above Sweatshops* (2003) 77-119; Tom L. Beauchamp and Norman E. Bowie, *Ethical Theory and Business* (2003) 45-94.

community.[968] An example of the externalisation process can be seen in retail supply chains. Corporations in supply chains outsource all of the risks of financial loss and the cost for employees' injuries to other corporate entities, communities and States.

The externalising of damage to the community and internalising of profits to the corporation has resulted in the growth of the CSR movement which has pressured corporations to reject the pure form of the shareholder primacy model.[969] The shareholder primacy model focuses upon monotonic objectives while CSR and the complicity principle adopt a pluralistic view of corporate objectives.[970] The image of western, buyer-driven supply chains forcing employees around the world into sweatshops has arguably placed considerable pressure on western corporations to alter their purchasing conduct.[971] It has been contend that if western corporations refused to purchase goods manufactured in sweatshop conditions, then manufacturers would meet the demand by altering the conditions under which the products were produced.[972] The driving force behind the CSR movement are external and internal consumers. External consumers are people who purchase products specifically because those products are associated with ethical corporate conduct and internal customers are workers and managers who associate with a particular corporation due to that corporation's stance on CSR.[973]

Chapter 2.4.3 argued that corporations had human rights duties and chapter 2.4.3 defined the nature of these duties. While in practice corporations are being pressured through the CSR movement to uphold human rights and general values, largely, corporations are not legally bound to adhere to such standards. Corporations are

[968] Ian B. Lee, 'Corporate Law, Profit Maximisation, and the "Responsible" Shareholder' (2005) 10 *Stanford Journal of Law, Business & Finance*, 31, 37-38.
[969] Lisa M. Fairfax, 'The Impact of Stakeholder Rhetoric on Corporate Norms' (2006) 31 *University of Iowa Journal of Corporation Law* 675, 678; Jedrzej Frynas, Scott Pegg and J. George Frynas, *Transnational Corporations and Human* Rights (2003) 53-78.
[970] Thomas W Dunfee, 'Corporate Governance in a Market with Morality' (1999) 62 *Law and Contemporary Problems* 3, 129.
[971] Ralph Armbruster-Sandoval, *Globalization and Cross-border Labor Solidarity in the Americas: the Anti-sweatshop Movement and the Struggle for Social Justice* (2004) 135-155; You-tien Hsing, *Making Capitalism in China: the Taiwan Connection* (1998) 53; Christiana Ochoa, 'Advancing the Language of Human Rights in a Global Economic Order: Analysis of a Discourse (2003) 23 *B.C. Third World Law Journal* 57- 63, 77; Jessica Rothenberg-Aalami, *Coming Full Circle? : Nike Production Networks in and beyond Vietnam* (PhD Thesis, University of Oregon, 2002) 58.
[972] Andrew Ross, *Introduction to No Sweat: Fashion, Free Trade, and the Rights of Garment Workers* (1997) 135-142.
[973] Richard B. Freeman, 'A Hard-headed Look at Labour Standards' in Werner Sengenberger & Duncan Campbell (eds), *International Labour Standards and Economic Interdependence* (1994) 82; see generally: Robert J. Liubicic, 'Corporate Codes of Conduct and Product Labelling Schemes: the Limits and Possibilities of Promoting International Labor Rights through Private Initiatives' (1998) 30 *Law and Policy in International Business* 1, 11-159.

pressured to be seen to uphold such values arguably due to a threat to their corporate image and profits.[974] Addo explained how human rights and profits interact:

> To the voluntarist therefore, in so far as human rights law falls into the domain of business ethics, their application to corporate activity remains a matter of choice. The decision to exercise this choice to take account of human rights in corporate affairs must however be justified on economic principles.[975]

In her doctorate, Allen examined the motivations and results of the Interfaith Centre on Corporate Responsibility in attempting to get western multinational corporations to cease their operations in Burma.[976] The Interfaith Centre on Corporate Responsibility was motivated by a conflict between religious values and the conduct of the dictatorship in Burma. The fact that western multinationals were utilizing the Burmese military junta to commit heinous human rights' abuses on their behalf provided the Interfaith Centre on Corporate Responsibility with strong religious arguments to use against the corporations. The Interfaith Centre on Corporate Responsibility utilized negative media campaigns and stockholder resolutions to pressure multinational corporations which were benefiting from Burmese-based manufacturing, oil extraction and other operations to withdraw from Burma.

It is submitted that some corporations do not justify their engagement in CSR on altruistic grounds but on the basis CSR can be profitable. Even where corporations appear to be engaging in altruistic conduct, corporations are able to justify their altruistic conduct by using this 'philanthropy' to increase or generate positive media attention.[977] As a consequence of the CSR movement, some corporations have elected to use socially responsible conduct as part of their marketing strategy to attract and retain consumers who are interested in social issues.[978] The threat of socially irresponsible conduct is reportedly a variable that creditors consider when determining whether to extend credit and is a factor when other businesses are

[974] Edwina Dunn, 'James Hardie: No Soul to be Damned and No Body to Be Kicked' (2005) 27 *Sydney Law Review* 2339, 2354.
[975] Michael K. Addo, 'Symposium: Human Rights Perspectives of Corporate Groups' (2005) 37 *Connecticut Law Review* 667, 676.
[976] Lisa Allen, *Religion and Corporate Social Responsibility: the Interfaith Centre on Corporate Responsibility and the Corporate Withdrawal Movement from Burma* (PhD Thesis, Boston University, 2003).
[977] Xueming Luo, 'A Contingent Perspective on the Advantages of Stores' Strategic Philanthropy for Influencing Consumer Behaviour' (2005) *4 Journal of Consumer Behaviour* 5, 390.
[978] William Werther and David Chandler, *Strategic Corporate Social Responsibility: Stakeholders in a Global Environment* (2005)) 43-62.

deciding to trade with a corporation or not.[979] Various authors claim the main reason corporations engage in socially responsible conduct is to gain a strategic advantage, which is ultimately intended to benefit corporations' bottom lines.[980] Indeed, Friedman argued corporations only embraced the notion of CSR to increase their profits.[981] According to this approach to CSR, ethical conduct is permissible to the extent it is profitable for the corporation.[982]

The Corporations and Market Advisory Committee claimed:

> The philanthropic approach to social responsibility involves companies giving to the community, in a variety of financial or other ways above and beyond their primary business activities, provided there is some direct or indirect benefit to the company in so doing.[983]

In his doctorate, Yu adopted a similar approach to corporate philanthropy, where he explained:

> [A]s a new vehicle for long-term profitability, many brand-named companies have adopted codes of conduct as market-based measures to ward off accusations of wrongdoing and regulate labour practices of their overseas suppliers.[984]

In essence, CSR attempts to deter corporations from failing to discharge their duties under the complicity principle by the threat of negative media attention for non-compliance and by the attraction of positive media attention for ethical conduct.

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[979] Eric Engle, 'Corporate Social Responsibility (CSR): Market-based Remedies for International Human Rights' Violations?' (2004) 40 *Willamette Law Review* 103, 110-111.

[980] Denis G. Arnold and Laura P. Hartman, 'Moral Imagination and the Future of Sweatshops' (2003) 108 *Business and Society Review* 4, 425; Stephen Bainbridge, 'Director Primacy: the Means and Ends of Corporate Governance' (2003) 97 *North western University Law Review* 547, 563.
Minette Drumwright and Patrick E. Murphy, 'Corporate Societal Marketing' in Paul N. Bloom and Gregory T. Gundlach (eds), *Handbook of Marketing and Society* (2001) 163-183; Marianne M. Jennings and Stephen Happel, 'The Post-Enron Era for Stakeholder Theory: A New Look Corporate Governance and the Coase Theorem' (2003) 54 *Mercer Law Review* 873, 873; Debbie McAlister and Linda Ferrell, 'The Role of Strategic Philanthropy in Marketing Strategy' (2002) 36 *European Journal of Marketing* 6, 689.

[981] Milton Friedman, 'The Social Responsibility of Business is to Increase Profits' in Scott B. Rae and Kenman L. Wong (eds), *Beyond Integrity: a Judeo-Christian Approach to Business Ethics* (1996) 241-245.

[982] Geoffrey P. Lantos, 'The Boundaries of Strategic Corporate Social Responsibility' (2001) 18 *Journal of Consumer Marketing* 7, 595.

[983] Commonwealth Corporations and Market Advisory Committee, *Corporate Social Responsibility'* (Discussion Paper, 2005) 1.3.2.

[984] 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) 89.

Pressure has been brought against corporations to improve the labour conditions in their overseas suppliers. Corporations responded to this pressure on the basis the negative publicity could hurt their profits.[985] In response to the media attention, some corporations have made a public show of improving working conditions in their supplier factories.[986] As the main motivator of corporations is negative publicity, most corporations engage in socially responsible conduct primarily as a marketing strategy.[987] Where the primary motivation of ethical conduct is to guard a positive corporate image, corporations will seek to minimise their socially ethical conduct as far as they can, while still maintaining the positive corporate image.[988] As profits are generally the main motivator for CSR, arguably corporations will maximise the corporate gain of CSR by focusing upon socially responsible conduct which will return the maximum corporate advantage. CSR as a business tool focuses upon socially responsible conduct which is profitable to engage in. The complicity principle focuses upon corporations using their sphere of influence to improve society:

> [C]orporate social responsibility as a business tool is distinct from CSR as a development tool. CSR emerged among leading firms and business schools as a public relations tool, a way to deflect criticism, engage critics and potentially capitalise on emerging business opportunities associated with doing, and being seen to be doing, good. This is a far cry, however, from constructing corporate strategies that are aligned with the pressing need to tackle poverty and social exclusion across developing States.[989]

It is foreseeable that not all socially responsible conduct will attract positive media attention and not all socially irresponsible conduct will attract negative media attention. This means the CSR movement may motivate corporations to maximise profits and not the social good. Where a corporation has the option of engaging in

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[985] Adrian Barnes, 'Do They Have to Buy from Burma? A Pre-emption Analysis of Local Anti-Sweatshop Procurement Laws' (2007) 107 *Columbia Law Review* 426, 426.

[986] Adrian Barnes, 'Do They Have to Buy from Burma? A Pre-emption Analysis of Local Anti-Sweatshop Procurement Laws' (2007) 107 *Columbia Law Review* 426, 426; Wang Chuanli and Dong Gang, 'Social Responsibilities of Transnational Corporations' (2007) 2 *Frontiers of Law in China* 3, 378-402.

[987] Peter Jones, Daphne Comfort and David Hillier, 'What's in Store? Retail Marketing and Corporate Social Responsibility' (2007) 25 *Marketing Intelligence & Planning* 1, 17; J Yan, 'Corporate Responsibility and the Brands of Tomorrow' (2003) 10 *Brand Management* 4/5, 290.

[988] Eric Engle, 'Corporate Social Responsibility: Market-based Remedies for International Human Rights' Violations?' (2004) 40 *Willamette Law Review* 103, 112-113.

[989] Peter Newell and Jedrzej George Frynas, 'Beyond CSR? Business, Poverty and Social Justice: an Introduction' (2007 28 *Third World Quarterly* 4, 669.

several possible socially responsible activities, it is submitted that the corporation will adopt the approach which maximises the corporate gain, and not the approach which addresses the greatest social need.

Even if directors desire to maximise the social gain, how do directors identify and determine social needs? Unlike Parliaments, corporations do not have the resources to conduct investigations to rank social needs. For example, if the group who can impact upon a corporation's profit is largely based in Australia, does this mean a corporation should only consider its interests? Should a corporation consider the interests of Chinese workers in SEZs? These are moral judgments which directors focusing upon profits are not well-equipped to make. Ribstein observed:

> Unconstrained managers cannot be expected to act in society's interests not only because they may prefer to act in their own interests, but also because they are unlikely to know what is best for society.[990]

Without accountability to discerning shareholders or regulatory directions on how to maximise the social good, arguably it is doubtful if directors will act in society's best interests.[991]

The current Australian corporate framework permits corporations to engage in corporate socially responsible conduct on the basis that socially responsible conduct is good for both society and corporations' bottom lines. It is essential that directors are held accountable for judgments on CSR. Royal Commissioner Owen J advised:

> [H]owever laudable the object of a donation, discretionary payments of this kind from the funds of shareholders should be undertaken in a transparent and justifiable way with full regard to the interests of shareholders.[992]

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[990] Larry E. Ribstein, 'Accountability and Responsibility in Corporate Governance' (2006) 81 *Notre Dame Law Review* 1431, 1436.
[991] Henry N. Butler and Fred S. McChesney, 'Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation' (1999) 84 *Cornell Law Review* 1195, 1209-1210; Faith Stevelman, 'Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy' (1997) 44 *UCLA Law Review* 579, 583.
[992] Commonwealth, Royal Commission on the Failure of HIH Insurance, *Final Report* (2003) vol 1, 120.

Corporate law is increasingly developing accountability vehicles through which corporations can explain the economic reasoning behind their CSR activities. For example, the Australian Stock Exchange's *Principles of Good Corporate Governance and Listing Rules* introduced CSR reporting requirements. The Australian Stock Exchange's *Principles and Rules*, however, only apply to corporations which are listed on the Australian Stock Exchange. To become listed upon the Australian Stock Exchange, a corporation must comply with the admission requirements in Chapter 1 of the Australian Stock Exchange *Listing Rules*. Even though the listing has statutory force, fundamentally the listing upon the Australian Stock Exchange is a contractual act, which is not necessary for corporations to continue to operate.[993] Listing on the Australian Stock Exchange is entirely optional for corporations. Pursuant to the *Corporations Act 2001* (Cth), corporations can operate as public companies, small proprietary companies or large proprietary companies.[994] Many of these corporate entities can be quite large. For example, small proprietary companies can have a net worth up to $25 million.[995] Indeed, as discussed in chapter 6.3.4 below, the largest discount retailer in Australia is not listed on the Australian Stock Exchange. Listing on the Australian Stock Exchange is only for corporations which desire to be listed. The thousands of corporate entities which are not listed, which make up the majority of outworkers and suppliers in Australia, are not bound by the Australian Stock Exchange *Listing Rules*.

Accounting for CSR only on an economic basis fails substantially to achieve the objectives of CSR. The problem with CSR is that it aims to compel corporations to consider social interests. In some cases, social interests cannot be accounted for in an economic way. Where acting socially responsibly affords a corporation a substantial amount of direct harm, or where an alternative ethical option would have afforded the corporation greater benefits, how can a corporation account for its decision?

[993] *Brolga Minerals Ltd v Stock Exchange of Perth Ltd* (1971-73) CLC 40-057; *Premier Pacific Pharmaceutical Industries Ltd v ASX Ltd* (1995) 57 FCR 548.
[994] These corporate forms are defined in s 9 of the *Corporations Act 2001* (Cth).
[995] *Corporations Act 2001* (Cth) s 45A(2).

Many corporations do not have adequate accountability procedures to cope with CSR decision making processes.[996] Unlike a person, a corporate entity does not have desire or reason which, according to Unger, is necessary for value judgments.[997] When directors make a decision, they must make that decision with reference to the corporation's constitution and the law. Currently, directors are permitted to make a business judgment in the best interests of the corporation. As CSR can place negative pressure upon corporation's profits, directors are authorised to direct the corporation to engage in ethical conduct. As the basis for engaging in ethical conduct is a positive corporate image, directors are encouraged to engage in the ethical conduct which maximises this positive impact. How to identify this link has led some commentators to claim corporations should not engage in any voluntary corporate social responsibility.

Arguably there are serious accounting procedures for directors to explain why they have supported one social cause over another. Sir Gerard Brennan suggested corporations leave such conduct to shareholders, once the profits have been distributed.

There are sound reasons of policy for imposing a limitation on directors' powers to donate corporate assets. Investors, whose charitable inclinations are diverse, do not authorise directors to dispose of corporate assets to charitable objects of the directors' choice. The choice should remain with the individual investor when he or she obtains his or her share of the distributed profits.[998]

Friedman and Wells argue the accountability problems associated with CSR mean directors' socially responsible conduct should be limited to activities which are profitable.[999]

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[996] Jon Entine, 'The Myth of Social Investing: a Critique of Its Practice and Consequences for Corporate Social Performance Research' (2003) 16 *Organization & Environment* 3, 352.
[997] Roberto Mangabeira Unger, *Knowledge and Politics* (1975) 38.
[998] Hon. Sir Gerard Brennan, 'Law Values and Charity' (2002) 76 *Australian Law Journal* 492, 497.
[999] Milton Friedman, 'The Social Responsibility of Business is to Increase Profits' in Scott B. Rae and Kenman L. Wong (eds), *Beyond Integrity: a Judeo-Christian Approach to Business Ethics* (1996) 241-245; C.A. Harwell Wells, 'The Cycles of Corporate Social Responsibility: an Historical Retrospective for the Twenty-first Century' (2002) 51 *Kansas Law Review* 77, 106.

Rather than relying upon a profit- making entity to determine how to engage in non-profit- making conduct, McWilliams and Siegel contend corporations should merely comply with the law and leave public policy to regulators.[1000] Levitt claims there are inherent dangers in corporations engaging in CSR and directors should focus upon profits.[1001] Jones argues that managers do not have the experience of identifying and distributing money for charitable purposes.[1002] Traditionally, charity was the province of government and churches, which have arguably the resources and expertise to identify and remedy social needs. As directors often do not have skills to identify and rank philanthropic causes to maximise the social good, CSR will arguably only be a viable soft law vehicle if directors have the guidance and authority to make CSR decisions.

5.5 Business judgment rule and CSR

When determining how to direct corporate resources, directors can elect to re-invest profits into the business, pay dividends or devote profits to socially responsible activities. If directors elect to devote corporate resources to socially responsible activities, on what basis can a director discriminate between the hundreds of options? For example, most corporations' activities impact on both internal and external parties. There are millions of charitable causes around the world calling for support. Arguably the *Corporations Act 2001* (Cth) provides directors with support when they make a business judgment to allocate corporate resources to socially responsible causes such as engaging in above compliance OHS practices. The *Corporations Act 2001* (Cth) encourages directors to focus on the conduct which will maximise the benefit to the corporation.

The main purpose of directors is to provide a corporate strategic direction.[1003] To support directors in this role, s 180 of the *Corporations Act 2001* (Cth) protects directors for making business judgments. As discussed above, s 180(1) requires directors to act with due care and diligence when exercising their functions. In an

[1000] Abagail McWilliams and Donald Siegel, 'Corporate Social Responsibility and Financial Performance: Correlation or misspecification?' (2000) 21 *Strategic Management Journal* 5, 603.
[1001] Theodore Levitt, 'The Dangers of Social Responsibility' (1958) 36 *Harvard Business Review* 5, 41.
[1002] Mark T. Jones, 'The Institutional Determinants of Social Responsibility' (1999) 20 *Journal of Business Ethics* 2, 163.
[1003] Bob Baxt, *Duties and Responsibilities of Directors and Officers* (18th ed, 2005) 40-42.

attempt to clarify that directors can exercise their business judgment,[1004] s 180(2) distilled the common law business judgment rule.[1005] Section 180(2) provides s 180(1) will be satisfied, if a director makes their decision:

(a) in good faith for a proper purpose; and

(b) the director does not have a material personal interest in the subject matter of the judgment; and

(c) the director has informed themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and

(d) the director rationally believed that the judgment was in the best interests of the corporation.

What constitutes a business judgment is defined in s 180(3) to mean 'any decision to take or not take action in respect of a matter relevant to the business operations of the corporation'.

Arguably the business judgment rule was introduced to protect directors from entrepreneurial activities which may or may not provide profits.[1006] Austin J held the business judgment rule was introduced to protect 'directors from the consequences of their entrepreneurial and non-entrepreneurial business judgments taken honestly and reasonably' in the best interests of the corporation.[1007]

For the business judgment defence to be available for directors, directors must positively turn their minds to what is in the corporation's best interests. This requires directors first to obtain all the necessary information, and then to decide if the proposed conduct will be in the corporation's best interests.[1008] It is therefore essential for directors to firmly have in their minds what constitutes the corporation's

[1004] Thomas Molomby, *Report on Fair Consumer Credit Laws* (Report to the Honourable G.O. Reid, Attorney-General for the State of Victoria by a Committee of the Law Council of Australia, 1972) (24).

[1005] For a discussion of the common law business judgment rule, see *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483, 493; H A J Ford, R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (2000) [8.060].

[1006] Thomas Molomby, *Report on Fair Consumer Credit Laws* (Report to the Honourable G.O. Reid, Attorney-General for the State of Victoria by a Committee of the Law Council of Australia, 1972).

[1007] *ASIC v Vines* [2005] NSWSC 1349, [67] for entrepreneurial judgments and [69] for non-entrepreneurial judgments.

[1008] *Gold Ribbon (Accountants) Pty Ltd (in liq) v Sheers and Ors* [2006] QCA 335, [247] (Keane JA), with Williams JA [106] and Wilson J [329] agreeing with the conclusions of Keane JA and with how Keane JA defined directors' duties.

interests. In particular, are a corporation's interests the shareholders' interests only, or can a director consider all factors which may impact upon a corporation? This is relevant, as the corporation's interest may dictate ethical conduct, while the shareholders' interests may not be impacted on by such conduct. This situation can arise in outworking supply chains in Australia. Often incorporated traders, which provide work to the outworkers, have very little liquidity. Often when an outworker attempts to assert his/her rights against traders, the incorporated trader enters into liquidation and thus the judgment cannot be enforced.[1009] The shareholders of the corporation, however, often re-enter the industry under a new corporate entity.[1010] This means the corporation's interest of continual survival can be in direct contrast with the shareholders' interest of obtaining profits gained from exploitation.

Corporations are owned by shareholders. Are corporations' interests shareholders' interests? In *Capricornia Credit Union Ltd v Australian Securities and Investment Commission*, one of the issues in dispute was whether a director should act in the shareholders' interests or the interests of the company generally.[1011]

Dowsett, Edmonds and Besanko JJ held s 180 of the *Corporations Act 2001* (Cth) clearly stated that 'the power to manage the company remains vested in the board'.[1012] Certain shareholders sought the power to direct the board in its conduct. The shareholders who sought to control the board submitted that shareholders' directions to the board would not require directors to breach their duties to the corporation. Dowsett, Edmonds and Besanko JJ held the shareholder proposal in substance said that it 'may be that a director, acting in accordance with his or her statutory and other obligations, would act in the same way as the members directed'.[1013] Their Honours held that 'the effect of the proposal is that the board be re-constituted to comprise directors who will act in accordance with members' directions without exercising any personal judgment. A director, who is prepared to give effect to members' directions, by definition, does not propose to fulfil [their

[1009] Igor Nossar, 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.
[1010] Sally Weller, 'Regulating Clothing Outwork: a Sceptic's View' (2007) 49 *Journal of Industrial Relations* 1, 69; For example of a case where the trader liquidated when faced with a claim, see *Textile Clothing Footwear Union of Australia v Southern Cross Clothing Pty Ltd* [2006] FCA 325.
[1011] *Capricornia Credit Union Ltd v Australian Securities and Investment Commission* [2007] FCAFC 79.
[1012] *Capricornia Credit Union Ltd v Australian Securities and Investment Commission* [2007] FCAFC 79, [61].
[1013] Ibid.

statutory obligations].[1014] Directors must exercise their personal judgment in the best interests of the corporation, and it is possible that the corporation's interests may conflict with certain shareholders' interests.

Ultimately, corporate law in Australia permits directors to engage in socially responsible conduct, providing the conduct is in the corporation's best interests. When determining what are in the best interests of the corporation it is submitted that directors have a wide discretion. A director's duty has been defined as a duty to take reasonable care in the performance of his/her offices[1015] and as a duty to exercise 'a reasonable degree of care and diligence in accordance with the requisite legal standard'.[1016] Generally, directors have an extremely wide discretion in determining what is in the corporation's best interests. McDougall J in *Ingot Capital Investments & Ors v Macquarie Equity Capital Markets & Ors* explained:

> In determining whether a director has exercised the necessary degree of care and skill, it is necessary to bear in mind that risk and benefit are often two sides of the same coin, or two possible consequences of the same course of conduct, and that risk and return are an integral part of industry and commerce.[1017]

Ipp J also made this point in *Vrisakis v Australian Securities Commission*, where his Honour stated:

> The mere fact that a director participates in conduct that carries with it a foreseeable risk of harm to the interests of the company will not necessarily mean that he has failed to exercise a reasonable degree of care and diligence in the discharge of his duties. The management and direction of companies involve taking decisions and embarking upon actions which may promise much, on the one hand, but which are, at the same time, fraught with risk on the other. That is inherent in the life of industry and commerce.[1018]

[1014] Ibid.
[1015] See *Daniels & Ors (Formerly Practising as Deloitte Haskins & Sells) v AWA Limited* (1995) 37 NSWLR 438, 505 (Clarke and Sheller JJA).
[1016] *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395, 450 (Ipp J), with whom Malcolm CJ and Rowland J concurred.
[1017] *Ingot Capital Investments & Ors v Macquarie Equity Capital Markets & Ors [No 6]* [2007] NSWSC 124, [1433].
[1018] *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395, 449-450 (Ipp J), with whom Malcolm CJ and Rowland J concurred.

Even though directors have a high duty of care as fiduciaries,[1019] arguably they are permitted to 'display entrepreneurial flair and accept commercial risk'.[1020] The power of directors to take risks can be contrasted with other fiduciaries, such as trustees, who have a duty 'to exercise a degree of restraint and conservatism in investment judgments'.[1021] It is clear, providing the corporation's constitution permits CSR, directors can generally justify acting socially ethically, on the basis such conduct will ultimately benefit the corporation.

If the justification for corporate socially responsible conduct is distilled down to its basis, a corporation is only entitled to act ethically if ethical conduct will provide a direct or indirect benefit to the corporation. Where a corporation relies entirely upon providing extremely cheap goods to consumers, the motivation for that corporation to engage in socially responsible conduct would be reduced. Indeed, if consumers were indifferent to the plight of foreign workers, then the benefit the corporation would receive from acting socially responsibly would be minimal. In contrast, if the very viability and survival of the corporation depended upon low-priced goods, then a director may have limited grounds to justify the decision to direct the corporation to act socially responsibly, especially in a niche market where consumers were price conscious and not socially conscious. Directors have an obligation to exercise their powers and discharge their duties with a reasonable degree of care and diligence, and for a proper reason. If the main purpose of the corporation is to make profits through acquiring and selling goods at the cheapest possible prices, then a proper purpose for directors is to ensure the corporation can continue to achieve its goal while complying with all relevant laws.

When a director is deciding whether or not to engage in socially responsible conduct which is unlikely to afford the corporation any benefit, the director's judgment will be assessed objectively. When determining what a proper purpose is, the courts do not consider the subjective opinion of directors. As Weinberg J explained in *Downey v Crawford*, a director can breach their duty to act for a proper purpose, 'if the law

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[1019] For a discussion of directors' roles as fiduciaries, see generally H A J Ford, R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (2000) [8. 010].
[1020] *Daniels v Anderson* (1995) 37 NSWLR 438, 494; see also R Austin, Harold Ford and Ian Ramsay, *Company Directors: Principles of Law and Corporate Governance* (2005) [5.16].
[1021] See for example of the powers of a trustee and the obligation to act conservatively: *Trusts Act 1973* (Qld) s 24.

objectively considers that what … [the director] is doing is improper, even if it is subjectively thought to be in the best interests of the company'.[1022] When determining whether a director has breached his/her duty, the actual subjective views of the director are immaterial.[1023]

The director's purpose is to act in the best interests of the corporation and not in the best interests of society. This means a director who directs a corporation to engage in outsourcing to a foreign jurisdiction, which results in substantial labour violations by an unrelated entity, arguably could be acting validly in the corporation's interests if this conduct will increase the profit margin sufficiently to make any pressure from CSR immaterial. As Hargrave J in explained:

> Section 182(1) provides that directors, officers and employees of a corporation must not improperly use their position … to cause detriment to the corporation.[1024]

Gowans J explained in *Marchesi v Barnes*:

> A breach of the obligation to act bona fide in the interests of the company involves a consciousness that what is being done is not in the interests of the company, and deliberate conduct in disregard of that knowledge.[1025]

The business judgment rule will permit directors to excuse their conduct only where they act with due care and diligence, in good faith and without 'wilfully or recklessly sacrificing the interests of' the corporation.[1026] Where the director's business judgment will reduce a corporation's ability to operate in its niche market, then it is unlikely the director's judgment will be determined objectively to be in the corporation's best interests.

[1022] *Downey v Crawford* [2004] FCA 1264, [176] (Weinberg J).
[1023] *Australian Growth Resources Corp Pty Ltd v Van Reesema* (1988) 6 ACLC 529, (King CJ); *Marchesi v Barnes* [1970] VR 434, (Gowans J).
[1024] *Australian Securities and Investments Commission v PFS Business Development Group Pty Ltd* [2006] VSC 192, [372].
[1025] *Marchesi v Barnes* [1970] VR 434, 438; even though this was before the *Corporations Act 2001* (Cth), this aspect of the duty has not altered; cited with approval by Young J in *Galipienzo v Solution 6 Holdings Ltd* (1998) 28 ACSR 139 and Einstein J in *Desmond Henry Randall v Aristocrat Leisure Limited (ACN 002 818 368)* [2004] NSWSC 411, (457).
[1026] *Deangrove Pty Ltd (Receivers and Managers Appointed) v Buckby* [2006] FCA 212, [70] (Branson J).

It is submitted that one of the reasons the business judgment rule was introduced was to avoid courts being required to judge whether or not directors judgments were likely to lead to profits or not. Elhauge explained that 'a legal duty to maximise profits [was] too hard to monitor' and that directors should engage in CSR.[1027] While generally courts have difficulty in ascertaining whether a director's judgment was or was not a reasonable decision to ultimately maximise profits, it is contended that there maybe cases where a director's decision to engage in non-profit-making activities is clearly not likely to result in profits. If acting socially responsibly will substantially reduce the corporation's profits and provide the corporation no benefits, then directors could be in breach of their directors' duties if they permit the corporation to act ethically.

5.6 Conclusion

To judge whether Australia is able to discharge its duty to protect workers' right to safety and health through using CSR as a regulatory, this chapter has asked whether Australian corporate law reflects the complicity principle. Arguably to be effective as a regulatory option Australia must first permit corporations to engage in CSR and have a vehicle to ensure those socially responsible resources maximize the social good. The first part of this chapter demonstrated how the complicity principle is conceived in Australian law largely through the CSR movement. CSR has sought to encourage corporations to use their vast resources to benefit the entire community, rather than just maximizing profits for shareholders.

The second part of this chapter analysed if Australian law permits directors to go beyond mere legal compliance and direct their corporations to act ethically. Corporations are not philanthropic entities. Corporations are created by investors to provide returns to shareholders. While Australian corporate law requires directors to focus upon acting in the best interests of corporations, the law anticipates socially responsible conduct may be essential to the successful operation of the corporation. For example, the Australian Stock Exchange Rules provide guidance on how

[1027] Einer Elhauge, 'Sacrificing Corporate Profits in the Public Interest' (2005) 80 *New York University Law Review* 733, 739; The Australian business judgment rule was based heavily upon the American business judgment rule: Andrew Clarke, 'The Business Judgment Rule -- Good Corporate Governance or Not?' (2000) 15 *Australian Journal of Corporate Law* 2, 2.

corporations should report such above-compliance ethical conduct. The third part of this chapter demonstrates how the underlying profit focus of CSR can limit directors' options. Where it is profitable for a corporation to be engaged in ethical purchasing practices, then Australian corporate law facilitates directors acting ethically. If the corporation's customers are not socially conscious, then the justification for the director acting ethically is reduced. Even if a director does decide to act ethically, how do directors discriminate between the various social causes? Should directors allocate corporate resources to the social conduct which maximizes the corporate gain at the smallest corporate cost or focus upon maximizing the social good? As directors have no training or ability to rank social causes, directors are required to focus upon social causes which are profitable for corporations.

The fourth part of this chapter analyzed how the business judgment rule defence enables directors to defend any business judgment which was made in good faith, in the best interests of the corporation and based upon facts. According to this defence, directors are able to allocate corporate resources to any social cause that affords the corporation some benefit. As virtually all socially responsible conduct improves the corporate image, the business judgment rule allows corporate Australians to donate to any social cause which can assist in maintaining a positive corporate image. There may be situations, however, where corporate image is immaterial to a corporation. In these limited cases, the business judgment rule may afford directors less support. In most cases however, the business judgment rule will enable directors to defend their socially responsible decisions.

This chapter argues that through enabling corporations to engage in CSR, Australian corporate law does permit corporations to discharge their human rights' obligations under the complicity principle. Whether Australia's reliance upon CSR is reasonable depends upon whether or not this soft law vehicle results in a substantial number of corporations discharging their human rights' obligations. While Australian corporate law permits and facilitates directors' compliance with the complicity principle, corporations are free to engage in unethical conduct providing this conduct is not illegal. If Australia is to rely upon CSR as a regulatory option to discharge its duties explained in chapters 2.4.1 and 2.4.4 then Australia must have a reasonable level of assurance that corporations will voluntarily protect workers' right to safety and

health. The next two chapters will analyze whether CSR is an effective regulatory vehicle to ensure corporations discharge their human rights' obligations under the complicity principle.

CHAPTER 6

6 Does voluntary Corporate Social Responsibility have sufficient coverage to constitute a viable soft law regulatory vehicle in Australia?

6.1 Introduction

Chapter 2.4.1 and 2.4.4 have established that States have a positive moral duty to take reasonably practicable steps to ensure corporations subject to their jurisdiction uphold workers' right to safety and health. Due to the complicity principle, corporations' moral duty extends to taking reasonably practicable steps to ensure human rights are respected within their spheres of influence. The extended interpretation of State responsibility requires States to take reasonably practicable steps to ensure corporations discharge their human rights' obligations under the complicity principle. The previous chapter argued that that Australian law permitted corporations to comply with the complicity principle. Chapter 3 analysed the circumstances in which Australian corporations are required to ensure their workers' right to safety and health is protected. Where hard law does not force Australian corporations to protect workers' right to safety and health, then arguably the primary reason corporations will take steps to ensure human rights are respected in their sphere of influence is pressure from corporate social responsibility (**CSR**).

The core argument of this thesis is that Australia has a moral duty to take reasonably practicable steps to protect workers' right to safety and health in Australian based supply chains. This chapter will argue that the low participation rate of corporate Australia in the CSR movement means that Australia cannot utilize CSR to discharge its moral duty to protect workers' right to safety and health. To be regarded as a viable soft law alternative to hard law regulation it is submitted CSR must be able to operate as an effective deterrent. Whether or not CSR is a viable soft law alternative will be analysed in both this chapter and chapter 7.

This chapter will analyse how corporations have responded to the direct pressure from negative media attention created by the CSR movement. If the CSR movement

pressures a critical mass of corporations to alter their conduct, then this can cause indirect pressures upon corporations. Indirect pressure is where corporations' responses are altered by the conduct of other corporations or by legal regulation. Indirect pressure is more difficult to assess because this form of pressure will occur after a sufficient number of corporations have been pressured by direct pressure to alter their practices. Indirect pressure requires a direct pressure to have a substantial impact upon industry at a level which is critical for the relevant industry. Rather than analysing both direct and indirect pressures, this chapter will focus entirely upon whether or not the direct pressure from CSR imposes sufficient pressure upon corporations to cause a change in their conduct.

The CSR movement encourages corporations to act ethically and deters corporations from acting unethically through the threat of damage to a corporation's image, which causes negative impacts upon the corporation's sales, business relationships and recruitment and retention. According to the regulatory pyramid as discussed in chapter 2.4.1, the pyramid is only successful where the threat of punishment at the top of the pyramid exists to act as a deterrent. This chapter will firstly analyse primary research to indicate whether the deterrent aspect of CSR is a real threat for most corporations. The second part of this chapter focuses on the adoption of CSR in the Australian retail sector to determine if the CSR movement is motivating retailers to manage labour conditions in their supply chains. One tactic used to magnify the impact of CSR is to target the most visible players in supply chains: major retailers.

6.2 Impact of corporate social responsibility upon corporations' conduct

6.2.1 The problem of mixed impact

The CSR movement's reliance on the fear that negative media attention will damage a corporation's brand name and reduce profits is arguably a substantial limitation of the movement. Where a corporation's brand image is important, then it will benefit from positive media attention and suffer deterrence from negative media

attention.[1028] In contrast, corporations which do not rely upon a brand image are far less vulnerable to CSR and therefore may have less compunction about failing to manage ethically their supply chains. If a large percentage of corporations do act unethically in an industry, then the incentive for corporations to act ethically is diminished, as other corporations continue to succeed and reduce their costs through acting unethically.[1029] As corporations seek to maximise their profits, if CSR does not motivate a sufficient mass of corporations to act ethically, then the expenses in acting ethically become harder to justify to shareholders.[1030] The pressure created from unethical corporations and their higher profits means 'corporate decision-makers, whatever their dispositions, will not be able to pursue non-profit-maximising ends for long, lest they be driven out of business …'.[1031] If unethical corporations continue to make higher profits than their ethical competitors, then it is submitted ethical corporations will be encouraged to reduce their expenditure on acting socially responsibly. Therefore, CSR will only operate as an effective deterrent if it can motivate a sufficient mass of corporations to be socially accountable.

The CSR movement has responded by the need to develop a critical mass of socially responsible corporations through placing pressure upon corporations with brand images to regulate their supply chains. The focus upon one vulnerable corporation to act ethically may force other parties in supply chains to improve their labour practices. [1032]

In clothing retail supply chains, the corporations most vulnerable to corporate social responsibilities are well- known, branded products and retail chains.

Sportswear companies rely increasingly upon a positive image to sell their products. These retailers and clothing and apparel brands largely outsource the production of

[1028] M Ogrizek, 'The Effect of Corporate Social Responsibility on the Branding of Financial Services' (2002) 6 *Journal of Financial Services Marketing* 3, 215.
[1029] Prakash Sethi, 'Corporate Codes of Conduct and the Success of Globalization' (2002) 16 *Ethics & International Affairs* 1, 89, 96.
[1030] Joel Makower, *Beyond the Bottom Line* (1994) 30.; Eric Engle, 'Corporate Social Responsibility (CSR): Market-based Remedies for International Human Rights' Violations?' (2004) 40 *Willamette Law Review* 103, 105.
[1031] Ronald Chen & Jon Hanson, 'The Ilusion of Law: the Legitimating Schemas of Modern Policy and Corporate Law' (2004) 103 *Michigan Law* Review 1, 166.
[1032] This approach was famously adopted by the Clean Clothes Campaign: see: Michael Santoro, 'Beyond Codes of Conduct and Monitoring: an Organizational Integrity Approach to Global Labor Practices' (2003) 25 *HumanRights Quarterly* 2, 407.

all their products to supplier factories.[1033] Such corporations, rather than being involved with manufacturing and marketing, devote all their attention to marketing and designing new products. For all intents and purposes, they are hollow corporations, focusing entirely upon marketing.[1034] Such corporations are vulnerable to the highest degree of CSR pressure. Klein explains this phenomenon by stating:

> In many ways branding is the Achilles' heel of the corporate world. The more these companies shift to being all about brand meaning and brand image, the more vulnerable they are to attacks on image.[1035] Therefore, CSR creates a conflict in corporations between the marketing department, which is attempting to create a strong positive brand image, and the production department, which is attempting to maximize productivity at the cheapest possible cost. For corporations with a strong brand image, CSR will have an impact upon the corporation's management.

For corporations without a brand image however, CSR has very little, if any, impact. Cooney explains that

> … firms are often led to adopt measures on labour standards in response to public pressure, while those firms not in the public eye have limited incentive to act. This is often the case with enterprises that produce intermediate, rather than consumer, goods.[1036]

If CSR relies upon negative marketing as a threat to a brand image, then corporations which have no brand image are unlikely to be subject to any pressure to act socially responsibly. Corporations are unlikely to act socially responsibly where the corporation has no deterrent against unethical conduct, engaging in ethical conduct is expensive and the rewards are uncertain. Davidsson observes:

> Socially responsible conduct has often been described as an economic win-win situation. In some circumstances, however, this view is overly simplistic and misleading. Additional costs are involved in adopting new policies and schemes to

[1033] Clean Clothes Campaign, 'Sportswear Industry Data and Company Profiles: Background Information for the '*Play Fair the Olympics' Campaign*' (2004) 15.
[1034] Robert Goldman and Stephen Papson, *Nike Culture: The Sign of the Swoosh* (1998) 4.
[1035] Naomi Klein, *No Space, No Choice, No Jobs, No Logo: Taking Aim at the Brand Bullies* (2002) 343; see also: Mat Haig, *Brand Royalty: How the World's Top 100 Brands Thrive and Survive* (2004).
[1036] Sean Cooney, 'A Broader Role for the Commonwealth in Eradicating Foreign Sweatshops?' [2004] 28 *Melbourne University Law Review* 291, 310.

> align existing company practices with social responsibilities, and these additional costs will not always result in increased profits.[1037]

Barrientos and Smith have concluded that '[u]ntil market incentive systems sufficiently reward good performance on labour practices, the majority of corporate actors are unlikely to prioritise ethical trade'.[1038] The precise number of corporations which are not subject to brand pressure can be fully realised when the actual number of brand names in the market place is considered. While some major sports shoe brands have been targeted by consumer groups, hundreds of shoe brands which have less identifiable brand names are subject to little or no negative media attention. Either these other brand-name shoes are produced in socially responsible circumstances, or for whatever reason, these brands have not had negative media attention. As a consequence, the impact of CSR is lost for hundreds of corporations, simply because there is insufficient information about their conduct provided to the consumer.

In addition to the actual number of brands in the marketplace, CSR arguably has even less impact on corporations involved with raw materials or at intermediate stages of the production process.[1039] These corporations do not rely upon their brand image, but upon personal relationships with parties higher in the supply chain. When these corporations do face investigation or regulatory pressure, they are able to enter into liquidation and effectively disappear. Often, these same corporations subsequently re-enter the industry with a new corporate front, and continue to operate with apparent impunity.[1040]

Weller has contended that Australian supply chains can be divided into four segments.[1041] Out of these four general groups, Weller argued that only brands that

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[1037] Pall A. Davidsson, 'Legal Enforcement of Corporate Social Responsibility within the EU' (2002) 8 *Columbia Journal of European Law* 529, 531, 532.
[1038] Stephanie Barrientos and Sally Smith, 'Do Workers Benefit from Ethical Trade? Assessing Codes of Labour Practice in Global Production Systems' (2007) 28 *Third World Quarterly* 4, 713, 729.
[1039] Robert Liubicic, 'Corporate Codes of Conduct and Product- labelling Schemes: the Limits and Possibilities of Promoting International Labour Rights through Private Initiatives' (1998) 30 *Law and Policy in International Business* 1, 11-159.
[1040] Igor Nossar, 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; Sally Weller, 'Regulating Clothing Outwork: a Sceptic's View' (2007) 49 *Journal of Industrial Relations* 1, 69.
[1041] Sally Weller, 'Regulating Clothing Outwork: a Sceptic's View' (2007) 49 *Journal of Industrial Relations* 1, 69, 71; See for further discussion 1.3 of this thesis.

sell their products to a consumer market sensitive to the conditions of production are subject to pressure from CSR. Corporations in the other segments can generally withstand or avoid any negative media attention. The threat to their brand image is therefore negligible, while the price savings in socially irresponsible conduct can be lucrative. For these corporations, the CSR movement is largely irrelevant.[1042]

6.2.2 Connection between CSR and consumers' responses

Arguably corporations are motivated to engage in socially ethical conduct where such conduct can positively impact on their bottom lines. For corporations such as retailers and brand name suppliers, one of the main reasons they engage in socially responsible conduct is to attract consumers. When a product is associated with socially responsible conduct, consumers purchase that ethical conduct as part of the product.[1043] It has been argued that there is insufficient evidence to demonstrate there is a substantial link between customers actually altering their purchasing practices due to CSR.[1044] This part will now examine substantive research to demonstrate that there is often not a link between CSR and positive consumer responses.

Pullig's doctorate examined the impact negative corporate social conduct had upon brand knowledge, key consumer brand and organisational associations, risk perceptions, and brand response variables.[1045] He conducted two between-subjects experiments with adult consumers as subjects. In his first study, negative brand events were associated with the brand itself and the brand's ability to fulfil the customer's practical requirements from the product. Pullig identified two types of events. First, he identified product-related events. Product-related events are events which concerned the product's ability to fulfil the customer's functional

[1042] See also Robert A. Kagan and John T. Scholz, 'The Criminology of the Corporation and Regulatory Enforcement Strategies' in Keith Hawkins and John M. Thomas (eds), *Enforcing Regulation* (1984) 68; Evaristus Oshionebo, 'The U.N. Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities' (2007) 19 *Florida Journal of International Law* 1, 18.

[1043] Tom Brown and Peter Dacin, 'The Company and the Product: Corporate Associations and Consumer Product Responses' (1997) 61 *Journal of Marketing* 1, 68; Sankar Sen and C. Bhattacharya, 'Does Doing Good Always Lead to Doing Better? Consumer Reactions to Corporate Social Responsibility' (2001) *38 Journal of Marketing Research* 5, 225.

[1044] Michael J. Hiscox and Nicholas F. B. Smyth, 'Is There Consumer Demand for Improved Labor Standards? Evidence from Field Experiments in Social Labeling' (Department of Government, Harvard University, Research Report, 2005) 2.

[1045] Chris Pullig, *The Effect of Negative Events and Firm Responses on Brand Associations, Organizational Associations, and Brand Evaluations* (PhD Thesis, Louisiana State University and Agricultural & Mechanical College, 2000).

requirements. Secondly, he identified organisation-related events. Organisation-related events are events which concerned how the customer's values impacted on the corporation's conduct. Organisation-related events did not impact on the product's ability to fulfil the customer's practical requirements.

Pullig found if a corporation had a negative event related to the quality of the product (a product-related event) then this caused a massive consumer response. Where the corporation had acted unethically (an organisation-related event), the consumer response on consumption was considerably less acute. It emerged that consumers were prepared to continue to purchase products, even where those products were related to breaches of CSR.

Similar to Pullig's doctorate, Mercer's doctorate found CSR had a minimal impact on a corporation's bottom line.[1046] Mercer focused upon the automotive industry in the USA. He sampled industry participants between the ages of 25 and 74. He first conducted eight study groups with 63 subjects to determine the level of CSR activities of subject corporations. His second study involved a statistically reliable population of 3200 across the USA. The subjects were presented with 22 values drawn from his first study, and asked to rank their importance.

Mercer found that the impact companies' CSR had on consumers was largely determined by the impact the company's unethical practices could have on them personally. He found that socially vulnerable consumer groups would alter their consumption where corporations acted unethically, as they were more likely to be impacted on negatively by such action. Mercer found that where a company's actions impacted negatively on other social groups, consumers were less likely to alter their conduct.

This is not to say CSR has no impact upon consumers. Gupta's doctorate involved comparing corporate ability to produce products, to the social responsibility associated with producing those products.[1047] Gupta examined the impact CSR had

[1046] Jeffrey Mercer, *Corporate Social Responsibility and Its Importance to Consumers* (PhD Thesis, The Claremont Graduate University, 2003).
[1047] Shruti Gupta, *Strategic Dimensions of Corporate Image: Corporate Ability and Corporate Social Responsibility as Sources of Competitive Advantage via Differentiation* (PhD Thesis, Temple University, 2002).

on a corporation's competitive advantage by testing consumers' willingness to purchase products, pay a premium price for ethically-produced products, their satisfaction and brand loyalty. The research found that consumers did transfer unethical conduct to their purchasing strategies. Where there is parity in price and quality, a company's conduct becomes the determining factor in consumers' choice.

Similarly, Menck found CSR did have an impact on consumers' behaviour. His doctorate found the symbolic value of products had a 'substantial' impact upon consumers.[1048] His research found consumers' price sensitivity decreased significantly in the presence of social involvement.

Menck's doctorate utilized a random utility model where social involvement was assumed to affect consumers' consideration and choice of products. To estimate the model's parameters, he conducted a mail survey which examined the conjoint choice tasks. Menck developed four categories of real brands and tested them by manipulations of corporate social involvement, expertise, price and attributes.

The research indicated consumers were prepared to alter their conduct on the basis of ethical conduct. The lower the price difference between products associated with ethical conduct and those associated with unethical conduct, the greater the association between CSR and consumer conduct.

The above research has focused on a positive impact flowing from a corporation advertising its involvement in socially responsible practices. In his doctorate, Yoon used psychological theories of suspicion and attribution to demonstrate the difficulties corporations have in improving their market share using positive CSR.[1049] Yoon built on work by Vein, Hilton and Miller which suggested that subjects which are suspicious of a target's motives reacted differently from subjects which believed the target's motives are genuine.[1050] Yoon postulated that a corporation's attempts to

[1048] Andre Menck, *Effects of the Firm's Social Involvement on Consumer Behaviour* (PhD Thesis, University of Florida, 1998).
[1049] Yeosun Yoon, *Negative Consequences of Doing Good: theEffects of Inferred Motives Underlying Corporate Social Responsibility (CSR)*' (PhD Thesis, University of Michigan, 2003).
[1050] Steven Fein and James L. Hilton, 'Judging Others in the Shadow of Suspicion' (1994) 18 *Motivation and Emotion* 2, 167-198; Steven Fein, L. Hilton and Dale T. Miller, 'Suspicion of Ulterior Motivation and the Correspondence Bias' (1990) 58 *Journal of Personality and Social Psychology* 753; Yaacov Trope, 'Identification and Inferential Processes in Dispositional Attribution' (1997) 93 *Psychological Review* 3, 239.

publicise its socially ethical conduct may create a negative effect. He tested whether consumers who were suspicious of a corporation's motives in engaging in socially responsible conduct would react positively or negatively to a corporation's marketing of its conduct.

Yoon's research identified that a corporation's efforts to adopt socially responsible practices could create a negative consumer response by identifying a process-based explanation of the reasoning behind the consumers' responses. The research concluded that consumers sometimes adopt the perception that the corporation is acting to improve its status and, in fact, has no genuine concern for good social practices. As a consequence of this belief, consumers punish the corporation by refusing to trade with it. As a consumer's suspicion can be derived from various sources, including historical information provided by the target, information provided by other sources about the target and the subject's own subjective biases,[1051] any marketing of a corporation's socially responsible activities has the potential to create a negative effect.

The research examined in this section indicates socially responsible conduct has a mixed impact on consumers. Pullig's and Mercer's doctorates found CSR impacted differently on different groups. Gupta's and Menck's doctorates found CSR can have a substantial impact on some consumers' purchasing practices. These doctorates indicate CSR does not motivate many corporations to become good corporate citizens. While some corporations may find it beneficial to engage in CSR in many areas, doctorates such as Mercer's indicate consumers will only respond negatively to certain irresponsible behaviour. As a uniform approach, based on this research, CSR has dubious credibility. While there is the potential for positive results, there is also the risk that the corporation will be subject to a negative response. Yoon's doctorate indicated a corporation which has engaged in socially responsible conduct must take care in targeting consumers when marketing its product. Advertising CSR requires corporations to ascertain whether the advertisement will bring a positive or negative response from consumers. In conclusion, this section indicates CSR will not uniformly motivate corporations to engage in socially responsible conduct.

[1051] Daniel Gilbert and Patrick S. Malone, 'The Correspondence Bias' (1995) 117 *Psychological Bulletin* 1, 21.

6.2.3 Recruitment and turnover

The way in which CSR can impact on people external to a corporation is similar to the impact CSR has on people within the corporation. The major internal implication caused by CSR is on employees.[1052] When an employment contract is struck, the success of the relationship largely turns on whether there is a good organisational fit between the employee and the employer in the underlying psychological contract. The success of the fit will determine the success of the relationship.[1053] Employees attempt to achieve this fit when seeking a potential employer. Recognizing the fact that employees are becoming discerning, employers are becoming concerned with improving their attractiveness.[1054]

Koys found employers who demonstrate a positive concern for society earned increased employee commitment.[1055] Albinger and Freeman surveyed applicant responses from 25 companies.[1056] They then engaged independent experts to determine the CSR compliance of these companies and compared job applicants' responses to the companies. They found CSR had increased relevance for employees in tight labour markets or for employees with many employment options. Greening and Turban found potential employees will distinguish between employers depending on what socially responsible practices the corporate employer engages in.[1057]

Wulfson found that employees would distinguish between employers who engaged in philanthropic or socially ethical practices.[1058] Holliday and Schrnidheiny explain that Shell noticed a massive downturn in job applications following revelations that

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[1052] Ronald Chen and Jon Hanson, 'The Ilusion of Law: the Legitimating Schemas of Modern Policy and Corporate Law' (2004) 103 *Michigan Law* Review 1, 46-48.
[1053] Philip Stiles, Linda Gratton, Catherine Truss, Veronica Hope-Hailey and Patrick McGovern, 'Performance Management and the Psychological Contract' (1997) 7 *Human Resource Management Journal* 1, 57.
[1054] Daniel Greening and Daniel Turban, 'Corporate Social Performance as a Competitive Advantage in Attracting a Quality Workforce' (2000) 39 *Business and Society* 3, 254.
[1055] Daniel Koys, 'The Effects of Employee Satisfaction, Organizational Citizenship Behavior and Turnover on Organizational Effectiveness: a Unit-level, Longitudinal Study' (2001) 54 *Personnel Psychology* 1, 101.
[1056] Heather Albinger and Sarah Freeman, 'Corporate Social Performance and Attractiveness as an Employer to Different Job- seeking Populations' (2000)28 *Journal of Business Ethics* 3, 243.
[1057] Daniel Greening and Daniel Turban, 'Corporate Social Performance as a Competitive Advantage in Attracting a Quality Workforce' (2000) 39 *Business and Society* 3, 254.
[1058] Myrna Wulfson, 'The Ethics of Corporate Social Responsibility and Philanthropic Ventures' (2001) 29 *Journal of 29 Business Ethics* 135.

their company had not acted to stop human rights' abuses perpetrated to forward their business interests.[1059] The extent of the economic harm such a reduction has caused Shell is questionable. Okoro, in his doctorate, details the human rights' abuses perpetrated in the Niger Region by oil companies, despite their claims to support CSR practices.[1060] Despite such conduct, these oil corporations continue to remain profitable and retain staff.

Arguably, the most relevant current research on the impact CSR has on employees' conduct is Ray's PhD Thesis.[1061] Ray quantifiably examined the behaviour of senior-level, undergraduate business students and graduate business students at three universities.

Ray first tested whether the subjects would discriminate between employers on the basis of their economic performance, ethical and discretionary conduct. He found job applicants would discriminate between employers based on the employer's economic performance in the market, how ethically an employer conducted its operations and the amount of CSR discretionary behaviours the employer engaged in.

Ray then tested whether gender or minority group status played a part in responses to the importance of CSR. He found female applicants were far more likely than male applicants to rate CSR factors over economic factors. He found the fact that a person was in a minority group did not significantly alter the importance they placed on CSR conduct in potential employers.

Ray then examined the relationship between an individual's CSR orientation and their perceptions of employer attractiveness. He found applicants who were interested in a potential employer's economic performance generally, were more likely to find a potential employer's CSR economic activities relevant. Interestingly, Ray found that people who had an interest in CSR statistically did not discriminate

[1059] Charles Holliday, Stephan Schrnidheiny and Sir Philip Watts, *Walking the Talk: the Business Case for Sustainable Development* (2002) 34-36.
[1060] Edmund Okoro, *Comparative analysis of the Environment and Effectiveness of Transformational Leadership Style of Management Used by Transnational Oil Companies in Implementing Corporate Social Responsibility and Sustainable Development in the Niger Delta Region of Nigeria* (PhD Thesis, Capella University, 2004).
[1061] Richard Ray, *Investigating Relationships between Corporate Social Responsibility Orientation and Employer Attractiveness* (PhD Thesis, The George Washington University, 2006).

between companies who had high or low discretionary behaviours to any significant amount.

Finally, Ray examined the moderating effect demographic factors had upon subjects' responses. He found individual characteristics did influence applicants' rating of economic, ethical and discretionary behaviours.

When recruiting, CSR will be immaterial for some employers and crucial for others. Wulfson and Holliday and Schrnidheiny found employees sometimes respond to factors which have no impact upon them. Ray and Greening and Turban found males and females regarded different CSR factors as important. The impact CSR will have on the employee is dependent upon the requirements job applicants have for their psychological contract with the employer. CSR will be crucial for some employees and immaterial for others. Where corporations' core employees primarily fall in a group which is not concerned with CSR, then arguably the motivation for that corporation to act ethically is considerably reduced. The conclusion that CSR does not have a uniform impact on recruitment and turnover means there is a reduction in the deterrent effect of CSR to motivate corporations to act ethically and avoid practices such as trading with sweatshops. As the deterrent effect is reduced corporations are less motivated to ensure their suppliers operate safe factories and thus the ability for Australia to rely upon CSR to discharge its obligation to take reasonably practicable steps to ensure workplace health and safety is reduced.

6.2.4 Does corporate social responsibility motivate directors to act?

To be an effective regulatory model that Australia can use to discharge its obligations described in chapters 2.4.1 and 2.4.4 CSR must motivate a critical mass of directors to embrace socially responsible business practices. Based upon empirical research, adopting good corporate socially- responsible practices may afford a corporation a competitive edge in some circumstances. Is this advantage sufficient to motivate directors to direct their corporations to adopt socially responsible practices? Even if CSR has a positive impact on some consumers and employees, is that impact sufficiently acute to compel corporations to make practical changes? Traies' doctorate involved 42 in-depth interviews with Australian corporations, trade unions

and non-government organisations which had been involved in sustainability.[1062] Traies examined the subjects' feelings and experiences with triple bottom line reporting. She found:

> [C]orporate citizenship is at best, a set of initiatives for making minor adjustments to the way companies perform their day-to-day operations and at worst, a program for improving corporate image rather than performance and for shifting the agenda of sustainable development toward corporate interests.[1063]

Traies' research concluded that a corporation's self-interest was an ineffective vehicle through which to address social issues.

Okoro's doctorate found CSR did not have the capacity to impact on large multinationals when dealing in developing States.[1064] His research examined the failure of corporate culture change efforts by transnational oil companies in the Niger Delta to make any impact on improved CSR practices. He acknowledged the Niger Delta was an unstable political environment, but noted that the attempts by the oil companies to introduce socially responsible practices over a 10 year period had amounted to, at best, minimal change.

In his doctorate, Glazebrook concluded that CSR can impact on corporations' decisions.[1065] His research drew upon scholarly, government, media, legal, business discourses and his four years of practical knowledge implementing the public face of British Petroleum's 'public face' to the cultural changes flowing through to individual employees. He concluded that CSR offered benefits to corporations and to society generally.

[1062] Samantha Traies, *Corporate sustainability: Greenwash or a Path to Sustainable Capitalism?* (PhD Thesis, Deakin University, 2005) 1.
[1063] Ibid.
[1064] Edmund Okoro, *Comparative analysis of the Environment and Effectiveness of Transformational Leadership Style of Management used by Transnational Oil Companies in Implementing Corporate Social Responsibility and Sustainable Development in the Niger Delta Region of Nigeria* (PhD Thesis, Capella University, 2004).
[1065] Mark Glazebrook, *Exchange as a Determinant in Corporate Citizenship: Exploratory Action* (PhD Thesis, Deakin University, 2004).

Jones, Marshall, Mitchell and Ramsay conducted research into the factors Australian corporate directors considered when making their business judgments.[1066] Their research successfully surveyed 375 directors from large and small corporations across all industries. This survey involved a range of questions. One group of questions asked directors what they felt their main priority was in directing the corporation. Not surprisingly, the research found most directors focused upon factors which directly related to the corporation's profitability. The research found that there were three main issues directors felt was their primary concerns: 97.4 per cent of directors felt ensuring customers was their main priority, 95.4 per cent felt growing the corporation was their main priority and 94.2 per cent felt ensuring employees were fairly treated was their main priority. The research also asked directors to explain how they would prioritize corporate interests against other variables. When asked if there was any interest which would take priority over all other interests, the research found 40 per cent of directors prioritized the corporation's interests over all other interests and 6.6 per cent prioritized shareholders' interests as paramount. When the research asked how directors factored in stakeholders' interests, 55 per cent felt statute and common law required them to factor in stakeholders' interest. Stakeholders' interests here included all interests external to the corporation and shareholders, including social causes, environment, employees, customers and the like. When the research asked whether above-compliance CSR had an impact upon their decisions, only 0.3 per cent felt considering stakeholders' interests was necessary for the short term success of the corporation. This research demonstrated that unless CSR had a direct impact upon the profitability of a corporation, then above-compliance ethical conduct was a low priority for directors.

The Brotherhood of St Laurence has conducted research to determine if parties in the Australian retail sector attempt to source their products from factories which respect workers' labour rights.[1067] The report stated the sentiments from one purchaser who explained that 'the decisions always comes down to what benefit are we going to get

[1066] Meredith Jones, Shelley Marshall, Richard Mitchell and Ian M. Ramsay, *Company Directors' Views Regarding Stakeholders* (Research Report No. 1, University of Melbourne, 2007) 36-42.
[1067] Brotherhood of St Laurence, *Ethical Threads: Corporate Social Responsibility in the Australian Garment Industry*' (Report, 2007).

in terms of efficiency, quality, production, versus the cost'.[1068] Out of the 23 corporations successfully surveyed, only half adopted strategies to promote ethical conduct and the majority ignored labour conditions when selecting which factories to purchase products from.[1069]

Based on Traies', Okoro's and Glazebrook's doctorates and upon Jones, Marshall, Mitchell and Ramsay's research, there is evidence that CSR may have a sporadic impact on corporate practices.

6.2.5 Corporate Australia's acceptance of external supervision

The failure of the CSR movement to place pressure upon corporations has arguably attributed to the low rates of Australian corporations participating in sustainability reporting. The Parliamentary Joint Committee on Corporations and Financial Services Report considered the three major sustainability reporting indices in Australia. Sustainability reporting indices were defined to mean indices which 'seek to rank corporations with respect to their overall financial and non-financial performance and also allow investors to track the performance of sustainable investments'.[1070] The main three indices which were considered were the CSR Reporting Index (**CRI**),[1071] the Sustainable Asset Management Australia[1072] and the RepuTex SRI Index.[1073] Of these three indices, only the CRI involves external auditing by a highly recognised auditing firm. Therefore, this section will focus upon the CRI.

The Corporate Social Responsibility Reporting Index was developed and implemented first in the United Kingdom by Business in the Community. The Australian Corporate Social Responsibility Reporting Index commenced when St. James Ethics Centre obtained a licence from Business in the Community to establish an Australian CRI. The CRI is a sustainability index and is one of Australia's largest

[1068] Ibid 10.
[1069] Ibid 11.
[1070] Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value* (Report, 2006) [6.104].
[1071] Ibid [6.106].
[1072] Ibid [6.112].
[1073] Ibid [6.117].

external, voluntary, business-led indexes.[1074] The CRI achieves objectives through providing participating corporations with assistance in improving the effectiveness of their socially responsible conduct, and by providing an independent auditing service.[1075]

The CRI independently verifies participating corporations' corporate social responsibility claims.[1076] The CRI operates across all industries and focuses upon core areas of social responsibility: community, workplace, marketplace and environment. Participating corporations' boards are required to submit a self-assessment on these points to the CRI every year. To ensure the reliability of corporate claims, the CRI outsources all audit and validation checking to Ernst & Young.

The results of these audits are then published by Fairfax's *The Sydney Morning Herald* and *The Age*. Participating corporations are also able to use their CRI results in their marketing as a form of underwriting and validating of their CSR claims. As the CRI's results are published by Australia's major media group,[1077] and audited by one of Australia's largest accounting auditors,[1078] the CRI provides corporations with an extremely convincing procedure to validate their CSR claims.

Corporations in Australia have demonstrated a marked resistance to reporting on their CSR activities. The Centre for Australian Ethical Research compared Australian corporations' sustainability reporting with that of corporations in other nations.[1079] The report found Australian corporations are substantially behind the international standard when it comes to sustainability reporting. Out of 18 nations examined, corporate Australia's level of sustainability reporting was rated 14th.[1080] An analysis of the number of corporations participating in the CRI versus the number

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[1074] Corporate Responsibility Index, *GeneralFAQ- Corporate Responsibility Index*: <http://www.corporate-responsibility.com.au/about/frequently_asked_questions/general_faq.asp> at 8 December 2008.
[1075] Commonwealth Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Responsibility: Managing Risk and Creating Value* (Report, 2006) [6.106] and [6.107].
[1076]Corporate Responsibility Index, *GeneralFAQ- Corporate Responsibility Index*: <http://www.corporate-responsibility.com.au/about/frequently_asked_questions/general_faq.asp> at 8 December 2008.
[1077] Fairfax, *Annual Report 2005-2006* (2006) 1-5.
[1078] Ernst & Young Australia has over 1140 employees, and worldwide, the Ernst & Young group has over 114, 000 employees across 140 nations: Ernst & Young Australia, About us <http://www.ey.com/global/content.nsf/Australia/About_EY_-_Overview> at 4 December 2008.
[1079] [1079] The Centre for Australian Ethical Research, *State of Sustainability Reporting in Australia* (Report, 2005).
[1080] Ibid 28.

of corporations registered with the Australian Security and Investment Commission (**ASIC**) demonstrates just how infrequently independently-verified corporate responsibility reporting occurs in Australia.

The CRI first released its report in 2003. Similarly to the 2004 CRI report, the 2003 report included both Australian and global corporations in the one assessment. The CRI defines a global corporation as one which has at least 75 per cent of its operations beyond Australia's jurisdiction. In 2003, the CRI audited 20 corporations,[1081] 27 corporations in 2004,[1082] 22 Australian corporations and 7 global corporations in 2005,[1083] and 19 Australian corporations and 7 global corporations in 2005-2006.[1084] Corporations across all industries, from car manufacturing, law firms, banking and mining to retail participate in the CRI. The only retail group to be mentioned in every year was Coles Myer.

Generally, the numbers of corporations which have participated in the CRI are insignificant when compared to the number of corporations in Australia. Even when the approximately 50 corporations which participated in the Sustainable Asset Management Australia index[1085] are compared, the numbers of corporations involved in sustainability indices in Australia are well below the number of corporations in Australia.

In Australia, all corporations must lodge documents with ASIC.[1086] In 2003-2004 and 2004-2005, ASIC claimed there were approximately 1.43 million registered corporations in Australia,[1087] and in 2005-2006, there were approximately 1.48 million corporations.[1088] Over the same periods of time, the number of corporations participating in sustainability reporting is comparatively small. Indeed, the number of criminal convictions successfully prosecuted by ASIC in 2005-2006 dwarfed the number of corporations participating in sustainability reporting. While fewer than

[1081] Corporate Social Responsibility Index, *Annual Report* (2003).
[1082] Corporate Social Responsibility Index, *Annual Report* (2004).
[1083] Corporate Social Responsibility Index, *Annual Report* (2005).
[1084] Corporate Social Responsibility Index, *Annual Report* (2006).
[1085] Commonwealth Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Responsibility: Managing Risk and Creating Value* (Report, 2006) [6.112].
[1086] SSS 5H, 9 of the *Corporations Act 2001* (Cth) require corporations to be registered and lodge documents with ASIC.
[1087] Australian Securities and Investment Commission, *Annual Report 2003-2004* (2004) 46; Australian Securities and Investment Commission, *Annual Report 2004-2005* (2005) 45.
[1088] Australian Securities and Investment Commission, *Annual Report 2005-2006* (2006) 40.

150 corporations participated in the CRI, hundreds of corporations have been convicted for acting unethically. For example, ASIC successfully prosecuted 352 people and corporations.[1089] Rather than corporations acting ethically, in 2005-2006 ASIC recorded a 90 per cent increase in civil action to prevent corporations from misconduct and unlawfully stripping assets and a 21 per cent increase in criminal prosecutions.[1090] Based upon these figures, sustainability reporting indices are not popular with Corporate Australia.

If CSR placed pressure upon all corporations to engage in socially responsible activities, presumably more corporations would be involved in sustainability indices. When a corporation participates in a sustainability index and obtains favourable reports this is likely to attract positive publicity. In the case of the CRI, a corporation has its CSR claims audited, verified and these positive results published in major newspapers. It could be argued that if the CSR movement placed pressure on Australian corporations to take positive action to demonstrate their socially responsible credentials, presumably more Australian corporations would be involved in sustainability indices. The fact that sustainability indices have such little coverage demonstrates Australian corporations have insufficient motivation to be involved with publicly validating their socially responsible activities through this process.

6.3 Corporate social responsibility in the Australian retail industry

6.3.1 Method to increase the relevance of corporate social responsibility: targeted brand corporations

While there are literally millions of corporate brands in the world, most nations have major retail stores. These few big-name, brand-name stores can stock a substantial percentage of most suppliers' products. Unlike the corporations which are involved in the manufacturing of the goods, retail stores have extremely visible brands. For example, it would be rare for a consumer to know the corporate entities associated with growing the raw materials, manufacturing the component parts of a product or the company which assembled the product. Consumers are presumably only

[1089] Australian Securities and Investment Commission, *Annual Report 2005-2006* (2006) 5-8.
[1090] Ibid.

cognizant of the products and the retail stores' brands. As a consequence, targeting large retailers can reduce the number of brands the CSR movement targets, and thus increase the impact of the movement.

This section is seeking to determine if CSR has motivated the major Australian retailers to appear to take steps to ensure corporations' suppliers operate workplaces which uphold basic labour conditions. As the core focus of this thesis is assessing whether Australia is taking reasonably practicable steps to protect workers' right to safety and health in supply chains, it is important to assess whether the CSR model can be modified to greater deter corporations from trading with sweatshops. CSR theories indicate corporations which have brand images which depend upon a positive image will engage in CSR. Those corporations which do not have a susceptible brand image are less likely to be subject to pressure to engage in CSR; rather, those corporations will focus on obtaining the cheapest possible product.

One method of identifying the impact of CSR in the retail industry is to analyse the number of signatories to the main retail industry certification scheme. The most relevant industry accreditation scheme for clothing supply chains is the *Home Workers Code of Practice*. The *Home Workers Code of Practice* requires signatories to provide the Home Workers Code of Practice Committee prescribed information. First, the signatory is required to state whether they are a retailer, clothing brand name or a manufacturer.[1091] The signatories must provide details about their supply chains in Australia. The signatories must provide copies of contracts from their Australian suppliers and manufacturers which show that they agree to manufacture products in accordance with relevant awards and legal entitlements. The signatories must then produce documented evidence that they or their suppliers have paid all outworkers the correct rate of pay and superannuation entitlements. When compared to their actual output, outworkers work between 30 and 76 hours (and are paid overtime where relevant). Whilst the *Home Workers Code of Practice* does not consider OHS or labour conditions in international supply chains, it does require signatories to provide outworkers with information about the relevant trade union, to provide details of all their suppliers, and the addresses where all work is performed.

[1091] Home Workers Code of Practice Committee, 'How to become accredited?' <http://www.nosweatshoplabel.com/howto.asd< at 1 December 2008.

This level of disclosure increases the ability of Australian outworkers' working conditions to be independently monitored.

Unlike the CRI, the *Home Workers Code of Practice* has attracted a substantial number of retail industry signatories. At the time of publishing, 31 Australian retailers are fully certified by the Home Workers Code of Practice Committee, including retailers with strong brand names such as Colorado, Country Road, David Jones, Jeans West, K Mart, Myer, Noni B, R M Williams and Rodger David, as well as a number of small and medium sized retailers with less powerful brand names.[1092] This movement continues to grow with a further 50 retailers currently in varying stages of obtaining certification. Even with these additional signatories there remain hundreds of retailers who are not signatories to the *Home Workers Code of Practice*. It is difficult to obtain direct comparative data because of the various corporate structures adopted in the retail industry. When a corporation signs the *Home Workers Code of Practice*, its subsidiaries are bound and as franchisers control the purchasing for the group, they can ensure their franchisees have ethical purchasing practices. The number of actual retail stores in Australia was calculated by the Commonwealth Government's Productivity Commissioner in 2007.[1093] The Productivity Commissioner reported that there were 6396 department stores, 8085 apparel & footwear stores and 28 854 other specialty retailing, making total retail stores of 43 335.[1094] Even if every signatory to the *Home Workers Code of Practice* controlled the purchasing practices of 200 stores, this would only cover 22 400 stores out of 43 335 stores in Australia.

One of the key planks of the *Home Workers Code of Practice* is that signatories force their suppliers to engage in ethical practices. The Home Workers Code of Practice Committee estimated that their scheme covers between 300 and 400 manufacturers and outworkers.[1095] While this is an extremely positive achievement, this scheme does not have coverage of thousands of outworkers. In chapter 1.2 this thesis noted that research claims that there are between 50 000 and 329 000 outworkers in

[1092] Home Workers Code of Practice Committee, 'Participating retailers' (2007): <http://www.nosweatshoplabel.com/ethical_retailers.asp> at 6 June 2009; Note these figures were last updated by the website on 1 March 2007. A call to the Home Workers Code of Practice Committee on 5 June 2009 confirmed that the 2008 participating retailers are not currently published.
[1093] Commonwealth Productivity Commission, *The Market for Retail Tenancy Leases in Australia* (Draft Report, 2007).
[1094] Ibid 48.
[1095] Ibid.

Australia. While the *Home Workers Code of Practice* has the potential to improve the working conditions of thousands of people, the limited involvement by retailers in the CSR movement has reduced the impact of this Code.

It is clear from these figures that a substantial number of retailers have elected to engage in the CSR movement and have become signatories to the *Home Workers Code of Practice*. The fact that hundreds of retailers have not become signatories to this code of practice does not indicate these retailers are not influenced by CSR. These non-signatory retailers may adopt ethical purchasing practices but for various reasons may not have signed the *Home Workers Code of Practice*. It is beyond this thesis to analyse how each retailer has approached CSR. As the pressure from the CSR movement should be greatest on the retailers which have the most identifiable brands, retailers with identifiable brands should be more likely to divert resources from direct profit maximisation, and put resources towards socially responsible conduct. To test whether this result has occurred in fact, this section will examine the CSR response of the two largest retail chains and the largest discount retail chain in Australia.

It is hypothesized that the impact CSR has on these three retail chains is not uniform, despite all retail chains having a strong public image. Rather than a uniform impact, this section hypothesizes that the two major retail chains rely both upon a positive corporate image and price for corporate success. As a consequence, these retailers are more likely to engage in socially responsible purchasing practices. Conversely, the major discount retail chain's strategic focus is primarily upon low prices. It is hypothesized this retailer will have little or no incentive to engage in socially responsible conduct. If this hypothesis is validated, then this section will conclude that, as CSR has a varied impact on corporations, unregulated, market-driven CSR should not be relied upon by States as a remedial regulatory option to reduce corporate irresponsibility.

The data for this section was readily available from the corporations themselves. The two largest retail corporations in Australia are Coles Myer Ltd and Woolworths Ltd. Both of these corporations are listed on the Australian Stock Exchange, and are therefore required to comply with the Australian Stock Exchange Listing Rules.

These rules require corporations to explain in their Annual Reports why they have complied with or failed to comply with the *Principles of Good Corporate Governance and Best Practice Recommendations*.[1096] Principle 10 requires listed corporations to disclose annually their CSR activities. These reports can be examined to ascertain how the CSR movement has motivated these corporations to attempt to ensure labour conditions are respected throughout their supply chains.

The largest discount retail group in Australia is Australian Discount Retail Pty Ltd. Australian Discount Retail was created in November 2005 when CHAMP and Catalyst Investment Managers jointly purchased Miller's Retail Ltd and The Warehouse Group Ltd.[1097] Miller's Retail Limited operated the Go-Lo chain in New South Wales, South Australia and Victoria, Crazy Clark's chain in Queensland, Northern Territory and Western Australia, and Chicken Feed in Tasmania. Warehouse Group Ltd operated over 122 shops across Australia. Australian Discount Retail is now the largest discount retailer in Australia, with over 400 stores, revenues in excess of A$1 billion and a store presence in every state and territory in Australia.

Despite being by far the largest discount retailer in Australia, Australian Discount Retail is not listed on the Australian Stock Exchange. As a consequence, Australian Discount Retail has no obligation to provide details on how it manages its corporate social responsibility activities as the Australian Stock Exchange *Principles of Good Corporate Governance and Best Practice Recommendations* Principle 10 does not apply to it. Australian Discount Retail has elected not to release any CSR reports. The failure of Australian Discount Retail to release a CSR report does not mean the corporation does not take steps to ensure labour conditions are being respected throughout their supply chain. How Australian Discount Retail approaches its supply chains is provided in detail on its website. Its website provides the terms and conditions on which Australian Discount Retail will trade with suppliers and details about Australian Discount Retail's corporate philosophy towards the acquisition of goods in its supply chain.

[1096] See the discussion of rule 4.10 of the Australian Stock Exchange Listing Rules above at 5.3.
[1097] Champ Private Equity, *Australian Discount Retail Portfolio* <http://www.champmbo.com/html/portfolio_adr.html> 13 December 2008.

6.3.2 Coles Myer

Coles Myer Group published its first CSR report in 2004.[1098] In its first report, Coles Myer defined the socially responsible character of the corporation by focusing on the interests of three stakeholders:

1. Employees - Coles Myer aims to recruit , develop and retain quality employees;
2. Customers - Coles Myer aims to offer customers the best merchandise at the best value possible; and
3. Shareholders - Coles Myer aims to maximise its profitability to provide shareholders the greatest return possible on their investments.[1099]

In 2005 and 2006 Coles Myer altered its focus. Corporate social responsibility was expanded to include the community and the environment.[1100]

While Coles Myer has always acted to protect shareholders' interests, this has not excluded the corporation from proactively seeking to improve the working conditions of employees working in Coles Myer's suppliers' corporations. The entire Coles Myer group is bound to uphold the Textile, Clothing and Footwear Union of Australia's *Ethical Clothing Code of Practice* when sourcing goods from suppliers.[1101] As the first retailer to sign the *Ethical Clothing Code of Practice*, Coles Myer demonstrated its commitment to ethical sourcing. Coles Myer's other ethical sourcing policies only applied to individual corporate entities within the Coles Myer group. For example, Coles Myer's Target brand had a Deed of Cooperation with the Textile, Clothing and Footwear Union of Australia and Kmart and Myer were signatories to the *Home Workers Code of Practice*.[1102] At the time of the 2004 report, not all the Coles Myer brands had the same approach to ethical sourcing. This enabled some Coles Myer brands to engage in socially irresponsible conduct.

[1098] Coles Myer, *Taking Stock: Corporate Social Responsibility Report* (2004) 3.
[1099] Ibid.
[1100] Coles Myer, *Corporate Social Responsibility Report* (2005) 4; Coles Myer, *Corporate Social Responsibility Report* (2006) 2.
[1101] Coles Myer, *Taking Stock: Corporate Social Responsibility Report* (2004) 11.
[1102] Ibid.

To remedy this approach, Coles Myer proposed in 2004, and implemented in 2005, a Coles Myer *Ethical Supply Code*.[1103]

Coles Myer's *Ethical Supply Code* aims to ensure the 'safe and ethical manufacture and supply of merchandise sold through its retail outlets'.[1104] Coles Myer has moved beyond merely focusing upon its own conduct, as its *Ethical Supply Code* aims to generate 'supplier commitment to the sourcing of ethically- produced products'.[1105] In general, the Coles Myer's *Ethical Supply Code* covers:

A. Employment practices: child labour, living wages, working hours, forced labour, discrimination, disciplinary action and the freedom of association.
B. The workplace: health and safety, accommodation, equipment safety.
C. Management controls: compliance with local laws, environmental standards and controls and ethical standards.

In 2005, Coles Myer imposed these standards in all their supply contracts. Initially, supplier factories were not required to comply with these standards, merely demonstrate they agreed with the 'spirit of the code'.[1106] The second phase of the Code increased the onus upon suppliers considerably.

In 2006, Coles Myer finalised the launching of its *Ethical Supply Code*. Pursuant to this Code, suppliers are required to perform audits of manufacturers from which they source products. Coles Myer boldly claims the purpose of this Code is 'to make sure everything we sell is made in good, safe, working conditions and in workplaces where workers' basic human rights are respected'.[1107] In an attempt to realise this ambition, Coles Myer has communicated with 11 000 product supplier corporations about their requirements under the Code and provided training to all Coles Myer's purchasing teams. Coles Myer has also held training seminars for major suppliers in

[1103] Coles Myer, *Taking Stock: Corporate Social Responsibility Report* (2004) 11; Coles Myer, *Corporate Social Responsibility Report* (2005) 14.
[1104] Coles Myer, *Corporate Social Responsibility Report* (2005) 14.
[1105] Ibid.
[1106] Ibid.
[1107] Coles Myer, *Corporate Social Responsibility Report* (2006) 14.

Hong Kong, Shanghai, Shenzhen and Taipei. In addition to relying upon suppliers to perform audits on themselves and their suppliers, Coles Myer has performed 177 audits on Coles Myer's major suppliers in the People's Republic of China (**China)**.

6.3.3 Woolworths

Woolworths Group PLC released its first CSR report covering the 2004/2005 financial year.[1108] Woolworths considered that respect for labour conditions such as occupational health and safety carried the same priority as any other business function at Woolworths.[1109] Occupational health and safety extended to employees, contractors, customers and suppliers. To support the importance of labour conditions generally, Woolworths has set labour conditions within its non-financial key performance indicators.[1110]

While Woolworths acted to ensure its operations are conducted in a way which ensures OHS standards are maintained, in 2005-2006 Woolworths took an extremely limited approach to ensuring labour conditions in its suppliers' workplaces. While Coles Myer was prepared to focus upon all its suppliers, Woolworths was only concerned with those suppliers which provided goods which subsequently were labelled as Woolworths' private brand.[1111]

In 2005-2006, the Woolworths' Quality Assurance standard required all Woolworths' private brand suppliers to comply with a certification process, in order to retain their contracts with Woolworths.[1112] As part of this certification process, Woolworths conducted biannual audits of its suppliers to ensure those suppliers comply with laws, minimise their impact on the environment and are socially accountable. As part of the social accountability obligations, Woolworths requires its suppliers to avoid exploitative labour practices, to comply with all local labour laws and to comply with all International Labour Organization standards.[1113]

[1108] Woolworths Group PLC, *Corporate Social Responsibility Report 2005-2006* (2006) 2.
[1109] Ibid 15.
[1110] Woolworths Group PLC, *Corporate Social Responsibility Report 2006-2007* (2007) 4.
[1111] Woolworths Group PLC, *Corporate Social Responsibility Report 2005-2006* (2006) 12.
[1112] Ibid.
[1113] Ibid.

In 2006-2007, Woolworths drastically increased the coverage of its supply chain regulation from covering the Woolworths' brand name suppliers to covering all parties who supplied Woolworths' stores products.[1114] The expansion of coverage also required Woolworths' suppliers to ensure the suppliers' suppliers complied with the standards. In effect, Woolworths' ethical standards were intended to extend to every level throughout the Woolworths' supply chain.

While Woolworths has expanded the number of suppliers which are bound by its standards, it has subtly reduced the actual standard expected from suppliers. In 2004/2005, suppliers were required to comply, inter alia, with local laws and International Labour Organization standards. This joint requirement meant a corporation could comply with a local law but would be forced to improve its conduct to ensure compliance with the International Labour Organization's standards. Where the local laws were more generous than the International Labour Organization's standards, then the supplier was required to comply with the local laws. In 2006-2007, the report places the *Code of Compliance* in Appendix 2.[1115] This Code only requires suppliers to ' abide by the law'. Whilst Australia's industrial laws generally comply with the International Labour Organization's standards, it is certain laws in some foreign jurisdictions fall far short of International Labour Organization standards.[1116] Therefore, even though Woolworths' coverage of ethical standards has expanded, the actual standard demanded from suppliers has been effectively reduced.

To ensure compliance with its ethical standards, Woolworths has introduced a system of three year rolling audits.[1117] Suppliers were required to complete questionnaires, against which workplace audits were assessed. In 2006-2007, Woolworths performed 215 audits. To improve its contact with Chinese suppliers, Woolworths established Woolworths Asia. Woolworths Asia has offices in Hong Kong and in Shanghai. In the 2006-2007 financial years, Woolworths Asia

[1114] Woolworths Group PLC, *Corporate Social Responsibility Report 2006-2007* (2007) 5.
[1115] Ibid 26.
[1116] For an example of laws which do not protect rights protected by the ILO see S 2.3.6.1.
[1117] Woolworths Group PLC, *Corporate Social Responsibility Report 2006-2007* (2007) 5.

performed 449 audits.[1118] To ensure increased compliance, 101 of these audits were performed without first providing the supplying factory notice.

Woolworths provides an example of how effective its ethical purchasing standards are, for determining from which suppliers to source products.[1119] In 2005, Woolworths' auditors visited a factory in China which supplied toys to Woolworths. They found workers without face masks, disconnected extraction systems, stagnant pools of water in the paint-spraying area and fire hazards. During the year, Woolworths worked with the factory to improve the labour conditions. A subsequent audit identified workers were wearing masks, extraction fans were operating, better drainage systems were installed to prevent water collecting and fire hazards were reduced.

6.3.4 Australian Discount Retail

Australian Discount Retail Pty Ltd focuses on providing customers with the cheapest products possible. The owners of Australian Discount Retail believe the brands compete on 'excitement and price, appealing to value-conscious customers'.[1120] One of the Australian Discount Retail brands explains how it focuses on the price as a determining factor in its supply chains:

> [O]ur buying teams search far and wide throughout the world to source the best bargains for an ever-expanding product range.[1121]

When determining what products to purchase, Australian Discount Retail explains that a product 'is selected on the basis of customer / market demands, the needs to fit our criteria around pricing, quality and Australian standards where applicable'.[1122] Australian Discount Retail appears to ignore the labour conditions existing in its suppliers' factories.

[1118] Ibid 6.
[1119] Ibid 10-12.
[1120] Champ Private Equity, *Australian Discount Retail Portfolio* <http://www.champmbo.com/html/portfolio_adr.html> 13 December 2008.
[1121] Crazy Clark's and Go-Lo, *About Us*: <http://www.golo.com.au/aboutus.htmm> at 8 December 2008.
[1122] Crazy Clark's and Go-Lo, *How Does Our Buying Process Operate?*: <http://www.golo.com.au/suppliers.htm> at 15 December 2008.

Australian Discount Retail's Terms of Trade provide an insight to its supply chain management approach.[1123] The Terms of Trade form the terms and conditions on which Australian Discount Retail contracts with all its suppliers.[1124] Australian Discount Retailing claims it engages in 'Sustainable Retailing', through realizing the corporation's values of:

a) where everyone gets a bargain;
b) where people come first; and
c) where the environment matters.[1125]

In respect of labour conditions, Australian Discount Retail claims it places its employees first. At a 'minimum', Australian Discount Retail expects its suppliers to meet the 'terms and conditions of employment set out' in the Terms of Trade's supplier guidelines.[1126] The Terms of Trade's supplier guidelines fall far short of requiring suppliers to meet basic human rights or comply with International Labour Organization standards. They require suppliers to:

a. meet basic labeling and packaging requirements;[1127]
b. agree to pre-pricing;[1128]
c. provide samples to buyers;[1129]
d. provide Australian Discount Retail necessary information to enable Australian Discount Retail to complete its documentation;[1130] and
e. ensure that if the supplier outsources any work, that other entity complies with Australian Discount Retail's Terms of Trade.[1131]

The supplier's performance will be judged against its compliance with the order, product compliance, product safety, product labelling and the delivery of the product

[1123] Australian Discount Retail, *Terms of Trade*: <http://www.thewarehouse.com.au/Terms%20of%20Trade%20Version%202.1%20March%202006.pdf> at 15 December 2008.
[1124] Ibid cls 2.2, 2.3.
[1125] Ibid cl 1.1.
[1126] Ibid cl 1.6.
[1127] Ibid cl 5.2.
[1128] Ibid cl 5.3.
[1129] Ibid cl 5.4.
[1130] Ibid cl 5.5.
[1131] Ibid cl 5.7.

on time.[1132] At no time is the supplier examined for the labour conditions under which the products were manufactured.

To ensure the product is being manufactured to the standards of the order, Australian Retail Discount is empowered under the Terms of Trade to have a surprise audit on 24 hours' notice.[1133] The factors which these surprise audits ensure are all matters specific to the product, and do not touch on the labour conditions under which the product is being manufactured.[1134]

The Terms of Trade anticipate Australian Discount Retail will source goods from international supply chains; however, no effort has been made to require the goods to be manufactured in workplaces that respect labour conditions. The only way in which the Terms of Trade makes reference to an international standard is to exclude it. Clause 19.1 excludes the operation of the *United Nations Convention on Contracts for the International Sale of Goods*. Australian Discount Retail arguably demonstrates that unregulated market driven CSR does not motivate all large retail groups to participate in the CSR movement.

6.4 Conclusion

Chapter 2.4.1 and 2.4.4 established that States have an obligation to take reasonably practicable steps to ensure corporations discharge their human rights' duties. Australia relies upon a mix of hard law and soft law approaches to ensure corporations discharge their human rights' obligations. Chapter 3 analysed how Australia has adopted OHS duties supported by criminal sanctions to ensure safety in domestic supply chains. These duties imposed hard law OHS duties over traders and retailers to varying degrees for workplace health and safety in domestic supply chains. Due to the failure of some States to enforce their domestic OHS laws, when an Australian-based supply chain outsources work to international workplaces, Australia relies upon CSR to motivate corporations to ensure they discharge their human rights' obligations pursuant to the complicity principle. This chapter has demonstrated that CSR as a soft law vehicle has not motivated the majority of

[1132] Ibid cl 5.6.
[1133] Ibid cl 7.3.
[1134] Ibid cl 7.2.

Australian corporations to participate in the CSR movement. Australia is required to take reasonably practicable steps to ensure workers' right to safety and health is realized. As market driven CSR does not deter a sufficient number of corporations from trading with sweatshops, in its current form CSR cannot be utilized by Australia to discharge its obligations as explained above under chapters 4.4.1 and 4.4.2

This chapter firstly analysed primary research which demonstrated that many consumers and employees do not alter their conduct based on corporations' unethical misconduct. While the CSR movement has some impact, it is submitted that this impact has not motivated substantial numbers of Australian corporations to participate in this movement. Additional primary research demonstrated directors and Australian corporations have not overwhelmingly embraced the CSR movement. While the majority of Australian corporations may act ethically generally, this chapter has focused upon the impact the CSR movement has upon corporations managing labour conditions in their supply chains.

The second part of this chapter analysed how civil society groups began to focus the CSR movement on retailers and on corporations which rely upon positive brand names. Firstly, this part explored how a large number of retailers have signed the *Home Workers Code of Practice*. While this is an extremely positive move, there are hundreds of corporations which are not signatories. This part then analysed in detail the corporate social reporting of Coles Myer, Woolworths and Australian Discount Retail. Coles Myer and Woolworths are the largest retail stores in Australia and Australian Discount Retail is the largest discount chain in Australia. This research demonstrated that Coles Myer and Woolworths are substantially pressured to appear to be good corporate citizens. Both Coles Myer and Woolworths have highly visible brands and are in an extremely competitive relationship. Providing Coles Myer or Woolworths are engaging ethical supply chain regulation, economic necessity compels the other retail group to also engage in ethical supply chain regulation. If either corporate group was associated with labour abuses then it is probable that that retail group would lose market share to the other corporate group. Where brand names are highly visibile and are motivated by their brand image to maintain ethical

supply chains, then the CSR movement will motivate corporations to devote resources to CSR activites to avoid negative publicity.

While CSR can be effective for highly visible brand names in a marketplace sensitive to ethical conduct, CSR will have virtually no impact on retailers who target price conscious customers. Unlike Coles Myer and Woolworths, Australian Discount Retail does not release CSR reports. Australian Discount Retail's websites indicate its supply chains management is focused upon product quality and obtaining the product at the cheapest price possible. Unlike Coles Myer and Woolworths who both have labour standards as conditions in their supply contracts, Australian Discount Retail's purchasing guidelines places no obligations upon suppliers to adhere to labour standards.

Based upon an analysis of the major retail chains in Australia and upon the conduct of all Australian corporations which participate in sustainability indices, this section argues that CSR does not motivate a large number of corporations to manage ethically their supply chains. The CSR movement has made significant gains in motivating many Australian corporations to ensure they adopt some form of ethical supply chain practices. Even though this is an extremely positive outcome, the number of corporations which are motivated by CSR to ensure they have ethical supply chains is insufficient to enable Australia to discharge its human rights' obligations by relying upon this soft law option in its current form. To discharge its human rights' obligations, Australia is required to take reasonably practicable steps to ensure corporations discharge their human rights' obligations under the complicity principle. Australia is therefore required to explore other vehicles to ensure workers' right to safety and health is protected in Australian based supply chains.

CHAPTER 7

7 Leaving regulation to the market: is weak social auditing confounding the impact of the Corporate Social Responsibility movement?

7.1 Introduction

Chapter 6 argued that the coverage of corporate social responsibility (**CSR**) in Australia is not currently sufficient for Australia to rely upon this vehicle to discharge its human rights' obligations. In order to discharge its human rights' obligations, Australia is required to take reasonably practical steps to ensure corporations which operate in Australia comply with their human rights' obligations under the complicity principle. If Australia introduced soft law or hard law vehicles which resulted in almost unanimous support of CSR from the corporate sector, this would not be sufficient for Australia to discharge its moral duty. The fact corporations claim to have ethical supply chain purchasing strategies does not mean these codes are enforced in practice. Australia's human rights' obligations are discharged when the corporate codes are supported by reasonable level of enforcement.

As Australia is currently utilizing CSR to deter corporations from trading with sweatshops it is important to assess the effectiveness of the CSR movement. If CSR is ineffective then Australia will not be able to rely upon CSR to discharge its duties as described in chapters 2.4.1 and 2.4.4. This chapter will analyse how effective market forces are at ensuring corporate social reports are validly audited. In this environment of self-regulation, many corporations do ensure their ethical supply chains are validly audited, however it is submitted that a substantial number of audits provide confounded results. One of the key aspects of CSR is that consumers and the market at large are able to determine which corporation is acting ethically and which corporation is exploiting workers. If consumers and other parties have no method to determine when corporations' CSR claims are accurate or false, then corporations with unethical supply chains can negate the impact of the anti-

sweatshop movement through releasing positive corporate social reports and failing to audit rigorously that report.

This chapter is divided into four parts. The first part analyses how corporations' social responsibility reports are subject to social audits. This section briefly contrasts the formalised nature of financial audits with the dynamic status of social audits. One of the current problems identified with social audits is identifying an internationally recognised standard to judge conduct against. Jurisdictions such as Australia have developed national standards, however internationally there are hundreds of standards which provide guidance on how corporations can discharge their human rights' obligations. In the last quarter of 2008 a draft of ISO26000 is expected to be released. ISO26000 is anticipated to assist greatly in providing unified standards to judge social audits against.

The second part of this chapter analyses the problems with market-driven, self-regulated, social audits. This part first analyses current problems with performing social audits in Chinese factories. This part reviews research which demonstrates many audits are superficially performed by under-qualified auditors. Secondly, part 2 analyses the different options corporations can adopt to audit their social responsibility reports. Corporations can elect to perform these audits with internal or external auditors. If corporations decide to utilize external auditors, then they can select to hire directly commercial auditors or NGO auditors, or they can elect to participate in a certification scheme. This part briefly analyses the strengths and weaknesses of each option in providing valid audit results in a process which consumers are likely to trust.

Market-driven self-regulation of CSR largely relies upon the corporations' level of commitment. The third part of this chapter demonstrates that many corporations continue to regard profits as more important than human rights. This part analyses research which contests that corporations' claim to adopt ethical supply chains often constitutes a public relations exercise without achieving substantive changes for workers. This part analyses three methods through which corporations from the USA have demonstrated their minimalist commitment to the complicity principle.

Finally, this chapter analyses the positive impact CSR has made to improve the ethical conduct of some corporations.

7.2 How effective are social audits which assess corporations' compliance with their corporate codes?

The fact that corporations claim in their rhetoric to adhere to prescribed human rights' standards does not provide any assurance that the corporation and its sub-contractors, and third party suppliers, actually adhere to the codes' values. In order to increase their credibility, corporations have started to release audited CSR reports. These CSR reports have some similarities with corporations' financial annual reports. The main difference between annual reports and CSR reports is that annual reports are audited by accountants under strict financial guidelines issued by accounting regulators, whereas CSR reports have no mandatory auditing requirements.

Auditing provides credibility for representations in a corporation's report through assessing and validating claims. The American Auditing Association defines auditing to be 'a systematic process of objectively obtaining and evaluating evidence regarding assertions about economic actions and events to ascertain the degree of correspondence between the assertions and established criteria and communicating the results to interested users'.[1135] From the 1980s there has been explosion in auditing activity to respond to calls for both private and public accountability.[1136] The calls for accountability have resulted in detailed procedures and regulations on performing audits. The Australian Auditing and Assurance Standards Board explains that an audit plan 'includes the nature, timing and extent of audit procedures to be performed by engagement team members in order to obtain sufficient appropriate audit evidence to reduce audit risk to an acceptably low level so as to be able to form an opinion'.[1137] If performed correctly, the auditing process can reduce the risk of misleading reports to a 'socially acceptable level'.[1138]

[1135] J Robertson and W Smieliauskas, *Auditing: An international approach*, (2nd ed, 2001) 6.
[1136] for a discussion: Michael Power, *The Audit Society: Rituals of Verification* (1997).
[1137] Auditing and Assurance Standards Board, 'Glossary of defined terms': http://www.auasb.gov.au/Standards-and-Guidance/Glossary-of-defined-terms.aspx 5 June 2009; The Australian Auditing and Assurance Standards Board is an

In Australia, the process of financial auditing is strictly regulated by the *Corporations Act 2001* (Cth). Every year, corporations must have their financial accounts audited by an auditor.[1139] The auditor has access to all the corporation's records, and can require the corporations to provide further and better particulars of their accounts.[1140] The audit must be performed in accordance with the *Corporations Act 2001* (Cth) and in accordance with prescribed auditing standards.[1141] If the financial reports do not comply with relevant laws, then the auditor must notify the Australian Securities and Investment Commission which will take enforcement action.[1142] If the auditor has reasonable grounds to suspect a breach of the *Corporations Act 2001* (Cth) or of an attempt to unduly influence, coerce, manipulate or mislead a person involved in the conduct of the audit, then the auditor is required to notify the Australian Securities and Investment Commission in writing.[1143] A failure to so notify attracts a legal sanction.[1144] In addition to these strict reporting requirements, the auditor must attend the corporation's annual general meeting and answer questions about the corporation's financial reports.[1145] Strict regulations and standards apply to financial reporting to enable high levels of corporate accountability.[1146]

Even though the auditing process for financial reporting is strictly regulated, the process for auditing corporate social reports is only regulated by the market. As social audits are extremely complicated, failing to provide guidance on standards for social auditing leads to uncertainty and reduces corporate accountability. The very nature of CSR reports is that they report on social, environmental and non-traditional economic issues. Vinten defines social auditing to include:

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independent, statutory agency of the Australian Government, responsible for developing, issuing and maintaining auditing and assurance standards:Auditing and Assurance Standards Board, 'About the AUASB': http://www.auasb.gov.au/About-the-AUASB.aspx at 5 June 2009.

[1138] Ibid 10.

[1139] *Corporations Act 2001* (Cth) s 301.

[1140] *Corporations Act 2001* (Cth) s 310.

[1141] *Corporations Act 2001* (Cth) ss 310, 310A; accounting standards enter into force pursuant to s 334 of the *Corporations Act 2001* (Cth).

[1142] *Corporations Act 2001* (Cth) s 311.

[1143] *Corporations Act 2001* (Cth) s 311.

[1144] *Corporations Act 2001* (Cth) s 311.

[1145] *Corporations Act 2001* (Cth) ss 250RA, 250T.

[1146] Australian Institute of Company Directors, Institute of Internal Auditors and the Auditing and Assurance Standards Board, *Audit Committees: a Guide to Good Practice* (3rd ed, 2008).

> A review to ensure that an organization gives due consideration to its wider and social responsibilities to those both directly and indirectly affected by its decisions, and that a balance is achieved in its corporate planning between these aspects and the more traditional business-related objectives.[1147]

Buchholz explains the social audit:

> The social audit is an attempt by an individual corporation to measure its performance in an area where it is making a social impact ... an attempt to identify, measure, evaluate, report and monitor the effects a corporation is having on society, that are not covered in the traditional financial reports …[1148]

The informal process of auditing can be traced back for centuries. In medieval times, stewards would provide oral evidence of their management to their lords. The concept of financial auditing formally emerged in the 1800s and has developed since then.[1149] In contrast to the centuries of history associated with financial auditing, social auditing has started to develop over the last few decades. One of the most substantial limitations of social auditing is defining standards against which to audit conduct. Accountability will only exist where corporations are 'answerable to authority that can mandate desirable conduct and [subject to] sanction [for] conduct that breaches identified obligations'.[1150]

As social auditing involves such a range of areas, traditionally, there has been no unified standard. There is a continuing debate over what is, and is not, included within CSR.[1151] In 2006, there were reportedly over 400 different standards against which to judge social audits.[1152] In the following chapter the standards set by the UN Global Compact, Chinese Social Compliance 9000, Social Auditing 8000, and by the ILO will be analysed. Where there are no standard criteria to judge social audits reports against, then consumers will not be able to compare easily social audit reports

[1147] Gerald Vinten, 'The Social Auditor' (1990) 3 *International Journal of Value-Based* Management 2, 125,127; see also: Samuel Natale and Joseph Ford, 'The Social Audit and Ethics' (1994) 4 *Managerial Auditing Journal* 1, 29.
[1148] R Buchholz, *Business Environment and Public Policy* (1982) 499.
[1149] Timothy Bartley, *Certifying Forests and Factories: the Emergence of Private Systems for Regulating Labor and Environmental Conditions* (PhD Thesis, The University of Arizona, 2003)129.
[1150] Martha Minow, 'Public and Private Partnerships: Accounting for the New Religion' (2003) 116 *Harvard Law Review* 1229, 1260.
[1151] Peter Newell and Jedrzej George Frynas, 'Beyond CSR? Business, Poverty and Social Justice: an Introduction' (2007 28 *Third World Quarterly* 4, 669.
[1152] China Textile and Apparel Industry, *Annual Report on Social Responsibility 2006* (2007) 6.

and thus consumers will be unable to determine which corporation is, in fact, ethical. The failure to have consistent standards also presents problems for corporations which desire to act ethically, as they are unaware of what is expected of them.

As a result of the problems caused by inconsistent standards, calls to develop uniformed standards have grown. The European Union Commission has acknowledged a 'global consensus needs to evolve on the type of information to be disclosed, the reporting format to be used, and the reliability of the evaluation and audit procedure'.[1153] Ruggie observes:

> [E]ven among the leaders, certain weaknesses of voluntarism are evident. Companies do not necessarily recognize those rights on which they may have the greatest impact.[1154]

The failure to have settled standards means corporations, human rights advocates, and the market in general do not have a consistent standard against which to judge corporate conduct. In most cases, the more accountable corporations are for their corporate codes, the more likely those corporations will ensure they comply with their codes.[1155]

Arguably the failure to settle all the issues which should be included in social audits has enabled corporations to act unethically in some areas by promoting their ethical behaviour in other areas. This harm minimisation strategy can be evinced by Wal-Mart's conduct. Wal-Mart is the world's largest retailer.[1156] As a consequence, its ability to influence the marketplace is considerable. In an attempt to harness this vast power, the CSR movement has pressured Wal-Mart to ensure that the products it sells in its retail stores are produced in socially responsible conditions. Wal-Mart has adopted socially responsible conduct in certain areas. For example, in relation to environmental issues, Wal-Mart states:

[1153] European Commission, *Promoting a European Framework for Corporate Social Responsibility* (Green paper, 2001) [60].
[1154] John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, reported to the UN Human Rights Council on 9 February 2007, implementation of GA Res 60/251, 20.
[1155] Kate Macdonald, 'Globalising Justice within Coffee Supply Chains? Fair Trade, Starbucks and the Transformation of Supply Chain Governance' (2007 28 *Third World Quarterly* 4, 793.
[1156] Benedict Sheehy, 'Corporations and Social Costs: the Wal-Mart Case Study' (2004) 24 *University of Pittsburgh Journal of Law and Commerce* 1, 33.

> Focusing on the environment is key to our mission to improve the quality of life for people around the world.[1157]

This drive for environmentally friendly practices extends to Wal-Mart seeking to purchase its products from suppliers who are environmentally friendly.[1158] Wal-Mart claims it 'helped' one of its suppliers adopt more environmentally friendly, manufacturing practices.[1159] Wal-Mart links this focus on environmental concerns back to its drive for profits, claiming that caring for the environment makes 'good business sense'.[1160] Clearly, the CSR movement has compelled Wal-Mart to protect the environment.

In relation to labour practices, Wal-Mart has a far poorer record. Wal-Mart appears not to ensure labour conditions in its supplier factories are protected[1161] and actively suppresses its own employees' labour rights. For example, Wal-Mart has a union-busting team of employees to fly into any Wal-Mart outlet which attempts to unionise.[1162] It appears Wal-Mart is attempting to minimise the negative media attention of their open violations of employees' labour rights through promoting their high ethical standards in relation to the environment. Based upon research earlier in this chapter, this approach may actually succeed. It should be recalled that Mercer's PhD research found that customers only altered their purchasing practices if they felt the unethical conduct may impact upon them. The abuse of workers may not impact upon many customers, while environmental degradation can impact upon the survival of the planet. This means customers may react negatively to environmental abuse, but may have a lesser reaction to labour abuses.

[1157] Wal-Mart, 'Home page': <website: http://Wal-Martstores.com/GlobalWMStoresWeb/navigate.do?catg=217< at 6 November 2008.
[1158] Ibid.
[1159] Ibid.
[1160] Ibid.
[1161] Charles Kernaghan, Jonathann Giammarco, Barbara Briggs, Alexandra Hallock and Thomas Donoso, *Making Barbie, Thomas & Friends, and Other Toys for Wal-Mart: the Xin Yi Factory in China* (National Labor Committee (USA), Report, 2007); Students and Scholars against Corporate Misbehaviour, *Wal-Mart's Sweatshop Monitoring Fails to Catch Violations: the Story of Toys Made in China for Wal-Mart* (Report, 2007); The National Labor Committee (USA), *Another Wal-Mart Bargain: Made in China*' (2007): http://www.nlcnet.org/Art.php?id=503 at 26 December 2008.
[1162] Benedict Sheehy, 'Corporations and Social Costs: the Wal-Mart Case Study' (2004) 24 *University of Pittsburgh Journal of Law and Commerce* 1, 39.

To avoid uncertainty about what areas should be covered by CSR reporting and to avoid corporations manipulating their reporting, it is essential that standardised CSR guidelines are promoted. In order to promote uniformity on CSR, many standard-setting associations around the world have released guidance standards. In Australia, the Council of Standards Australia has released voluntary standards on CSR. The main standard is AS 8003-2003 Corporate Governance – CSR, which provides guidance on establishing, implementing and maintaining an effective CSR program within corporations.[1163] Other relevant standards are AS 8000-2003 Corporate Governance - Good Governance Principles,[1164] AS 8001-2003 Corporate Governance - Fraud and Corruption Control,[1165] AS 8002-2003 Corporate Governance - Organizational Codes of Conduct[1166] and AS 8004-2003 Corporate Governance - Whistleblower Protection.[1167] While these standards provide substantial assistance for operations within Australia, these standards have limited application for corporations which are attempting to discharge their obligations under the complicity principle. Where corporations have entities within their sphere of influence based in foreign States, it would be complicated for that entity to comply with the standards set by every individual State. A Chinese factory may export products to New Zealand, Canada, USA, Europe and to other Asian nations. It would be logistically complicated for that factory to ensure it complied with technical standard requirements from every jurisdiction.

The confusion pertaining to the appropriate standards for social auditing may be diminished when the International Standards Organization releases ISO26000 in September 2010. ISO26000 is currently being developed by the ISO. The ISO is the largest publisher of standards in the world.[1168] ISO is an NGO which has representatives from the public and private sector from 157 member nations. The ISO standards are used across all industries and are widely regarded as international bench marks for good business practice.[1169]

[1163] Council of Standards Australia, AS 8003-2003 Corporate Governance - Corporate Social Responsibility (2003).
[1164] Council of Standards Australia, AS 8000-2003 Corporate Governance - Good Governance Principles (2003).
[1165] Council of Standards Australia, AS 8001-2003 Corporate Governance - Fraud and Corruption Control (2003).
[1166] Council of Standards Australia, AS 8002-2003 Corporate Governance - Organizational Codes of Conduct (2003).
[1167] Council of Standards Australia, AS 8004-2003 Corporate Governance - Whistleblower Protection (2003).
[1168] International Standards Organization, 'About ISO': < http://www.iso.org/iso/about.htm> at 22 December 2008.
[1169] Fred Karr, *Quality Management in Museum Information Systems: a Case Study of ISO 9000-2000 as an Evaluative Technique* (PhD Thesis, University of North Texas, 2005); Rodney Morehead, *The Feasibility of the Aerospace Corporation Achieving Accreditation to ISO* (MA Thesis, California State University, 2006); Bengt Pettersson, *Environmental Management Systems: an Initial Environmental Review of the Transportation Maintenance Branch,*

The ISO Working Group on Social Responsibility has been developing ISO26000 over an extensive consultation process which gained substantial momentum in September 2005 when representatives from 50 developed and developing ISO nations and the ILO finalized the design specification and structural outline of ISO26000.[1170] At the sixth plenary meeting of the WG SR on 1-5 September 2008 in Santiago, Chile voted unanimously to send ISO26000 to committee. On 12 December 2008 a committee draft of ISO26000 standard, Guidance on Social Responsibility was published.

ISO26000 is the guidance standard for CSR and will provide details on what is expected from organizations. On the bases ISO26000 has stated that it will draw from, inter alia, existing ILO treaties on OHS in setting these standards, it is anticipated that these standards will protect workers' right to safety and health. Therefore, ISO26000 is likely to provide an internationally recognised standard against which to judge social auditing for OHS in international supply chains.

7.3 Problems with social auditing

7.3.1 Generic problems with social audits

This section and 7.3.2 contributes to the core focus of this thesis by identifying the current regulatory gap surrounding CSR auditing. The problems in this part will be built upon in phase 3 of this thesis to identify how Australia can better protect workers' in Australian based supply chains. Market-driven, self-regulated CSR cannot guarantee corporations will perform social audits on their corporate codes. As the process of reporting is driven by the market, only those corporations which are pressured by consumers or other market forces to perform a social audit are likely to perform a social audit. Even if a corporation does provide CSR reports, the

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Government of Yukon, in Accordance with the ISO 14000 Series (MA Thesis, Royal Roads University, Canada, 2006); Theresa Thonhauser, *Factors that Relate to the Successful Implementation of ISO 9000 in Education: a Comparison between the United States and England* (PhD Thesis, The Pennsylvania State University, 2005).

[1170] International Standards Organization, *ISO Lays the Foundations of ISO 26000 Guidance Standard on Social Responsibility* (2006) : <http://www.iso.org/iso/pressrelease.htm?refid=Ref972> at 21 December 2008; International Standards Organizations, 'ISO26000 Memorandum of Understanding' (2005.

content of the reports is only as valid and reliable as the audit which forms the basis of the report.

The reliability of social audits is dictated by the auditing process. There are a number of confounding variables which are common to both internal and all forms of external audits. The Auditing and Assurance Standards Board explain that audit risk includes:

> The risk that the auditor expresses an inappropriate audit opinion when the financial report is materially misstated. Audit risk is a function of the risk of material misstatement (or simply, the "risk of material misstatement") (i.e. the risk that the financial report is materially misstated prior to audit) and the risk that the auditor will not detect such misstatement ("detection risk") at the financial report level and at the assertion level. The risk of material misstatement at the assertion level consists of two components: inherent risk and control risk. Detection risk means the risk that the auditor will not detect a misstatement that exists in an assertion that could be material, either individually or when aggregated with other misstatements.[1171]

If the audit process fails to address these concerns, then the audit will not provide internal validity or internal reliability. These variables are most acute where Australian corporations are attempting to perform social audits of factories in foreign States. This section will now analyse how effective Australian corporations can be at auditing a factory controlled by an unrelated corporation in the People's Republic of China (**China**).

Social auditing will be judged by how effective audits are at detecting unsafe workplaces. It has been contended that identifying OHS breaches in factories is the labour condition which is the easiest to detect.[1172] OHS risks are often visible, such as machines without guards, workers without safety equipment or fire exits blocked, whereas under-payment, restrictions on freedom of association or discrimination is

[1171] Auditing and Assurance Standards Board, 'Glossary of defined terms': http://www.auasb.gov.au/Standards-and-Guidance/Glossary-of-defined-terms.aspx 5 June 2009.
[1172] Nina Ascoly and Ineke Zeldenrust, *Challenges in China: Experiences from 2 CCC Pilot Projects on Monitoring and Verification of Code Compliance* (Clean Clothes Campaign, Report, 2003) 16-17; Clean Clothes Campaign, *Looking for a Quick Fix - How Weak Social Auditing is Keeping Workers in Sweatshops* (Report, 2005) 31, 32.

not as easily detectable by a visual inspection of a factory. Even though OHS risks are one of the easiest labour conditions to audit, an OHS audit will only be effective if the auditor has sufficient training and experience. To perform an OHS audit successfully, the auditor must use machines to detect noise, light and air quality and must know where workers require safety equipment and which machines require guards.[1173] In a non-prescriptive environment, auditors do not just use a checklist to ensure workplace health and safety; rather, auditors must have the experience to be able to identify a risk to workers.[1174]

Research demonstrates that many social audits provide confounded results. The UK War on Want reported that most social audits consist of three stages.[1175] Firstly, the audit reviews employment documents, including wage sheets, timekeeping, personnel records and OHS policies. Secondly, the audit performs site inspections to observe workers at work. This factory walk-through may or may not involve checklists or qualified OHS inspectors. Thirdly, the audit interviews managers and workers. The higher-end social audits also interview non-governmental organisations and trade unions. Many of these audits have inadequate time to obtain results accurately. War on Want observed:

> Most audits attempt to do all this in a few hours, though some take several days. And some are better than others.[1176]

Reportedly, many social audits are superficial and fail to audit factories effectively.[1177] The Clean Clothes Campaign reports that insufficient time is taken at the factory, auditors do not take the time to validate claims through visual inspections, auditors have insufficient training to identify OHS risks and often, auditors knowingly provide confounded results.[1178] One of the major problems with brief social audits is that the auditors may rely excessively upon documentation. It is

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[1173] National Occupational Health and Safety Commission, *Occupational Noise: National Standard for Occupational Noise* NOHSC: 1007 (1993).
[1174] Andrew Hopkins, 'Beyond Compliance Monitoring: New Strategies for Safety Regulators' (2007) 29 *Law & Policy* 2, 210.
[1175] War on Want, *Fighting Global Poverty: Fashion Victims: the True Cost of Cheap Clothes Primark, Asda and Tesco* (Report, 2005) 12.
[1176] Ibid.
[1177] Business for Social Responsibility Education Fund, *Independent University Initiative: Final Report* (2000) 2.
[1178] Clean Clothes Campaign, *Looking for a Quick Fix - How Weak Social Auditing is Keeping Workers in Sweatshops* (Report, 2005) 11-53.

relatively easy to draft policies to reflect corporate codes. The fact that factories have policies and documentation does not mean the documentation accurately reflects what is happening on the factory floor.[1179] Audits which rely heavily upon documentation effectively only analyse if the documentation meets prescribed standards. These audits fail to investigate if the documentation is accurate, and if labour conditions comply with local laws or corporate codes.[1180] The Clean Clothes Campaign provided an example of where a factory's documentation alleged to provide workers with certain benefits which workers rarely received.[1181] In the case investigated by the Clean Clothes Campaign, the factory provided workers free medical visits and medication during work time. The clinic where workers were required to visit took approximately 3 or 4 hours for each appointment, however the factory only gave employees one hour off work. This meant workers either had to forego half a day's wages or had to pay for their own private medical care. If social auditors only rely upon documentation, then it is probable that the audit will not accurately reflect the actual labour conditions in the factories.

Research indicates social auditors often realise their audits are flawed, yet continue to provide positive reports.[1182] The problem of confounded results was emphasised by O'Rourke's research into Price Waterhouse Coopers' social audit of university purchasing supply chains.[1183] O'Rourke had inspected over 100 factories and was retained by the Independent University Initiative to audit their supply chain auditors, Price Waterhouse Coopers. O'Rourke found Price Waterhouse Coopers' auditing was 'significantly flawed'.[1184] The research discovered the social audit failed to report that hazardous and carcinogenic chemicals were being used in the factories. For example a number of factories were using the carcinogenic chemical Benzene as a spot cleaner.

[1179] Cases demonstrate written policies do not demonstrate compliance unless there is evidence they are implemented: Christine Parker, 'Public Rights in Private Government: Corporate Compliance with Sexual Harassment Legislation' (1999) 1 *Australian Journal of Human Rights* 159; Karen Wheelwright, 'Corporate Liability for Workplace Deaths and Injuries: Reflecting on Victoria's Laws in the Light of the Esso Longford Explosion' (2002) 7 *Deakin Law Review* 323.
[1180] Rachel P. Lorenzen, Cameron Neil, Krisha Corbo and Sasha Courville, *Social Standards and Social Auditing Methodologies* (Social Accountability International and Sustainable Agriculture, Final Report, 2005) 29.
[1181] Clean Clothes Campaign, *Looking for a Quick Fix - How Weak Social Auditing is Keeping Workers in Sweatshops* (Report, 2005) 38.
[1182] Jill Esbenshade, *Sweatshops: Workers, Consumers, and the Global Apparel Industry* (2004) 209-225.
[1183] Dara O'Rourke, *Monitoring the Monitors: a Critique of Price Waterhouse Coopers' Labor Monitoring* (2000); The Independent University Initiative research was jointly funded by Harvard University, Notre Dame University, Ohio State University, the University of California, and the University of Michigan.
[1184] Dara O'Rourke, *Monitoring the Monitors: a Critique of Price Waterhouse Coopers' Labor Monitoring* (2000) 1.

On the day O'Rourke attended a factory with Price Waterhouse Coopers, employees indicated they were working excessive overtime. The factory had no overtime records and did not pay overtime pay, in contravention of the corporate code and local laws. The Price Waterhouse Coopers' social audit failed to note this labour breach.[1185] In other factories, the social audit failed to observe that time cards were completed with different pens and by different hands and appeared to have been altered. In another audit, the Price Waterhouse Coopers' auditors requested management to enter the overtime data directly into their spreadsheets. In a hot-dyeing section in a Chinese factory, workers had no protective shoes, gloves or eye protection, and in the cutting section, employees had no protective clothing and the machines had no guards to prevent workers coming into contact with machinery. The audit relied upon managements' versions of facts and failed to investigate any negative worker , NGO or media reports on factories. When the auditors did interview employees, they were selected by management, escorted by management to and from the interview and the interview consisted of ten minutes of the interviewer asking questions off a checklist. In many cases, the interviewer did not look up between questions and did not cross-check the workers' statements with management reports. The entire factory inspections, including inspecting and entering time and pay records, inspecting the factories' OHS conditions and interviewing workers and management were completed in approximately five hours. The social audit of a 300 worker Shanghai factory was performed with two auditors.[1186] The auditors were both financial accountants with limited social auditing training. The auditors completed the OHS audit in 45 minutes, without inspecting some parts of the factory, without using specialist equipment to check the temperature and noise, and failed to report various obvious OHS risks, including failing to report workers in the hot dye section operating machines with uncovered footwear, machines had their guards removed, chemicals and spot cleaners were not labelled, workers lacked respiratory protection and workers working on machines did not have mesh metal gloves.

[1185] Ibid 2.
[1186] Ibid Appendix A

Many social audits reportedly provide factories with notice prior to inspecting the factories. This approach to social auditing enables management to structure work flows around audits and is preferred by management. It is submitted that warning factories prior to visits can have disastrous effects upon the internal validity of the audit. If a factory receives a negative report, then the factory can lose contracts or be required to spend money improving labour conditions.[1187] If the factory loses work or is required to make improvements, this could cost management their jobs. Providing factories time to prepare for an audit enables factories to clean the factory, ensure fire exits are not blocked and to modify how workers operate.[1188] War on Want reports many audits provide factories 20 days' warning prior to inspecting the factory and its records.[1189] This distorts the auditing data as this does not represent how workers are actually working under normal circumstances. When Chinese factories are notified of an audit, management are reported to have committed fraud, threatened workers and engaged in other unethical acts to distort the auditing result.[1190] To increase the validity of results, social audits need to occur randomly and provide factories minimal notice prior to performing the inspection.[1191]

There are a large number of reported instances of Chinese factory management engaging in extreme acts to ensure social audit results are confounded. Egels-Zande performed a meta-study of primary research and reported that 77 per cent of factories engaged in unethical acts to distort the auditing results.[1192] This study found that 77 per cent of factories ordered workers to lie to the social auditors. Thirty-three per cent provided workers with financial benefits for lying and punished workers who failed to deceive the social auditors sufficiently. Forty-four per cent of factories ordered workers who were under the lawful age to stay home on the days of factory audits and 14 per cent of factories fraudulently generated employment contracts prior

[1187] China Textile and Apparel Industry, *Annual Report on Social Responsibility 2006* (2007) 20; Charles Kernaghan, Jonathann Giammarco, Barbara Briggs, Alexandra Hallock and Thomas Donoso, *Making Barbie, Thomas & Friends, and Other Toys for Wal-Mart: the Xin Yi Factory in China* (National Labor Committee (USA), Report, 2007) 37.
[1188] S Frenkel and D Scott, 'Compliance, Collaboration, and Codes of Labor Practice: the Adidas Connection' (2002) 45 *California Management Review* 1, 29; Mike Healy and Jennifer Iles, 'The Establishment and Enforcement of Codes' (2002) 39 *Journal of Business Ethics* 112, 117-124.
[1189] War on Want, *Fighting Global Poverty: Fashion Victims: the True Cost of Cheap Clothes Primark, Asda and Tesco* (Report, 2005) 13.
[1190] Diana Winstanley, Joanna Clark and Helena Leeson, 'Approaches to Child Labour in the Supply Chain' (2002) 11 *Business Ethics: a European Review* 3, 210.
[1191] May Wong and Stephen Frost, *Monitoring Mattel: Codes of Conduct, Workers and Toys in Southern China* (Asia Monitor Resource Center, Report, 2002) 23.
[1192] Niklas Egels-Zande, 'Suppliers' Compliance with MMNC's Code of Conduct: Behind the Scenes of Chinese Toy Suppliers' (2007) 75 *Journal of Business Ethics* 45.

to audits. Kernaghan, Giammarco, Briggs, Hallock and Donoso,[1193] War on Want,[1194] Labour Behind The Label,[1195] the Playfair Alliance,[1196] Ascoly and Zeldenrust,[1197] Students and Scholars Against Corporate Misbehaviour[1198] and Wai-ling Chan,[1199] found factories required workers to sign two sets of timesheets. One set of time sheets accurately recorded the workers' egregious overtime hours of 10 to 13 hour days, 7 days a week, and the other set of timesheets recorded hours of work which complied with Chinese laws and relevant corporate codes. Workers are coached on how to lie to corporate auditors. This process enables the Chinese factories to 'appease the gullible … corporate auditors so that the corporate monitoring scam can proceed'.[1200]

It is difficult to obtain accurate data from vulnerable workers. Research demonstrates that when auditors interview workers, they should ensure basic linguistic or cultural factors do not inhibit communications.[1201] War on Want found that to obtain accurate results, they first had to obtain the trust of workers over time and utilize positive references from independent worker representatives.[1202] Even with this level of trust, workers then refused to be interviewed anywhere but in their own homes, as they would lose their jobs if their employers knew they were being interviewed. Interviewing employees in environments controlled by their employers confounds accurate results. Students and Scholars against Corporate Misbehavior found that when they interviewed workers on-site and off-site, workers provided

[1193] Charles Kernaghan, Jonathan Giammarco, Barbara Briggs, Alexandra Hallock and Tomas Donoso, *Making Barbie, Thomas & Friends, and Other Toys for Wal-Mart the Xin Yi Factory in China* (National Labor Committee (USA), Report, 2007) 11; Charles Kernaghan, Jonathan Giammarco, Barbara Briggs, Alexandra Hallock and Tomas Donoso, *Olympic Sweatshop: Speedo Production in China* (National Labor Committee (USA), Report, 2007) 19; See additional reports of the National Labor Committee: The National Labor Committee (USA), *Another Wal-Mart Bargain: Made in China* (2007): < http://www.nlcnet.org/Art.php?id=503> at 22 December 2008.
[1194] War on Want, *Fighting Global Poverty: Fashion Victims: the True Cost of Cheap Clothes Primark, Asda and Tesco* (Report, 2005) 4.
[1195] Labour behind the Label, *Let's Clean up Fashion: the State of Pay behind the UK High Street* (Report, 2006) 6; Labour behind the Label, *Update: Let's Clean up Fashion: the State of Pay Behind the UK High Street* (Report, 2007) 6.
[1196] Play Fair 2008 Campaign, *No Medal for the Olympics on Labour Rights* (Report, 2007) 25 – 29.
[1197] Nina Ascoly and Ineke Zeldenrust, *Challenges in China: Experiences from 2 CCC Pilot Projects on Monitoring and Verification of Code Compliance* (Clean Clothes Campaign, Report, 2003) 8.
[1198] Students and Scholars against Corporate Misbehavior, *Looking for Mickey Mouse's Conscience: a Survey of the Working Conditions of Disney Factories in China* (Report, 2005) 6 - 9.
[1199] Jenny Wai-ling Chan, 'Gender and Global Labor Organizing: Migrant Women Workers of Garment Industry in South China' (Paper presented the Sweatshop Watch and Marianas Fund of the Tides Foundation Conference, Colorado, 8-9 May, 2005); Presenting research gathered with the Chinese Working Women Network.
[1200] Charles Kernaghan, Jonathan Giammarco, Barbara Briggs, Alexandra Hallock and Tomas Donoso, *Olympic Sweatshop: Speedo Production in China* (National Labor Committee (USA), Report, 2007) 19.
[1201] Rachel P. Lorenzen, Cameron Neil, Krisha Corbo and Sasha Courville, *Social Standards and Social Auditing Methodologies* (Social Accountability International and Sustainable Agriculture, Final Report, 2005) 22.
[1202] War on Want, *Fighting Global Poverty: Fashion Victims: the True Cost of Cheap Clothes Primark, Asda and Tesco* (Report, 2005) 13.

different results.[1203] Hemphill[1204] and O'Rourke[1205] argue that performing unofficial off-site interviews with workers greatly improves the quality of worker responses and should be included in social auditing processes. Ascoly and Zeldenrust found that while off-site interviews were ideal, as workers often worked 13 hours per day and 7 days per week, unless management gave employees paid time off to participate in the off-site interviews, workers were unable to participate.[1206] Their research found that management was reluctant even to allow workers to take unpaid leave to participate in interviews and as a result successfully performing social audits was extremely difficult.

If the auditors are regarded by workers as merely an extension of management, then arguably workers will be unlikely to trust the independence of the auditors. To counteract this confounding variable, non-governmental organisations and trade unions can be included in the process. Where these organisations are genuinely independent, their inclusion often improves the accuracy of the auditing results.[1207] Egels-Zande claims that until social auditors enable employees to become actively involved in the auditing process and provide workers with incentives to be involved, audits will continue to provide confounded results.[1208] Another way to ensure workers' voices are heard is through including worker representative organisations in the social audit. Identifying independent organizations that can represent employees can be difficult. Ascoly and Zeldenrust found that Hong Kong-based, non-governmental organisations felt they were insufficiently representative of Chinese workers. As mentioned in chapter 2.3.5.1, trade unions in China are representative of the State and not workers, which means the inclusion of Chinese trade unions in an audit would not necessarily provide independent representation of workers.

[1203] Students and Scholars against Corporate Misbehavior, *Wal-Mart's Sweatshop Monitoring Fails to Catch Violations: the Story of Toys Made in China for Wal-Mart* (Report, 2007) 4.
[1204] Thomas Hemphill, 'Monitoring Global Corporate Citizenship: Industry Self-regulation a Crossroads' (2004) 14 *Journal of Corporate Citizenship* 81.
[1205] Dara O'Rourke, *Smoke from a Hired Gun: a Critique of Nike's Labor and Environmental Auditing in Vietnam as Performed by Ernst & Young* (Transnational Resource and Action Centre, Report, 1997).
[1206] Nina Ascoly and Ineke Zeldenrust, *Challenges in China: Experiences from 2 CCC Pilot Projects on Monitoring and Verification of Code Compliance* (Clean Clothes Campaign, Report, 2003) 15.
[1207] Dara O'Rourke and Garrett Brown, 'Experiments in Transforming the Global Workplace: Incentives for and Impediments to Improving Workplace Conditions in China' (2003) 9 *International Journal of Occupational and Environmental and Health* 4, 378.
[1208] Niklas Egels-Zande, 'Suppliers' Compliance with MMNC's Code of Conduct: Behind the Scenes Chinese Toy Suppliers' (2007) 75 *Journal of Business Ethics* 45.

As management has been reported to coach workers to lie to auditors, permitting management to select the workers to be interviewed increases the probability that the workers interviewed will provide inaccurate results.[1209] Obtaining accurate survey results requires the researcher to adopt a sampling strategy which will provide valid and reliable results so the survey results can be generalized from the sample to the entire factory population.[1210] If the sampling strategy is innately flawed, then the results are arguably confounded and cannot be relied upon.[1211] There are a range of different types of sampling strategies, such as probability sampling, simple random sampling, systematic sampling, stratified random sampling, cluster sampling, non-probability sampling and many others. These strategies all attempt to minimise the impact of confounding bias on the data collection process. Enabling managers to select those workers who are most likely to confound the social audit successfully is a fundamentally flawed sampling strategy.

The problem of auditing workplaces is compounded where Chinese factories outsource work to homeworkers.[1212] For example, a factory in Dongguan City, Guangdong Province, China, reportedly used approximately 100 homeworkers to help fulfil their orders.[1213] Families in residential housing adjacent to the factory would regularly collect raw materials from the factory and would work on the materials in their houses. Reports indicate that Chinese factories do not provide auditors access to records of when and if their factory outsources work to sub-contractors and outworkers. [1214]

Critic's claim that corporations are not genuinely concerned with obtaining accurate social audits as their primary motive with participating in CSR is to ensure a positive image and not to improve labour conditions:

[1209] Nina Ascoly and Ineke Zeldenrust, *Challenges in China: Experiences from 2 CCC Pilot Projects on Monitoring and Verification of Code Compliance* (Clean Clothes Campaign, Report, 2003) 8.
[1210] James Stevens, *Applied Multivariate Statistics for the Social Sciences (4th ed,* 2002) 52.
[1211] Richard Ray, *Investigating Relationships between Corporate Social Responsibility Orientation and Employer Attractiveness* (PhD Thesis, The George Washington University, 2006) 84-86.
[1212] China Textile and Apparel Industry, *Annual Report on Social Responsibility 2006* (2007) 19; Labour behind the Label, *Update: Let's Clean Up Fashion: theState of Pay behind the UK High Street* (Report, 2007) 36.
[1213] Students and Scholars against Corporate Misbehavior, *Looking for Mickey Mouse's Conscience: a Survey of the Working Conditions of Disney Factories in China* (Report, 2005).
[1214] Clean Clothes Campaign, *Looking for a Quick Fix - How Weak Social Auditing is Keeping Workers in Sweatshops* (Report, 2005) 9.

> The retailers and their suppliers are playing an elaborate game. They only want to reassure consumers, not to improve conditions …[1215]

The Clean Clothes Campaign reported workers as stating:

> [Social] auditing is more about securing orders than improving the welfare of the workers, which is why the management only make cosmetic changes to impress the auditors and not to better the conditions of workers.[1216]

The USA National Labour Committee has argued that many audits are ineffectual and amount to nothing more than auditing 'well-run minimum security prisons'.[1217] Even where the corporate code has been entered into with good will and accurate auditing results are encouraged, this has often not translated into reliable auditing results and concrete improvements in labour conditions.[1218]

When a social audit is performed, in most cases, the corporation elects what information it will release to the public. The selective release of auditing results has reportedly generated suspicion with consumers that corporations only regard their corporate codes and auditing as a public relations exercise and that accordingly, corporations only release positive results.[1219] It is argued that the selective release of social auditing results potentially misleads consumers and investors and therefore has the potential to undermine the CSR movement.[1220] The CSR movement treats labour conditions in factories as private-based goods, for which consumers are prepared to pay a premium. This approach fails where consumers do not have sufficient information to be able to distinguish successfully between ethical and unethical products.[1221] Herrnstadt has argued that corporate 'codes frequently lack real substance and fail to address vital elements that concern basic labour standards and

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[1215] Dr Liu Kaiman of the Institute of Contemporary Observation in Shenzhen, China, reported in War on Want, *Fighting Global Poverty: Fashion Victims: the True Cost of Cheap Clothes Primark, Asda and Tesco* (Report, 2005) 27.
[1216] Clean Clothes Campaign, *Looking for a Quick Fix - How Weak Social Auditing is Keeping Workers in Sweatshops* (Report, 2005) 9.
[1217] The National Labor Committee (USA), *Another Wal-Mart Bargain: Made in China* (2007): http://www.nlcnet.org/Art.php?id=503 at 26 December 2008.
[1218] Matthew Kauffman and Lisa Chedekel, *As Colleges Profit, Sweatshops Worsen* (2004).
[1219] May Wong and Stephen Frost, *Monitoring Mattel: Codes of Conduct, Workers and Toys in Southern China* (Asia Monitor Resource Center, Report, 2002) 5.
[1220] Carol Adams, 'The Ethical, Social and Environmental Reporting - Performance Portrayal' (2004) 17 *Accounting, Auditing & Accountability Journal* 5, 731.
[1221] Robert J. Liubicic, 'Corporate Codes of Conduct and Product Labelling Schemes: the Limits and Possibilities of Promoting International Labor Rights through Private Initiatives' (1998) 30 *Law and Policy in International Business* 1, 11, 11-13.

essential procedures for implementation and enforcement'.[1222] Liubicic claims the CSR movement will only have a significant impact where there are uniformed reporting standards and those reports are externally audited to a high standard.[1223] Without external regulation, corporations will continue to determine how they will respond to the CSR movement. If corporations conceive CSR primarily as a public relations exercise, then the quality of social audits is unlikely to improve beyond the extent necessary to maintain a positive corporate image. Until CSR reports are consistently audited to a high standard then arguably the effectiveness of the CSR movement will be confounded and Australia will not be able to rely upon CSR to discharge its duties as posited in chapters 2.4.1 and 2.4.4.

7.3.2 Problems with different auditing processes

Arguably corporations can largely control the reliability of social audits by who they appoint to perform them. Under the market-driven model of self-regulated CSR, corporations which desire to perform social audits can perform these audits with internal or external auditors. Internal auditors are employed within the corporate group and they audit business units in the corporation or corporations related to their employers' business group. Internal auditors generally have unlimited access to workshops and do not create any risks in relation to intellectual property or trade secret threats.[1224] Many social auditors performed their audits simultaneously with product control audits.[1225] While this is logistically economical, this practice has created suspicion that social audits are not reliable due to the inherent conflict between corporations retaining suppliers and increasing profits.[1226] Internal stakeholders, such as workers, regarded internal auditors as an extension of management and not to be trusted.[1227] Yu concluded that the 'growing public awareness of weakness of the internal monitoring and further activist pressure led to

[1222] Owen E. Herrnstadt, 'Are International Framework Agreements a Path to Corporate Social Responsibility?' (2007) 10 *University of Pennsylvania Journal of Business & Employment Law* 187, 187-188.
[1223] Ibid.
[1224] Hu Xiaoyong, *Corporate Codes of Conduct and Labour-related Corporate Social Responsibility: Analyzing the Self-regulatory Mechanisms of Multinational Enterprises and Their Impacts to Developing Countries* (The Japan Institute for Labour Policy and Training, Report No. 55, 2006) 33-35.
[1225] Ibid.
[1226] Ibid.
[1227] Marc J. Monte, 'Corporate Factory/Supplier Monitoring Programs and the Failure of International Law in Regulating Indian Factory Conditions' (2001) 26 *Brooklyn Journal of International Law* 1125, 1140.

the development of external monitoring systems'.[1228] On the basis that corporations' financial reports are externally audited, it is not surprising that internal social audits which were not subject to external validation were viewed with suspicion.

Similarly to traditional financial auditing, corporations can retain an external for-profit social auditing firm to audit their corporation. Accounting firms come with centuries of credibility with auditing financial accounts but they initially proved to lack sufficient expertise in auditing environmental, employment, OHS and other areas related to social responsibility.[1229] In addition to accounting firms' apparent lack of qualified social auditors, for-profit auditing firms were regarded by workers as merely an extension of management and were viewed with suspicion. O'Rourke concluded:

> [A]ccounting firms retained by manufacturers are not the appropriate organisations to be conducting audits of labour … conditions. Accounting firms such as Ernst & Young simply do not have the training, independence, or the trust of workers, to perform comprehensive, unbiased audits of working conditions.[1230]

While some large multi-national accounting firms continue to offer social auditing, the failure by accounting firms to deliver reliable audits led to the establishment of for-profit specialist auditing firms.[1231] The largest three for-profit, specialist social auditing firms are the Intertek, owned Labtest, Societé Générale de Surveillance (SGS) and Bureau Veritas.[1232] These auditing firms provide increased expertise, however it is submitted that these auditors can appear extremely close to the corporations which retain them.[1233]

[1228] 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) 98.
[1229] Dara O'Rourke, 'Monitoring the Monitors: a Critique of Corporate Third-party Labour Monitoring' in Rhys Owen Jenkins, Ruth Pearson and Gill Seyfang (eds), *Corporate Responsibility and Labour Rights: Codes of Conduct in the Global Rconomy* (2002) 61-76.
[1230] Dara O'Rourke, *Smoke from a Hired Gun: a Critique of Nike's Labor and Environmental auditing in Vietnam as Performed by Ernst & Young* (Transnational Resource and Action Centre, Report, 1997) 11.
[1231] Clean Clothes Campaign, *Looking for a Quick Fix - How Weak Social Auditing is Keeping Workers in Sweatshops* (Report, 2005) 55-57.
[1232] Ibid.
[1233] John M. Conley and Cynthia A. Williams, 'Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement' (2005) 31 *University of Iowa, The Journal of Corporation Law* 1, 29.

The second type of external social auditing can be conducted by not-for-profit NGOs. The development of CSR resulted in not-for-profit, non-governmental organisations auditing corporations' ethical conduct. Initially, these not-for-profit, NGOs audited corporations without permission from the corporations they were auditing. Some corporations have elected to retain these organisations to perform authorised social audits of their corporations' activities. Authors have claimed NGO auditing provides additional credibility over for-profit auditing.[1234] NGOs are often regarded as more independent than for-profit corporations and therefore maybe able to afford more transparent social audits than for-profit auditors.[1235] Due to their history of political and commercial independence, human rights' NGOs have been regarded as unofficial ombudsmen to protect human rights.[1236]

Unlike for-profit auditing firms which focus on profits, not-for-profit NGOs' development continues, because their members are interested in the same social issues.[1237] In addition, NGOs are not restrained by shareholder pressures to seek profits.[1238] The NGOs' main focus is to advance their members' interests. Where those members' interests are the furthering of human rights internationally, then the NGO increases its credibility by producing accurate reports. As a consequence, NGOs are more able to 'be much more vocal, outspoken and fiercely critical of violations that occur' than for-profit auditors.[1239]

As NGOs are independent and focus upon social causes rather than profits, it is argued that the probability of conflict of interests is diminished. This does not mean NGOs never have conflicts of interests. A trade union, for example, is focused upon furthering the interests of its members. Arguably if a trade union is auditing a foreign factory, an Australian trade union may provide extremely negative reports in order to deter corporations from outsourcing work internationally and thus protect

[1234] Ivanka Mamic, *Implementing Codes of Conduct* (ILO, Report, 2004); Simon Zadek, 'The Path to Corporate Social Responsibility' (2004) 82 *Harvard Business Review* 12, 125.
[1235] John Ruggie, 'How to Marry Civic Politics and Global Governance' in A. Kuper (ed), *The Impact of Corporations on Global Governance* (2004) 10-23.
[1236] David Wiessbrodt and James McCarthy, 'Fact-finding by Non-governmental Organisations' in B.G. Ramcharan (ed), *International Law and Fact-finding in the Field of Human Rights* (1982) 186.
[1237] L Gordenker and T Weiss, 'Pluralizing Global Governance: Analytical Approaches and Dimensions' in T Weiss and L Gordenker (eds), *NGOs, the UN and Global Governance* (1996) 26.
[1238] Robert Blitt, 'Who will Watch the Watchdogs? Human Rights' Non-governmental Organisations and the Case for Regulation' (2004) 10 *Buffalo Human Rights Law Review* 261, 287.
[1239] Paul Lauren, *The Evolution of Human Rights*: *Visions Seen* (1998) 287-288.

their Australian members' jobs.[1240] Furthermore, while NGOs are established for non-profit purposes, it is argued that often these organisations are not accountable to their members.[1241] One of the most active NGOs in Australia is the Brotherhood of Saint Laurence. The Brotherhood of Saint Laurence is controlled by its board.[1242] The board is controlled by 15 people who are made up of five clerics approved by the Archbishop, five non-employees or officers approved by the other members and five employees or officers of the Order.[1243] While the Brotherhood of Saint Laurence produces extremely high quality research on social issues, similar to many other NGOs, the Brotherhood of Saint Laurence has limited accountability. Blitt contended that:

> the lack of NGO accountability 'hints at the larger picture whereby a lack of concrete operating standards, coupled with a laissez-faire approach, leaves fulfilment of informal regulatory principles to the NGOs themselves. The result is uneven at best, and at worst, points to a severe, looming crisis with respect to credibility and authority'.[1244]

Esbenshade has acted for both for-profit auditors and not-for-profit auditors, and claims they both adopt similar principals when they are performing authorised audits.[1245] While NGO auditors often appear independent and reliable, the number of NGOs is dwarfed by the number of corporations.[1246] In 2000, the Asia Monitor Resource Centre reported there were over 5000 toy factories across China, with a working population of 1.3 million.[1247] It is submitted that there are simply insufficient NGOs to perform effective audits of all of these factories. In addition, many smaller NGOs lack the financial resources to perform involved primary research on corporations.[1248] One approach to increase the number and capacity of

[1240] John H. Goolsby, 'Is the Garment Industry Trying to Pull the Wool over Your Eyes? The Need for Open Communication to Promote Labor Rights in China' (2001) 19 *Law and Inequality* 1, 193, 202-203; Li Youzhi and Liu Hong, 'Influence of Blue-barrier on China's Export and Its Counter Measure' (2006 6 *Journal of Hunan International Economics University* 3, 1.
[1241] P Simmons, 'Learning to Live with NGOs' (1998) 112 *Foreign Policy* 83.
[1242] *Brotherhood of St. Laurence (Incorporation) Act 1971* (Vic) s 4(2).
[1243] Sch of the *Brotherhood of St. Laurence (Incorporation) Act 1971* (Vic).
[1244] Robert Ch. Blitt, 'Who will Watch the Watchdogs? Human Rights, Non-governmental Organisations and the Case for Regulation' (2004) 10 *Buffalo Human Rights Law Review* 261, 321-322.
[1245] Jill Esbenshade, *Monitoring Sweatshops* (2004) 142.
[1246] May Wong and Stephen Frost, *Monitoring Mattel: Codes of Conduct, Workers and Toys in Southern China* (2000) Asia Monitor Resource Center 6.
[1247] Ibid.
[1248] Robert Ch. Blitt, 'Who will Watch the Watchdogs? Human Rights, Non-governmental Organisations and the Case for Regulation' (2004) 10 *Buffalo Human Rights Law Review* 261, 290.

NGOs to perform audits is to provide them with financial support. If corporations paid NGOs to perform the audits, then this potentially could alter the very aspect which makes NGOs so reliable: their independence. If NGOs started competing for social auditing contracts, then it is foreseeable that these NGOs may modify their approach to reporting to more closely resemble for-profit auditing firms. If NGOs accept substantial finances from governments, then they become de facto mouthpieces of governments.[1249] While receiving financial support from corporations and governments can enable NGOs to fund additional research, the additional funding will inevitably result in a perceived reduction in autonomy.

The third type of external social auditors are not-for-profit, industry-controlled, third-party-accredited auditors. These not-for-profit, industry-controlled auditors are funded generally by corporations, and are intended to operate independently from the corporations which established them. These entities first emerged in 1996/1997 when two associations emerged. The first association was developed by the Apparel Industry Partnership which established the Fair Labour Association and the second association established was the Council on Economic Priorities Accreditation Agency, which subsequently changed its name to Social Accountability International.[1250] These industry- controlled certification associations were established directly in response to the lack of accountability and appearance of validity of the existing social auditing procedures.[1251] The Fair Labour Association and SA8000 are both schemes which posit standards and certify third party certification bodies to actually perform the audits. The Fair Labour Association and Social Accountability International do not actually perform audits themselves. The SA8000 scheme, for example, contains extremely detailed standards on labour conditions including safety protection and guards, OHS training, hygiene and other OHS factors.[1252] Factories are audited by qualified certification bodies.[1253] Auditing firms become certified under SA8000 by applying to Social Accountability Accreditation Services for accreditation. Social Accountability Accreditation

[1249] Ibid 329.
[1250] For a discussion of the standards, see Deborah Leipziger, *SA8000; the Definitive Guide to the New Social Standard, Reference and Research Book* (2002).
[1251] Charles Curry-Smithson, *The Fair Labor Association: a Case Study of Emerging Intersectional Collaboration as a Strategy for Ensuring Global Labor and Human Rights* (PhD Thesis, Fielding Graduate Institute, 2002) 38-41.
[1252] Neil Kearney, 'Corporate Codes of Conduct: the Privatised Application of Labour Standards' in Sol Picciotto and Ruth Mayne (eds), *Regulating International Business: Beyond Liberalisation* (1999) 218-19.
[1253] Social Accountability International, *Accreditation*: < http://www.sa-ntl.org/index.cfm?fuseaction=Page.viewPage&pageId=511&parentID=473> at 21 December 2008.

Services assesses the expertise of the auditing firm through an impartial assessment procedure, and periodically reviews the accuracy of the certification body's auditing by performing their own audits. This means that a certification body which performs confounded audits may have their certification revoked.

Factories which have SA8000 accreditation are published on-line, which enables corporations which are concerned with ethical trading to identify easily factories which are accredited as respecting human rights. Social Accountability International is developing the Business Development Database of SA8000-compliant factories.[1254] This database will provide details of the certified factories' capacity, current production runs, nature of work, costs and geographic location. This will increase substantially the ability of purchasers to identify SA8000-compliant factories. Once SA8000 improves their register of certified factories, this will greatly increase the potential for small and medium-sized corporate purchasers to source their products ethically. Currently, small and medium-sized corporations often lack financial resources to engage fully in the CSR movement.[1255] If a register of certified factories is available at the click of a button, then the cost of maintaining an ethical supply chain is negligible.

One of the major criticisms of not-for-profit, industry-controlled, third-party accreditation auditing is that associations are controlled by their members and their members are the corporations which are accused of breaching human rights. Regardless of the actual validity of the audits, the perception of bias can exist if these associations permit high degrees of corporate control over the auditing process. The Fair Labour Association, for example, was criticized as it certified auditing firms but then allowed individual corporations to select who would perform the audit and what factories would be audited. The perceived lack of independence of auditors attracted

[1254] Social Accountability International, *SA8000 Harvard Study*: < http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageID=810&nodeID=1>13> at 23 December 2008.
[1255] Natalie Odd, *The Global Reporting Initiative (GRI): To What extent Do the GRI Corporate Sustainability Guidelines Enable Business to Move towards Sustainability? What Are the Organizational-level Challenges to Implementation of the GRI for Different Sizes and Types of Companies?* (MA Thesis, Royal Roads University, Canada, 2003).

criticism and resulted in amendments, so now the Fair Labour Association selects the auditors, pays the auditors and selects which factories the auditors will visit.[1256]

If corporations' supply chains are certified by associations such as SA8000 or the Fair Labour Association then it is submitted that there is a comparatively high probability that labour abuses will be identified by the audits when compared to partial or internal audits. The SA8000 auditing process is highly regarded. Lyn claims 'SA8000 … is the most viable and comprehensive international workplace management system available in the world'.[1257] Gilbert and Andreas Rasche have contended that SA8000 is 'theoretically well-founded and able to overcome some of the current deficits of the certification initiative'.[1258] While the certification process may provide valid results, Gobbels and Jonker have questioned if SA8000 provides sufficient support to deal with labour issues at an organisational level.[1259] There is, however, research which has demonstrated SA8000 has had a positive impact upon improving labour conditions in some certified factories.[1260]

While not-for-profit, third-party, certified auditors can provide transparent and valid auditing results, many corporations continue to utilize internal company auditors which potentially provide less valid results. This part has explored the range of social auditing options which the market-driven, self-regulated CSR model enables corporations to utilize. When corporations are determining which model to adopt, their directors will weigh up the economic cost of acting ethically versus the potential damage suffered by adopting a less rigorous social auditing process. If Australia is to discharge its duties as explained above in chapters 2.4.1 and 2.4.4 then Australia is required to take reasonably practicable steps to ensure corporations' supply chains uphold labour rights. One regulatory vehicle adopted by Australia to improve corporations' ethical conduct has been to encourage CSR. The motivation for corporations to engage in CSR is the deterrent threat from negative media

[1256] 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), 100-101.
[1257] I-Ling Lin, *Profit Through goodwill: Corporate Social Responsibility in China and Taiwan* (MA Thesis, University of Southern California, 2006) 49
[1258] Dirk Gilbert and Andreas Rasche, 'Discourse Ethics and Social Accountability: the Ethics of SA 8000' (2007) 17 *Business Ethics Quarterly* 2, 187.
[1259] Math Gobbels and Jan Jonker, 'AA1000 and SA8000 Compared: a Systematic Comparison of Contemporary Accountability Standards' (2003) 18 *Managerial Auditing Journal* 1, 54.
[1260] Kaewta Rohitratana, 'SA 8000: a Tool to Improve Quality of Life' (2002) 17 *Managerial Auditing Journal* 2, 60.

attention dissuading customers. If customers and the market have no way to be assured that CSR reports are valid then corporations which fail to perform valid audits will be able to hide unethical behaviour and corporations which engage in substantive audited CSR activities may lose market share to their unethical competitors who are able to source cheaper products. The current status of CSR relies upon market pressures and largely corporate good will. The next part analyses research which claims that when corporations from the USA are confronted with electing to maximise profits or human rights, corporate America has elected to maximise profits.

7.4 Do USA-based corporations genuinely attempt to act as good corporate citizens?

Australia's obligation is to take reasonable steps to ensure corporations discharge their obligations under the complicity principle. If research demonstrates corporations are embracing the complicity principle in good faith then States can discharge their obligations through largely leaving the market to regulate itself. If research indicates economically powerful corporations within supply chains have a history of avoiding human rights obligations then States will have a greater obligation to act. This part will analyse whether corporations genuinely attempt to act as good corporate citizens in discharging their duties under the complicity principle.

The focus in this part is upon American corporations as a large number of footwear and apparel products sold in Australia are owned by American corporations. In particular this part will analyse Reebok and Nike's supply chains. Both of these American owned corporations supply products to Australian retail stores and are therefore relevant to analysing labour conditions in Australian based supply chains.

7.4.1 Reebok case study

There is a difference between a corporation genuinely attempting to discharge its obligations under the complicity principle and a corporation maintaining the lowest level of socially responsible practices which the market will accept without making a

negative reaction. The distinction between a corporation acting ethically and gleaning benefits from adopting a minimalist, sophisticated, strategic, CSR approach is highlighted by Yu's doctorate.[1261] Even though Yu's study focused upon an American brand name, this research is still relevant to this thesis. In many cases, Australian retail stores purchase products directly from agents representing hollow corporations based in the USA. Corporations such as Reebok and Nike utilize their own supply chain to manufacture products, and then sell the completed product to retail stores. As a consequence, the hollow corporation's supply chain becomes relevant to this thesis when the hollow corporation is within Australian corporations' spheres of influence.

Yu explored the emergence, development and implementation of Reebok's corporate code of practice in a Reebok supplier, footwear manufacturer, in Fuzhou City, Fujian Province in China. Reebok was perhaps one of the world's leaders in establishing CSR throughout its supply chain. Reebok had established the Reebok Human Rights Foundation, sponsored the 'Human Rights Now!' concert tour, set up Reebok Human Rights Awards, and introduced the Reebok Human Rights Production Codes of Conduct.[1262] The main motivation behind these moves was not altruism; rather, Reebok aggressively positioned itself as the leader in respecting human rights in order to gain the competitive edge over its competitors. Reebok's marketing positioning, therefore, made it crucial for Reebok to avoid embarrassing human rights' violations.

Prior to Reebok's CSR drive, Yu observed that the subject factory demonstrated despotic management strategies.[1263] Employees had no rights and had their human rights violated. In chapter 8 of his thesis, Yu explored the impact Reebok's CSR had upon improving the lives of workers. Yu found some of the more visible problems, such as child labour and major occupational health and safety problems were remedied, however as a result of these expenses, workers were forced to work harder, faster and for less money. As Reebok had simply imposed its new standard

[1261] 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) 7.
[1262] Ibid ch 5.
[1263] Ibid ch 7.

upon the subject factory, the subject factory had absorbed the additional expenses by cutting workers' wages and rest breaks, and by increasing the pace of production.

The situation at the subject factory became even worse when Reebok reduced the price it was prepared to pay for the manufactured product. This resulted in factories forcing workers to work even harder and resulted in further cost-cutting by management. Yu's interviews with workers found those workers blamed Reebok for worsening their labour conditions.[1264]

Rather than seeking genuine improvement in workers' labour conditions, Yu concluded Reebok was engaging in a race to the lowest acceptable, ethical, legal standards possible.[1265] Rather than seeking to improve workers' labour conditions, Reebok sought to identify the most visible sweatshop conditions and remove them. Reebok sought to ensure its CSR practices were slightly more advanced than its competitors. While Reebok had made some visible efforts to improve labour conditions, in reality, Yu argued Reebok's efforts were a marketing strategy. As a marketing strategy, Reebok only required the image of a good corporate citizen, and not the reality of actual ethical labour conditions in its supplier factories. As Reebok's motivation was profits through positive marketing, it was not prepared to invest adequate resources into improving the labour conditions in supplier factories. As a consequence, the under-funded CSR effort only resulted in changing the types of labour conditions being breached and not in an overall reduction in the number of labour conditions being breached.[1266] Corporations which adopt the lowest level of socially acceptable CSR can be criticised for failing to demonstrate genuine commitment to discharging their human rights' obligations.

7.4.2 How corporations adopt exculpatory strategies to minimise the impact of human rights violations, rather than enforcing their codes

When a corporation is criticised for trading with factories which violate their workers' human rights, corporations can respond to the negative publicity by making genuine efforts to improve those labour conditions or by counteracting the negative

[1264] Ibid 217.
[1265] Ibid 267-268.
[1266] Ibid ch 11.

publicity with other publicity tools. The ability of corporations to counter negative publicity with their positive publicity can arguably reduce the effectiveness of the CSR movement. This approach to CSR issues has been adopted by a number of large corporations. For example, Williams examined how Nike, Gap and Disney utilized exculpatory propaganda as a form of ideological social control.[1267] Ideological social control uses a person's beliefs to control people where direct social control uses coercive sanctions when a person digresses from acceptable social norms.[1268] Williams claimed these corporations established a standard of acceptable conduct through their corporate codes, then manipulated the way in which the corporation's failure to meet those codes were perceived by consumers and employees. To prove her hypothesis that that corporations use excuses, justifications and disclaimers to rationalize their participation in sweatshops in developing States, Williams obtained CSR statements from the websites of Nike, Gap and Disney.[1269] The statements gathered included these corporations' stated intention to achieve socially responsible conduct, and the corporations' statements which excused, justified or rationalized their participation in sweatshops.

Williams analysed the material gathered from Nike, Gap and Disney and identified various approaches to exculpate the corporation, without making any effort actually to improve the labour conditions.[1270] For example, Nike has been criticised for decades about its sweatshop conditions in its supplier factories in Asia. Rather than addressing the underlying issue of Nike's failure to provide employees with satisfactory labour conditions, Nike claimed employees were better off now than ten years ago.[1271] In reaching this conclusion, Nike focused on the fact that labour conditions had improved and used this as a means to excuse its conduct. Through the use of outsourcing work to unrelated corporations, Nike was able to distance itself from liability and claim it had done all it could to improve labour conditions. Nike's Code required factories to which it outsources work, to ensure adequate lighting, guards on machines, ventilation and compliance with all other labour

[1267] Heidi Williams, *Smiling and Lying: Corporate Evasions of Responsibility Regarding Global Sweatshops* (MA in Sociology Thesis, Marshall University, 2003).
[1268] Ann Ewen, *Social Stratification and Power in America: the View from Below* (1998) 145-147, 154-157 and 162 for discussion.
[1269] Heidi Williams, *Smiling and Lying: Corporate Evasions of Responsibility Regarding Global Sweatshops* (MA in Sociology Thesis, Marshall University, 2003) 26-28.
[1270] Ibid 28-42.
[1271] Sharon Beder, 'Putting the Boot In' (2002) 32 *Ecologist* 24, 25.

conditions. When these factories failed to meet the standards set by Nike, Nike blamed the factory. Nike also required every factory to have Nike's Code of Conduct on the wall in the factory. Workers were instructed to contact Nike directly if there was a breach. When workers failed to contact Nike when there were breaches, Nike blamed the workers. In essence, Nike's approach was to shift the blame for the labour conditions' violations to external parties. Williams concluded that the approach of Nike, Gap and Disney to socially responsible conduct was a marketing ploy without any substance.

Nike's use of exculpatory public relations campaigns has attracted particular academic attention. Nike's efforts to mislead consumers by the existence of corporate codes came to a head in the USA's *Nike Inc. v Kasky* case.[1272] In response to substantial negative media attention, protests and a decline in sales, Nike launched a public relations blitz.[1273] This public relations blitz largely consisted of Nike claiming it had complied with its corporate code of practice, and that labour conditions in its supplier factories was acceptable. A consumer activist, Kasky filed suit against Nike, claiming, in effect, Nike was lying. Kasky claimed Nike was, in fact, acting socially irresponsibly, and that its public relations blitz consisted of false and misleading commercial statements in violation of California's unfair trade practices and false advertising laws, found in the *Californian Business & Professional Code*. The unfair competition law defines 'unfair competition' to include 'any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the false advertising law]'.[1274]

Nike did not seek to deny that it had lied. To defend the case, Nike argued, inter alia, that the claim was flawed and that it should not be liable for its representations as there was a constitutional right to free speech in the First Amendment to the USA's *Bill of Rights*. In essence, Nike pleaded that constitutionally, it has a right to mislead the public in its CSR propaganda. Piety explains Nike's position as follows:

[1272] 539 US 654 (2003); for a good discussion of this case, see Ronald K.L. Collins & David M. Skover, 'The Landmark Free-Speech Case that Wasn't: the *Nike v. Kasky* Story' (2004) 54 *Case Western Reserve Law Review* 965.
[1273] Ronald K.L. Collins & David M. Skover, 'The Landmark Free-Speech Case that Wasn't: the *Nike v. Kasky* Story' (2004) 54 *Case Western Reserve Law Review* 965, 970-972.
[1274] S 17200 of the *Californian Business & Professional Code* (West 2000).

> [Kasky] claimed Nike lied, and Nike replied (in effect), 'So what? The First Amendment protects everything your lawsuit alleges we said, even if we lied'.[1275]

This case was never heard on its facts. Nike attempted to have the case struck out on constitutional grounds through the lower courts, to the Californian Supreme Court and ultimately to the United States Supreme Court. The United States Supreme Court did not hand down a judgment on the substantive issues in the case. The United States Supreme Court held *certiorari* was 'improvidently granted'.[1276] Kasky's claim was struck out and the veracity of Nike's public relations' claims was never tested. Even though the United States Supreme Court declined to hear the case and provide a precedent, human rights advocates have rated *Nike Inc. v Kasky* as a victory, in the sense that it provides a warning to corporations that they run the risk of litigation if they lie in their CSR propaganda.[1277]

Nike Inc. v Kasky demonstrated that Nike's position in relation to socially responsible conduct may only amount to a public relations' exercise. Nike claimed that it should not be liable for the accuracy of its CSR public relations' propaganda, even when it was made negligently or fraudulently. From Nike's perspective, this argument was a sensible position. Corporations are about maximising profits, and any diversion caused by defending suits that its CSR representations were negligent or fraudulent would cost money. Presumably, if Nike was taking its social responsibilities seriously, then Nike would have already performed reliable audits and obtained reports from which it could easily defend its position. The fact that Nike vigorously fought this action, rather than just providing the courts with its internal audits for inspection, arguably indicates that Nike did not have confidence in its audits. After all, if a judicial examination of Nike's CSR propaganda judged Nike to be honest, then this would have been an extremely positive marketing tool. Rather than exposing itself to the expense of a legal battle and the associated public scrutiny Nike elected to adopt a strategy to avoid their CSR reporting and auditing process from examination.

[1275] Tamara R. Piety, 'Grounding Nike: Exposing Nike's Quest for a Constitutional Right to Lie' (2005) 78 *Temple Law Review* 151, 153.
[1276] *Nike Inc v Kasky 539* US 654, 655 (2003).
[1277] David Bigge, 'Bring on the Bluewash: a Social Constructivist Argument against Using *Nike v. Kasky* to Attack the UN Global Compact' (2004) 14 *Northwestern School of Law, Lewis & Clark College International Legal Perspectives* 6, 6; Julia Fisher, 'Free Speech to Have Sweatshops? How *Kasky v. Nike* Might Provide a Useful Tool to Improve Sweatshop Conditions' (2006) 26 *Boston College Third World Law Journal* 267.

7.4.3 Corporations from the USA claim they should not be liable for their violations of human rights committed abroad

While corporations' associations have claimed to be concerned with human rights' violations in their subsidiaries and suppliers overseas, an *amicus curiae* brief, filed in the *Sosa v Alvarez-Machain* Supreme Court case[1278] by those same corporations, has claimed they should not be required to uphold basic human rights.[1279] In the brief, the National Foreign Trade Council, the USA Chamber of Commerce, the USA Council for International Business and the USA Business Roundtable claimed the action contained in the *Judiciary Act of 1879* (USA) and *Torture Victim Protection Act* (USA) should not be applied to corporations based in the USA, as this would place them at a competitive disadvantage.[1280] Collingsworth explains:

> Rather than embracing the binding norms of the …. [*Alien Tort Statute*] as the foundation for meaningful corporate responsibility, the brand names of the global economy collectively asserted that the … [*Alien Tort Statute*] should be nullified by the Supreme Court because its application to U.S.-based multinational corporations placed them at a competitive disadvantage in the global economy.[1281]

This section does not intend to explore in detail the operation of the *Alien Tort Statute* and the associated legislation. It is sufficient to note here that the *Alien Tort Statute* only provides a cause of action in the most extreme cases, for example, slavery, torture, extra-judicial killing, genocide, war crimes, crimes against humanity and arbitrary detention.[1282] While some corporations have engaged with civil society to improve their ethical conduct,[1283] other corporations based in the USA have argued that holding them accountable for such crimes placed them at a competitive disadvantage against foreign corporations. If these corporations did not have the intent to engage in human rights' violations in the future, then the existence of the

[1278] 542 US 692 (2003); Judgment: *Sosa v Alvarez-Machain*, 542 U.S. 692 (2004) 699 (United States).
[1279] Brief of Amicus Curiae, the National Foreign Trade Council, *Sosa v. Alvarez-Machain*, 124 S. Ct. 807 (2003) (No. 03-339).
[1280] These industry groups represent a substantial number of large corporations in the USA, many of which have substantial business interests in Australia.
[1281] Terry Collingsworth,' "Corporate Social Responsibility" Unmasked' (2004) 16 *St. Thomas Law Review* 669, 669.
[1282] See chapter 8.3.3 of this thesis for a detailed discussion of the *Alien Tort Statute*.
[1283] Richard L. Herz, 'The Liberalizing Effects of Tort: How Corporate Complicity Liability under the *Alien Tort Statute* Advances Constructive Engagement' (2008) 21 *Harvard Human Rights Journal* 2, 207

Alien Tort Statute could not have placed them at a competitive disadvantage. A law which restrained corporations from engaging in conduct that the corporation had taken steps to ensure it, its subsidiaries or suppliers would never perpetrate, may have been expected to have supported the expansion of the *Alien Tort Statute*. If these corporations were sued under the *Alien Tort* Statute arguably these corporations would have been able to defend such claims and could use the law to harass competitors who violate human rights. As even unsuccessful litigation can create negative publicity, it seems corporations regarded the threat of publicity outweighed any advantages. For corporations which were violating human rights, the threat from the *Alien Tort Statute* was potentially disastrous. The fact corporations attempted to reduce this avenue of judicial scrutiny over potentially serious human rights abuses arguably raises concerns about the willingness of these corporations to participate in the CSR movement in good faith.

7.5 Can States rely upon the deterrent impact of CSR in its current form to discharge their human rights' obligations?

There is a substantial amount of evidence that corporate codes are not being effectively audited in many cases. This does not mean that corporate codes are never effectively audited. If a corporation is subject to pressure from CSR, management in that corporation may feel pressured to provide the appearance of taking social responsibility seriously. If a corporation's code fails to deliver results in every case, then the corporation would have no positive results to report to the market and may suffer adverse pressure from the socially conscious consumers and corporations. While it is clear many social audits have some positive impacts, it is submitted that the degree of improvement and the amount of labour violations which are not addressed which reduces the ability of States to rely upon CSR as a vehicle to discharge their human rights' obligations.

While market driven unregulated CSR is currently not in a form for States to rely upon this vehicle, it could be argued that CSR does have a positive impact on improving some labour conditions. As a market-driven movement, CSR has achieved some successes in improving corporations' ethical conduct. Chapter 6.3 analysed how CSR has motivated the Coles Myer and Woolworths groups to become

active in managing their supply chains and motivated 112 retailers to sign up to the *Home Workers Code of Practice*. The 2008 Australian Centre for CSR 2008 Conference heard testimonies from corporations about their innovative approaches to CSR.[1284] These testimonies included speeches by the CEO of Westpac,[1285] and senior managers from Australian companies including Transurban,[1286] Investa,[1287] Coca-Cola South Pacific,[1288] Telstra Business[1289] and from other corporations and industry participants. Labour Behind the Label has concluded that '[s]ocial audits can be valuable, if they are frequent and unannounced, include gender-sensitive, rigorous, off-site interviews, and involve local trade unions and NGOs'.[1290] Whether or not social audits are effective depends on the other tools adopted by the corporate code, such as ensuring freedom of association, accountability, independent complaints mechanisms and the like. Representatives from the Society for Technical Co-operation and the German Ministry of Economic Co-operation and Development claim social auditing has the potential to motivate employers to improve workplace illumination, to provide sufficient and clean toilets, to ensure safe ventilation, to ensure employees have access to adequate equipment, to ensure workplace canteens provide adequate sustenance and, to ensure there are proper and appropriate spaces to deposit raw materials.[1291] The Clean Clothes Campaign concludes:

> It is clear that, in spite of limited impact in many cases, the insistence of buyers on compliance, policed by social auditing, is helping to have a limited but positive effect on companies, particularly in areas linked to occupational health and safety.[1292]

[1284] Australian Centre for Corporate Social Responsibility, *Raising the Bar: Leading Sustainable Business in 2008*, Sydney, 20 February 2008.
[1285] Gail Kelly, 'Opening Address' (Paper presented at the Australian Centre for Corporate Social Responsibility Conference on Raising the Bar: Leading Sustainable Business in 2008, Sydney, 20 February 2008).
[1286] Lisa Hunt, 'Transurban Sustainability Update' (Paper presented the Australian Centre for Corporate Social Responsibility Conference on Raising the Bar: Leading Sustainable Business in 2008, Sydney, 20 February 2008).
[1287] Campbell Hanan, 'Environment and Buildings' (Paper presented the Australian Centre for Corporate Social Responsibility Conference on Raising the Bar: Leading Sustainable Business in 2008, Sydney, 20 February 2008).
[1288] Gareth Edgecombe, 'Environment and Buildings' (Paper presented the Australian Centre for Corporate Social Responsibility Conference on Raising the Bar: Leading Sustainable Business in 2008, Sydney, 20 February 2008).
[1289] Deena Shiff, 'How Should Businesses Deal with the Growing Expectation around Climate Change?' (Paper presented the Australian Centre for Corporate Social Responsibility Conference on Raising the Bar: Leading Sustainable Business in 2008, Sydney, 20 February 2008).
[1290] Labour Behind the Label, *Let's Clean up Fashion: the State of Pay behind the UK High Street* (Report, 2006) 36.
[1291] Cited in Clean Clothes Campaign, *Looking for a Quick Fix - How Weak Social Auditing is Keeping Workers in Sweatshops* (Report, 2005) 18.
[1292] Ibid.

China Labour Watch reported on the positive impact corporate codes and rigorous social auditing had at the Zheng Run (Toy Factory) in China.[1293] At this factory, the continual surveillance of auditors with unannounced regular audits motivated factory management to make many improvements. Dangerous machines are inspected once a week by trained employees and new employees are provided with basic OHS training. Employees who are exposed to dust are provided with respirators and protective equipment and most factories are fitted with extractor fans. The only way in which the factory appears to attempt to deceive auditors is in relation to the air conditioning of the factories. When factory auditors perform their surprise audits, factory management turns on the air conditioning units, but at all other times, the air conditioning remains switched off, regardless of the heat of the factories.

Barrientos and Smith argued that:

> Ongoing tensions exist between corporate and civil society actors. While these tensions have driven positive change in outcome standards, in that corporations have responded to demands from civil society to adopt codes of labour practice, they have not done much to improve workers' access to process rights. Our analysis suggests this is partly because buyers and retailers prioritise commercial imperatives and take a technocratic approach to code compliance which does little to challenge embedded social relations or business practices that undermine labour standards in global production systems.[1294]

Shellenberger & Ethical Business Campaigns detail a number of high profile successes where corporations have agreed to act ethically.[1295] Despite the successes, this report observes that corporate culture continues to conceive CSR as an optional extra which many corporations elect to ignore. The systematic problems with the auditing of corporate codes, has led Wells to conclude the current model of social auditing is not a viable soft law alternative to hard law regulation.[1296] Arguably CSR provides a vehicle for social campaigning, but the low success rate of motivating

[1293] China Labor Watch, *Investigations on Toy Suppliers In China: Workers are Still Suffering* (Report, 2007) 34.
[1294] Stephanie Barrientos and Sally Smith, 'Do Workers Benefit from Ethical Trade? Assessing Codes of Labour Practice in Global Production Systems' (2007) 28 *Third World Quarterly* 4, 713, 729.
[1295] Michael Shellenberger, *Race to the Top: a Report on Ethical Business Campaigns* (Ethical Business Campaigns Network, Report, 2006) Ethical Business Campaigns 1-3.
[1296] Don Wells, 'Too Weak for the Job: Corporate Codes of Conduct, Non-Governmental Organisations and the Regulation of International Labour Standards' (2007) 7 *Global Social Policy* 1, 51.

corporations to purport to act ethically and problems in holding accountable corporations which claim to engage in CSR activities means CSR cannot be regarded as a viable option for Australia to discharge its obligations under chapter 2.4.4.

7.6 Conclusion

Chapter 2.4.4 has demonstrated Australia has a moral obligation to take reasonably practicable steps to ensure that corporations that are subject to its jurisdiction discharge their moral obligations under the complicity principle. Chapter 6 demonstrated that the number of corporations which have adopted CSR in Australia is insufficient for Australia to rely upon market self-regulation to discharge its human rights' obligations. If circumstances altered so corporate Australia overwhelmingly claimed to act socially responsibly, this would not mean Australia had discharged its human rights' obligations. If CSR reporting became standard industry practice, then Australia would have an obligation to take reasonably practicable steps to ensure those reports were accurate. If corporate social reports were inaccurate and corporations were not ensuring corporations within their spheres of influence were respecting human rights, then the corporation in question would not be discharging their obligations under the complicity principle. If States which had jurisdiction over that corporation had not taken reasonably practicable steps to ensure that the corporation had discharged its human rights' obligations, then those States would have breached their moral duty. Therefore, corporations must translate claims of ethical conduct into action on the ground, and States have a corresponding duty to take reasonably practicable steps to ensure corporations actually act ethically.

This chapter argued that market driven unregulated CSR cannot ensure that a critical mass of corporations perform valid and transparent social audits. As a consequence this chapter argues that the current model of CSR cannot be used by Australia to discharge its obligations under chapters 2.4.1 or 2.4.4.

This chapter was divided into four parts. Firstly, this chapter analysed how the process of social auditing is developing. Unlike financial audits which are mandatory and highly regulated, social audits are voluntary and rely upon industry guidance materials. Secondly, this chapter analysed the problems with relying upon the

market to self-regulate the process of social auditing. This part first analysed primary research, which has documented a substantial amount of confounding variables, which are distorting the assurance of CSR audits. Research demonstrated that many social auditors are under-qualified and perform only superficial audits of factories. The validity of social audits are reportedly further undermined by factory managers fraudulently altering employment records, altering OHS conditions in factories just prior to audits and forcing workers to mislead auditors. When social auditors do identify negative labour conditions in their audit report, then corporations can elect to release this negative data or only release aspects of social audits which are positive. The second part of this part analysed the different forms social audits can take. In a self-regulated environment, corporations can elect to perform social audits internally or externally. Crucially for the CSR movement, both internal and external auditing can be performed with varying degrees of validity and transparency. Often, the factor which determines whether or not the social audit will be effective is the approach of the corporation. Corporations control the social auditing process and therefore control almost all relevant variables, such as whether the audit will be superficial, independent or performed by experts. This part concluded that the validity of social auditing currently depends upon the commitment to the goodwill of corporations.

The third part of this chapter argued that USA-based corporations which often trade with Australian corporations, have acted to minimise their involvement in CSR. While the opinion of corporations based in the USA cannot be directly imputed onto Australian corporations, many of these USA-based corporations fall within Australian corporations' spheres of influence, thus making the activities of these USA corporations relevant to Australian corporations' obligations under the complicity principle. The research has reported that a substantial number of Australian corporations have supply chains which include corporations based in the USA.[1297] This part first analysed primary research which argued that major brand names to engage in the lowest level of ethical conduct that is acceptable to the market. As corporations are primarily motivated to engage in CSR to protect their corporate image, this part argued that corporations will attempt to maintain their corporate image at the cheapest possible cost. Secondly, this part explored research

[1297] See discussion above at 4.5.

which demonstrated that CSR does not always motivate corporations to focus upon improving labour conditions in their factories. Research explored in this part asserted that corporations have countered negative CSR publicity by adopting sophisticated media campaigns which use psychological tactics to improve the corporation's image without improving its respect for human rights. Finally, this part examined submissions to legal action wherein major corporations in the USA stated they should not be bound by human rights as it would restrict their competitive edge internationally.

The last part of this chapter observed that even though the number of corporations which participate in CSR is limited and there are substantial problems with social auditing, CSR has resulted in some corporations discharging their obligations under the complicity principle which has resulted in improvements in supplier factories. While CSR remains a positive tool for civil society to motivate corporations to act ethically, this chapter argued that the problems with performing unregulated social audits prevent States from relying upon social auditing results to discharge their human rights' obligations. States are required to take reasonably practicable steps to ensure corporations within their jurisdictions meet their obligations under the complicity principle. As unregulated social audits have varying degrees of validity, States such as Australia should seek alternative vehicles to ensure their corporations meet their obligations under the complicity principle. The following two chapters will analyse alternative vehicles Australia could adopt to discharge its obligation to ensure corporations in Australia discharge the complicity principle. If these chapters identify regulatory vehicles which Australia could reasonably practicably adopt to improve the safety at work of workers in supply chains, this thesis will argue that Australia has an obligation to adopt such measures based upon the standards posited in chapters 2.4.1 and 2.4.4.

PHASE 3 – REMEDIAL REGULATORY MODELS

CHAPTER 8

8 Can State-based regulation improve workers' health and safety in supply chains?

8.1 Introduction

Chapters six and seven have demonstrated unregulated, market-driven corporate social responsibility (**CSR)** is not a viable soft law alternative for Australia to discharge its human rights' obligations. This chapter will analyse how State based mandatory supply chain regulation could improve the respect for workers' right to safety and health and discharge Australia's obligations as discussed in chapters 2.4.1 and 2.4.4. This chapter is divided into two parts.

The first part of this chapter argues that an existing mandatory supply chain regulatory model which operates in New South Wales and South Australia could be altered to enable Australia to discharge its duty under chapter 2.4.1. This part argues that existing regulatory framework should be extended to cover OHS and could be extended to all Australian jurisdictions to discharge Australia's obligations under 2.4.1.

If workers working in Australia had their OHS conditions substantially improved while labour conditions in foreign States remained unenforced, then the race to the bottom theory as described in chapter 1.3 provides that the jurisdiction with the lowest labour conditions would attract the majority of contracts. To limit the impact of the race to the bottom on Australian supply chains, the second part of this chapter analyses whether Australia could regulate extraterritorial supply chains. This part first analyses how the New South Wales and South Australian Codes utilize state-based territorial regulation to regulate extraterritorial supply chains across Australia. If this intra-Australian extraterritorial regulation was extended to ensure labour conditions in Australian-based international supply chains then Australia would confront substantial barriers in enforcing these laws. This part first raises the

potential WTO complications with Australian-based extraterritorial supply chain regulation. On the basis Australia would be confronted with substantial problems in enforcing extraterritorial regulation, this part focuses upon these enforcement problems. This part considers the problems the USA has had with enforcing USA laws with extraterritorial effect in order to gain an understanding of the problems Australian courts would confront in the enforcement of extraterritorial supply chain regulations. Based upon the problems of enforcing State-based exterritorial supply chain regulation this part argues Australia should not introduce such regulation.

8.2 Could Australian mandatory retail Codes improve the health and safety of outworkers?

There are currently two Australian based mandatory retail codes which are supported by punitive sanctions. 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). The mandatory nature of these codes resolves two critical problems with the effectiveness of the CSR movement. Chapter 6 argued that corporations' low adoption rate of voluntary corporate codes has limited the effectiveness of CSR in Australia, but the New South Wales and South Australia Codes avoid this problem through the imposition of mandatory duties. All retailers and traders in those jurisdictions are subject to the standard and long arm provisions of the codes. This means all retailers and traders must comply with the codes' documentation, disclosure and retention provisions.[1298] Chapter 7 demonstrated that there are substantial problems with CSR auditing. Where small retailers and traders cannot place sufficient market pressure upon large traders to enforce voluntary codes of conduct, collectively these small retailers have a strong voice. Under the voluntary CSR structure, each corporation sets its standards and uses its buying power and market influence to force other corporations to comply with these labour conditions. Where a small sports store retailer would not be able to exert much pressure upon a large multinational corporation to comply with a voluntary code, the mandatory retail codes alter this position so that failure to comply with the codes attracts punishments

[1298] Cl 7.1 of the New South Wales and South Australian codes.

for both the trader and the retailer. As a consequence, small retailers and traders would not need to rely upon their buying power to force compliance with a code of conduct.

Arguably it would be relatively easy to extend the requirements under the codes' schedules to include OHS. The New South Wales and South Australian codes already seek to ensure outworkers receive their lawful entitlements under all relevant awards,[1299] remuneration and 'other lawful entitlements to outworkers in the clothing trades industry through the disclosure regime.[1300] James, Johnstone, Quinlan and Walters have argued that 'other legal entitlements' include OHS.[1301] This means there may already be an obligation under the codes to protect OHS.

While OHS may be indirectly protected under the codes, the codes have express disclosure requirements and the documents which are prescribed do not focus upon OHS. Currently, the only express protection in relation to OHS is a duty to keep records where all work is performed and, where relevant, the factory registration number under relevant OHS regulations.[1302] Clause 15 of both codes also requires disclosure of outworkers' names and when the trader will supply the products to the retailer. Where the retailer supplies the trader a substantial amount of work and there is only a small number of outworkers performing the work in a short turn-around time, then the retailer should be concerned that outworkers may be working excessive overtime and suffering from fatigue or that the trader has neglected to include the names of all their outworkers. Retailers wouldonly be aware of the risk of outworker fatigue where a single retailer provided a trader substantial work. If a trader took work from several retailers, then the current documentation would be unlikely to provide retailers sufficient information to detect outworker fatigue.

Even though the codes do not provide outworkers OHS protection, as the codes already aim to protect all labour conditions through disclosure, it would be feasible to extend the disclosure requirements to OHS. OHS duties require parties to perform risk assessments, ensure a safe system and ensure there is adequate training. All of

[1299] Cl 3(1) of the New South Wales Code; Cl 3(b) of the South Australian Code.
[1300] Cl 3(2)(d) of the New South Wales Code; Cl 3(d) of the South Australian Code.
[1301] Phil James, Richard Johnstone, Michael Quinlan and David Walters 'Regulating Supply Chains to Improve Health and Safety' (2007) 36 *Industrial Law Journal* 163
[1302] Cls 12(f) of the New South Wales and South Australian Codes.

these duties require documentation. On the basis the codes already require documents detailing how many outworkers are employed and when the trader will supply the goods to the retailer, the imposition of the obligation to provide copies of safety documentation which the trader should have already performed in order to comply with their existing OHS duties is not onerous. Chapter 3 explored how various Australian Parliaments have imposed OHS laws upon traders and other parties to protect outworkers' OHS. In the jurisdictions which impose such duties, traders are already required to generate OHS-related documentation.[1303] If the codes required traders to provide copies of OHS documentation concerning outworkers, then this would not be imposing OHS duties upon traders, but merely requiring traders to photocopy documentation which they should have generated already, pursuant to their duties under state-based OHS laws. Requiring traders to photocopy existing documentation is arguably a small burden. the provision of such information could assist in protecting outworkers' right to safety and health at work.

The codes rely primarily on private enforcement to ensure traders comply with the codes.[1304] Clause 13 of both codes requires retailers to obtain the information from Schedule 2 from traders. An obvious weakness with the codes is their reliance upon internally produced documentation. In effect, the codes rely upon self-incrimination to detect breaches. While this approach is considerably less intrusive than requiring independent social audits, the problems with self-enforcement have already been explored above in this thesis in chapter 7.3. Relying entirely upon documents prepared by these parties therefore may fail to detect code breaches, where parties are prepared to commit fraud.

While the codes do not impose any obligations upon retailers or traders to proactively ensure the codes are complied with, the codes do prevent parties from wilfully shutting their eyes to breaches. Clauses 11(2) of the codes require retailers to report any violation they are aware of, or where the retailer:

[1303] Refer to chapter 3 for a discussion of which jurisdictions impose these OHS duties.
[1304] Igor Nossar, '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, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell (eds), *Labour Law and Labour Market Regulation* (2006) 202-222; Sally Weller 'Regulating Clothing Outwork: a Sceptic's View' (2007) 49 *Journal of Industrial Relations* 1, 69.

A. has information provided under the codes;
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.[1305]

Where a labour breach is not reported by outworkers, traders or retailers, then unions and public inspectors are charged with identifying prosecuting breaches. 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. The ability of unions to prosecute arguably increases outworkers' OHS protection. A New South Wales Workcover report recommended the continuation of union prosecutions for OHS breaches, on the basis unions have been successfully prosecuting such breaches in New South Wales for over 60 years.[1306] Braithwaite,[1307] Gunningham and Johnstone have argued that the ability of unions to prosecute increases the level of OHS enforcement.[1308]

Where a retailer or trader is proven to have breached the codes, then they will be subject to legal and commercial sanctions. Clause 7(2) of the codes enables a party who has breached the code to be subject to a fine. In addition to the direct impact of legal sanctions, if a trader is fined for breaching the codes, then traders and retailers may be reluctant to trade with that party, as once a trader is convicted, there would be a commercial history of the party breaching the code provisions. Arguably in such circumstances, it would be questionable whether the retailer or trader could reasonably rely upon the convicted trader's representations without some form of

[1305] Cl 11(2) of the *Scheme*.
[1306] Workcover NSW, *Review of the Occupational Health and Safety Act 2000* (Report, 2006) 8.9.
[1307] J Braithwaite, 'Thinking Laterally: Restorative and Responsive Regulation of OHS' (Working Paper No. 13, National Research Centre for OHS Regulation, The Australian National University, , 2003) 147.
[1308] Neil Gunningham and Richard Johnstone, *Regulating Workplace health and safety Systems and Sanctions* (1999).

additional validation. If retailers and traders cannot reasonably rely upon traders' representations, then the retailer or trader 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 and a loss of business.

In addition to the threat from direct legal sanctions, if a trader has been repeatedly fined for breaching the codes, the existence of CSR arguably may pressure parties not to trade with the person who has performed such breaches. While attracting legal sanctions under the codes may not justify blacklisting by retailers and traders, CSR focuses on the image or perception of the target group. This means, if a target group is likely to perceive a trader as unethical, then retailers and traders may blacklist the convicted trader simply to avoid any negative taint.

Unlike existing OHS protection afforded to outworkers, it is submitted that expanding the existing New South Wales and South Australian Codes to include OHS would substantially address the three overarching problems with outworkers' OHS protection, as identified by Nossar, Johnstone and Quinlan.[1309] These problems consisted of an entitlement gap between the need for formal protection and the existence of this protection, the failure to enforce existing OHS protection, and a failure to impose obligations up the supply chain over retailers. If OHS protection was expressly included in the codes, then outworkers would enjoy increased formal protection. 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 imposes limited OHS duties upon retailers to manage safety in their supply chains, the New South Wales and South Australian Codes provide a model of increasing their role.

While the expansion of the existing retail codes to include OHS would not be a perfect remedial response, on the basis these regulatory instruments are operative in two jurisdictions is a strong argument that this measure is reasonably practicable for

[1309] Igor Nossar, 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, 166-167.

all Australian jurisdictions. On the basis these codes arguably have successfully improved the transparency and enforcement of outworkers' labour conditions and could be used to regulate OHS this part contends Australia should consider introducing mandatory supply chain regulations which include OHS to discharge their duty discussed above in chapter 2.4.1.

8.3 Could Australian mandatory retail codes improve the health and safety of workers in extraterritorial supply chains in China?

The previous part focused on using State based supply chain regulation to improve the safety of Australian outworkers. This part will ask whether Australian based supply chain regulation can improve OHS in factories that are performing work for Australian corporations in China. Despite the popularity of State-based exterritorial supply chain regulation, this part will argue that the barriers to enforcing such regulation means Australia should not adopt this regulatory model.

One of the most striking limitations with the New South Wales and South Australian retail codes is their coverage outside Australia. While the New South Wales and South Australian codes do not have application outside Australia, these codes do have limited extraterritorial affect. Both codes have extraterritorial effect extending to all Australian states and territories. Clause 19 of both codes imposes obligations upon traders in any Australian jurisdiction, who provide manufactured goods to traders and retailers in New South Wales and South Australia, to provide accurate details about labour conditions associated with the manufacturing process. Traders outside the codes' jurisdictions must provide this information to retailers and traders who are subject to the codes.

Clauses 15 of the New South Wales and South Australian codes requires traders to state if any of products they supply were produced within Australia. In New South Wales Code Schedule 2 -Part B requires a trader to inform retailers if any of their products were produced in Australia and the address where the actual work was performed. If the work was performed in a factory, the trader must provide details of the factory's registration under relevant OHS regulations.

The supervision of extraterritorial supply chains is more complicated than intra-jurisdictional supply chains. As a consequence, retailers and traders are entitled to rely upon assertions made by traders outside the jurisdiction. Clause 8(2)(b) of the codes enables 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 the party who detects the breach may perform a cost analysis and decide that the risk of prosecution is low but the gains from exploitation is high. As 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 under this model.

To increase the enforcement of extraterritorial supply chains, 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 and relevant awards. The South 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 provide the notice cannot require the records to be produced on the retailer's premises. Similar to intra-jurisdictional supply chain regulation, the 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. The ability for 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.

If a trader breaches the codes' documentation provisions then they will be subject to the codes' enforcement provisions. When a trader outside New South Wales or

South Australia does not comply with the retail codes this act in itself is not an offence. The actionable breach occurs when the trader outside the jurisdictions actually provides false information to traders or retailers inside the codes' jurisdictions. As a consequence, the sanction would be intra-jurisdictional, and enforceable, as a civil judgment through cross-vesting laws,[1310] or as a criminal sanction under the *Service and Execution of Process Act 1982* (Cth).[1311] As Australia is a federation, each jurisdiction's jurisdictional sovereignty is read down when an offence is being enforced exterritorialy within the commonwealth. Speaking with the majority Gaudron, Gummow and Hayne JJ held that '[t]he requirement of nexus {to a jurisdiction} should be liberally applied. A real connection with the jurisdiction will suffice'.[1312] The extraterritorial application of the codes imposes liability over the information when it enters the territorial jurisdiction which has posited the code. As a consequence, the codes do not significantly impose upon other jurisdictions' sovereignty and these breaches would be enforceable.

Nossar claimed that clause 19 of the New South Wales Code represents 'the practical embodiment of the potential inherent within "contractually entrenched forms of regulation" to overcome the regulatory obstacle of geographical jurisdiction'.[1313] Macklem has observed that '[c]orporate codes of conduct potentially enable transnational implementation of international labour standards in ways that do not rely on traditional modes of international legal authority'.[1314]

8.3.1 What problems do the WTO Rules create for Australian extraterritorial supply chain regulation?

Australia is a member of the WTO and thus is bound by WTO rules against erecting barriers to trade. Potential international, extraterritorial, supply chain regulation must consider WTO rules when determining the prescribed labour conditions which

[1310] Ss 3, 14 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth).
[1311] Ss 23, 82 of the *Service and Execution of Process Act 1982* (Cth).
[1312] *Lipohar v R* [1999] 200 CLR 485, (123).
[1313] Igor Nossar, '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, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell (eds), *Labour Law and Labour Market Regulation* (2006) 216.
[1314] Patrick Macklem, 'Labour Law beyond Borders' (2002) 5 *Journal of International Economic Law* 605.

apply internationally and when allowing recovery by the Australian corporation against workers' actual employers. This thesis argues that Australia is required to take reasonably practicable steps to protect workers' safety at work. If a regulatory vehicle is unlawful under international law then it would not be reasonably practicable for Australia to adopt that approach.

The introduction of extraterritorial supply chain regulations would place restrictions upon how States trade. The WTO is focused on eliminating barriers to trade and trade distortions.[1315] A State which introduces restrictions on how a product is produced can have its laws contested in the WTO's dispute procedure and declared to be unlawful. A State can then be subject to WTO sanctions. The main exemption which is relevant to linking trade and human rights is article XX of the *General Agreement on Tariffs and Trade 1994* which now forms part of the WTO rules.[1316] Article XX permits a State to introduce trade restrictions on limited grounds, 'subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail'. The grounds on which such trade restrictions are permitted include measures 'necessary to protect public morals or to maintain public order'[1317] or 'necessary to protect human, animal or plant life or health'.[1318] The article XX provisions have been interpreted using the product-process doctrine. The product-process doctrine compares the treatment of domestically produced goods and similar goods which are imported.[1319] This doctrine holds that regulations which require both domestic and imported goods to be produced according to international

[1315] Elisa Baroncini, 'The WTO Dispute Settlement Understanding as a Promoter of Transparent, Rule-oriented, Mutually Agreed Solutions- A Study on the Value of Consultations and Their Positive Conclusion' in Paolo Mengozzi (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trade System* (1999) 153; John H. Jackson, 'Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects' in Anne O. Krueger (ed), *The WTO as an International Organization* (1998) 161; Christian Haberli, 'The WTO Dispute Settlement Procedure: Implications for Agricultural Trade Arising from the Bananas Case' in Sanoussi Bilal and Pavlos Pezaros (eds), *Negotiating the Future of Agricultural Policies: Agricultural Trade and the Millennium WTO Round* (2001) 211; Debra P. Steger, 'WTO Dispute Settlement' in Philip Ruttley, Philip MacVay, Iain and George Carol (eds), The *WTO and International Trade Regulation* (1998) 53.

[1316] Marrakesh Agreement establishing the World Trade Organization, opened for signatures 15 April 1994, ATS 8 (Entered into force for Australia 1 Janurary 1995, Appendix A '*General Agreement on Tariffs and Trade 194*'.

[1317] Art XX(a) of the *General Agreement on Tariffs and Trade 1994*.

[1318] Art XX(b) of the *General Agreement on Tariffs and Trade 1994*; The protections are generally interpreted to protect a State's domestic market. For example the USA government has threatened to introduce health and restrictions over China to protect American children who play with toys made with dangerous lead or chemicals: Elvira Cortez, 'Total Recall on Chinese Imports: Pursuing an End to Unsafe Health and Safety Standards through Article XX of GATT' (2008) 23 *American University International Law Review* 915

[1319] Robert E. Hudec, 'The Product-Process Doctrine in GATT/WTO Jurisprudence' in Marco Bronckers and Richard Quick (eds), *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (2000).

labour conditions violate article III.[1320] This doctrine reinforces the WTO's attempt to keep trade liberalisation isolated from all other global issues.

The product-process doctrine has exceptions which may allow international supply chain regulation to be acceptable under WTO rules. A State is permitted to discriminate under article XX on grounds related to the protection of health or human, animal, or plant life.[1321] The most recent example of an article XX occurred in the *Shrimp Turtle Case*.[1322] In this case, the USA banned the importation of shrimps, which were not captured with a net which had a device to protect sea turtles from being trapped and killed. This ban was upheld utilizing the article XX exceptions. John Jackson criticised this decision, claiming it could be a slippery slope, which could result in the intermingling of trade and social issues. Jackson argues:

> What other conditions could be addressed (such as minimum wage standards or gender discrimination) and what other process possibilities should we consider? One could think of thousands of them, and they could become serious obstacles for the trade policies we are trying to promote.[1323]

Following his study of the WTO and the environment, Gary Sampson concluded that decisions such as the *Shrimp Turtle Case* created uncertainty.[1324] While they may provide a short term solution, he contended laws which allow international conduct to reflect domestic societal preferences require negotiations between nations and not decisions from international institutions. Jin argued strongly that attempts to regulate labour conditions in supply chains constituted a breach of WTO rules and that the People's Republic of China (**China)** should take action within the WTO to have all such regulation removed.[1325]

[1320] Robert Howse and Donald Regan, 'The Product/Process Distinction- An Illusory Basis for Disciplining "Unilateralism" in Trade Policy' (2000) 11 *European Journal of International Law* 249.
[1321] Claude E. Barfield, *Free Trade, Sovereignty, Democracy: the Future of the World Trade Organization* (2001) 28-37.
[1322] *Shrimp Products* (WT/DS58/AB/R), World Trade Organization, Geneva, Switzerland, 1998; see generally how the WTO dispute regime factors in social factors in Gary Sampson and John Whalley (eds),) *WTO, Trade and the Environment* (2005) 455-469.
[1323] John Jackson, 'Comments on Shrimp/Turtle and the Product/Process Distinction' (2000) 11 *European Journal of International Law* 2, 303, 306.
[1324] Gary P. Sampson, *Trade, Environment, and the WTO: the Post-Seattle Agenda* (2000) 111.
[1325] Shi Jin, *Study of Blue Trade Barrier Issues in International Trade* (LLM Thesis, Harbin Engineering University, China, 2006).

Other commentators argue that linking trade and human rights is essential under the WTO[1326] and that article XX does permit trade restrictions on human rights' grounds. Cassimatis argues:

> Trade measures that are focused on particular human rights' violations and that minimise incidental harm will not necessarily violate human rights' obligations under general international law even though the measures may have negative consequences for some in the target State.[1327]

Cleveland has argued that measures aimed at improving international labour conditions are almost certainly protected under article XX(a)), which authorizes measures to protect public morals, or article XX(b), which authorises measures which protect human … life or health.[1328] Hoe Lim has observed that the exceptions in article XX have many similarities with rights protected under human rights conventions.[1329] Adelle Blackett has observed article XX (a) 'can be considered to encompass ... fundamental international principles and rights at work'.[1330]

The WTO Appellant Body in 2005 provided additional support for the idea that trade can be restricted on human rights' grounds. The *Appellate Body Report, United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services* permitted the USA to ban internet gambling on the basis it offended that State's public morals.[1331] While this decision demonstrates a willingness of the WTO Appellant Body to link State-based standards and trade, arguably this decision has left a number of important questions unresolved, for example:

> [W]ho defines what constitutes a 'public moral'? Can the exception only be used for inward-directed measures designed to protect the morals of one's own citizens? Or can the exception be outward-directed and serve as a legal cover for trade restrictions against countries with poor records on human rights, labour norms, or

[1326] Daniel A. Zaheer, 'Breaking the Deadlock: Why and How Developing Countries Should Accept Labor Standards in the WTO' (2003) 9 *Stanford Journal of Law, Business & Finance* 69, 79.
[1327] Anthony Cassimatis, *Human Rights- related Trade Measures under International Law* (2007) 365.
[1328] Sarah Cleveland, 'Human Rights Sanctions and International Trade: a Theory of Compatibility' (2002) 5 *Journal of International Economic Law* 133, 163.
[1329] Hoe Lim, 'Trade and Human Rights: What's the Issue?' (2001) 35 *Journal of World Trade* 2, 275, 284.
[1330] Adelle Blackett, 'Whither Social Cl? Human Rights, Trade Theory and Treaty Interpretation' (1999) 31 *Columbia Human Rights Law Review* 1, 72.
[1331] *Appellate Body Report, United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005).

> women's rights? Can the clause be used to curtail trade with those whose actions threaten a country's territorial integrity? ...[1332]

It is argued that the operation of the product-process doctrine and judgments such as the *Shrimp Turtle Case* and the *Appellate Body Report, United States - Measures Affecting the Cross-Border* Supply *of Gambling and Betting Services* demonstrate that there is a high probability that Australian supply chain regulation would be held by the WTO Appellant Body to be WTO compliant. How the WTO Appellant Body will alter its approach with the active memberships by State such as China is unclear.[1333] Whether or not Australia laws would be compliant would depend upon how they were drafted. Rather than devoting significant space here exploring the WTO issue this thesis will focus now upon another problem of enforcing international supply chain regulations. As seen by the analysis of OHS laws in chapters 3 and 4 merely having duties will not achieve a policy objective unless those laws are enforced. The problems of enforcing Australian exterritorial supply chain regulation is arguably the most substantial barrier to Australian successfully utilizing this regulatory vehicle. This part will now perform a detailed analysis of the fatal legal problems Australia would confront in seeking to enforce extraterritorial supply chain regulation.

8.3.2 Problems with Australia detecting breaches of extraterritorial supply chain duties

To ensure a sufficient level of accountability, Australian extraterritorial supply chain regulation would require proactive auditing of factories. If there was no process of ensuring trader factories provided accurate documentation, then supply chain regulation would effectively rely upon CSR to ensure compliance. Chapter 7 argued that relying upon CSR and private auditing did not always provide sufficiently reliable results to enable good corporate citizens to gain the benefits from CSR or to punish bad corporate citizens for acting unethically. Consequently, to ensure

[1332] Gillian Moon, 'The WTO-Minus Strategy: Development and Human Rights under WTO Law' (2008) 2 *Human Rights & International Legal Discourse* 1, 37; Mark Wu, 'Free Trade and the Protection of Public Morals: an Analysis of the Newly Emerging Public Morals Cl Doctrine' (2008) 33 *The Yale Journal of International Law* 215, 216.
[1333] See for a discussion of China's recent membership of the WTO: jiang Kong, '*China's WTO accession and the Asean-China Free Trade Area: The perspective of a Chinese lawyer*' (2004) 7 *Journal Of International Economic Law*, 839.

Australian extraterritorial supply chains provided reliable results requires a more rigorous auditing process than just relying upon unregulated market driven CSR. The New South Wales and South Australian Codes rely upon a combination of public and trade union enforcement. Could Australian extraterritorial supply chain regulation adopt this model?

The ability of the Australian government to inspect Chinese factories is entirely at the discretion of the Chinese government. China can control who enters its borders and who remains in its borders.[1334] The ability of a foreign nation to obtain permission to perform direct inspections in China can be extremely difficult, as the USA discovered. As discussed in chapter 2.3.5.2, the Chinese government-controlled Lagai prison system forces political and religious prisoners to work under conditions which involve indirect risks, through grossly unsafe conditions, and direct risks, which reportedly involve torture, starvation and murder. The manufactured products from these prison factories are exported to Western nations.[1335] Under USA laws, it is illegal to import goods which have been made by prison labour,[1336] and it is a criminal offence to knowingly import such goods.[1337] According to WTO rules, the USA government is able to ban imports of prison labour.[1338] The USA government has faced substantial practical problems identifying which products are produced in prisons.

In order to enforce their laws and ensure prison-manufactured products are not imported into the USA, the USA and Chinese governments signed a prison labour Memorandum of Understanding in 1992 and a Statement of Cooperation in 1994.[1339] Under these agreements, the USA government was able to require the Chinese government to permit USA officials to visit prison factories and perform other inspections in China to ensure products manufactured in China were not exported to

[1334] Arts 1, 3, 12, 15 of the *Rules for the Implementation of the Law of the People's Republic of China Governing the Administration of Entry and Exit of Foreigners 1986* (PRC).
[1335] Jonathan M. Cowen, 'One Nation's Gulag is Another Nation's Factory within a Fence: Prison-labor in the People's Republic of China and the United States of America' (1993) 12 *UCLA Pacific Basin Law Journal* 90.
[1336] S 307 of the *Tariff Act,* Pub L No 930, 19 USC 1307.
[1337] S 1761 of Title 18 of the *United States of America Code*.
[1338] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signatures 15 April 1994, ATS 8 (Entered into force for Australia 1 Janurary 1995, Appendix A '*General Agreement on Tariffs and Trade 194*', Art XX(e).
[1339] Daniel C. Turack 'The Clinton Administration's Response to China's Human Rights' Record: the Half-Way Point' (1995) 3 *Tulsa Journal of Comparative & International Law* 1, 12-15.

the USA. In 1994, USA officials visited five factories.[1340] Between 1996 and 2001, USA officials requested to visit 11 factories. The Chinese government only approved one visit in 1996, one in 1997 and one in 2000.[1341] The level of inspections did not drastically increase until 2004 when the Chinese government authorised three prison inspections in one year.[1342] The Chinese government, however, refused to allow the International Red Cross to perform more regular visits under this arrangement.[1343] In 2005, the Chinese government and the USA were able to resolve a 'few' cases of suspected prison labour being exported.[1344]

Chapter 7 argued that social audits which were organized in advanced had low levels of reliability. It is highly doubtful if inspections of Chinese prison labour factories would be any more effective, considering they had substantial notice of the inspections. Also, the number of inspections considerably confounded the effectiveness of the inspection regime. Even though prison labour was used in private factories and government-run factories, inspections only occurred over the government-run factories.[1345] The number of inspections compared to the number of prison factories operating is insignificant. The USA government claim there are over 100 prison factories,[1346] while the Lagai Institute claims there are well over 1000 factories with between 4 and 6 million prisoners.[1347] The number of Lagai prisoners has been estimated as high as 6.8 million.[1348] Based upon the restrictive access of the inspection regime, it appears the USA government's efforts to prevent the trade in products manufactured by prison labour have failed.

In the unlikely event that Australia obtained permission from China to perform regular audits of manufacturing factories, could Australia perform such audits effectively? If the Australian government was responsible for inspecting factories

[1340] U.S.-China Security Review Commission, *Policy Paper on Prison Labor and Forced Labor in China* (2002), Attachment to Appendix 5.
[1341] Ibid.
[1342] Bureau of Democracy, Human Rights, and Labour: Country Reports on Human Rights' Practices - People's Republic of China (2005), S 2(c).
[1343] Ibid.
[1344] Bureau of Democracy, Human Rights, and Labour Country Reports on Human Rights' Practices - People's Republic of China (2006), S 2(c).
[1345] Bureau of Democracy, Human Rights, and Labour: Country Reports on Human Rights' Practices - People's Republic of China (2006) Introduction.
[1346] U.S.-China Security Review Commission, *Policy Paper on Prison Labor and Forced Labor in China* (2002), Attachment to Appendix 5.
[1347] Laogai Research Foundation, *Laogai Handbook 2005-2006* (2006).
[1348] Ramin Pejan, 'Laogai: "Reform through Labor" in China' (2000) 7 *Human Rights Brief* 22.

around the globe, this would be an extremely expensive process. Research demonstrates sweatshops can be found in nations across the globe. It is beyond this thesis to list every nation which has been accused of sweated labour. This thesis has focused on the OHS conditions in China. It is doubtful if it would be financially viable for Australia inspectors to visit factories in China. Even if it was financially viable to inspect factories in China's SEZs, Australia could not fund audits in all nations which reportedly have sweated labour. While sweatshops are generally found in nations with a large, socio-economically depressed population,[1349] such as Bangladesh,[1350] Brazil,[1351] India,[1352] Indonesia,[1353] Kenya,[1354] Korea,[1355] Mexico,[1356] Romania,[1357] Thailand[1358] or Vietnam,[1359] sweatshops have been reported in first world nations such as the USA.[1360] In essence, sweatshops can potentially develop in almost any nation on any continent. While the Australian government could recruit auditors to work in China, considering the number of nations involved in the international manufacturing trade, it would be financially impossible for the Australian government to fund inspectorates in every State which may have sweatshops.

[1349] Theodore H. Moran, *Beyond Sweatshops: Foreign Direct Investment and Globalisation in Developing Nations* (2002) 10-22.
[1350] War on Want, *Fighting Global Poverty: Fashion Victims: the True Cost of Cheap Clothes: Primark, Asda and Tesco* (Report, 2005).
[1351] Simone Buechler, *Enacting the Global Economy in Sao Paulo, Brazil: the Impact of Labor Market Restructuring on Low-income Women*' (PhD Thesis, Columbia University, 2002).
[1352] Marc J. Monte 'Corporate Factory/Trader Monitoring Programs and the Failure of International Law in Regulating Indian Factory Conditions' (2001) 26 *Brooklyn Journal of International Law* 1125.
[1353] Labour Behind the Label, *Sweet FA? Football Associations, Workers' Rights, and the World Cu*' (Report, 2006); David Scorse, *The Effects of Social and Environmental Information on Firm Behavior* (PhD Thesis, University of California, 2005).
[1354] Clean Clothes Campaign, *Looking for a Quick Fix - How Weak Social Auditing is Keeping Workers in Sweatshops*' (Report, 2005).
[1355] Stephen Frenkel and Kim Seongsu, 'Corporate Codes of Labor Practice and Employment Relations in Sport Shoe Contractor Factories in South Korea' (2004) 42 *Asia Pacific Journal of Human Resources* 1, 6; Don Wells, 'Too Weak for the Job: Corporate Codes of Conduct, Non-Governmental Organisations and the Regulation of International Labour Standards' (2007) 7 *Global Social Policy* 1, 51.
[1356] C Rodríguez-Garavito, 'Global Governance and Labor Rights: Codes of Conduct and Anti-sweatshop Struggles in Global Apparel Factories in Mexico and Guatemala' (2005) 33 *Politics & Society* 2, 203; Ellen Israel Rosen, *Making Sweatshops: the Globalization of the U.S. Apparel Industry* (2002) 129-152.
[1357] Clean Clothes Campaign, *Looking for a Quick Fix - How Weak Social Auditing is Keeping Workers in Sweatshops* (Report, 2005).
[1358] Tim Connor and Kelly Dent, *Offside! Labour Rights and Sportswear Production in Asia* (Oxfam Australia, Report, 2006); Labour Behind the Label, *Let's Clean Up Fashion: the State of Pay behind the UK High Street* (Report, 2006).
[1359] Anita Chan and Hongzen Wang, 'The Impact of the State on Workers' Conditions: Comparing Taiwanese Factories in China and Vietnam' (2004) 77 *Pacific Affairs* 4, 629; Jessica Rothenberg-Aalami, *Coming Full Circle? : Nike Production Networks in and beyond Vietnam*, (PhD Thesis, University of Oregon, 2002);
Danielle McGurrin, *Fabrication: Corporate and Governmental Crime in the Apparel Industry* (PhD Thesis, University of South Florida, 2007); Lynn Ta, *Citizens without Borders: American Identity and the Cultural Politics of Globalization* (PhD Thesis, University of California, 2007).

As noted earlier in this chapter and in chapter 7, trade unions have become involved with inspecting factories to enforce corporate codes.[1361] To increase the enforceability of the New South Wales and South Australian Codes, these codes empower the TCFUA to investigate and prosecute breaches. The TCFUA is the main trade union involved with the protection of outworkers' interests in Australia.[1362] The TCFUA is currently responsible for advocating for outworkers' rights in all Australian jurisdictions.[1363] The TCFUA has investigated and prosecuted outworkers' interests in a number of major actions.[1364] Despite this powerful position, the TCFUA has argued it has encountered substantial difficulties in enforcing outworkers' rights within Australia, due to the costs in detecting and inspecting geographically isolated workplaces.[1365]

If the TCFUA did attempt to investigate extraterritorial supply chain regulation, it is argued they would not be able to obtain assistance from local Chinese trade unions without the Chinese government's approval.[1366] As discussed in chapter 2.3.5.1, the All-China Federation of Trade Unions is the sole employee trade union and is controlled directly by the Chinese government.[1367] As a consequence, before Chinese trade unions in China would afford Australian extraterritorial supply chain regulation any support, it would be necessary to obtain the agreement of the Chinese government. Based upon the expense and complications of obtaining Chinese government approvals to permit Australian auditors to inspect Chinese factories it is argued the approach to detecting breaches posited by clause 19 of the New South Wales and South Australian Codes would be largely ineffective for international extraterritorial supply chain regulation.

[1361] See for further examples, Peter Utting, 'Corporate Social Responsibility and Equality', (2007) 28 *Third World Quarterly* 4, 697.
[1362] Cl 4 of the Textile Clothing and Footwear Union of Australia Rules.
[1363] Cl 6 of the Federal Clothing Trades Award 1999; see also s 55 of the *Outworkers (Improved Protection) Act 2003* (Vic).
[1364] For example, see *Feltex Australia Pty Ltd v Textile, Clothing and Footwear Union of Australia* (2006) 158 IR 463; *Textile Clothing & Footwear Union of Australia v Southern Cross Clothing Pty Ltd* [2006] FCA 325; *Paulo v J F Garments (Qld) Pty Ltd* [2003] QIRComm 41; *Textile Clothing & Footwear Union of Australia v Lotus Cove Pty Ltd* [2004] FCA 43.
[1365] Igor Nossar, *Proposals for the Protection of Outworkers from Exploitation* (Textile, Clothing and Footwear Union of Australia, 1999); Igor Nossar, *Proposals for Protection of Outworkers in South Australia* (Textile, Clothing and Footwear Union of Australia, 2002).
[1366] For the the failure of the international trade union movement to develop a strong relationship with China's trade union, see: Anita Chan, 'Labor in Waiting: the International Trade Union Movement and China' (2002) Fall/Winter *New Labour Forum* 55.
[1367] For a further discussion of the mixed role of China's trade unions, see: Chen Feng, 'Between the State and Labour: the Conflict of Chinese Trade Unions' Double Identity in Market Reform' (2003) 176 *China Quarterly* 1006.

Rather than analysing additional options for detecting breaches of a hypothetical Australian-based regulation of international supply chains, this chapter will analyse the fatal problems Australian courts would confront in attempting to enforce such regulations. At this point, it is important to observe that international supply chain regulation does exist. As mentioned in chapter 2.4.4, both the European Union and USA jurisdictions have introduced voluntary extraterritorial supply chain regulation. Presuming at this point that one of the approaches mentioned above can ensure sufficient auditing, can Australian courts pass judgment where the Australian, international, extraterritorial supply chain code is breached? As described in chapter 2.4.1, laws without effective legal sanctions will have a limited deterrent effect. Enforcing the legal sanction for breaching labour rights is therefore essential to the successful operation of Australian, international, extraterritorial supply chain regulation.

If Australian retail codes were extended to cover international supply chains, how would the imposition of liability operate? The core message of this thesis is that Australia must take reasonably practicable steps to protect workers in Australian based supply chains. This part is analysing whether Australia could use supply chain regulation to regulate international supply chains. If Australia cannot effectively enforce these laws then according to the regulatory pyramid, as explored in chapter 2.4.1, supply chain regulation would be ineffective at significantly altering corporations' conduct. In these circumstances Australia should seek alternative regulatory vehicles to improve the safety of workers in foreign factories working in Australian based supply chains.

Under the New South Wales and South Australian Codes, retailers and traders can be directly liable for a failure of a party lower in the supply chain. For example, a retailer or trader can be liable where a party lower in the supply chain has not paid an outworker their legal entitlements.[1368] As a consequence, the New South Wales and

[1368] In New South Wales, Queensland, South Australia and Victoria, where an outworker has not been paid for work, the outworker can bring a claim against the supplier, the party who hired the supplier, the party who engaged the party who hired the supplier: S 99D - 99G of the *Fair Work Act 1994* (SA); s 129E-129G of the *Industrial Relations Act 1996* (NSW); s 400A-400H of the *Industrial Relations Act 1999* (Qld); ss 7-9 of the *Outworkers (Improved Protection) Act 2003* (Vic); In all these jurisdictions however, outworkers cannot bring claims against a person who is solely engaged in the supply chain as a retailer: S 99B of the *Fair Work Act 1994* (SA); s 129 of the *Industrial Relations Act 1996* (NSW); s 400B(3) of the *Industrial Relations Act 1999* (Qld); s 3 of the *Workplace Relations Amendment (Improved Protection For Victorian Workers) Act 2003* (Vic).

South Australian Codes are not just passing judgment upon a party within their jurisdiction for failing to act, the Codes are also indirectly passing judgment over a party in another jurisdiction. Therefore, if this model was extended to extraterritorial supply chain regulation, an Australian party could attract a legal sanction due to conduct which occurred in a foreign jurisdiction. Presuming Australian retailers and traders complied with the requirement to obtain documentation, the most likely reason for a conviction would be that the documentation was proved to be false. This would require an Australian court to pass judgment over labour conditions in a foreign State.

8.3.3 Problems with enforcement: Lessons from the USA Alien Tort Statute

Australia does not currently have laws which impose legal sanctions for corporate human rights abuses in foreign jurisdictions. In contrast the USA *Alien Tort Statute* is centuries old and has attracted a substantial amount of judicial attention as to how a domestic court can pass judgment over alleged tortious activities in foreign jurisdictions. This part will contribute to the core focus of this thesis by providing a guide as to what barriers Australian courts may encounter in judging whether Australian exterritorial supply chain regulations were violated. Once these barriers are identified then this chapter will determine how Australian courts may respond to these barriers and thus determine whether exterritorial supply chain regulation provides a reasonably practicable option to improve OHS in Australian based exterritorial supply chains.

8.3.3.1 Introduction to the Alien Tort Statute

The *Alien Tort Statute* was introduced as the *Judiciary Act* of 1789 by the first Federal Congress. The *Judiciary Act* introduced a Federal right of action in circumstances where

> the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.[1369]

The *Alien Tort Statute* provides people who are not USA citizens with a cause of action against Americans where the corporation has breached a law of nations and where the court has general jurisdiction.[1370] The plaintiff has the burden of proof to establish both the breach of the law of nations and jurisdiction.[1371]

Even though the *Alien Tort Statute* enables plaintiffs to sue under the law of nations or treaties ratified by the USA, Federal Courts have held that the *Alien Tort Statute* did not create a general right for U.S. courts to pass judgment on defendants worldwide. For the court to entertain jurisdiction, it was essential for the defendant to be sufficiently connected with the U.S.[1372] For example, in *Matsuda v Wada,* the District Court held that it did not have diversity jurisdiction over a suit involving two Japanese citizens, even though one was a permanent resident alien.[1373] In *Unkel Ltd. v Tay*, the court dismissed a suit between a Hong Kong corporation and an Indonesian citizen, even though the Indonesian citizen was regarded as a permanent resident alien.[1374] In *Gall v Topcall*, a Dutch citizen, who was residing in Pennsylvania, had his action against an Austrian company, which was based in Australia, dismissed for lack of jurisdiction.[1375]

8.3.3.2 Who can be sued under the Alien Tort Statute?

The scope of who could be sued under the *Alien Tort Statute* was expanded by the Second Circuit in *Kadic v Karadzic*.[1376] In *Kadic*, Croat and Muslim people alleged that they were victims, and representing victims, of atrocities including rape, torture, and summary executions, perpetrated in Bosnia-Herzegovina by Bosnian-Serb governmental forces. The plaintiffs filed against Karadzic, alleging, as he was the

[1369] 28 USC § 1350.
[1370] *Sosa v Alvarez-Machain* 542 U.S. 692 (2004) 699
[1371] *Rio Properties Inc. v Rio International Interlink* 284 F 3d 1007 (2002) 1019.
[1372] *Chavez-Organista v Vanos* 208 F Supp. 2d 174 (2002) 177.
[1373] *Matsuda v Wada* (2000) 128 F. Supp. 2d 659.
[1374] U.S. Dist. LEXIS 22196 (1995).
[1375] U.S. Dist. LEXIS 4421 (2005).
[1376] 70 F.3d 232, 236 (2d Cir. 1995).

President of the Bosnian-Serb faction who committed the atrocities, he should be liable.

The Second Circuit held '[w]e do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals'.[1377] To determine what constituted the law of nations, the court did not just refer to treaties which were ratified by the USA but held that 'evolving standards of international law govern who is within the [*Alien Tort Statute's*] jurisdictional grant'.[1378] Not surprisingly, the Second Circuit found that murder, genocide, torture, and rape were contrary to international norms, as espoused by such conventions.[1379]

Arguably *Kadic* laid a precedent which enabled private corporations to be held liable for their involvement with human rights' violations in foreign countries. In 1993, the USA-based Unocal Corporation and French company Total entered a joint venture with the Burmese Government's State Law and Order Restoration Council (**SLORC**) to develop the Yadana gas pipeline. Unocal Corporation and Total agreed that the SLORC would be responsible for clearing land and supplying labour. In 1997, it was alleged that the SLORC had engaged in forced labour, crimes against humanity, torture, violence against women, arbitrary arrest and detention, cruel, inhuman, or degrading treatment, and wrongful death. Suit was filed against Unocal Corporation for its financial association with these crimes, even though the actionable conduct was perpetrated by the SLORC.

In *John Doe I v Unocal*, it was found that there was sufficient evidence against Unocal Corporation to try them for aiding and abetting SLORC's conduct.[1380] There was evidence of rape, murder and forced labour. One woman gave evidence that her husband attempted to escape from the forced labour and was shot at by the Burmese military. In retaliation, she and her child were thrown into a fire. Her child died

[1377] Ibid 239.
[1378] Ibid 241.
[1379] Ibid 241 – 244.
[1380] *John Doe I v Unocal Corp.* (2002) 395 F.3d 932 (9th Cir.

from these wounds. The Ninth Circuit sent the case back for trial.[1381] In reaching its judgment, the court considered international treaties and customary laws, including those to which the U.S. government had not ratified or introduced legislation to support. The Ninth Circuit held:

> Where, as in the present case, only *jus cogens* violations are alleged -- i.e., violations of norms of international law that are binding on nations even if they do not agree to them, … it may, however, be preferable to apply international law rather than the law of any particular State, such as the State where the underlying events occurred or the forum State. The reason is that, by definition, the law of any particular State is either identical to the *jus cogens* norms of international law, or it is invalid.[1382]

Following this decision, Unocal Corporation settled.[1383]

The application of *jus cogens* laws in *Doe I v Unocal* adopted an approach to norms which is considerably wider than that which is adopted under international law. Article 26 of the *Vienna Convention on the Law of Treaties* requires States to perform treaty obligations in good faith.[1384] *Jus cogens* are not, however, directly binding upon States. Article 64 provides that *jus cogens* norms are superior to other international laws and therefore States' reservations do not limit the impact of *jus cogens* norms against that State. [1385] This does not mean that a breach of a *jus cogens* norm by a State within their domestic jurisdiction can be actionable. In *Democratic Republic of the Congo v Rwanda*, the parties in the case accepted the *Genocide Convention* stated laws of the *jus cogens*.[1386] The majority held that genocide enjoyed peremptory status, nevertheless they held the International Court of Justice did not have jurisdiction to consider an action against a State which had not agreed to be subject to the court's jurisdiction.[1387] In effect this meant that a breech of a *jus cogens* norm by itself could not support an action against Rwanda. The court

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[1381] Ibid 954.
[1382] Ibid 954.
[1383] K Redford, K Bruno and W Has, *Historic Advance for Universal Human Rights: Unocal to Compensate Burmese Villagers*, Earthrights, April 29, 2005.
[1384] *Vienna Convention on the Law of Treaties*, 1155 UNTS 331.
[1385] *North Sea Continental Shelf Cases, (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) (*1969) ICJ Rep 38-39, para 3; see discussion in Wolfgang Friedmann 'The North Sea Continental Shelf Cases--A Critique' (1970) 64 *American Journal of International Law* 2, 229.
[1386] *Democratic Republic of the Congo v Rwanda* (2002), request for the indication of provisional measures order, ICJ 12610, 40.
[1387] Ibid 71, 72.

in *John Doe I v Unocal Corp* went further than international law and held that as genocide constituted a law of nations, this created an actionable right under the *Alien Tort Statute*.

8.3.3.3 Law of nations

This part is considering if Australia could introduce exterritorial supply chain regulation to improve labour conditions. The *Alien Tort Statute* has not sort to regulate labour conditions but serious crimes under international law. Since the 1980s, U.S. Federal Courts have developed a range of torts which fall within the 'law of nations'.[1388] Prior to the expansion of the *Alien Tort Statute* in the 1980s, for almost 200 years this Act had been used only twice. The first case, *Bolchos v Darrel*,[1389] involved a slave owner suing for the return of his slaves from a Spanish prize of war. It was held that the Treaty of France preceded the law of nations. The second case, *Adra v Clift*,[1390] concerned a child custody dispute between two aliens. One alien had forged the child's passport. It was held that wrongfully withholding a child was actionable. The fraudulent activity breached the law of nations. Human rights laws have developed considerably since the *Alien Tort Statute* was introduced in 1789. Considering that this statute was enacted centuries before international law formally recognised human rights in the post-World War II period the rapid expansion of actions under this statute was arguably remarkable.

The case of *Filartiga v Pena-Irala* turned the *Alien Tort Statute* from an obscure action into a practical remedy.[1391] In *Filartiga*, the U.S. Court of Appeals for the Second Circuit held that the *Alien Tort Statute* could be expanded and used to sue a person for additional torts. *Filartiga* concerned the torture and murder of a 17 year old boy in Asuncion, Paraguay by the then Inspector of Police. It was alleged that the boy was murdered due to his father's criticism of the Paraguayan government. The Filartiga family attempted to take legal action against the inspector of police in

[1388] See for example, the District Court for the Central District of California's judgment that polluting international waters provided residents of Papua New Guinea a recognisable claim: *Sarei v Rio Tinto PLC* (Sarei I), 221 F. Supp. 2d 1116, 1160-63 (C.D. Cal. 2002); See generally, discussion of the expansion of actionable torts: Jordan J Paust, 'Human Rights and Responsibilities of Private Corporations' (2002) 35 *Vanderbilt Journal Transnational Law* 801.
[1389] 3 F Cas. 810 (1795).
[1390] 195 F. Supp. 857 (D. Md. 1961).
[1391] (1980) 630 F.2d 876 (2d Cir.).

Asuncion, Paraguay without success. The inspector of police moved to the U.S... The family then sued in the U.S. Federal Court under the *Alien Tort Statute*.

The Second Circuit in *Filartiga* held that they 'must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today'.[1392]

The court held that the international law of nations granted fundamental human rights upon all people, regardless of their nationality. The right to be free from torture and murder was an innate human right, a breach of which was actionable under the *Alien Tort Statute*.[1393] Clarens observes that '*Filartiga* represented an important step in the realm of international human rights litigation. Its progeny represent an outlet through which plaintiffs, though aliens in this country, can use the federal judicial system to seek reprieve for human rights abuses committed against them abroad.' .[1394]

The legal avenue which was created, *Filartiga* subsequently developed and applied in subsequent cases. For example in *Doe v The Gap* garment industry guest workers from the People's Republic of China, the Philippines, Bangladesh, and Thailand working in the Commonwealth of the Northern Mariana Islands the plaintiffs claimed that the defendant operated a workplace which involved physical abuse, violent intimidation tactics, forced labor, involuntary servitude and discrimination.[1395] The plaintiffs alleged the defendant had violated the law of nations by infringing on workers' rights of freedom of association, freedom of speech, privacy, rights to be free from workplace discrimination and corporal punishment in the workplace, the right to organize and join labour unions and to engage in concerted protected activity and right to practice. The District Court for the Northern Mariana Islands dismissed the claim of servitude because the plaintiffs could not demonstrate that they were forced into servitude through physical or legal

[1392] Ibid 878.
[1393] Richard P. Claude, 'The Case of *Joelito Filartiga* in the Courts' 328, 336, in Richard Pierre Claude and Burns H. Weston, (eds), *Human Rights in the World Community: Issues and Action* (2nd ed, 1992) 328-339.
[1394] Margarita S. Clarens, 'Deference, Human Rights and the Federal Courts: The Role of the Executive in *Alien Tort Statute litigation'* (2007) 17 *Duke Journal of Comparative & International Law*, 415, 416.
[1395] In *Doe v The Gap, Inc.* (2002) No. CV-01-0031, WL 1000073 (D. N. Mar. I. May 10, 2002) the court granted a motion for class certification.

coercion but held the other torts were actionable.[1396] The claim settled against all the defendants except Levi Strauss & Co.[1397] This included a settlement fund of approximately US$20 million.

The Estate of Rodriguez v Drummond Co. involved the alleged 'systematic intimidation and murder of trade unionists' in Colombia at the hands of paramilitaries working as agents of the defendants.[1398] The defendant companies allegedly contracted with paramilitary security forces which perpetrated extreme violence including murder.[1399]

The District Court for the Northern District of Alabama, Western Division held that extrajudicial killing was actionable under the *Alien Tort Statute* as a breach of the law of nations. The rights to associate and organize were generally recognized as international principles sufficient to maintain a claim under the law of nations. The fact that the United States and Colombia had ratified the relevant conventions was crucial to the decision.

Following these decisions, a number of cases were filed against corporations under the *Alien Tort Statute*, including Abercrombie & Fitch, BHP, Chevron, Coca-Cola, Del Monte, Dole, Drummond Coal, ExxonMobil, The Gap, J.C. Penney Co., Levis Strauss, Nike, Pfizer, Rio Tinto, Shell, Siemans, Southern Peru Copper Corporation, Target, Texaco, Total, Union Carbide and Unocal.[1400] The operation of the *Alien Tort Statute* created a large liability risk for many multinational corporations. Damages awards under the Alien Torts Statute have been impressive, including:

- *Mehinovic*: US$40 million for compensatory damages and US$100 million for punitive damages;[1401]

[1396] Order Re: Motion to Dismiss Plaintiffs' First Amended Complaint (Nov 26, 2001), Third Amended Complaint for Damages and Injunctive Relief, *Doe v The Gap*, Inc. No. CV-01-0031, PP 159-90 (D.N.M.I. July 25, 2002.
[1397] Sweatshop Watch, '*U.S. Clothing Retailers on Saipan Settle Landmark Workers' Rights Lawsuit*' (Press release, Sept. 26, 2002).
[1398] *Estate of Rodriquez v Drummond Co.* (2003) 256 F. Supp. 2d 1250 .
[1399] Ibid 27, 28.
[1400] Donald J Kochan, '*No Longer Little Known But Now a Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Torts Statute in Human Rights and International Law Jurisprudence*' (2005) 8 *Chapman Law Review* 103, 128 ; Robert Vosper, 'Conduct Unbecoming; No Longer Satisfied with Destroying the Reputations of Corporations That Get Entangled in Human Rights' Abuses Overseas, Activist Groups are Seeking Retribution in U.S. Courts', *Corporate Legal Times*, October 2002, 35.
[1401] *Mehinovic v Vuckovic* (2002) (Northern District of Georgia, Atlanta Div) 198 F. Supp. 2d 1322.

- *Hilao, Class Plaintiffs v Marcos Estate*: US$766 million for compensatory damages and US$1.2 billion for punitive damages;[1402]
- *Xuncax v Gramajo*: US$18 million for compensatory damages and US$28.75 million for punitive damages;[1403]
- *Paul v Avril*: US$17 million for compensatory damages and US$24 million for punitive damages;[1404] and
- *Doe v Karadzic* (2000): US$617 million in compensatory damages, US$3.9 billion in punitive damages.[1405]

8.3.3.4 Hope that the Alien Tort Statute will hold corporations liable for human rights' abuses

Dale heralded the expansion of the *Alien Tort Statute* as a powerful response to corporate human rights' abuse.[1406] Amit predicted in his doctorial thesis:

> U.S. judges breached the gap between the collection of human rights norms as a statement of aspirations, and as a system of legal protections. And they did not stop at the protections established by *Filartiga*. Instead, they solidified an expanding range of international human rights norms.[1407]

Clark argued that the expanded coverage under the *Alien Tort Statute* provided a vehicle to hold multinational corporations accountable for international human rights' abuses. [1408] Pagnattaro argued:

> Widely adopted international agreements, treaties, and conventions indicate that the law of nations encompasses core labour rights. Accordingly, this paper advocates the use of the … [the *Alien Tort Statute*] as a way of raising international labour standards … based on a number of official documents, there is demonstrable

[1402] *Hilao v Estate of Ferdinand Marcos* (1996) (9th Circuit) 103 F.3d 767.
[1403] *Xuncax v Gramajo* (1995) (District of Massachusetts) 886 F. Supp. 162.
[1404] *Paul v Avril* (2001) (Southern District of Florida) 901 F. Supp. 330.
[1405] *Doe v Karadzic* (2000) (Southern District of New York.
[1406] John Dale, *Transnational Legal Space: Corporations, States, and the Free Burma Movement* (PhD Thesis, University of California, Davis, 2003).
[1407] Roni Amit, *Judges Without Borders: International Human Rights Law in Domestic Courts* (PhD Thesis, University of Washington, 2004).
[1408] Dana L. Clark, 'Boundaries in the Field of Human Rights: the World Bank and Human Rights: the Need for Greater Accountability' (2002) 15 *Harvard Human Rights Journal* 205, 223-26.

> international agreement that the law of nations also protects freedom of association and collective bargaining, prohibitions on child labour, and discrimination, including gender.[1409]

Even though Kochan was opposed to including human rights litigation under the *Alien Tort Statute,* he recognized that international conventions which had not been ratified by the U.S. Government may be regarded as falling within the law of nations.[1410]

8.3.3.5 United States Supreme Court decision in Sosa

The United States Supreme Court has narrowed the scope of the *Alien Tort Statute* in *Sosa v Alvarez-Machain* by having narrowed the scope of violations of the law of nations which may be actionable under this statute.[1411] This case concerned an alleged unlawful detention and sponsored kidnapping by the United States Drug Enforcement Agency (**DEA**) of a Mexican citizen from Mexico. The DEA attempted to have Alvarez-Machain extradited but the Mexican Government failed to act. The DEA then hired private agents to perform the kidnapping. One of the hired kidnappers was Sosa.

Sosa kidnapped Alvarez-Machain and handed him over to DEA officials in the U.S. Alvarez-Machain was prosecuted and acquitted of all charges. He then sued Sosa, inter alia, under the *Alien Tort Statute* for false imprisonment contrary to the law of nations. Sosa first had summary judgment issued against him for the damage sustained during the kidnapping in Mexico, but not for any damage once he entered U.S. jurisdiction.[1412] This decision was subsequently reversed on motion from the U.S. government.[1413]

[1409] Marisa Anne Pagnattaro, 'Enforcing International Labor Standards: the Potential of the *Alien Torts Claims Act*' (2004) 37 *Vanderbilt Journal of Transnational Law* 203, 204; footnotes not included.
[1410] Donald J Kochan, 'No Longer Little Known but Now a Door Ajar: an Overview of the Evolving and Dangerous Role of the *Alien Tort Statute* in Human Rights and International Law Jurisprudence' (2005) 8 *Chapman Law Review* 103, 128.
[1411] 542 U.S. 692 (2004).
[1412] *Alvarez-Machain v United States* (2003) 331 F.3d 604, 610-11 (9th Cir.
[1413] Ibid 699.

Eventually, the matter came before the United States Supreme Court after a lengthy legal process.[1414] The Supreme Court found that the U.S. government could not be liable for any tort where the damage was suffered in a foreign jurisdiction due to the operation of the *Federal Tort Claims Act.*[1415] As for Sosa's liability under the Alien Tort Statute, the Supreme Court examined the *Alien Tort Statute* with reference to the intended scope of the 'law of nations' in 1789. The Supreme Court then required a cause of action to have a similar level of certainty, as the causes anticipated under the 1789 statute. The Supreme Court held:

> We do not believe ... that the limited, implicit sanction to entertain the handful of international common law claims understood in 1789 should be taken as authority to recognize the right of action asserted by Alvarez here.[1416]

Justice Scalia, with Justices Rehnquist and Thomas concurring, held that there is no 'reservation of a discretionary power in the Federal Judiciary to create causes of action for the enforcement of international-law-based norms'.[1417]

Justice Souter found that there was 'no basis to suspect that Congress had any examples in mind beyond those corresponding to Blackstone's three primary offences: of safe conducts, infringement of the rights of ambassadors, and piracy'.[1418]

The Supreme Court found the causes of action under the *Alien Tort Statute* were not static. The Court recognised that new causes of action could be recognized, providing that the claims were 'based on the present-day law of nations, to rest on a norm of international character accepted by the civilized world, and defined with a specificity comparable to the features of the 18th century paradigms'.[1419]

The Federal Courts have been left with the obligation of determining whether a particular international law has reached the level of universality, as envisaged by the

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[1414] Carolyn A. D'Amore, '*Sosa v Alvarez-Machain* and the *Alien Torts Statute*: How Wide has the Door to Human Rights Litigation Been Left Open?' (2006) 39 *Akron Law Review* 593.
[1415] *Sosa v Alvarez-Machain* 542 U.S. 692 (2004), 124 S. Ct. 2739, 2761, 159 L. Ed. 2d 718, 712.
[1416] Ibid 712.
[1417] Ibid 739.
[1418] Ibid 724.
[1419] Ibid 717.

1789 statute.[1420] Generally, *Sosa* has substantially wound back the scope of *Alien Tort Statute* litigation.

8.3.3.6 Can a corporation still be liable post-Sosa?

If Australia introduced exterritorial supply chain regulation then this regulation would seek to hold corporations liable. Chapters 2.4.3 and 2.4.4 of this thesis explored how international human rights are increasingly being imposed over private actors such as corporations. The fact that international law remains primarily the province of States has resulted in USA courts limiting the ways in which corporations can be held liable under the *Alien Tort Statute*. If Australia introduced exterritorial supply chain regulation then Australia would be required to find a way to reconcile holding corporations liable under domestic laws with the State centric nature of international laws. Rather than engaging in such a debate USA courts have simply wound back the liability of corporations under the *Alien Tort Statute*.

In relation to the scope of liability for a breach of the law of nations, the Supreme Court suggested that only States, and not corporations or individuals, may be liable for international law violations:

> [A] related consideration is whether international law extends the scope of liability for a violation of a given norm to the alleged perpetrator being sued, if the defendant is a private actor such as a corporation or individual.[1421]

While the Supreme Court was not excluding all private defendants, it certainly demonstrated its intent to wind back the scope of the *Alien Tort Statute*.

Prior to the Supreme Court decision in *Sosa*, corporations were liable under the *Alien Tort Statute*. After the United State Supreme Court decision in *Sosa*, corporations appear to be immune from suit for torture. Priselac explains that the trouble with holding corporations under the *Alien Tort Statute* is that the causes which are

[1420] Ibid 738; Eugene Kontorovich, 'Implementing *Sosa v Alvarez-Machain*: What Piracy Law Reveals About the Limits of the *Alien Tort Statute*' (2004) 80 *Notre Dame Law Review* 111.
[1421] *Sosa V Alvarez-Machain* 542 U.S. 692 (2004), 124 S. Ct. 2739, 2761, 159 L. Ed. 2d 718, 726, with Scalia, J. Rehnquist, Ch. J. and Thomas, J. dissenting on this point.

actionable under this act are breaches of international law. [1422] As corporations have not traditionally been liable for breaches of international law directly, USA courts have been reluctant to hold corporations liable for breaches of these laws.

The District Court for the Eastern District of New York in *Vietnam Association for Victims of Agent Orange Product Liability Litigation*[1423] and the District Court for the Central District of California in *Mujica v Occidental Petroleum Corp* held that a corporation could not be held liable under the *Alien Tort Statute*.[1424]

In *Vietnam Association for Victims of Agent Orange Product Liability Litigation v Dow Chem* Vietnamese nationals and an organisation sued the manufacturers of Agent Orange for harms allegedly inflicted during the Vietnam War.[1425] The District Court for the Eastern District of New York observed international law is primarily a law for the international conduct of States and not of their citizens.[1426] Generally, personal law claims are unenforceable under the *Alien Tort Statute*.[1427] Consequently, the law of nations generally does not impose obligations or grant actionable rights under the *Alien Tort Statute*.

The Court noted the express rejection by the drafters of the treaty establishing the International Criminal Court to include the liability of corporations. The *Alien Tort Statute* imposes liability in section 2 upon 'individuals' and makes no reference to corporations in the definition section of the Act. Even though corporations had previously been held liable under the *Alien Tort Statute*, the court in *Agent Orange* held that 'common sense' indicated that only natural persons could be 'individuals'. Only individuals and not corporations could perform torture:

> [T]he definition of 'individual' within the statute appears to refer to a human being, suggesting that only natural persons can violate the Act.[1428]

[1422] Jessica Priselac, 'THE REQUIREMENT OF STATE ACTION IN *ALIEN TORT STATUTE* CLAIMS: DOES *SOSA* MATTER?' (2007) 21 *Emory International Law Review*, 789, 792.
[1423] *Re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7, 2005.
[1424] *Mujica v Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 2005.
[1425] *Re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7, 2005.
[1426] Ibid 158-159.
[1427] *United States DOC v Montana* (1992) 503 U.S. 442, 458, 118 L. Ed. 2d 87, 112 S. Ct. 1415 (1992).
[1428] *Re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7, 2005, 124.

As a consequence, the plaintiffs had to identify the individuals in question and not just point to a corporation. The Court stated:

> [T]he prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it. Responsibility does not automatically attach to an act proved to be criminal merely by virtue of a defendant's membership in the … [corporation]. Conversely, one may not utilize the corporate structure to achieve an immunity from criminal responsibility for illegal acts which he directs, counsels, aids, orders or abets. But the evidence must establish action of the character we have already indicated, with knowledge of the essential elements…[1429]

Prior to the United States Supreme Court decision in *Sosa*, in *John Doe I v Unocal Corporation*, there was no obligation to identify specifically the individual directors or managers who actually authorized the conduct in question.[1430] The decision in *Vietnam Association for Victims of Agent Orange* represents an increased burden upon any potential litigant if they wish to hold a corporation liable for human rights' breaches under the *Alien Tort Statute*.

8.3.3.7 Justiciability problem under the Alien Tort Statute

Even if a plaintiff proves there is a prima facie case against the defendant for a breach of the law of nations, the claim may still be struck out on the grounds of non-justiciability. Non-justicibility has been a problem under the *Alien Tort Statute* and would likely be a problem under any potential Australian based exterritorial supply chain regulation. As most laws of nations and treaties impose legal obligations primarily upon States and States then impose those obligations over corporations,[1431] it is probable that many violations by corporations will have occurred with either the sanction or neglect by a State. This connection to a foreign State has proven fatal to an action under the *Alien Tort Statute* (as applied post-*Sosa*). Where a foreign State is likely to be a party to the litigation it is 'inappropriate' for a court to pass judgment

[1429] Ibid 129.
[1430] (2002) 395 F.3d 932 (9th Cir..
[1431] Robert Alexy, *Theory of Constitutional Rights* (Julian Rivers trans, 2002) 351.

.[1432] In *Re South African Apartheid Litigants*, three groups of black South African nationals commenced proceedings against multinational corporations which had conducted business in South Africa during the apartheid era.[1433] The plaintiffs claimed that the corporations had aided and abetted the South African government's violation of the law of nations and that the corporations were consequently liable under the *Alien Tort Statute*.

The District Court for the Southern District of New York held that the corporations could not be liable for aiding and abetting a national government. The court held that liability for 'aiding and abetting' violations of international law was not itself actionable under the *Alien Tort Statute*. The court was mindful of the United States Supreme Court's approach in *Sosa* that 'Congress should be deferred to with respect to innovative interpretations' of the *Alien Tort Statute*.[1434]

In addition, the court was 'mindful of the collateral consequences and possible foreign relations repercussions that would result from allowing courts in this country to hear civil suits for the aiding and abetting of violations of international norms across the globe'.[1435]

South African Apartheid Litigants demonstrates a significant problem for litigants. The *Alien Tort Statute* is primarily concerned with international law which primarily imposes duties upon States. Courts are, however, reluctant to pass judgment over the conduct of foreign States.

Where the judgment against a corporate defendant may indirectly pass judgment upon a foreign State, the court in *Doe v Exxon Mobil Corporation* has gone even further.[1436] *Doe v Exxon Mobil Corporation* concerned retaliatory violence following individual villagers' attacks on an oil pipeline in Indonesia. The plaintiffs alleged that the Exxon Corporation hired the Indonesian military to secure the

[1432] Margarita S. Clarens, 'Deference, Human Rights and the Federal Courts: The Role of the Executive in *Alien Tort Statute litigation'* (2007) 17 *Duke Journal of Comparative & International Law*, 415, 430.
[1433] 346 F. Supp. 2d 538, 2004, 549-51 (S.D.N.Y.).
[1434] Ibid 550.
[1435] Ibid 551.
[1436] 393 F. Supp. 2d 20 (2005); See more on oil companies' liability: James Goodwin and Armin Rosencranz, 'Holding Oil Companies Liable for Human Rights' Violations in a Post-*Sosa* World' (2008) 42 *New England Law Review* 4, 701.

pipeline. They also alleged that the Indonesian military engaged in various conduct which constituted a violation of the law of nations, including sexual violence, genocide and the systematic attack on certain segments of the population.

The District Court for the District of Columbia determined that 'sexual violence', was not actionable per se as a violation of the law of nations, as 'it is not sufficiently recognized under international law and is not a specific, universal, and obligatory norm (although claims of sexual violence may be recognizable elements of such illegal conduct as torture)'.[1437]

The court did determine that genocide was actionable. Genocide was defined to include 'acts calculated to bring about the physical destruction, in whole or in part, of a national, ethnic, racial, or religious group'.[1438] The court also found that the 'systematic attack on certain segments of a population' was a violation of the law of nations. [1439]

Similar to the *Unocal* case, the plaintiffs asserted the defendants knew or ought to have known 'that the military did commit, was committing, and would continue to commit these tortuous acts'.[1440] Similar to *Unocal*, in *Exxon* the court found the defendant oil corporation could not be held liable as there was no evidence the defendants 'participated in or influenced' the military's unlawful conduct.[1441]

The court in *Exxon* went further than *Unocal* in refusing to entertain any action which involved judging the conduct of a nation due to the principle of non-justicibility:

> Most important[ly], determining whether defendants engaged in joint action with the Indonesian military necessarily would require judicial inquiry into precisely what the two parties agreed to do. For reasons explained above, such an inquiry cuts too

[1437] 393 F. Supp. 2d 20 (2005) 12.
[1438] Ibid 13.
[1439] Ibid 13.
[1440] *John Doe I v Unocal Corp.*, (2002) 395 F.3d 932 (9th Cir, 1306); *Doe v Exxon Mobil Corporation*, 393 F. Supp. 2d 20 (2005) 20.
[1441] *John Doe I v Unocal Corp.*, (2002) 395 F.3d 932 (9th Cir, 1306); *Doe v Exxon Mobil Corporation*, 393 F. Supp. 2d 20 (2005) 20.

> close to adjudicating the actions of the Indonesian government, and for that independent reason, should be avoided on justicibility grounds.[1442]

The judgment in *Exxon* effectively excludes all breaches of the law of nations actionable under the *Alien Tort Statute* where the potential liability of a multinational corporation involves judging the conduct of a foreign government.

8.3.4 Problems if Australia attempted to impose international extraterritorial supply chain regulations imposing obligations on its own citizens

If Australia introduced extraterritorial supply chain regulation there would likely be two broad categories of defendants. The first category is defendants who are Australian citizens, registered as a corporation in Australia or are present in Australia's territorial jurisdiction.[1443] The second category is defendants who fall outside the first category, for example Chinese factories which are owned and operated by Chinese citizens. [1444]

Based upon the New South Wales and South Australian extraterritorial regulatory models, Australian extraterritorial supply regulation would most likely impose obligations upon retailers and traders based in Australia, to ensure their overseas traders performed certain acts, such as provide documentary evidence that labour conditions are met. Where the Australian retailer or trader failed to collect any documents, then there would be no complications in taking action against the Australian retailer or trader for breaching the regulations. If the retailer or trader obtains documents they knew or suspected were fraudulent, then any action against the Australian defendants would indirectly pass judgment over labour conditions and conduct in a foreign nation. Regulations which passed judgment over conduct in foreign States would face many of the same problems as the *Alien Tort Statute*. One problem which the *Alien Tort Statute* and Australian supply chain regulation would not have in common is the definition of duties. The fact the *Alien Tort Statute* was enacted in 1789 means courts were faced with the challenge in rendering this statute

[1442] *Doe v Exxon Mobil Corporation*, 393 F. Supp. 2d 20, 20, 21 (2005).
[1443] Hereinafter 'Australian defendants'.
[1444] Hereinafter 'Non-Australian defendants'.

relevant to twenty-first century legal norms. This resulted in substantial judicial dispute about how this statute should be interpreted. Australian supply chain legislation could avoid this problem by clearly stating the legal duties to be imposed.

Australian-based extraterritorial supply chain regulation which imposed obligations upon Australian defendants would not be exempting those Australian defendants for any potential liability which may arise in foreign States due to their conduct. For example, if an Australian corporation encouraged a foreign sweatshop to exploit workers, then the Australian corporation could be liable under Australian and the foreign State's laws. While issues of double jeopardy or *forum non conviens* may arise, it is important to observe that any such regulation would not attempt to exclude another State's jurisdiction over Australian defendants. The idea that one nation's laws should take primacy in another nation's jurisdiction is no longer generally accepted by nations. Historically, powerful Western nations claimed extraterritoriality over their citizens. Extraterritoriality is where a nation claims it has the sole jurisdiction to prosecute its citizens, regardless of where they commit an offence.[1445] Under the principle of extraterritoriality, predominantly Western nations successfully prevented other nations from trying their citizens for criminal offences which were committed in the host nation's jurisdiction.[1446] Nations' extraterritoriality was in direct contrast with the principal of territoriality.

Territoriality provides a nation has sovereign rights within its jurisdiction. As a result, the existence of extraterritoriality was in direct conflict with a nation's right to territoriality. Nations, such as Great Britain and the USA, had permanent courts in nations such as China, to trial their citizens.[1447] Great Britain and the USA had exclusive rights to try their citizens in China until 1943.[1448] While China had unsuccessfully resisted Western extraterritoriality, the advent of World War II and the military strategic pressures motivated Western powers to abolish

[1445] Turan Kayaoglu, *Sovereignty, State-building, and the Abolition of Extraterritoriality* (PhD Thesis, University of Washington, 2005) 11.
[1446] John Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations' (1993) 47 *International Organizations* 139.
[1447] Jeffrey Gayton, *From Here to Extraterritoriality: American Sovereignty Within and Beyond Borders*' (PhD Thesis, University of Wisconsin, 2003) 58-114.
[1448] K Chan, 'The Abrogation of British Extraterritoriality in China, 1942-1943' (1977) 11 *Modem Asian Studies* 291.

extraterritoriality and close down their courts in China.[1449] Now nations have no right to insist other nations do not prosecute their nationals.[1450] While nations no longer have exclusive jurisdiction over their nationals, there is nothing in international law preventing a nation from continuing to exercise jurisdiction over its nationals when those nationals are in foreign nations. For example, Australian courts have extraterritorial power to convict Australians who sexually abuse children in foreign jurisdictions.[1451] Authors, such as Seck, have argued that that exercise of unilateral home state jurisdiction over 'transnational corporate conduct does not violate jurisdictional principles of public international law'.[1452] In summary, Australia has the jurisdictional power to introduce laws which require Australian corporations to take steps to ensure labour conditions are respected in foreign States, however enforcing these laws would be extremely difficult without the support of the host States.

8.3.5 Forum non conveniens

The mere fact an Australian law creates a duty, does not mean a breach of that duty is enforceable in an Australian court.[1453]

Where a plaintiff's action has extraterritorial elements, a defendant can defeat the plaintiff claim if they can demonstrate the claim is served in the incorrect forum. The court will ask:

> [D]oes the court possess the jurisdiction whereby the defendant is amenable to be sued in that court, and is that court an appropriate court to hear the matter?[1454]

In all Australian jurisdictions, plaintiffs can have their claim defeated if the court finds they are in the incorrect forum. To determine if the plaintiff is in the incorrect

[1449] Turan Kayaoglu, *Sovereignty, State-building, and the Abolition of Extraterritoriality* (PhD Thesis, University of Washington, 2005) 192.
[1450] Michael P. Scharf, 'Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States' (2001) 35 *New England Law Review* 363, 377.
[1451] Marianna Brungs, 'Abolishing Child Sex Tourism: Australia's Contribution' [2002] 8 *Australian Journal of Human* Rights 2, 101.
[1452] Sara Seck, *Home state obligations for the prevention and remediation of transnational harm: Canada, global mining and local communities* (PhD Thesis, York University, 2008) 1.
[1453] The issue of forum non conveniens is not restricted to Australia: Alan O. Syke, 'Transnational Forum Shopping as a Trade and Investment Issue' (2008) 37 *University of Chicago The Journal of Legal Studies*, 339, 343.
[1454] Ron McCallum, 'Conflicts of Laws and Labour Law in the New Economy' (2003) 16 *Australian Journal of Labour Law* 3.

forum, in *Spiliada Maritime Corp v Cansulex Ltd*, Lord Goff of Chieveley held a plaintiff's suit would be dismissed on the grounds of *forum non conveniens* 'where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, in which the case may be tried more suitably for the interests of all the parties and the ends of justice'.[1455] The High Court of Australia considered *Spiliada Maritime Corp v Cansulex Ltd* in *Oceanic Sun Line Special Shipping Company Inc v Fay*.[1456] In *Oceanic Sun Line Special Shipping Company Inc v Fay*, Brennan J observed that it was the 'duty of an Australian court to exercise its jurisdiction'.[1457] Reflecting Brennan J's sentiments, Deane J held:

> It is a basic tenet of our jurisprudence that, where jurisdiction exists, access to the courts is a right. It is not a privilege which can be withdrawn otherwise than in clearly defined circumstances.[1458]

The High Court of Australia settled upon the 'clearly inappropriate forum' test in *Voth v Manildra Flour Mills Pty Ltd*.[1459] In *Voth*, Mason CJ, Deane, Dawson and Gaudron JJ explained the High Court of Australia's reason for adopting a stricter approach than the English approach:

> [T]he selected forum's conclusion that it is a clearly inappropriate forum is a persuasive justification for the court refraining from exercising its jurisdiction.[1460]

The High Court of Australia has confirmed the 'clearly appropriate forum' test. The 'clearly inappropriate' test was applied by the High Court in *BHP Billiton Limited v Schultz*[1461] and in *Regie National des Usines Renault SA v Zhang*.[1462]

While cost and efficiency may indicate the most appropriate forum, there are no specific factors relevant to determining whether a plaintiff is in the correct

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[1455] *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, 476; For a more recent application of this test in the UK, see *Anton Durbeck GmbH v Den Norske ank ASA* [2003] 2 WLR 1296; [2003] 2 All ER (Comm*)* 411.
[1456] *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 *CLR* 197.
[1457] Ibid 238.
[1458] Ibid 252.
[1459] *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 559.
[1460] Ibid.
[1461] *BHP Billiton Limited v Schultz* (2004) 221 CLR 400, 405 (Gleeson CJ, McHugh and Heydon JJ).
[1462] *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491, 503, 504 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

jurisdiction.[1463] The High Court of Australia observed in *John Pfeiffer Pty Ltd v Rogerson*, the ordinary basis of jurisdiction of common law courts in personal actions is the presence of the defendant within the court's territory, and the defendant's resulting amenability to the court's process. [1464] If international supply chain regulation provided protection to a worker in a foreign jurisdiction, this would create difficulties in identifying Australia as the correct forum. Australian employees who have travelled outside Australia on work have had no difficulty in prosecuting their action in Australian courts.[1465] Where an Australian employer is deemed to be the employee of a foreign worker, then the action will have two defendants, one of whom is based in a foreign jurisdiction. The cost of moving all the evidence, the plaintiff and the second defendant to Australia may result in Australia being deemed the incorrect forum.

International supply chain regulation which focuses upon intraterritorial contracts to regulate extraterritorial conditions may avoid some *forum non conveniens* problems. In such circumstances, the contract was executed in Australia and the obligation to take steps to ensure labour law compliance exists in Australia. In effect, it is an Australian contract which obliges parties to engage in conduct within Australia and in foreign jurisdictions.

Where the supply contract is enforceable in Australian courts, then a plaintiff with a viable action can forum shop when selecting the appropriate jurisdiction to prosecute his/her claim. Australian laws permit plaintiffs to forum shop. In *BHP Billiton Limited v Schultz*, Shultz worked for the then BHP between 1957 and 1964, and between 1968 and 1977, in South Australia. Shultz claimed he developed asbestosis and an asbestos-related pleural disease from exposure to asbestos while working for BHP in South Australia. Shultz sued BHP in the Dust Diseases Tribunal of New South Wales, alleging negligence, breach of contract and breach of statutory duty.

[1463] *BHP Billiton Limited v Schultz* (2004) 221CLR 400, 405 (Gleeson CJ, McHugh and Heydon JJ).
[1464] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 517 [13], referring to *Gosper v Sawyer* (1985) 160 CLR 548, 564-565; see for discussion: Gary Davis, *'John Pfeiffer Pty Ltd v Rogerson*: Choice of Law in Tort: the Dawning of the 21st Century' [2000] *Melbourne University Law Review* 982.
[1465] For example see: *Amaca Pty Ltd v Bernard George Frost* [2006] NSWCA 173; *Atkinson v Gameco* (NSW) Pty Limited [2005] NSWCA 338; Ron McCallum, 'Conflicts of Laws and Labour Law in the New Economy' (2003) 16 *Australian Journal of Labour Law* 3.

Shultz alleged the asbestos was manufactured in New South Wales and purchased by BHP in New South Wales. BHP disputed this, and claimed it purchased the asbestos in South Australia. When Shultz commenced proceedings against BHP, he was a resident of South Australia. BHP was registered in Victoria, but carried on business in both South Australia and New South Wales. Shultz prosecuted his claim in New South Wales so he could access the specialist Dust Diseases Tribunal. The Dust Diseases Tribunal was created by the Parliament of New South Wales under the *Dust Diseases Tribunal Act 1989* (NSW). This forum afforded plaintiffs certain benefits; for example, the court actively took into consideration the nature of dust diseases. The defendant in this case objected to the plaintiff's choice of forum.

In upholding the plaintiff's right to forum shop, Gleeson CJ, McHugh and Heydon JJ observed a 'plaintiff's choice is not lightly to be overridden'.[1466] Their Honours held a plaintiff was entitled to choose a jurisdiction based upon the laws of the jurisdiction:

> The capacity of the Tribunal to deal expeditiously with cases has always, and rightly, been regarded as relevant to the interests of justice, bearing in mind the condition of many sufferers from dust diseases.[1467]

Under Australian law, plaintiffs have the right to decide in which forum to prosecute their claim. Where extraterritorial supply chains created a legal right, providing a plaintiff can defeat any *forum non-conviens* claim, and then the plaintiff is entitled to forum shop.

8.3.6 Justiciability problem with Australian extraterritorial supply chain regulation

Justiciability is one of the most substantial legal difficulties to the successful introduction of Australian extraterritorial supply chain regulation. If an Australian court held an Australian-based retailer or trader was liable for a breach of labour conditions in China, then the Australian court would be indirectly passing judgment over a Chinese workplace. If the Chinese workplace is jointly controlled by a

[1466] (2004) 221 CLR 400, 421.
[1467] (2004) 221 CLR 400, 422.

Chinese government official, or if its labour conditions were approved by a Chinese government official, then an Australian court would be indirectly passing judgment over that Chinese government official. If the Chinese government official was working in his/her professional capacity representing the Chinese government, then Australian courts would indirectly be passing judgment over the Chinese government. In nations such as China, a number of manufacturing organisations are Chinese, state-owned enterprises.[1468] While the legal presumption in China that state-owned corporations are superior to privately owned corporations is diminishing, and privately owned corporations are now operating,[1469] there are a large number of joint venture arrangements between foreign companies and Chinese government entities.[1470] Joint venture arrangements with Chinese government entities may become increasingly popular, if this model enabled corporations to avoid liabilities.

The problems Australia would face in passing judgment over conduct in a foreign jurisdiction can be demonstrated by the problems USA courts have had with enforcing the *Alien Tort Statute*. The United States Supreme Court read the *Alien Tort Statute* narrowly as it concerned activities in a foreign jurisdiction. When USA courts faced justicibility issues under the *Alien Tort Statute*, plaintiffs could not prosecute their claims against defendants, where judging against the defendants would involve indirectly passing judgment over a national government, in *Re South African Apartheid Litigants*, or against the military, in *Doe v Exxon Mobil Corporation*. Similar to USA courts, Australian courts will not hear a matter which indirectly judges the action of a foreign government. Garnett has explored in detail the ability of Australian courts to hear disputes against foreign governments.[1471] When an Australian court is considering hearing a claim against a foreign government, the court is required to consider the rules relating to foreign State immunity, the Act of State doctrine and non-justifiability.

[1468] David Blumental, ' "Reform" or " Opening"? Reform of China's State-owned Enterprises and WTO Accession - the Dilemma of Applying GATT to Marketizing Economies' (1998) 16 *UCLA Pacific Basin Law Journal* 198, 209; Deborah Kay, 'Reforming the State-enterprise Property Relationship in the People's Republic of China: the Corporatization of State-owned Enterprises' (1995) 16 *Michigan Journal of International Law* 911.

[1469] Hong Kong Christian Industrial Committee, *Conditions of Women Workers in Special Economic Zones and Labour Standards in Trader Factories of German Garment Retailer Companies and Brands in China* (Report, 2004); Yuwa Wei, 'The Historical Development of the Corporation and Corporate Law in China' (2002) 14 *Australian Journal of Corporate Law* 13.

[1470] Arts 1, 5 of the *Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures 1988* (PRC).

[1471] Richard Garnett, 'Foreign States in Australian Courts' (2005) 29 *Melbourne University Law Review* 704.

Foreign state immunity, or sovereign immunity, in its widest interpretation, provides that Australian courts cannot hear any dispute against a foreign government. This rule has been distilled into legislation by the *Foreign States Immunities Act 1985* (Cth). Section 9 of that statute states:

> Except as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding.

Section 12 allows governments to be sued for breaches of employment contracts, providing those contracts were made in Australia or were to be enforced in Australia. The employment contracts where work is outsourced to States such as China, are entered into in a foreign nation between foreign nationals. These employment contracts would not satisfy the exception.

Section 11 provides a foreign State is not immune in a proceeding in so far as the proceeding concerns a commercial transaction. Section 11(3) defines a commercial transaction to include contracts for the supply of goods or services. The New South Wales and South Australian Codes regulate the supply chain through the contract supplying goods. If a trader is sued, it is sued for breaching its obligations under that contract. If this model was extrapolated to international supply chains, then an Australian corporation could be liable for breaches which occurred in China.

Pursuant to the 'Act of State' doctrine, Australian courts are prevented from adjudicating upon the acts of a foreign State within the foreign State's own territory.[1472] Garnett has explored the tendency for courts to allow such suits where the matter involves acts which are contrary to public policy:

> Where the foreign sovereign's acts are deemed to be contrary to public policy of the forum, such as where they contravene fundamental human rights or principles of public international law more generally, those acts will not be excluded from adjudication.[1473]

[1472] *A-G (UK) v Heinemann Publishers Pty Ltd* (1988) 165 CLR 30, 40 (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ).
[1473] Richard Garnett, 'Foreign States in Australian courts' (2005) 29 *Melbourne University Law Review* 704, 721.

Garnett examined the case authorities, which considered this exception to the Act of State doctrine, and concluded that there must be a clear consensus of international law for the exception to stand. While labour rights are now being increasingly recognized as human rights, it is highly doubtful if OHS would be sufficiently recognized to meet this standard. When determining what constituted a breach of the law of nations under the *Alien Tort Statute*, in *Aldana v Fresh Del Monte Produce*, cruel, inhuman, degrading treatment or punishment was not regarded as sufficiently recognized to sustain a claim and in *Doe v Exxon Mobil Corporation*, sexual assault was not regarded as sufficient. Based upon these USA precedents, the OHS conditions which could support a claim would have to be extraordinarily repugnant to sustain a claim.

The doctrine of non-justicibility prevents Australian courts from reviewing the acts of foreign states where there are no 'manageable judicial standards' to resolve the issues, or where adjudication would cause embarrassment to the Australian executive.[1474] Garnett has explored the British and Australian authorities on this doctrine. He has explored the trend towards recognizing human rights' violations as the exception to non-justicibility. He observed international human rights provided a manageable standard against which foreign nations could be judged. International supply chain regulation contains a standard to which both parties agree in writing to be bound to uphold. Where the foreign government has agreed to enter a contract which binds them to uphold prescribed standards, it is likely a court would be able to identify a manageable standard in order to avoid the doctrine of non-justicibility.

The doctrine of non-justicibility will also prevent Australian courts from adjudicating in disputes which would damage Australia's interests. Where the Australian government provides the court with a submission stating adjudication on a certain international dispute will damage Australia's national interest, the court must take this into consideration. This is largely a political question, and courts are unable to examine whether the Australian government's assessment of the situation is

[1474] *Petrotimor Companhia de Petroleos SARL v Commonwealth* (2003) 126 FCR 354.

correct.[1475] A recent example of this problem occurred in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*.[1476] In this case, Allsop J was required to determine whether the Japanese government could be served with a claim relying on Australia's sovereignty over areas of Antarctic waters. The case concerned Japanese whaling in Australian Antarctic waters. The Australian government submitted to the court, that if the court adjudicated this matter, this

> would or may provoke an international disagreement with Japan, undermine the status quo attending the Antarctic Treaty, and would 'be contrary to Australia's long term national interests'.[1477]

Allsop J observed he was unable to adjudicate on whether the Australian government's submission was accurate. As the submission concerned international affairs, Allsop J was forced to consider the submission as accurate and take it into account accordingly.[1478] The government submissions were more persuasive in these circumstances due to the difficulties in enforcing the judgment and the fact the judgment concerned natural resources and not personal interests. In those circumstances, Allsop J held Australian courts were unable to adjudicate this dispute.[1479] Importantly for international cross-jurisdictional supply chain regulation, submissions by the Australian government were not in themselves sufficient to render a case non-justiciable. Where a suit concerns the enforcement of a contract which is entered in Australia, public law issues of international relations will be less influential. In these circumstances, the view of the Australian government would be extremely influential but not conclusive.

In conclusion, Australian extraterritorial supply chains may be prima facie enforceable. To be enforceable however, courts would have to be satisfied the contract was sufficiently commercial to fall under section 11 of the *Foreign States Immunities Act 1985* (Cth), labour standards are sufficiently recognized to displace the Act of State doctrine and that the enforcement of such laws would not damage

[1475] Geoffrey Lindell, 'Judicial Review of International Affairs' in Brian Opeskin and Donald Rothwell (eds), *International Law and Australian Federalism* (1997).
[1476] [2005] FCA 664.
[1477] Ibid [14].
[1478] Ibid [19].
[1479] Ibid[28], [29].

Australia's interests. Whether Australian extraterritorial supply chains could surmount these hurdles is doubtful. As will be explored in chapter 9.4, China is increasingly involved with developing Chinese-run CSR. While this scheme is not directly controlled by the Chinese central government, the relevant agency maybe seen as a State-supervised agency. If foreign States started judging upon these reports, it is possible that the Chinese government or local Chinese governments would become involved in these reports and thus force Australian courts into a position where they must declare the Chinese government's reports to be inaccurate. Under the doctrine of non-justicibility, Australian courts would not pass judgment stating indirectly the Chinese government was wrong in its own State. In such a case, the courts would leave the matter for the Australian executive. Thus, Australian-based extraterritorial supply chain regulations would have limited effect unless there was a bilateral agreement between Australia and the host State.

8.3.7 Holding Chinese factories directly liable under Australian-based regulations

This section will analyse whether Australia could impose a sanction upon a factory in China to discharge its duty under 2.4.4 of this thesis. Australia would have no jurisdiction over non-Australian defendants such as a factory based in China. While internationally accepted human rights may be enforced by one State over other non-compliant States, this can only occur in limited circumstances.[1480] While Australia could attempt to assert universal jurisdiction, it is highly probable the International Court of Justice would not recognize Australia's right to assert universal jurisdiction for labour rights' violations. Universal jurisdiction is not sourced or prohibited by written international conventions. Universal jurisdiction is the concept that a State can exercise jurisdiction over conduct committed in another State in certain circumstances. The broad view of this approach enables a State to exercise this jurisdiction for all serious crimes under international law.[1481] A more narrow reading of universal jurisdiction requires the prosecuting State to have territorial jurisdiction,

[1480] Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (2007) 811-886.
[1481] Kriangsak Kittichaisaree, 'How Shall We Punish the Perpetrators? Human Rights, Alien Wrongs and the March of International Criminal Law: International Criminal Law' (2003) 27 *Melbourne University Law Review* 255, 262; Kenneth Randall and Richard Bilder, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (2004) 65.

personal jurisdiction, passive jurisdiction, or protective jurisdiction over the accused.[1482] When a State invokes universal jurisdiction, that nation is not acting in its own interests, but in the interests of the international community:

> Thus, the right to exercise universal jurisdiction belongs truly to the international community acting collectively and not the respective, individual States. When an individual State undertakes the prosecution of a perpetrator pursuant to an assertion of universal jurisdiction, that State acts as the de facto agent for the international community.[1483]

The ability of States to act unilaterally in the interests of the international community has been supported by the International Court of Justice.

In the *Yerodia* case, *(Congo v Belgium),* a Belgium national court issued proceedings against the acting foreign affairs minister of Congo.[1484] The International Court of Justice focused on whether the accused was immune, based on head of state immunity. On the issue of universal jurisdiction, their Honours supported universal jurisdictions adopting two different approaches. President Guillaume and Judges Ranjeva and Rezek held that nations were entitled to exercise universal jurisdiction when they also have territorial jurisdiction over the accused.[1485] The court held States could exercise universal jurisdiction, without the need for territorial jurisdiction, where the offence constituted 'crimes against humanity'.[1486] Universal jurisdiction has been accepted to apply over crimes committed in international waters such as piracy[1487] and against heinous crimes, such as genocide, torture, serious war crimes and crimes against humanity.[1488]

[1482] David Scheffer, 'The Future of Atrocity Law' (2002) 25 *Suffolk Transnational Law Review* 389, 410.
[1483] Anthony Sammons, 'The " Under-theorization" of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts' (2003) 21 *Berkeley Journal Of International Law* 111, 137.
[1484] *Concerning the Arrest Warrant of 11 April 2000* (*Congo v Belgium*), 2002 I.C.J. (14 Febuary 2002).
[1485] Ibid 15.
[1486] Ibid 65, (Judges Higgins, Kooijmans and Buergenthal); see for discussion, Mark A. Summers, 'The International Court of Justice's Decision in *Congo v. Belgium*: How Has It Affected the Development of a Principle of Universal Jurisdiction That Would Obligate All States to Prosecute War Criminals?' (2003 21 *Boston University International Law Journal* 63, 86.
[1487] Eugene Kontorovich, 'Implementing *Sosa v Alvarez-Machain*: What Piracy Law Reveals About the Limits of the *Alien Torts Statute*' (2004) 80 *Notre Dame Law Review* 111, 184.
[1488] Committee on International Human Rights Law and Practice, International Law Association, *Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences* (Final Report, 2000) 4-9; Henry J. Steiner, 'Three Cheers for Universal Jurisdiction -- Or Is It Only Two?' (2004) 5 *Theoretical Inquiries in Law*, 199, 223;
See also, Eric Heinze, *"In extreme cases only": Humanitarian intervention in theory, law and practice* (PhD Thesis, University of Nebraska – Lincoln, 2005), who argued only extreme circumstances justified the exercising of universal jurisdiction or humanitarian interventions; the exercise of universal jurisdiction for civil law is limited in a similar

If Australia introduced extraterritorial supply regulation which sought to regulate non-Australian defendants, this law would not be sustainable pursuant to universal jurisdiction. Australia would not have territorial jurisdiction over people associated with Chinese factories to enliven territorial jurisdiction. Furthermore, while OHS breaches can be fatal, OHS breaches are not of the same class as crimes against humanity, which include genocide and war crimes. The offences which can be enforced pursuant to universal jurisdiction must be of a character, where they either directly impact on the international community or so heinous, that they offend international morals and stability. The mere fact a crime impacts upon life is not sufficient to enliven universal jurisdiction. For example, even though drug manufacturing, trafficking and dealing is an international problem and results in substantial harm to the peoples of the world, drug offences are not regarded as forming part of universal jurisdiction.[1489] As OHS is not sufficiently serious to enliven universal jurisdiction and any defendant would not be subject to Australian territorial jurisdiction, Australian extraterritorial supply chain laws would exceed Australia's jurisdiction if they imposed duties directly over Chinese factories.

If Australia attempted to use universal jurisdiction to regulate exterritorial supply chains, it is probable that the International Court of Justice would declare any regulations which infringed China's sovereignty to be unlawful. The International Court of Justice reached an analogous decision in a dispute between Spain and China. A Spanish law empowered Spanish courts to prosecute 'Spaniards or foreigners outside the national territory' of Spain.[1490] A Spanish citizen of Tibetan origin and non-governmental organisations complained about human rights' abuses perpetrated by Chinese officials in Tibet. The Spanish court accepted these charges and held Spain had the jurisdiction to try the Chinese citizens, who included the former president Jiang Zemin, former Prime Minister Li Peng, and five other former

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manner to criminal universal jurisdiction: Donald Francis Donovan and Anthea Roberts, 'The Emerging Recognition of Universal Civil Jurisdiction' (2006) 100 *American Journal of International Law* 142.

[1489] Anne Geraghty, 'Universal Jurisdiction and Drug Trafficking: a Tool for Fighting One of the World's Most Pervasive Problems' (2004) 16 *Florida Journal of International Law* 371; Geraghty contends laws could be introduced relying upon universal jurisdiction to combat the problem of international elicit drug trafficking, however to date no such provisions have been enacted.

[1490] Art 23.4 of *Law on Judicial Power* (Spain).

officials associated with the Chinese administration in Tibet.[1491] Exiled Chinese Falun Gong members have also successfully complained to Spanish courts about the Chinese government's alleged practice of torture and murdering Falun Gong members for their organs.[1492] China remonstrated with the Spanish government in the strongest terms about Spain's interference in China's sovereign affairs:

> China reiterated its longstanding position that it has absolute sovereignty over its citizens and rejects any foreign interference in its domestic affairs 'under the pretext of human rights'.[1493]

If Australia attempted to prosecute Chinese factories for labour breaches without the Chinese government's approval, based on its response to the Spanish courts, China would likely protest against Australia's interference, refuse to cooperate and Australia's efforts would be unlikely to result in any judgment being enforced.[1494]

China would be able to argue it is in a stronger position to prosecute its own citizens for crimes perpetrated in its territory. Chapter 4 of this thesis demonstrated that there are serious problems with the enforcement of Chinese OHS laws in Special Economic Zones.

China has not been able to thus far ensure the safety of workers in Special Economic Zones. If an Australian court exercised universal jurisdiction and prosecuted corporations in China, it is doubtful if this procedure would result in greater results than the Chinese could achieve. Australian courts would have no direct power over local witnesses, would confront barriers in obtaining evidence and hearing evidence in Chinese languages. A Chinese tribunal 'offers the convenience of a trial close to the events', and would increase knowledge of OHS in China.

[1491] *Jos Yoldi, La Audiencia Perseguir al Ex Presidente Chino por Genocidio en el Tibet, El Pais* (Spain), Jan. 11, 2006; *Pekin Convoca al Embajador Espanol para Quejarse de las Imputaciones de Genocidio, El Pais* (Spain), June 9, 2006; see also: Christine Bakker, 'Universal Jurisdiction of Spanish Courts over Genocide in Tibet: Can It Work?' (2006) 4 *Journal of International Criminal Justice* 3, 595.

[1492] *Jorge A. Rodriguez, Detenido en Madrid un Ex Militar Argentino Acusado de 161 Casos de Secuestro o de Tortura, El Pais* (Spain), Feb. 10, 2006.

[1493] *Jos Reinoso, China Acusa a Espana de Injerencia por Dar Asilo a Miembros de Falun Gong, El Pais* (Spain), June 14, 2006, 19; see for discussion of these cases: Mugambi Jouet, 'Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond' (2007 35 *Georgia Journal of International and Comparative Law* 495, 525-526.

[1494] The political complications caused by exercising universal jurisdictions has led to calls to focus upon developing the jurisdiction of the International Criminal Court, rather than on exercising universal jurisdiction: Gabriel Bottini, 'Universal Jurisdiction After the Creation of the International Criminal Court' (2004) 36 *New York University Journal of International Law and Politics* 503, 545-560.

8.4 Conclusion

This chapter has analysed the ability of Australia to regulate domestic and international supply chains in order to protect workers' right to safety and health. Chapters 3 to 7 have demonstrated the problems with Australia's current approach to regulating employees' safety at work in supply chains. Chapter 2.4.1 argued Australia has an obligation to ensure workers' right to safety and health domestically and chapter 2.4 argued that Australia has a moral duty to take reasonably practicable steps to ensure corporations subject to Australia's jurisdiction discharge their obligations under the complicity principle, both domestically and exterritorialy. This means Australia has an obligation to take reasonably practicable steps to ensure corporations which are subject to Australia's jurisdiction embrace ethical supply chains. Chapter 3 argued that Australian OHS legislation was providing outworkers' formal protection but was failing to substantially enforce these laws. Where Australian corporations have supply chains which source products from China, then chapter 4 demonstrated that Australian corporations have constructive knowledge that there is a high risk that factories in SEZs are sweatshops. Currently, one of the major vehicles relied upon by Australia to motivate corporations to act ethically is the CSR movement. Chapters 5, 6 and 7 demonstrated that while the CSR movement is a positive avenue for civil society to motivate corporations to act ethically, the limited coverage of this movement combined with the limitations associated with its enforcement prevents States from relying upon market-driven unregulated CSR as a vehicle to discharge their human rights' obligations.

This chapter has analysed the difficulties Australia would confront if it introduced domestic and international supply chain regulation to ensure the safety of employees in Australian-based supply chains. This chapter was divided into two substantive parts. The first part demonstrated how Australia could regulate domestic supply chains through extending mandatory supply chain regulatory models from New South Wales and South Australia. These models do not significantly protect OHS, however it would be relatively easy to extend these codes to improve the safety of outworkers. Chapter 3 demonstrated traders and retailers have OHS duties for

outworkers, however these duties were not being enforced by regulators. It is submitted that increasing the requirements of parties in supply chains to document the steps they have taken to ensure outworkers' OHS and requiring parties to provide copies of such documentation would increase the visibility of outworkers' workplaces and thus increase the probability of detection and enforcement. Accordingly it is argued that Australia should introduce supply chain regulations in all jurisdictions which specifically involve reporting on OHS issues.

The second part of this chapter analysed if Australia could unilaterally enforce domestic legislation to regulate extraterritorial supply chains. This part first analysed how the New South Wales and South Australian models currently have extraterritorial effect outside those domestic jurisdictions to all jurisdictions in Australia. If this model was extended to regulate international supply chains, Australia would face substantial barriers in enforcing those laws. This part firstly considered briefly the WTO and detection issues Australian-based extraterritorial supply chain regulation would confront.

This part then focused upon the critical problem of enforcement. The problems Australia would have in enforcing domestic legislation extraterritorially can be evinced by the problems USA courts had with passing judgments over actions in foreign States under the *Alien Tort Statute*. Ultimately, these problems resulted in the United States Supreme Court drastically reading down the scope of the *Alien Tort Statute*. It is likely that Australia would encounter many of the same problems if it attempted to introduce international supply chain regulation. While Australia has the ability to enforce laws against its own citizens, incorporated entities in Australia or natural or legal entities which are within Australia's territorial jurisdiction, if the actual labour conditions are occurring in a foreign State, then Australia would face justicibility problems. Australian courts are unable to pass judgment on the conduct of foreign States. As many alleged sweatshops are run or condoned by foreign States, then all of these factories would be non-justiciable. The problems Australia would face in enforcing Australian supply chain regulations against Australian defendants are insignificant compared to the problems Australia would face in attempting to enforce laws against non-Australian defendants. Pursuant to international law, Australia would likely be found to have no jurisdiction against all

foreign sweatshops and any Australian-based regulations would be entirely unenforceable. This chapter argues that Australian-based unilateral regulation of international supply chains would have limited legal enforceability and consequently, such regulations would be unlikely to improve the safety of foreign workers in Australian-based supply chains. As a consequence this chapter argues that Australia should seek alternative regulatory vehicles to protect workers' right to safety and health who are working in China for Australian based supply chains.

CHAPTER 9

9 Can public international vehicles improve employees' health and safety in Australian-based supply chains?

9.1 Introduction

Chapters 3 and 4 demonstrated that employees working in Australian-based supply chains are working in unsafe working conditions. According to chapter 2.4.4, Australia has a moral duty to take reasonably practicable steps to ensure corporations subject to Australia's jurisdiction comply with the complicity principle. Chapters 6 and 7 analysed the problems with unregulated market-driven CSR. In order to address these limitations, chapter 8 explored if Australia could introduce laws to directly regulate labour conditions in supply chains. The first part of chapter 8 demonstrated that Australia could expand existing supply chain regulation in Australia to protect employees in Australia working in Australian-based supply chains. The second part of chapter 8 demonstrated, however, that Australia could not enforce extraterritorial supply chain regulation over Chinese factories. As a result, this chapter will explore if Australia can utilize international public law vehicles to ensure the safety at work of workers working in the People's Republic of China (**China**) for Australian- based supply chains.

This chapter is divided into three parts. The first part of this chapter will analyse the United Nations Global Compact (**UNGC**). Chapter 1.5.3 introduced the UNGC and explained this agency had the considerable support of the UN General Assembly. This part will analyse how effective the UNGC is at addressing the problems with voluntary corporate social responsibility (**CSR**) which was analysed in chapters 4, 5 and 6. Firstly, this part will discuss how the UNGC has attempted to create the most widely adopted CSR scheme in the world. Despite this scheme having the considerable support of the UN General Assembly, currently this scheme does not have extensive coverage in either Australia or China. Secondly, this part will analyse concerns raised about the UNGC's approach of identifying ten overarching standards rather than providing extensive detail on how these standards are to be met. This

part will demonstrate that the UNGC's ten principles are not stand-alone principles. These principles draw from a wider body of international conventions and human rights instruments to distil the obligations of corporations into ten principles. Therefore, there is a mass of legal material which can be drawn when interpreting what is required to discharge these ten principles. This part then considers the assurance problems with the UNGC. The UNGC has not purported to be a certification scheme. As a consequence, the UNGC has not focused upon auditing participants which has arguably resulted in substantial assurance problems. The UNGC does not perform audits of factories nor does it pass judgment upon the accuracy of corporations' communications on progress. The introduction of a complaints procedure has enabled the UNGC to improve the level of corporate accountability, nevertheless substantial problems remain with the UNGC's approach to assurance. This part finally analyses what steps Australia could take to improve the UNGC.

The second part of this chapter will analyse how Australia, China and the International Labor Organization (**ILO**) could work together to improve labour conditions for Chinese-based employees working in Australian-based supply chains. This part will analyse how the ILO is working with USA and Cambodia to ensure the safety of Cambodian-based employees working for USA- based supply chains. The ILO's Better Factories Project involved the ILO participating directly in monitoring reporting on Cambodian factories' compliance with Cambodian labour laws and ILO standards. On the basis China does not agree to permit the ILO to inspect Chinese factories, the third part analyses how the successful implementation of the Chinese government-supported China Social Compliance for the Textile and Apparel Industry (**CSC9000T**) scheme may be linked to a free trade agreement.

The CSC9000T scheme was developed with the support of the Chinese government to audit Chinese factories' compliance with prescribed CSR standards. These standards reflect Chinese laws and ILO standards. When CSC9000T is fully implemented, then this scheme will have blanket coverage over the Chinese textile and apparel industry. As argued China has a poor record on enforcing its labour laws. This part will argue that CSC9000T affords a vehicle which may result in

higher levels of labour law enforcement and that Australia should work with China to develop this project.

9.2 Can Australia rely upon the United Nations Global Compact to improve the safety of workers in exterritorial supply chains?

9.2.1 Does the UNGC have sufficient coverage to constitute a viable regulatory vehicle?

Chapter 6 argued that voluntary CSR did not have sufficient coverage for States to rely upon this vehicle as a soft law vehicle to discharging their human rights obligations. The largest problem with non-regulated market driven CSR is that thousands of corporations are able to avoid their human rights' obligations under the complicity principle. This part will analyse whether the UNGC is able to provide sufficient coverage to enable States to rely upon this vehicle to discharge their human rights' obligations.

The UNGC is 'the world's largest voluntary corporate citizenship initiative'.[1495] As a consequence, the UNGC is not a 'prescriptive or conduct- regulating' scheme.[1496] The UNGC relies upon CSR and corporate citizenship to motivate corporations to become signatories to the ten principles.[1497] As explained in chapter 2.4.3 the UNGC has advanced the complicity principle and has exhorted corporations to take reasonably practicable steps to ensure human rights are not violated within their spheres of influence. Once a corporation joins the UNGC, it implicitly supports the role as a corporate citizen and rejects the profit maximisation focus of corporations.[1498]

[1495] United Nations Global Compact, *After the Signature: Your Guide to Engagement in the United Nations Global Compact* (2007) 5; See also Meaghan Shaughnessy, 'Human Rights and the Environment: the United Nations Global Compact and the Continuing Debate about the Effectiveness of Corporate Voluntary Codes of Conduct' (2000) *Colorado Journal of International Environmental Law and Policy Yearbook* 159, 162 which argues there is a trend towards voluntary codes.

[1496] Evaristus Oshionebo, 'The U.N. Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities' (2007) 19 *Florida Journal of International Law* 1, 16.

[1497] United Nations Global Compact, *Annual Review 2006* (2007); See for example: United Nations Global Compact, *After the Signature: Your guide toEngagement in the Global Compact* (2007).

[1498] Maureen A. Kilgour, 'The UNGC and Substantive Equality for Women: Revealing a "Well-hidden" Mandate' (2007) 28 *Third World Quarterly* 4, 751.

To motivate corporations to discharge their obligations under the complicity principle, the UNGC provides a platform to enable corporations to discharge their obligations. The UNGC focuses industry-wide concepts of facilitating 'cooperation, learning and collective problem solving among a full cast of stakeholders' and micro-corporation level concepts of internalizing the UNGC's principles into corporate strategies and daily conduct.[1499] To achieve these macro and micro objectives, the UNGC provides a platform for corporate education, exchange of ideas and distribution of CSR best governance practices.[1500] The UNGC primarily exists to encourage corporations to comply with their obligations and does not punish corporations who do not become involved with the scheme.

Similar to the CSR movement generally as discussed in chapter 6, to operate effectively as a deterrent, the UNGC must obtain a critical mass of participants. The task of obtaining even a representative sample of all corporations in the world is daunting. Ruggie has observed there are over 77 000 transnational corporations across the world with over 770 000 subsidiaries and then millions of suppliers.[1501] Even individual corporations have thousands of suppliers. For example, Wal-Mart has more than 60 000 suppliers.[1502] While the challenge of implementing a world wide CSR scheme is a monumental undertaking, this chapter is not examining whether the UNGC has made considerable achievements to improve CSR across the globe.[1503] This chapter is analysing whether the UNGC has managed to obtain sufficient coverage to constitute a vehicle through which States can discharge their human rights' obligations as explained in chapter 2.4.4 of this thesis.

[1499] Andreas Rasche, *"A Necessary Supplement" - What the United Nations Global Compact Is and Is Not* (Helmut-Schmidt-University, University of the Federal Armed Forces, Report, 2008) 5, 6.

[1500] For an example of case studies of how to implement the UNGC's 10 principles see: United Nations Global Compact and the UN High Commission for Human Rights, *Integrating Human Rights into Business Practice* (2008), for 20 case studies; United Nations Global Compact, *Human Rights and Labour - A Guide for Implementing Human Rights into Business Management*' (2006), for 10 case studies; United Nations Global Compact And the Danish Ministry of Foreign Affairs, *Implementing the Global Compact – A Booklet for Inspiration* (2005), for examples of how Danish corporations are adopting the 10 principles; United Nations Global Compact, *Embedding Human Rights in Business Practice* (2004), for 4 case studies; See generally: Georg Kell and David Levin, 'The Global Compact Network: an Historic Experiment in Learning and Action' (2003) 108 *Business & Society Review* 151.

[1501] John Ruggie, 'Business and Human Rights: the Evolving International Agenda' (2007) 101 *American Journal of International Law* 819, 823.

[1502] Ibid.

[1503] Based upon the UNGC's most recent annual review, it appears the movement is making considerable improvements in corporate behaviour: United Nations Global Ccompact, *Annual Review 2006* (2007).

Deva has argued the limited coverage of the UNGC remains a substantial limitation to the effective operation of this agency.[1504] Thus far the UNGC has not managed to ensure a substantial number of participants in Australia or China. There are only 21 active UNGC Business Participants in Australia, compared with 137 in China.[1505] In terms of percentages of the overall coverage in terms of participants, 17 per cent of participants come from Asia and 0.72 per cent comes from Australasia.[1506] Chapter 7.3 explained that one of the main methods that CSR activists use of forcing compliance in supply chains is to focus upon retailers. In terms of general retail only one Australian retailer is a participant to the UNGC and four Chinese retailers are participants.[1507]

Global Renewables is the only Australian retailer UNGC participant. Global Renewables is a development company which has assembled the world's leading technologies to maximise the recovery of resources from the municipal solid waste stream. [1508] While Australia has no active participant involved in the clothing or textile industry one of the largest suppliers of Chinese clothing and textiles is a UNGC participant. The giant Li and Fung Ltd group has an active UNGC participant who has lodged their Communication On Progress on theUNGC's website.[1509] In response to the UNGC, Li and Fung Ltd have become active in trying to improve recognition of the right to collective bargaining within their supply chains in China and Turkey.[1510] To achieve this Li and Fung Ltd has performed systematic inspections and educates supply factories on the enforcement of this right. As independent trade unions are not permitted in China,[1511] Li and Fung Ltd encourage parallel means of freedom of association in the form of worker representatives and

[1504] Surya Deva, 'The UNGC for Responsible Corporate Citizenship: Is It Still Too Compact to be Global?' (2006) 2 *The Corporate Governance Law Review* 45.
[1505] United Nations Global Compact, *Participant Search*: <http://www.unglobalcompact.org/ParticipantsAndStakeholders/search_participant.html?submit_x=page> at 22 December 2008.
[1506] McKinsey & Company, *Assessing the Global Compact's Impact* (2004) UNGC, 11.
[1507]The UNGC defines the 'General Retail' industry to include retailers who sell products to customers as well as major suppliers.
[1508]Global Renewables, 'Global Compact 2007 Communication on Progress' (2007): < http://www.unglobalcompact.org/ParticipantsAndStakeholders/search_participant.html?detail=Global+Renewables&cop=5F51CF88-2B13-4DA5-AB85-0F5B380A83A3> at 10 December 2008; Global Renewables, 'About Us' < http://www.globalrenewables.com.au/about-us> at 16 December 2008.
[1509]For a discussion of the size of Li and Fung Ltd see chapter 1.3.1 of this thesis; Li and Fung Ltd, 'Communication on Progress (COP) 2007': <http://www.unglobalcompact.org/ParticipantsAndStakeholders/search_participant.html?detail=Li+and+Fung+Limited&cop=30349CA8-6205-4E07-97EC-AFC23553CE9A> at 17 December 2008.
[1510]Li and Fung Ltd, 'Case Study: Ensuring Responsibility within the Global Supply Chain': 'http://www.unglobalcompact.org/ParticipantsAndStakeholders/search_participant.html?detail=Li+and+Fung+Limited&case=e9a1c447-f700-0010-0080-d75e54f851fd' at 17 December 2008.
[1511]For a discussion of breaches of the right to collective bargain in China see above at chapter 2.3.5.1.

worker associations. While the UNGC has not encouraged Li and Fung Ltd to focus heavily upon OHS issues the UNGC has clearly encourages a major corporation to take active steps to improve the respect of labour rights. Due to the commercial power of Li and Fung Ltd potentially hundreds of factories are being pressured to comply with the UNGC. While Li and Fung Ltd's participation in the UNGC is extremely positive unfortunately most other retail suppliers in China have not been so active. As at December 2008 the three other retail participants have not lodged their Communications on Progress or provided any case study examples.[1512] Based upon the number of UNGC participants in Australia and China it is arguably that the UNGC has insufficient coverage to substantially influence labour rights in these jurisdictions. It is submitted that the lack of participants in China and Australia means Australia cannot rely upon the UNGC to discharge its human rights' obligations.

It could be argued that one of the reasons the UNGC has low participation rates in Australia is due to the fact that Australian federal and state governments have not promoted this scheme. To the date of publication, no Australian public agency has become a participant to the UNGC.[1513] Australian governments have not provided substantial encouragement for corporations to become involved with the UNGC. Therefore, one of the reasons the UNGC has insufficient coverage to constitute a viable regulatory vehicle maybe the inaction by States to promote this scheme. Interestingly, even though China has struggled to enforce its domestic labour laws,[1514] China has demonstrated it is willing to be involved in soft law through the UNGC. Rather than disregard a CSR vehicle which has the support of the UN General Assembly, Australian public agencies should become participants to the UNGC and should encourage corporations to follow the government's lead. This chapter will continue to analyse the UNGC, on the basis regulatory vehicles can be

[1512] United Nations Global Compact, 'Communincation On Progress – Catic Shenzen Company': <http://www.unglobalcompact.org/ParticipantsAndStakeholders/search_participant.html?detail=Catic+Shenzen+Company> at 15 December 2008; United Nations Global Compact, 'Communincation On Progress – CIIC - CN Intl. Industry and Commerce Co., Ltd': <http://www.unglobalcompact.org/ParticipantsAndStakeholders/search_participant.html?detail=CIIC+-+CN+Intl.+Industry+and+Commerce+Co.%2C+Ltd> at 15 December 2008; United Nations Global Compact, 'Communincation On Progress – Ji Si Guang Yi - Beijing Culture Communication Co., Ltd': <http://www.unglobalcompact.org/ParticipantsAndStakeholders/search_participant.ht> at 15 December 2008.

[1513] United Nations Global Compact, *Participant Search*: <http://www.unglobalcompact.org/ParticipantsAndStakeholders/search_participant.html?submit_x=page> at 22 December 2008.

[1514] In particular, see above 4.5,discussing research on Chinese Special Economic Zones.

identified which would ensure this scheme develops sufficient coverage to be a viable regulatory vehicle for Australia to discharge its human rights' obligations.

9.2.2 UNGC's ten principles: Do they provide adequate guidance?

Chapter 7 argued that the failure to reach international consensus upon CSR standards and problems with invalid social auditing are substantially undermining the accountability of CSR reporting. These are substantial limitations which the UNGC should address if this scheme is to constitute a viable regulatory vehicle. The UNGC has faced criticism on both of the issues identified in chapter 7. This part will analyse these criticisms and assess the strength of the criticism.

As briefly mentioned in chapter 1.5.3 the UNGC promotes ten principles. These principles are:

HUMAN RIGHTS *Principle 1*	*Businesses should support and respect the protection of internationally proclaimed human rights; and*
Principle 2	*Businesses should make sure that they are not complicit in human rights' abuses.*
LABOUR *Principle 3*	*Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;*
Principle 4	*Businesses should uphold the elimination of all forms of forced and compulsory labour*
Principle 5	*Businesses should uphold the effective abolition of child labour*
Principle 6	*Businesses should uphold the elimination of discrimination in respect of employment and occupation*
ENVIRONMENT *Principle 7*	*Businesses should support a precautionary approach to*

	environmental challenges.
Principle 8	*Businesses should undertake initiatives to promote greater environmental*
Principle 9	*Businesses should encourage the development and diffusion of environmentally friendly technologies*
ANTI-CORRUPTION *Principle 10*	*Businesses should work against corruption in all its forms, including extortion and bribery.*

These ten broad principles distil down a large number of human rights' instruments and conventions into ten principles. Instead of voluminous detail defining precisely what these concepts require, the UNGC has elected for ten broad principles. The UNGC principles have substantially less detail than the ILO tripartite declaration, the UN Sub-Commission on Human Rights Code, the OECD guidelines or the UDHR, ICCPR or *ICESCR*. Murphy has labelled the UNGC's approach as a minimalist approach to defining standards.[1515] Deva and Nolan have argued the failure to define the ten principles in detail provides considerable scope for unethical business to avoid genuine compliance with the principles.[1516]

Arguably the reason the UNGC's ten principles do not provide extensive detail is because the focus of this scheme is not on providing detailed standards. The UNGC provides a platform to assist corporations to act ethically. Rasche observes that the UNGC's ten principles 'are not meant to be a benchmark against which to assess compliance'.[1517] The flexible nature of the ten principles enables corporations to find innovative vehicles to discharge the complicity principle.

This flexible approach has resulted in some positive outcomes.[1518] For example, Tavis provided a case study which demonstrated how the UNGC's flexible approach

[1515] Sean D. Murphy, 'Essay in Honor of Oscar Schachter: Taking Multinational Corporate Codes of Conduct to the Next Level' (2005) 43 *Columbia Journal of Transnational Law* 389, 425.
[1516] Surya Deva, 'Global Compact: a Critique of the U.N.'s "Public-Private" Partnership for Promoting Corporate Citizenship' (2006) 34 *Syracuse Journal of International Law and Commerce* 107, 129; Justine Nolan, 'The United Nations Global Compact with Business: Hindering or Helping the Protection of Human Rights?' (2005) 24 *University of Queensland Law Journal* 445, 460.
[1517] Andreas Rasche, "*A Necessary Supplement" - What the United Nations Global Compact Is and Is Not* (Helmut-Schmidt-University, University of the Federal Armed Forces, Report, 2008) 16.
[1518] Linda Hancock, 'The Advantages of a Proactive Business Response to Human Rights Reporting' (2006) 2 *The Journal of Corporate Citizenship* 23, 21-24.

had encouraged one of the largest pharmaceutical companies in the world to develop innovative approaches to discharging their obligations, which has resulted in substantial social benefits.[1519] The fact that the flexibility of the purpose of the UNGC is not to act as a bench mark and the ten principles have resulted in positive outcomes does not, however, answer the criticisms that the UNGC provides insufficient detailed standards to detect unethical corporations.

While the ten principles are not specific, the UNGC acknowledges this and facilitates access to detailed standards. Rather than attempting to provide detailed industry standards for every issue, the UNGC partners with expert agencies:

> [The UNGC has] complementary partnerships with a broad range of organizations, notably the International Organization for Standardization … and the Global Reporting Initiative … [The UNGC] continues to pursue a strategy of convergence, so that the initiative and its principles can indeed evolve into the world's most important reference point for corporate responsibility.[1520]

To achieve their objective, the UNGC has commenced publishing guidelines to explain how corporations can discharge their obligations under the UNGC's ten broad principles and under schemes with substantially more detailed standards. The UNGC has already released joint guidelines with the Global Reporting Index and further guidelines are expected to follow.[1521]

Where the UNGC does not have a partnership arrangement with a scheme, the UNGC adopts other means to encourage corporations to join schemes with more stringent standards. The main motivator the UNGC has at its disposal is publicizing details on corporate conduct. The UNGC has encouraged corporations to become involved with schemes which provide detailed supply chain standards such as SA8000. One example of where the UNGC has encouraged corporations to adopt SA8000 was in the UNGC's Annual Review. In this report, the UNGC made

[1519] Lee A. Tavis, 'Novartis and the U.N. Global Compact Initiative' (2003) 36 *Vanderbilt Journal of Transnational Law* 735, 754.
[1520] United Nations Global Ccompact, *Annual Review 2006* (2007) 17.
[1521] United Nations Global Compact and Global Reporting Index, *Making the Connection – Global Compact and GRI G3* (2006).

particular reference to Tata Steel's adoption of the SA8000 and praised the corporation's ethical approach to business generally.[1522]

Under the approach of linking the ten principles with other schemes, the UNGC will provide the overarching ten principles and facilitate corporations to join schemes with more detailed standards under each principle. Providing corporations comply with the UNGC's guidance, then the UNGC can facilitate a centralized point for CSR standards. Therefore, rather than providing insufficiently detailed standards, the UNGC actually provides a platform for the identification of extremely detailed standards for ethical corporate conduct.

Criticism such as Deva's and Nolan's that the UNGC standards are too vague and are enabling unethical corporations to avoid compliance has not been addressed by the UNGC.[1523] The UNGC does not provide binding standards currently as this is not the focus of the scheme. It is foreseeable that the UNGC will develop to provide further details on standards through directly positing standards or requiring compliance with external standards such as SA8000 or ISO26000. Presuming the UNGC does provide more detailed standards, does the UNGC provide sufficient assurance measures to ensure participants' claims of compliance can be relied upon?

9.2.3 Are there assurance problems with the UNGC?

Chapter 7 of this thesis analysed the assurance problems with market driven unregulated CSR. The UNGC confronts the similar assurance problems as market driven CSR. Arguably the UNGC must provide adequate assurance measures to ensure corporations do not simply claim to act ethically and then continue to breach human rights. Without such assurance States such as Australia cannot rely upon the UNGC to discharge their human rights obligations.

[1522] United Nations Global Compact, *Annual Review 2006* (2007) 132.
[1523] Surya Deva, 'Global Compact: a Critique of the U.N.'s "Public-Private" Partnership for Promoting Corporate Citizenship' (2006) 34 *Syracuse Journal of International Law and Commerce* 107, 129; Justine Nolan, 'The United Nations Global Compact with Business: Hindering or Helping the Protection of Human Rights?' (2005) 24 *University of Queensland Law Journal* 445, 460.

When a corporation signs up to the UNGC, the corporation must have written support from the corporation's chief officers, for example, the chief executive officer or board of directors,[1524] and the UNGC Principles must form an integral part of the corporation's strategy and operational approach.[1525] This requires the corporation to develop measurable targets and a transparent method of communication of the meeting of those targets, communication of the standards and operational targets to all members of the corporation and parties within the corporation's sphere of influence and the development of a business environment favourable to achieving the ten principles.[1526]

The UNGC's Integrity Measures involve participating corporations submitting an annual Communications on Progress to their stakeholders.[1527] To facilitate the communication to the corporations' stakeholders, the UNGC requires participating corporations to submit a copy of the Communication on Progress to the UNGC office. The UNGC office then makes these Communications on Progress available on the UNGC's website.

The annual Communication on Progress must first include a statement from the board or chief executive officer of the corporation, stating their continuing support for the UN Global Compact.[1528] The Communication on Progress must then provide a description of how the corporation has implemented the ten principles. This description must include quantitative results on the actions the corporation has taken and what outcomes they have achieved. Corporations can utilize external reporting schemes here such as the Global Reporting Index or SA8000 to demonstrate their compliance with the ten principles.

The UNGC does not provide certification of the accuracy of corporations' annual Communications on Progress. The UNGC does adopt a form of assurance, but this is not a formal auditing or certification process. The UNGC does not inspect factories or records. Rasche has noted:

[1524] United Nations Global Ccompact, *Annual Review 2006* (2007) 11.
[1525] United Nations Global Compact, *After the Signature: Your Guide to Engagement in the United Nations Global Compact* (2007) 7-12.
[1526] Ibid.
[1527] Ibid 13-16.
[1528] Ibid.

> From its inception, the [UNGC] … was never designed as a seal of approval for participating companies since this would require an enormous amount of resources that are currently not available. The Compact expects proactive behaviour from its participants and is thus not about regulation and compliance.[1529]

Rather than relying upon formal auditing, the UNGC forces corporations to disclose publicly information about their socially responsible progress. The formalized public disclosure is intended to pressure corporations to be honest. Many annual Communications on Progress have been sub-standard. In 2004, the UNGC started the Notable Communications on Progress Program to recognize annual Communications on Progress which appeared comprehensive and valid.[1530] Communications on Progress would be regarded as falling into this category where they had '[i]nformation and processes used in the preparation of [the report was] … externally assured by peer review, stakeholder audits/consultations … [or] in-depth third- party assurance based on standards'.[1531] It is submitted that if the UNGC regards Communications on Progress which have been externally audited to some extent as 'notable', this suggests that many Communications on Progress have not been subjected to valid auditing procedures.

The integrity assurance approach adopted by the UNGC has drawn substantial criticism.[1532] In particular, Bigge,[1533] Deva,[1534] Elson,[1535] Hughes and Wilkinson,[1536]

[1529] Andreas Rasche, "*A Necessary Supplement" - What the United Nations Global Compact Is and Is Not* (Helmut-Schmidt-University, University of the Federal Armed Forces, Report, 2008) 18, 19.
[1530] United Nations Global Compact, *Notable COP Program* (2004).
[1531] Ibid.
[1532] Isabella D. Bunn, 'Global Advocacy for Corporate Accountability: Transatlantic Perspectives from the NGO Community' (2004) 19*American University International Law Review* 1265, 1285; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (2006) 225; T Hemphill, 'The United Nations Global Compact: the Business Implementation and Accountability Challenge' (2005) 1 *International Journal of Business Governance and Ethics* 3; Petersmann Ernst-Ulrich, 'Time for a United Nations " Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations : Lessons from European Integration' (2002) 13 *European Journal of International Law* 3, 621; Mark D. Kielsgard, 'Unocal and the Demise of Corporate Neutrality' (2005) 36 *California Western International Law Journal* 185, 201; Marisa Anne Pagnattaro and Ellen R. Peirce, 'Between a Rock and a Hard Place: the Conflict between U.S. Corporate Codes of Conduct and European Privacy and Work Laws' (2007) 28 *Berkeley Journal of Employment and Labor Law* 375, 391; Oliver F. Williams, 'The UNGC: the Challenge and the Promise' (2004) 14 *Business Ethics Quarterly* 4, 755.
[1533] David Bigge, 'Bring on the Bluewash: a Social Constructivist Argument Against Using *Nike v. Kasky* to Attack the UNGC' (2004) 14 *International Legal Perspectives* 6, 12.
[1534] Surya Deva, 'Global Compact: a Critique of the U.N.'s "Public-Private" Partnership for Promoting Corporate Citizenship' (2006) 34 *Syracuse Journal of International Law and Commerce* 107, 146.
[1535] Diane Elson, 'Human Rights and Corporate Profits: the UNGC – Part of the Solution or Part of the Problem?' in Lourdes Benería and Savitri Bisnath (eds), *Global Tensions: Challenges and Opportunities in the World Economy* (2003) 45-64, 60.
[1536] S Hughes and R Wilkinson, 'The Global Compact: Promoting Corporate Responsibility?' (2001) 10 *Environmental Politics* 1, 155, 157.

Nolan[1537] and Thérien and Pouliot [1538] have criticized the lack of assurance of annual communications of progress from corporations. These authors claim that if corporations are not held accountable, then their involvement with the UNGC may only constitute a public relations exercise. The process where corporations participate in the UNGC without improving their human rights' compliance has been labelled as bluewashing.[1539] The term 'bluewashing' has been adopted as corporations utilize the positive image of the UN to mislead the market about the corporation's actual practices.[1540] The problem bluewashing is arguably similar to the concerns raised in chapter 7 of this thesis that corporations claim to act ethically but in fact fail to convert their public relations representations into conduct. If the UNGC is to constitute a viable regulatory vehicle for Australia to discharge its duties under chapter 2.4.4 it is submitted that the problem of Bluewashing must be addressed.

The UNGC has responded to the substantial criticism surrounding Bluewashing and introduced additional integrity measures. One of the main integrity measures the UNGC has introduced is a complaints mechanism which enables complaints to be lodged about UNGC participants.[1541] Once a complainant lodges a complaint about a participant, the UNGC office reviews the complaint to ensure it is not frivolous or vexatious.[1542] Providing the complaint surmounts these threshold criteria, the UNGC forwards the complaint to the participant corporation. The corporation must then respond to the complainant directly and provide a copy of the response to the UNGC. The UNGC does not pass judgment over the participant's response. As Oshionebo observes, this complaints procedure is not judgmental or punitive:

[1537] Justine Nolan, 'The United Nations Global Compact with Business: Hindering or Helping the Protection of Human Rights?' (2005) 24 *University of Queensland Law Journal* 445, 462.

[1538] Jean-Philippe Thérien and Vincent Pouliot, 'Shifting the Politics of International Development' (2006) 12 *Global Governance* 55, 67.

[1539] Corporate Watch, *Tangled up in Blue* (Report, 2000); Sean D. Murphy, 'Essay in Honor of Oscar Schachter: Taking Multinational Corporate Codes of Conduct to the Next Level' (2005) *43 Columbia Journal of Transnational Law* 389, 413; Trine Nielsen, 'Global Compact –Regulation of a Global Governance Network' (Working Paper No. 2, Center For Democratic Network Governance, Roskilde University, 2007); Alexis M. Taylor, 'UN Reports: the UN and the Global Compact' (2001) 17 *New York Law School Journal of Human Rights* 975, 981.

[1540] The colour blue is used as the UN often adopts blue as its colour: for example UN Peace Keepers wear blue helmets.

[1541] United Nations Global Compact, *Note on Integrity Measures*: <http://www.unglobalcompact.com/docs/aboutthe gc/2.3/im 290605.pd f> at 21 December 2008.

[1542] Ibid 3.

> The complaint mechanism is essentially meant to facilitate mutual resolution of problems rather than to compel compliance.[1543]

If, however, the participant does not respond within three months to the complaint or if the UNGC determines the continuing listing of the participant may damage the UNGC's reputation and integrity, then the UNGC has the power to 'remove' the participant's active listing status and indicate this on the UNGC's website.[1544] This complaints procedure is aimed at reducing the instance of bluewashing and facilitating compliance. The validity of this complaints procedure, however, relies upon third parties to perform unremunerated audits upon participants' Communications on Progress and lodge complaints if discretion is detected. As chapter 7.3.2 of this thesis states, relying upon NGOs and other members of civil society to fund and perform unauthorized social audits is not a viable vehicle to audit large numbers of factories. This chapter submitted that even with the corporations' permission, these audits are difficult to perform.

It appears the UNGC has a substantial number of participants who are not even providing Communications On progress reports. As of November 2008 internationally the UNGC had 4, 869 Business participants and 1, 544 Non-business participants but has only received 4, 621 Communication On Progress reports.[1545] This means approximately 72% of participants are only partially complying with their UNGC obligations. As a consequence of non-compliance the UNGC has delisted 783 participants.[1546] On this basis, it could be argued that the UNGC in its current form cannot provide a reasonable degree of assurance that participants are not bluewashing.

9.2.4 Are there steps Australia could take to improve the operation of the UNGC?

[1543] Evaristus Oshionebo, 'The U.N. Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities' (2007) 19 *Florida Journal of International Law* 1, 22.
[1544] United Nations Global Compact, *Note on Integrity Measures*: <http://www.unglobalcompact.com/docs/aboutthegc/2.3/im 290605.pd f> at 21 December 2008, 4.
[1545] United Nations Global Compact, 'Participant Status: New Signatories, COPs and Delistings' (2008) 12 UN *Global Compact Bulletin*, 8.
[1546] Ibid.

This part has considered how effective the UNGC is at regulating the conduct of corporations. The UNGC is a multinational instrument and therefore beyond Australia's jurisdiction to alter directly. This part identified there were two continuing concerns with the existing UNGC: coverage and assurance. Australia could work within the framework of the UNGC to increase the coverage of this instrument in Australia. One direct step Australia could adopt would be to alter the reporting requirements for public corporations as discussed in chapter 5.3 of this thesis, to require all corporations in Australia to release CSR reports to accompany their annual reports. If Australia adopted this approach, it would avoid the problem identified in chapter 6.3.4 where the largest discount retailer in Australia was not required to produce a CSR report as it was not publicly listed. The viability of this option to increase the coverage of the UNGC would depend upon two variables. First, the regulatory intervention must require corporations to communicate on how they have discharged the complicity principle, and secondly, the UNGC must attract increased corporate participants.

How could Australia require corporations to communicate on how they have discharged the complicity principle? As described in chapter 5.3, Australia provides some guidelines to publicly listed corporations. Rather than producing further Australian-based guidelines, where possible it is argued that Australia could require corporations to comply with recognized international schemes. While some commercial schemes such as SA8000 may have certification and more rigorous reporting than the UNGC, it would be extremely unusual for an Australian law to force Australian corporations to become customers of a foreign commercial enterprise.[1547] Australian laws could, however, require corporations to participate in the UNGC. The UNGC is an agency owned and controlled by the UN. The UN is a State-based organization of which Australia is a member.[1548] If Australia was not prepared to adopt such sweeping changes, Australia could take steps to encourage the development of the UNGC in Australia. One step Australia could take is to sign up to the UNGC itself.

[1547] Chapter 7.3.2 explained that SA8000 was a commercial operation.
[1548] *Charter of the United Nations Act 1945* (Cth).

Under the UNGC, individual cities can sign up to the scheme. To date 29 cities across the world are participants to the UNGC.[1549] To date, no Australian city or public agency has active status on the UNGC.[1550] In comparison, China also has no public agencies which are participants, however, it has one city which is a participant: Jinan.[1551]

Another option Australia could consider utilizing is using government procurement power to require corporations to maintain ethical supply chains both domestically and internationally. Currently, Australian government procurement supports sustainable and ethical purchasing, however the focus is upon ethical conduct within Australia and not international supply chains.[1552] As discussed in chapter 2.4.4, a number of USA jurisdictions utilize their government procurement power to ensure ethical international supply chains. Australia could adopt similar measures to increase the coverage of the UNGC in Australia.

Even if Australia increased the coverage of the UNGC in Australia, this could arguably not improve the quality of the annual Communications on Progress. Chapter 7 of this thesis demonstrated that many social audits are invalid and are providing distorting results to the market. The UNGC is continuing to work to remedy these problems, but obtaining international consensus on such issues is difficult. Australia should continue to work with the UNGC to increase the quality of the annual Communications on Progress. If Australia was a major participant in the UNGC, then Australia would be in a stronger position to influence this institution's development. While the fact this institution is soft law, if no hard law alternative can be developed, a strong soft law alternative should be adopted.[1553] The UNGC is a dynamic and evolving institution which is finding new methods of using CSR to regulate supply chains.[1554] Based upon the size, dynamic nature and potential of the UNGC it is argued that Australia should drastically increased its

[1549] United Nations Global Compact, *Participant Search*: <http://www.unglobalcompact.org/ParticipantsAndStakeholders/search_participant.html?submit_x=page> at 22 December 2008.
[1550] Ibid.
[1551] Ibid.
[1552] For example, see Cl 3.5 of the *Queensland State Procurement Policy: Operations*: < http://www.hotmail.com/> at 21 December 2008.
[1553] Andrew Kuper, 'Redistributing Responsibilities: the UNGC with Corporations' in Andreas Follesdal and Thomas Pogge (eds), *Real World Justice: Grounds, Principles, Human Rights and Social Institutions* (2005) 359-380.
[1554] Georg Kell, 'The Global Compact: Selected Experiences and Reflections' *(2005)* 59 *Journal of Business Ethics* 69, 78.

participation in the UNGC. While the UNGC by itself arguably has insufficient coverage and assurance for Australia to discharge its duties as discussed in chapter 2.4.4 by relying upon this institution, the fact the UNGC is the world's most significant CSR movement, is continuing to improve its coverage and assurance and is regulated by the UN provide strong grounds for Australia's active involvement.

9.3 How could Australia, China and the ILO work together to improve the safety of work of Chinese-based employees in Australian-based supply chains?

This thesis is analysing what reasonably practicable steps Australia should take to ensure workers' right to safety and health. This part analyses how Australia could work with the largest and oldest international agency focusing upon labour rights. Australia supports the ILO through being a member State and has a history of participating with the ILO. This part will ask whether there are additional reasonable practicable steps Australia could take to work with the ILO to improve the workers' safety and health.

Chapter 1.5.2 of this thesis explained that the International Labor Organization is the paramount body charged with monitoring international labour conditions. While the ILO can set standards, draft conventions and write reports, the ILO has no substantive power to directly enforce labour standards in States.[1555] The ILO can use its enforcement powers to sanction a State, however these sanctions have had little effect. Jonassen observes that the ILO has only used its enforcement procedures once and that was in 2000 against Burma for government-sponsored slavery, murder, torture and rape and these sanctions did not reduce the abuse.[1556] The ILO has not utilized its punitive sanctions for standard labour abuses such as those identified in reasonably practicable . Rather than imposing punitive sanctions, the ILO is emerging as a critical player in identifying State-wide monitoring programs. Where

[1555] Maryke Dessing, *The Social Cl and Sustainable Development* (2001) 15-27; Francis Maupain, 'Is the ILO Effective in Upholding Labour Rights? Reflections on the *Myanmar* Case' in Philip Alston (ed), *Labour Rights as Human Rights* (2005), ch 4.
[1556] Frederick B. Jonassen, 'A Baby-Step to Global Labor Reform: Corporate Codes of Conduct and the Child' (2008) 17 *Minnesota Journal of International Law* 7, 15; Francis Maupain 'Is the ILO Effective in Upholding Labour Rights?: Reflections on the *Myanmar* Case' in Philip Alston (ed), *Labour rights as human rights* (2005) ch 4.

the UNGC has created a global institution which has low numbers and does not audit factories, the ILO has become involved in a programme which focuses upon helping a small number of States. Where the UNGC is world-wide and non-binding, the ILO has started a Better Factories Project which has the support of the host State. Where the UNGC has focused on improving the effectiveness of CSR, the ILO has focused upon increasing the effectiveness of public law vehicles. Chapters 3 and 4 analysed the legal duties and enforcement of those duties by States. The ILO Better Factories project focuses upon increasing the enforcement of the duties established by host jurisdictions.

9.3.1 Could Australia use a modified ILO Better Factories Project to improve the safety of workers in extraterritorial supply chains?

The Genesis of the ILO's Better Factory Program started with a free trade agreement between the USA and Cambodia. It is submitted that the *United States-Cambodia Bilateral Textile Trade Agreement* is especially relevant for this thesis as this agreement specifically targeted garment manufacturing in international supply chains.[1557] The USA and Cambodia initially reached an agreement on linking labour rights to trade and requested the ILO to conduct the labour supervision. After consulting with the States, factories and trade unions, the ILO agreed to monitor labour conditions in Cambodian factories producing textile and apparel.[1558] The Cambodian industry stood to make substantial profits if the ILO found their factories labour conditions were compliant with prescribed standards. If a majority of Cambodian factories complied with the relevant labour standards, then the USA agreed to provide substantial trade benefits which would result in Cambodian exports increasing.

[1557] USA, *Ministry of Commerce Agreement Relating to Trade in Cotton, Wool, Man-made Fiber, Non-Cotton Vegetable Fiber and Silk Blend Textiles and Textile Products Between the Royal Government of Cambodia and the United States of America* (came into force on 1 January 1999); *US- Cambodia Textile Agreement*'.
[1558] Lejo Sibbel and Petra Borrmann, 'Linking Trade with Labor Rights: The ILO Better Factories Cambodia Project' (2007) 24 *Arizona Journal of International and Comparative Law* 235, 237.

Kolben has analysed in detail how *The United States-Cambodia Bilateral Textile Trade Agreement has* operated.[1559] He examined how the *United States-Cambodia Textile Agreement* achieved its objects of bringing Cambodian textile manufacturers into compliance with international labour rights and with the Cambodian labour laws. Prior to the *United States-Cambodia Textile Agreement*, Cambodia had 'pervasive violations of health and safety standards embodied in the Cambodian Labour Code, including inadequate toilet facilities, inadequate medical care and poor ventilation in factories'.[1560] Kolbern observed that in 1999, over 24 workers passed out at work in one and were taken to hospital. The workers were exposed to toxic fumes due to poor ventilation. Under *The United States-Cambodia Bilateral Textile Trade Agreement*, the ILO was charged with regulating various labour rights and standards including OHS.[1561] In addition to monitoring factories and providing reports, the ILO worked with local trade unions, employees, factories and Cambodian officials to train and increase all parties to recognize and enforce labour rights.

Based upon Kolbern's findings the agreement has significantly increased the observance of labour rights in Cambodia.[1562] Kolbern concludes

> that combining trade strategies with ILO monitoring is a positive development in the effort to improve factory working conditions worldwide. Accordingly, the ILO ought to engage in more factory level monitoring programs that are transparent and work to build independent and democratic trade unions.[1563]

Other research supports Kolbern's positive opinion of the ILO's inspections in Cambodia.[1564] The ILO's Better Factories Project teams inspect factories three months after they sign up to the project. After providing a report to the factory, six months later Better Factories inspectors re-audit the factory and make both reports

[1559] Kevin Kolben, 'Trade, Monitoring, and the ILO: Working to Improve Conditions in Cambodia's Garment Factories' (2004) 7 *Yale Human Rights & Development Law Journal* 80.
[1560] Ibid 86.
[1561] Ibid 105.
[1562] Ibid 106.
[1563] Ibid 82.
[1564] Cambodia now has reportedly some of the best labour conditions in Asia: Junlin Ho, 'The International Labour Organization's Role in Nationalizing the International Movement to Abolish Child Labor' (2006) 7 *Chicago Journal of International Law* 337, 348.

publicly available in quarterly synthesis reports.[1565] Polaski, Sibbel & Borrmann reviewed the results from the publicly available factory reports and conclude that labour conditions in Cambodia are improving due to the ILO's involvement.[1566] Wells performed a similar analysis and concluded:

> Based on evidence provided in these reports from 2001 to 2005, it appears that while there is a considerable distance to go in achieving full compliance with international and Cambodian labor standards … [*The United States-Cambodia Bilateral Textile Trade Agreement*] with its ILO plant monitoring led to significant improvement in many important labor standards.[1567]

The ILO has used its Better Factories Cambodia Project as a launching platform to expand the Better Factories Program into other States.[1568] In 2009, the ILO Better Factories Project will become the Independent Better Factories Project.[1569] The Independent Better Factories Project is evolving into an inter-sectoral, collaborative programme between the ILO and the International Finance Corporation.[1570] Tripartite discussions are continuing for the Better Factories Project to monitor the apparel sectors in Jordan, Lesotho, and Vietnam.[1571] Providing the ILO can obtain the support of the host State, then the Better Factories project can provide valid reports and improve the host State's ability to enforce its own labour laws.

9.3.2 Could Australia reach an agreement with China on labour conditions using ILO oversight?

[1565] Better Factories Cambodia, Memorandum of Understanding (2005); discussed in Kevin Kolben, 'Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes' (2007) 48 *Harvard International Law Journal* 203, 239-240, 237.
[1566] Sandra Polaski, 'Combining Global and Local Forces: the Case of Labor Rights in Cambodia' (2006) 34 *World Development* 919, 924-927; Lejo Sibbel and Petra Borrmann, 'Linking Trade with Labor Rights: the ILO Better Factories Cambodia Project' (2007) 24 *Arizona Journal of International and Comparative Law* 235,242.
[1567] Don Wells,' "Best Practice" in the Regulation of International Labor Standards: Lessons of the U.S.-Cambodia Textile Agreement' (2006) 37 *Comparative Labor Law & Policy Journal* 357, 372; For Wells's analysis, see 369-373.
[1568] ILO Subcommittee on Multinational Enterprises, *Updates onCcorporate Social Responsibility (CSR)-related Activities*: <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_084530.pdf> at 15 December 2008.
[1569] Kevin Kolben, 'Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes' (2007) 48 *Harvard International Law Journal* 203, 239-240.
[1570] ILO Subcommittee on Multinational Enterprises, *Updates on Corporate Social Responsibility (CSR)-related Activities*: <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_084530.pdf> at 15 December 2008, 4, 5.
[1571] Ibid 5.

Australia currently has a trade agreement with China, the *Australia - China Trade and Economic Framework 2004*, and has signed a Memorandum of Understanding with the Chinese Ministry of Commerce on the commencement of negotiation of a free trade agreement between Australia and China.[1572] At this time, it is impossible to predict how the negotiations with China will progress. It can be observed, however, that negotiations are continuing at the time of writing.[1573] The Australian Department of Foreign Affairs has stated in its modelling the Potential Benefits of an Australia-China Free Trade Agreement publication and in the joint Australia-China Free Trade Agreement Feasibility Study 2004, that such an agreement would increase trade, in areas including manufacturing. Could Australia introduce a social clause into the pending free trade negotiations to ensure the increased flow of manufactured products which would flow to Australia under the free trade agreement are not made in sweatshops?

Australia does not have a history of linking trade and labour conditions in free trade agreements.[1574] Australia's free trade agreement program currently has four active agreements being the *Australia-United States Free Trade Agreement*,[1575] the *Thailand-Australia Free Trade Agreement,*[1576] *the Singapore-Australia Free Trade Agreement*[1577] and the *Australia-New Zealand Closer Economic Relations Trade Agreement*.[1578] Except for chapter 18 of the *AUSFTA*, none of the FTAs mentioned above include social clauses to protect workers' right to safety and health.

Chapter 18 of the *AUSFTA* has enforcement procedures that link each nation's trade benefits to its compliance with the obligation to maintain robust occupational health and safety legislation. [1579] Chapter 18 of the AUSFTA provides:

[1572] *Australia - China Trade and Economic Framework*, ATS 8 (signed on 24 October 2003).
[1573] See generally: the Department of Foreign Affairs and Trade, *Joint Australia-China Free Trade Agreement Feasibility Study* (2005); Department of Foreign Affairs and Trade, 'Trade 2006' (2006) chapter 6; updates on the negotiations at: Department of Foreign Affairs and Trade, 'Australia – China FTA negotiations updates': <http://www.fta.gov.au/default.aspx?ArtID=190 accessed 1 August 2008.
[1574] Gerard Griffin, Chris Nyland and Anne O'Rourke, 'Trade Promotion Authority and Core Labour Standards: Implications for Australia' (2004) 4 *Australian Journal of Labour Law* 2.
[1575] *Australia-United States Free Trade Agreement*, ATS 1 (came into force on 1 January 2005).
[1576] *Thailand - Australia Free Trade Agreement*, ATS 2 (came into force on 1 January 2005).
[1577] *Singapore-Australia Free Trade Agreement and associated Exchange of Notes*, ATS 1 (entered into force in July 2003).
[1578] *Australia-New Zealand Closer Economic Relations Trade Agreement, and Exchange of Letters*, ATS 2 (came into force 1 January 1983).
[1579] Gerard Griffin, Chris Nyland and Anne O'Rourke, 'Trade Promotion Authority and Core Labour Standards: Implications for Australia' (2004) 4 *Australian Journal of Labour Law* 2.

> A Party shall not fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.[1580]

Both parties' occupational health and safety standards are measured against ILO standards.[1581] The parties are further obliged to ensure the occupational health and safety legislation is enforced domestically in a manner which is fair, equitable, and transparent.[1582] Dispute resolution procedures contained in Articles 18.4 and 18.5 deal with the situation where either party breaches its obligations.

Practically, could Australia motivate China to sign a free trade agreement which involved a social clause? The relationship between Australia and China and that between USA and Cambodia is vastly different. Cambodia has approximately 10 million people, and in 2005, 71 per cent of all Cambodia's exports went to the USA.[1583] In 2005, the USA was by far Cambodia's main market for garment exports. The Australian-China relationship is vastly different. While Cambodia is a small economy and dependent upon the USA, China is the world's most populous nation[1584] and one of the largest economies in the region and could survive without Australian trade.[1585]

The USA has unsuccessfully attempted to introduce a trade and labour link with China. Stirlinp considered the movement in the USA in 1994, to link China's favoured trading partner's status with the USA to China's human rights record.[1586] While attempts were made to create such a link, China was able to resist such moves, inter alia, due to its economic power. Compared to the USA,

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[1580] Art 18.2(1)(a) of the *AUSFTA*.
[1581] Arts 18.1, 18.7 of the *AUSFTA*.
[1582] Art 18.3 of the *AUSFTA*.
[1583] Better Factories Cambodia, *Cambodian Garment Industry: One Year Later* (2006): <http://www.betterfactories.org/ILO/aboutIndustry.aspx?z=3&c=1> at 21 December 2008.
[1584] Joseph A. Petrick and Foster C. Rinefort, 'The Challenge of Managing China's Workplace health and safety' (2004) 109 *Business and Society Review* 171.
[1585] Ulric Killion, 'Chinese Regionalism and the 2004 ASEAN-China Accord: the WTO and Legalized Trade Distortion' (2005) 31 *North Carolina Journal of International Law & Commercial Regulation* 1, 2.
[1586] Patricia Stirlinp, 'The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: a Proposal for Addition to the World Trade Organization' (1996) 11 *The American University Journal of International Law & Policy* 1.

Australia has an extremely small economy.[1587] The political climate has substantially altered since the USA unsuccessfully attempted to create this social clause in an agreement with China. While Australia and China have a positive working relationship, it is unlikely Australia could obtain substantial concessions from China.[1588]

Arguably there are no reasonably practicable steps Australia could take to motivate China to agree to ILO auditing of Chinese factories. On that basis alternative vehicles to engage with China will be explored. China has moved to engage internationally on human rights and therefore may not be opposed to discussions on workers' health and safety at work in Special Economic Zones. China has recently signed the *ICCPR* and ILO Conventions, moreover China has made substantial moves to counter the imposition of external labour conditions over Chinese factories by introducing a comprehensive domestic CSR scheme: CSC9000T. The next part of this chapter will analyse CSC9000T in detail. If Australia and China cannot reach agreement on an ILO supervised project, then perhaps Australia could link Chinese labour conditions in a bilateral agreement similar to chapter 18 of the *AUSFTA*.

9.4 Could Australia work with China to promote CSC9000T?

Chapter 4 analysed China's comparatively poor record on enforcing OHS. Recently however, China has started to embrace corporate social responsibility which has culminated in a government-supported, mandatory reporting scheme in the textile and apparel industry. This part will analyse whether the introduction of this scheme has the potential to remedy China's poor record on enforcing labour laws in the apparel and textile industry and whether there are any steps Australia could reasonably take to encourage tis programme.

[1587] The USA is the largest world economy with its GDP over Au$16 trillion: Hon. Mark Vaile, MP, 'Australia – United States FTA Benefits both Economies': < http://www.trademinister.gov.au/releases/2006/mvt016_06.html> at 5 December 2008.
[1588] Caroline Fleay, 'Engaging in Human Rights Diplomacy: the Australia-China Bilateral Dialogue Approach' (2008) 12 *International Journal of Human Rights* 2, 233.

9.4.1 Development of China Social Compliance 9000 for Textile and Apparel – CSC9000T

CSR has developed in China in three broad waves.[1589] Firstly, from the early 1990s to the beginning of the twenty-first century, Chinese factories which were in western supply chains were first exposed to CSR through western-imposed corporate codes and social audits. Effectively, the pressure of civil society in western States motivated western corporations to force Chinese factories to adhere to western standards.[1590] The second wave of CSR in China occurred between the first three years of this century. During this period, the issue of CSR became increasingly debated by Chinese government agencies and by academics. The Ministry of Labor, the Ministry of Commerce and the Chinese Enterprise Confederation all created CSR investigation committees to investigate the development of this movement in China.[1591] The Chinese government encouraged the debate of the Global Compact in China, with a major Global Compact summit being held in China in 2005.[1592] At this summit, the Chinese vice Minister of Commerce, Yi Xiaozhun, and hundreds of Chinese business leaders and officials from the Employers and Trade Union Federations expressed their desire to improve the realisation of CSR in China.[1593] The third wave of CSR has started from 2004 and continues to this date. This third wave can be demonstrated by action to improve the number of corporations purporting to act ethically and to improve the quality of social auditing. To this end, in 2005, China amended the *Company Law of the People's Republic of China* to incorporate CSR principles so that now

> a company shall comply with the laws and administrative regulations, social morality and business morality.[1594]

[1589] China Textile and Apparel Industry, *Annual Report on Social Responsibility 2006* (2007) 7.
[1590] Yu Xiaomin, 'Labor Movement under Economic Globalization: Issues, Questions and Theories'(2006) 03 *Sociological Studies* 188.
[1591] China Textile and Apparel Industry, *Annual Report on Social Responsibility 2006* (2007).
[1592] United Nations Global Compact Summit: China, Shanghai, 31 November 2005 and 1 December 2005.
[1593] Observatoire sur la Responsabilité Sociétales de Enterprises, in cooperation with *Corporate Social Responsibility Europe, "Corporate Social Responsibility in China*" (Report, 2006) 2.
[1594] Art 5 of the *Company Law of the People's Republic of China*; 'Guanzhu gongsifa xiugai xilie duihua' [dialogue regarding the amendment of corporate law]' Gongren Ribao [Workers Daily], September 15, 2004; discussed in 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) 160; see also: China Securities Regulatory Commission, *The Code of Corporate Governance for Listed Companies in China* (2002).

In 2003, the Chinese government enacted the *Certification and Accreditation Act 2003* which provided the Accreditation Administration with the authority to promulgate regulations on Certification and Accreditation, launching the approval system and setting codes of conduct for certification firms.[1595] Under this scheme, in 2006 the China National Accreditation Service for Conformity Assessment was established, which approved certification firms, assessed their methods and attempted to reduce the instances of unlawful certifications.[1596]

From 2005 to 2009, China is introducing a certification and management system for the textile industry called China Social Compliance for Textile and Apparel Industry, (**CSC9000T**). The institution charged with implementing this system explains:

> The CSC9000T is an industry specific management system for social compliance for China's textile and apparel sector, which is based upon the Chinese laws and regulations and relevant international conventions as well as in line with the Chinese characteristics.[1597]

Where historically Chinese corporations were encouraged to focus entirely upon profits, now Chinese laws and writings encourage Chinese corporations to focus upon their social responsibility.[1598]

9.4.2 CSC9000T's coverage

CSC9000T will ensure all enterprises involved with textiles in China participate in this management and certification system once it is fully implemented. CSC9000T is a Chinese-owned and run factory certification system.[1599]

[1595] *Certification and Accreditation Act 2003* (PRC); Li-Wen Lin, 'Corporate Social Accountability Standards in the Global Supply Chain: Resistance, Reconsideration, and Resolution in China' (2007) 15 *Cardozo Journal of International and Comparative Law* 321, 347.
[1596] China National Accreditation Service for Conformity Assessment, '2007nian renzheng rengke gongzuo yaodian' [The Main Goals of CNCA in 2007], discussed in Li-Wen Lin, 'Corporate Social Accountability Standards in the Global Supply Chain: Resistance, Reconsideration, and Resolution in China' (2007) 15 *Cardozo Journal of International and Comparative Law* 321, 347.
[1597] Responsible Supply Chain Association, 'About CSC9000': < http://www.csc9000.org.cn/en/CSC9000T.asd> at 30 December 2008.
[1598] Wen Bingzhou and Niu Zhenxi, 'Social Responsibility and International Competitiveness of Modern Corporations' (2007) 127 *Northwestern Industrial University Journal* 12, 46.
[1599] Damien Ma, 'Corporate Social Responsibility Resources for Your China Business' (2007) 34 *The China Business Review* 3 64.

The central government in China is extremely powerful. It is therefore significant that CSC9000T has Chinese government support. This system was developed by the China National Textile and Apparel Council and is being implemented by the Responsible Supply Chain Association with Chinese government support.[1600] A number of government officials expressed their support for CSC9000T at the Responsible Supply Chain Association's second annual conference for CSC9000T in 2007.[1601]

The Chinese government's *11th 5-year Plan (2006-2010)* supports the development of CSR.[1602] The China Textile and Apparel Industry claims this plan 'urges the textile industry to enhance international economic and technological cooperation, making full use of both domestic and international markets and available resources, in order to develop and strengthen the CSR system, maintain a good order of market competition, and push the textile industry to realise all-around, coordinated and sustainable development …'[1603] The CSC9000T system has been developed to ensure improvements in both the perception of Chinese factories as sweatshops and improving labour conditions in Chinese factories.[1604] To achieve these objectives, CSC9000T will develop into a mandatory industry management and certification system.

The mandatory aspect of CSC9000T has already been realised for factory enterprises that have been selected for the CSC9000T pilot project. On 28 March 2006, an implementation pilot program for CSC9000T commenced. In order to identify participants, the Responsible Supply Chain Association 'selected' 10 enterprises and one industrial cluster to participate.[1605] According to the *CSC9000T Work Plan 2007*, this pilot program will be finalized in 2007, its results analysed and

[1600] China Textile and Apparel Industry, *Annual Report on Social Responsibility 2006* (2007) 5.
[1601] For example: Director of the Office for Promoting the Development of Social Responsibility, Sun Ruizhe, 'People Orientation, Social Responsibility, and Scientific Development' (Paper presented at the 2007 Annual Conference on Corporate Social Responsibility for China Textile and Apparel Industry, the Great Hall of the People in Beijing, 17 December 2007); Deputy Director of National Development and Reform Commission, Ou Xinqian, 'Address' (Paper presented at the 2007 Annual Conference on Corporate Social Responsibility for China Textile and Apparel Industry, the Great Hall of the People in Beijing, 17 December 2007); Chairman of China National Textile and Apparel Council, Du Yuzhou, 'Key Note Speech' (Paper presented the 2007 Annual Conference on Corporate Social Responsibility for China Textile and Apparel Industry, the Great Hall of the People in Beijing, 17 December 2007).
[1602] The Chinese government's *11th 5-year Plan (2006-2010)* (2006).
[1603] China Textile and Apparel Industry, *Annual Report on Social Responsibility 2006* (2007) 18.
[1604] Responsible Supply Chain Association, *About CSC9000*: < http://www.csc9000.org.cn/en/CSC9000T.asd> at 30 December 2008.
[1605] China Textile and Apparel Industry, *Annual Report on Social Responsibility 2006* (2007) 29.

amendments made for extending this system to enable the China Textile and Apparel Industry to extend this system.[1606] Following these reports to the China Textile and Apparel Industry, the *10+100+1000 Program* is scheduled to be implemented.[1607] This program will involve selecting10 export-oriented textile clusters as CSC9000T pilot clusters. During 2007 until 2009, these 10 clusters will involve over 100 large scaled enterprises and 1000 small- and medium-sized enterprises.

A violation of CSC9000T standards will not involve direct legal sanctions. While the enterprise may be prosecuted by other government agencies for breaching labour laws, CSC9000T itself does not involve direct legal sanctions. CSC9000T relies upon a scheme of naming and shaming enterprises which violate labour rights and encouraging Western purchasers to trade with those enterprises which are CSC9000T compliant. In order to facilitate purchasers to identify easily which factories are compliant, the China Textile and Apparel Industry will develop a business structure and public information platform. This database will include a product index on what products are manufactured at each factory, details on how the CSC9000T management system is being operated, copies of the CSC9000T evaluation reports from enterprises and associated correction plans, and its implementation.[1608] The existence of this database will place considerable commercial pressure upon Chinese factories to comply with the CSC9000T prescribed labour standards to ensure they maintain their contracts. It is anticipated the status of factories upon this database will enable both Western purchasers and Western civil society to identify easily where supply chains involve sweatshops. Corporations which are subject to pressure from the CSR movement would face substantial pressure to trade only with enterprises which are CSC9000T compliant.

The potential for this CSC9000T database can arguably be evinced by the results of a similar database developed under the Cambodian Better Factories Project. Western corporations have started highly regarding the ILO factory reports. Kolbern has described how a number of Western corporations require their Cambodian factories to provide them with copies of the ILO factory reports as a condition precedent to

[1606] China Textile and Apparel Industry, *CSC9000T Work Plan 2007*.
China Textile and Apparel Industry, *Annual Report on Social Responsibility 2006* (2007) 38.
[1607] China Textile and Apparel Industry, *10+100+1000 Program*, discussed in China Textile and Apparel Industry, *Annual Report on Social Responsibility 2006* (2007) 38.
[1608]China Textile and Apparel Industry, *Annual Report on Social Responsibility 2006* (2007) 38.

continuing with their supplier relationships.[1609] In response to this call by Western corporations for access to the ILO reports, Cambodian factories can now provide third parties direct access to their factory reports and to the employer's response.[1610] Kolbern observed:

> Though the … [*The United States-Cambodia Bilateral Textile Trade Agreement*] used quota incentives as the primary motivation, it was actually pressure from foreign buyers that compelled the most compliance by individual factories.[1611]

It is arguable that the public disclosure of CSC9000T reports may develop in a similar way to the Cambodian ILO reports.

9.4.3 CSC9000T standards

CSC9000T adopts standards from core ILO and UN standards on labour rights and human rights. Where the UNGC neglected to include expressly OHS protection, CSC9000T expressly includes OHS. The duties contained in CSC9000T do not replace existing Chinese laws as analysed in chapter 4, rather CSC9000T introduces additional duties and vehicles for enforcement of OHS laws in China.

The OHS standards which appear in CSC9000T are detailed and generally comply with ILO conventions on OHS. The general provision appears in clause 10 of the *CSC9000T China Social Compliance for the Textile & Apparel Industry Principles and Guidelines*:

> The enterprise shall establish, implement, maintain and improve occupational health and safety management system on the basis of … [plan - do - check – action], in order to build a healthy and safe workplace.[1612]

[1609] Kevin Kolben, 'Trade, Monitoring, and the ILO: Working to Improve Conditions in Cambodia's Garment Factories' (2004) 7 *Yale Human Rights & Development Law Journal* 80, 104.
[1610] Kevin Kolben, 'Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes' (2007) 48 *Harvard International Law Journal* 203, 237-242.
[1611] Ibid 239.
[1612] China National Textile & Apparel Council, *CSC9000T China Social Compliance for the Textile & Apparel Industry, Principles and Guidelines (2005)*.

This general duty in clause 10 of CSC9000T arguably reaffirms the OHS general duty in China as discussed in chapter 4. Clause 10 of CSC9000T firstly requires that all OHS policies are 'appropriate to the nature and intensity of the enterprise's potential health and safety risks'. CSC9000T requires 'senior management' to be involved in drafting and implementing the OHS policies which must clearly identify who is responsible for overall enterprise safety and safety at each level of the enterprise, and must establish a process of continual improvement at each level of the enterprise which documents, implements and improves safety. This dedication to continual improvement must include a commitment to periodical safety audits and safety audits after any accident. These safety audits must be retained and forwarded to senior management.

Senior management must ensure adequate resources are devoted to ensuring safety and that all employees have adequate training to perform their tasks safely. In addition to training, management must ensure all the OHS policies are 'communicated to all employees', ensuring all employees 'are aware of the potential risks and their responsibilities'.

In addition to extensive internal communication, CSC9000T requires enterprises to communicate their OHS policies to all their 'stakeholders'.

It is submitted that on their face, the OHS standards in CSC9000T largely comply with China's obligations pursuant to the *Convention Concerning Occupational Health and Safety and the Working Environment*. Parts II, III and IV of ILO Convention 155 require China to develop a consistent national policy which includes specified duties.[1613] The CSC9000T standard complies with almost all of these elements. For example, article 16 of ILO Convention 155 requires China to ensure employers have a general duty for OHS which CSC9000T ensures in article 10. Article 5 requires China's laws to ensure there is adequate maintenance of material elements of the work process. While CSC9000T does not expressly state these duties, CSC9000T does require enterprises to ensure there are adequate resources to ensure the workplace is safe and to audit periodically the factory for safety risks. In

[1613] *ILO Convention No. 155, Convention Concerning Occupational Health and Safety and the Working Environment,* open for signatures 11 August 1983 ATS 11 (entered into force for Australia 26 March 2005).

relation to periodic safety audits, both clause 10 of CSC9000T and article 7 of ILO Convention 155 require enterprises to be audited periodically. Article 5 of ILO Convention 155 requires States' OHS systems to ensure employees are adequately trained and that the policies are effectively communicated. Clause 10 of CSC9000T expressly requires training and communication.

While CSC9000T meets many obligations under ILO Convention 155, there are some labour conditions which violate China's international obligations. One concerning aspect of CSC9000T which is not present, is an absence of protection of employees who complain about OHS. Article 5(e) of ILO Convention 155 requires China to ensure 'the protection of workers and their representatives from disciplinary measures as a result of actions properly taken by them in conformity with' Chinese laws. Article 13 goes on to clarify that '[a] worker who has removed himself from a work situation which he has reasonable justification to believe presents an imminent and serious danger to his life or health shall be protected from undue consequences in accordance with national conditions and practice'. Article 19(f) of ILO Convention 155 elaborates:

> [When] a worker reports forthwith to his immediate supervisor any situation which he has reasonable justification to believe presents an imminent and serious danger to his life or health; until the employer has taken remedial action, if necessary, the employer cannot require workers to return to a work situation where there is continuing imminent and serious danger to life or health [sic].

Chapter 4 explained that Chinese workers have been assaulted and abused if they attempt to stop work due to safety breaches despite the fact Chinese laws protect workers who raise such concerns. As employers and workers are the parties most likely to detect safety risks by virtue of their proximity to the risk, failing to ensure the ability of workers to stop work based on reasonable safety risks means one of the parties most likely to identify safety risks cannot protect their own safety. If an employer orders workers to work excessive hours or to place themselves at risk to their life or limb, then workers are often required to elect either to accept the safety

risk or face other negative consequences such as physical and verbal abuse and being dismissed.[1614]

The barriers to worker mobility were discussed in chapter 4.3. CSC9000T does not provide improvement where employers force workers to pay for OHS training. In relation to OHS training CSC9000T provides:

> The enterprise must ensure that all persons within the enterprise, especially those performing tasks that can cause significant impacts on occupational health and safety, shall be competent in their roles. The competence can be achieved through appropriate training, education, or experience.[1615]

CSC9000T does not state who must pay for this training. If employers force workers to pay for OHS training, then this reduces their power to move between jobs, and thus reduces workers' ability to resign if they are faced with minor OHS risks.

After analysing the CSC9000T standards it is arguable that these standards are largely compliant with the OHS standards contained in ILO Convention 155. In some areas, CSC9000T fails to maximise safety at work, however in general CSC9000T affords a positive regulatory development in China's attempts to enforce its labour laws.

9.4.4 How valid are CSC9000T audits?

According to the regulatory pyramid as discussed in chapter 2.4.1 corporations will only alter their conduct when there is an adequate deterrent. Before a regulator can impose a sanction it is first necessary to detect non-compliance. It is arguable that the operation of the regulatory pyramid requires sufficient auditing to identify breaches. Chapter 7 demonstrated how the deterrent aspect of CSR requires social audits to be adequately audited and this chapter at 9.2.3 analysed the assurance problems with the UNGC and 9.3.1 demonstrated that the ILO's audits had improved labour conditions in Cambodia. This section will analyse whether CSC9000T has a

[1614] Note the case study in chapter 4 where an employee was beaten and fired for raising concerns in the workplace.
[1615] Cl 1.3(2) of the China National Textile & Apparel Council, *CSC9000T China Social Compliance for the Textile & Apparel Industry, Principles and Guidelines (2005)*.

sufficiently high level of assurance so that non-compliance can be detected and sanctions can therefore be imposed.

An enterprise which desires to implement the CSC9000T system follows five stages.[1616] Firstly, the enterprise obtains all the necessary documentation and secondly it performs a self-assessment of its enterprise's level of compliance. The enterprise then must identify how the CSC9000T Principles, Guidelines, and Implementation Guidance can be integrated into the enterprise. Fourthly, the enterprise implements the CSC9000T management system into the enterprise and finally performs an internal audit and management review to evaluate the system and its implementation. Where enterprises lack sufficient expertise, then they should use the Responsible Supply Chain Association's services or the professional services of training or consulting institutions. Finally, the enterprise should contact the Responsible Supply Chain Association to arrange a 'third party performance evaluation on CSC9000T management system in order to have an independent assessment to identify problems, their root causes, and corrective action plans for continuous improvement'.[1617] On the basis the labour standards contained in CSC9000T are sufficiently rigorous to ensure workers' right to safety and health at work, the validity of CSC9000T hinges on whether or not the third party auditing process provides valid results.

The process of auditing enterprises' CSC9000T compliance is performed by approved third party auditors. The Responsible Supply Chain Association will provide an enterprise with a list of approved third party auditors and the enterprise contacts the auditor directly.[1618] The enterprise provides the auditor with the self-evaluation form and then the enterprise jointly arranges a time for a site inspection to occur. The prior notification by auditors is a concern. Chapter 7.3.1 identified that providing factories notice of inspections enabled them to fraudulently alter records and to adjust the workplace to comply with labour standards. To increase validity, CSC9000T should arguably include some form of random audits to reduce the risk of dishonest factories avoiding detection.

[1616] Responsible Supply Chain Association, *About CSC9000*: < http://www.csc9000.org.cn/en/CSC9000T.asd> at 30 December 2008.
[1617] Ibid.
[1618] Responsible Supply Chain Association, *How to conduct CSC9000T performance evaluation*: <http://www.csc9000.org.cn/en/Databank.asp?DID=&DT=&AID=13013> at 17 December 2008.

CSC9000T auditors evaluate the enterprise's performance and provide a CSC9000T performance evaluation report. The CSC9000T performance evaluation report specifies where the enterprise fails to meet the CSC9000T standards and provides targets and an action plan to enable the enterprise to become compliant. According to their findings, the auditors will grade the enterprise upon the CSC9000T grading scale.[1619] This scale consists of five grades entitled defensive, complaint, managerial, strategic and civil. While the labels for this gradation scale do not translate clearly, in effect this is a licket scale ranging from worst to best. It is possible this scale may alter in the future. The China Textile and Apparel Industry adopted a different gradation scale for reporting the auditing evaluations of the enterprises in the CSC9000T pilot industrial cluster: urgent corrections, improvements needed and continuously improvable.[1620] When the China Textile and Apparel Industry reported on the pilot industrial cluster audits, they provided substantial detail. The quality of information provided on these enterprises was clear to understand and provided in a mix of quantified gradations and qualitative comments. In relation to the 10 factories inspected, the China Textile and Apparel Industry candidly stated:

> [E]nterprises showed a good performance and achievement in the areas of child labour, forced labour, discrimination, and harassment and abuse, particularly in the respect of child labour, where only one child labour was found in the whole initial assessment process who held an ID of another person to join the company. Critical deviations from the requirements or concerns, however, were found at most pilot enterprises in the areas of employment contract, working time, wages and welfare, and occupational health and safety, especially working time regarded the most critical issue, where they all failed to reach the legal requirements as prescribed in the Labour Law.[1621]

If the level of public reporting demonstrated by the China Textile and Apparel Industry in relation to the pilot industrial cluster is adopted, when CSC9000T

[1619] Marina Thorborg, 'Chinese Workers and Labor Conditions from State Industry to Globalized Factories. How to Stop the Race to the Bottom' (2006) 1076 *Annals of the New York Academy of Sciences* 1, 893; on how corporations can be ethical, see: Simon Zadek, *Civil Corporation* (2007) 151-155.
[1620] China Textile and Apparel Industry, *Annual Report on Social Responsibility 2006* (2007) 30.
[1621] Ibid 31.

auditing is fully integrated, then the quality of CSC9000T reports will be more rigorous than the majority of auditing discussed in chapter 7.

The penultimate step in the CSC9000T system involves the auditor providing the CSC9000T performance evaluation report and suggested grading to the Responsible Supply Chain Association.[1622] The Responsible Supply Chain Association then reviews the auditing process and conclusions for validity. Largely, the validity of the social auditing process hinges upon the effectiveness of the auditors. To increase the validity of the auditing process, the Responsible Supply Chain Association only approves auditors which have sufficient experience, able staff and have a good reputation.[1623] The Responsible Supply Chain Association then works with the third party auditors to ensure the auditors have sufficient training on the CSC9000T system and how to audit this system effectively. Once the Responsible Supply Chain Association has approved auditors, it then continues to work with the auditors through reviewing their CSC9000T performance evaluation reports and grading, and ensures the auditor's process is valid.

If third parties or stakeholders have concerns about the validity of the audit, then the Responsible Supply Chain Association 'will investigate and deal with these matters seriously'.[1624]

Chapter 7 provided details on variables which confound social audits in China. One of the confounding variables identified with social audit reports was superficial audits. Chapter 7.3.1 argued that many social audits were performed in a few hours or over a few days which confounded the validity of the audits. CSC9000T audits do not appear to be confounded by superficial auditing. The China Textile and Apparel Industry explains that when it audited one of the enterprises in the CSC9000T pilot industrial cluster, it utilized the services of 13 auditors who spent 25 days on the initial assessment, and on-site visits exceeded 100 hours.[1625] The auditors reviewed over 2,000 internal documents and interviewed over 1,000 employees.

[1622] Responsible Supply Chain Association, *How to Conduct CSC9000T Performance Evaluation*: <http://www.csc9000.org.cn/en/Databank.asp?DID=&DT=&AID=13013> at 17 December 2008.
[1623] Responsible Supply Chain Association, *How to Ensure the Fairness and Effectiveness of CSC9000T Performance Evaluation* http://www.csc9000.org.cn/en/Databank.asp?DID=&DT=&AID=130144 1 March 2008.
[1624] Ibid.
[1625] China Textile and Apparel Industry, *Annual Report on Social Responsibility 2006* (2007) 30.

It is submitted the focus of CSC9000T may limit the scheme's use as an enforcement vehicle. Chapter 7.3.1 reported that one of the reasons Chinese employees felt uncomfortable disclosing labour abuses to Western auditors was because the auditors were seen as an extension of management. Even though CSC9000T involves auditing and grading of enterprises, CSC9000T is not designed as a certification system. CSC9000T expressly states it is a performance and management system and not a certification system:

> CSC9000T adopts the mode of 'performance evaluation' to judge enterprises' social responsibility performance, giving up the conventional way of accreditation. CSC9000T performance evaluation is to help enterprises to review their own CSR management system and to find out the gap between voluntary social responsibility actions and the requirements of CSC9000T …[1626]

CSC9000T adopts the collaborative approach in order to increase enterprises' willingness to disclose problems to the CSC9000T auditors, to enable the Responsible Supply Chain Association to work with enterprises to improve labour conditions.[1627] Unfortunately, the approach adopted by CSC9000T may result in the overall auditing process being confounded.

While CSC9000T has not released sufficient information to make a substantial critique of the auditing process, it is arguable that the fact CSC9000T auditors are Chinese auditors with the support of the State may improve the quality of the audit. Chapter 7.3 reported that factory management allegedly coaches employees to lie to the Western auditors. If China is serious about ensuring the CSC9000T system works effectively, the Chinese State certainly has the power to decrease the instance of fraud in CSC9000T audits. China has taken a robust approach to non-compliance with laws in other areas.[1628] If China demonstrated the political will to reduce the instance of fraud, it has the power to impose substantial punishments for non-compliance. Ultimately, it comes down to political will. If China does not take

[1626] Ibid 23.
[1627] Ibid.
[1628] See S 9.4.

significant action to demonstrate it is serious about labour rights, then workers may be successfully coached to lie to CSC9000T auditors.

9.4.5 Why would China agree to accept Australian assistance in the implementation of CSC9000T?

This part argues that China may be willing to accept Australia's assistance in implementing CSC9000T. While China is a sovereign State and would likely resist any mandatory external regulation, China and Australia have a history of working together on improving Chinese OHS conditions. While this has not occurred in the textile industry it is possible that the positive experiences gained from other industries may encourage China to interact on implementing OHS in CSC9000T.

The industry where Australia has provided the most assistance to China is in improving OHS in Chinese coal mines. Australia has been able to export mine safety to China because of Australia's expertise in managing mines with high safety records. Instances such as the mine accident in Liaoning province where 200 Chinese workers were killed has motivated China to seek external expertise which resulted in China working closely with Australian OHS experts to improve mine safety.[1629] On one project the Shanghai Jiaotong University, the Huainan Mining Group and the Commonwealth Scientific and Industrial Research Organisation worked collaboratively to 'introduce Australian technologies into Chinese mines to improve the performance and safety of Chinese mines.'[1630] On another project Chinese officials have flown to Australia to receive OHS training to enable these officials to better identify and prevent risks in Chinese mines.[1631]

The question which is addressed in this section is whether China may agree to work with Australia to improve the implementation of CSC9000t? Chapter 4 argued that China has historically preferred to prioritize profits over ensuring workers' right to safety and health. Rather than ensuring increased respect for labour rights, China introduced the Special Economic Zone system which resulted in a substantial

[1629] 'Queensland to export mining expertise to China', *OHS Alert - The source for OHS and workers' compensation news*, Thursday, 24 February 2005.
[1630] Australian Government - Department of Climate Change, 'Media Backgrounder – New Partnership Projects ': <http://www.climatechange.gov.au/international/china/pubs/fs-projects.pdf> at 15 December 2008.
[1631] Central Queensland Institute Of Tafe, 'First Chinese Mine Managers Get Safety Training Under New Export Deal' (Monday, 18 June 2007): <http://www.cq.tafe.qld.gov.au/about_us/news/2007061801.html> at 17 December 2008.

reduction in labour conditions. More recently however, China has demonstrated increased commitments to OHS. In addition to supporting to the development and implementation of CSC9000T, it is argued that China is engaging internationally on OHS issues more than it did in the past. For example, at the Twenty-fourth Session of the Standing Committee of the Tenth National People's Congress in October 2006, China adopted the main ILO Convention on OHS.[1632]

China's historic failure to ensure employees' labour rights in SEZs has drawn international criticism and contributed to the development of CSR pressure upon Western corporations to ensure their supply chains are ethical. The pressure to ensure ethical supply chains has developed into the complicity principle which morally binds corporations to act ethically and morally binds States to take reasonably practicable steps to ensure corporations subject to their jurisdictions discharge their human rights' obligations. This development in pressure has led to calls to impose mandatory regulation over Western-based supply chains. Chapter 1.5.1 discussed how this debate first commenced with the North-South debate and then chapter 2.4.4 mentioned how the USA has introduced mandatory extraterritorial supply chain regulations. It is submitted that the plight of Chinese workers has become an issue of international concern and it is likely that if China does not ensure their safety at work, then foreign States or multinational bodies will continue to develop more advanced ethical supply chain auditing. Indeed, Meidinger claims that multinational corporations are already anticipating Western consumers' future preferences, and forcing their suppliers to comply with these Western standards.[1633] In effect, China is confronted by the possibility of effectively having its sovereignty diminished by external regulation of its citizens' conduct, if labour standards are not improved.

If labour standards were externally imposed over Chinese factories, then arguably China may have its competitive advantage diminished. China has emerged as the world's factory due to its ability to offer thousands of specialist factories which can

[1632] Decision of the Standing Committee of the National People's Congress on Adopting the *Convention of Occupational Health and Safety and Working Environment* in 2006 (PRC); *ILO Convention No. 155 Convention Concerning Occupational Health and Safety and the Working Environment,* open for signatures 11 August 1983 ATS 11 (entered into force for Australia 26 March 2005).
[1633] Errol Meidinger, 'Competitive Supragovernmental Regulation: How Could It Be Democratic?' (2008) 8 *Chicago Journal of International Law* 2, 513.

convert raw materials into manufactured goods at extremely low rates.[1634] If Western labour standards were imposed upon China, there is a real possibility that China may lose its competitive edge.[1635] If Western states actually tried to put Chinese workers' best interests first when setting labour standards, then perhaps the impact on the Chinese economy could be moderated. On the basis Western states are elected to represent their own citizens, any suggestion that Western states would genuinely consider the best interests of foreign workers is uncertain.[1636] It is not surprising then that some Chinese author's claim that the dominant reason Western states are concerned with labour conditions in China is to protect Western employees' jobs.[1637]

The growth of the WTO has resulted in a reduction in formal trade barriers.[1638] This has enabled Chinese factories to utilize their comparatively low cost of production and flood the world market with cheap products.[1639] As China became increasingly integrated into the world markets, Chinese industries became increasingly pressured to conform to international labour standards.[1640]

Chinese authors claim that Western states adopt blue trade barriers to protect Western states' domestic workers' jobs.[1641] The use of the word 'blue' in this term refers to the colloquial term for manufacturing workers: blue collar. Jin's LLM thesis argued that blue trade barriers, such as linking trade and labour conditions, were introduced as legal cloaks to hide Western states' real intention of reducing competition from China, and thus protecting Western manufacturing workers'

[1634] Ted C. Fishman, *China, Inc.: How the Rise of the Next Superpower Challenges America and the World* (2005) 53-76.
[1635] Huang He-tao, ' "Converging" and " Linkage": International Labor Standards and International Trade' (2001) 1 *China's Labor Relations Institute Journal*.
[1636] For an example of how Australia does not consider the interests of non-citizens, see the *MIMIA v B & Anor* (2004) 29 AltLJ 217 case, where the High Court of Australia approved the Commonwealth's policy of detaining refugee children indefinitely, in violation of their human rights simply because these children were not Australian citizens and they retained the right to leave Australia anytime; see for discussion: Michael Head, 'Detention Without Trial — A Threat to Democratic Rights' (2005) 9 *University of Western Sydney Law Review* 33.
[1637] Li Youzhi and Liu Hong, 'Influence of Blue Barrier on China's Exports and Its Counter Measure' (2006) 63 *Journal of Hunan International Economics University* 1; for a discussion for the 'protectionism in disguise' argument, see S 1.5.1 above.
[1638] Yuhong Zhao, 'Overcoming "Green Barriers": China's First 5 Years in the WTO' (2007) 41 *Journal of World Trade* 3, 535.
[1639] David Lei, 'Outsourcing and China and APOs: Rising Economic Power' (2007) 51 *Orbis* 1, 21.
[1640] Pan Hong, 'Chinese Enterprises: How to Deal with the SA8000 Blue Trade Barriers' (2006 1 *Malls Modernization* 12.
[1641] Li Wen-Chen, 'Situation of International Labor Rights' Protection and Its Influence on Chinese Enterprises' (2005) 4 *China Industrial Economy*.

jobs.[1642] While substantial blue trade barriers have not been imposed over China to date, the threat of such mandatory duties has caused substantial concern in China.

> It is submitted that Chinese public and private entities have observed the growth of SA8000 coverage in China with concern.[1643] SA8000 has developed into one of the major certification schemes in the world. Lin explains that SA8000 'is the most viable and comprehensive international workplace management system available in the world.'[1644]

The role of SA8000 in China is 'hotly discussed' in China.[1645] Some authors have claimed this accreditation system is effectively a blue trade barrier aimed at reducing the competitiveness of Chinese exports.[1646] As the Western-driven CSR movement has already resulted in some industries being forced to comply with Western-prescribed standards, some authors claim SA8000 is already sufficiently mandatory to constitute a blue trade barrier.[1647] Other authors claim that SA8000 will only become a blue trade barrier if it changes from a voluntary scheme to a mandatory scheme.[1648] .

The fear that SA8000 may become a mandatory scheme is arguably a major factor which is a driving public policy in the Chinese textile industry. Xiaoyong explains:

> SA8000 verification has a potential market sanction, so some Chinese companies and government agencies worried that the European and US governments were planning to limit Chinese imports that did not adopt these CSR standards. Such a measure would effectively force Chinese exporting manufacturers to adopt these

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[1642] Shi Jin, *Study of Blue Trade Barrier Issues in International Trade* (LLM Thesis, Harbin Engineering University, China, 2006), 1-5.
[1643] Dankanglin, 'SA8000 and the Realization of Laborers' Rights' (2005) 1*Chongqing Institute of Vocational and Technical Journal*; Pun Ngai, 'Globalized Factory Regimes and "Re-organized Moralism": Transnational Corporate Codes of Conduct and Labor Politics in China' (Working Paper, Div of Social Science, Hong Kong University of Science and Technology, 2004); Li Ying, 'SA8000, xin de maoyi bilei?' (SA8000, a new trade barrier?), *Nanfang Dushi bao*, 20 November 2003, cited in Anita Chan, 'Recent Trends in Chinese Labour Issues - Signs of Change' (2005) 57 *China Perspectives*, 23.
[1644] I-Ling Lin, *Profit Through Goodwill: Corporate Social Responsibility in China and Taiwan* (MA Thesis, University of Southern California, (2006)
[1645] Li-Wen Lin, 'Corporate Social Accountability Standards in the Global Supply Chain: Resistance, Reconsideration, and Resolution in China' (2007) 15 *Cardozo Journal of International and Comparative Law* 321, 327.
[1646] Ibid.
[1647] Liu Xin and Zuo Zhi-ping, 'Blue Trading System and Its Impact on Chinese Enterprises: Interpretation of the Blue Trade System as Well as Its Influences on China's Enterprises' (2005) 4 *Journal of Hunan Agricultural University (Social Sciences)*.
[1648] Zhao Jianjie, Huang He-tao and Zhao Jian-jie, 'SA8000 and Trade Unions to Safeguard Their Rights' Strategy' (2005) *Journal of the Chinese Institute of Labour Relations* 1.

social standards, which would involve various costs and thus limit China's competitiveness as a manufacturing and exporting economy.[1649]

Chinese public and private institutions are concerned that individual States, such as the USA and Japan, and regional blocks, such as the European Union, will popularise SA8000 through compulsion.[1650]

Concerns in China that the USA may introduce mandatory labour conditions are well-founded. Chapter 2.4.4 explored how some USA jurisdictions already demand that labour standards are respected in the production of any products which are used in association with government procurement contracts. The USA has historically attempted to impose labour standards over China. Stirlinp considered the unsuccessful movement in the USA in 1994 to link China's favoured trading partner's status with the USA to China's human rights record.[1651] Even though the USA has not been able to secure an agreement with China to link trade and human rights standards the USA has created this link in other relationships. The USA has a long history of linking trade and labour conditions. Zimmerman traces USA government's efforts to ensure States which trade with the USA protect their workers' labour rights .[1652] Zimmerman reviewed the USA's four main, unilateral, legislative responses to increase international labour standards:

1) Preferential duty programmes which required countries to meet certain working conditions to qualify for preferential trade benefits;
2) Investment guarantee programmes which all required countries to meet minimum standards prior to taking advantage of programmes, such as the Overseas Private Investment Corporation , the Multilateral Investment Guarantee Agency or the Export-Import Bank;
3) Legislation which prohibited the importation of goods which were produced by forced labour. For example, the *Omnibus Trade and Competitiveness Act*

[1649] Hu Xiaoyong, *Corporate Codes of Conduct and Labour-related Corporate Social Responsibility: Analyzing the Self-regulatory Mechanisms of Multinational Enterprises and Their Impacts to Developing Countries*' (The Japan Institute for Labour Policy and Training, Report No. 55, 2006).
[1650] Meng Tian, 'Sweatshop and Enterprise Social Responsibility' (2006) 11 *Inner Mongolia TVU Studies* 46.
[1651] Patricia Stirlinp 'The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: a Proposal for Addition to the World Trade Organization' (1996) 11 *The American University Journal of International Law & Policy* 1.
[1652] James Zimmerman *Extraterritorial Employment Standards of the United States: The Regulation of the Overseas Workplace* (1992).

of 1988, the *International Emergency Economic Powers Act*, and the *Smoot-Hawley Tariff Act* of 1930; and

4) Legislation which required USA companies engaging in business in countries with poor working conditions to have in place fair employment codes. For example, the *Anti-Apartheid Act of 1986*, which forced USA corporations, who employed more than 25 South Africans to have an affirmative action plan and racially integrated workplaces.

Both the USA and the European Union have become involved with encouraging developing States to have their factories SA8000 certified. For example, the USA State Department has jointly funded a project in Vietnam with two foundations and the German technical cooperation agency.[1653] This project has been running since 2003 to encourage respect for the rule of law and to ensure the effective implementation of SA8000 programs. In 2003, the USA Agency for International Development worked with USA corporations to develop a project to improve labour conditions in Central American workplaces.[1654] This project, Continuous Improvement in the Central American Workplace, encouraged factories in Guatemala, Nicaragua, the Dominican Republic, Honduras and El Salvador to comply with international labour standards. In 2007, the USA State Department funded Project Cultivar.[1655] Project Cultivar aims to improve labour conditions in the agricultural sectors in Nicaragua, Honduras and the Dominican Republic.

Similarly to the USA, the European Union has a history of linking trade and labour conditions. For example, in 1994 the European Union created a link between trade and labour through the Generalized System of Preferences program.[1656] Pursuant to this program, States which agreed to uphold labour rights obtained special treatment.[1657]

In addition to such programs, individual European states have been involved with developing SA8000 in China. European States and industry have developed the

[1653] Social Accountability International, *10th Anniversary Report* (2007) 67.
[1654] Ibid 65.
[1655] Ibid.
[1656] Baatlhodi Molatlhegi, *Trade and Labour Interface in the Context of Regional Economic Integration: the Case of the Southern African Development Community* (SJD Thesis, University of Toronto, 2001) ch2.
[1657] For a discussion of the effectiveness of this program, see: Michael J. Trebilcock and Robert Howse, 'Trade Policy and Labor Standards' (2005) 14 *Minnesota Journal of Global Trade* 261, 293-295.

charter by European social partners in the footwear sector.[1658] Under the terms of this charter, in 2003 the European Union funded Social Accountability International to conduct the European Footwear Supplier Training Program in China.[1659] Social Accountability International then partnered with the European Confederation of the Footwear Industry and The European Trade Union Federation (Textiles, Clothing and Leather) to provide training and explore vehicles to 'develop and implement a monitoring and verification system that would be both credible and adapted to the size of companies in' China.[1660] In effect, this program was providing research on which the European Commission could have based mandatory or voluntary standards over Chinese factories. On the basis European states are funding research which provides models for imposing labour standards over China, it is reasonable for public and private institutions in China to be concerned such models may be implemented.

It is submitted that the encouragement of SA8000 does not only come from developed States. A Social Accountability International report provides discussion of how India and Pakistan can further integrate, inter alia, SA8000 standards into their domestic industries.[1661] Social Accountability International attended 26 meetings in Indian cities convened by the Textiles Committee of the Indian Ministry of Textiles to facilitate increased SA8000 certifications. The Pakistani Ministry of Commerce has launched a national program to increase the number of SA8000 certifications across the State. The Pakistan Adoption of Social Accountability (SA8000) Project intends to provide approximately 250 factories with financial support to become SA8000 certified, and administrative assistance in organizing such certifications. Both these States claim that increasing their involvement with SA8000 will increase their exports by gaining a national reputation of ethical production.[1662] The fact developing states are demonstrating support for the internationalisation of labour standards increases the probability that some form of binding standards may be imposed internationally. The North/South debate surrounding the introduction of links to trade and labour conditions in WTO agreements was explored in chapter 1.5.1 of this thesis. One of the central problems

[1658] See for discussion: Andre Sobczak, 'Codes of Conduct in Sub-contracting Networks: a Labour Law Perspective' (2003) 44 *Journal of Business Ethics* 225.
[1659] Social Accountability International, *10th Anniversary Report* (2007) 73.
[1660] Ibid.
[1661] Ibid 1 for India, 61 for Pakistan.
[1662] Ibid.

with the introduction of social clauses in WTO agreements was the resistance from developing States. If developing States demonstrate a lower level of resistance to linking labour conditions and trade, then the possibility of reaching sufficient consensus to introduce such a scheme is increased.

There are a number of policy motivators behind the introduction of CSC9000T. While CSC9000T does not expressly state it is intended to prevent the imposition of external regulations, [1663] It is argued that this is widely regarded as a substantial policy motivator behind the system's introduction.[1664] The China Textile and Apparel Industry has observed the threat from blue trade barriers and claims that Chinese factories have previously been forced to adopt Western-driven codes of conduct as Chinese factories were at the bottom of supply chains.[1665] SC9000T is intended to empower Chinese factories and reduce the need to rely upon Western-controlled certification schemes. The adoption of CSC9000T is China's response to developing CSR in Chinese factories. During the second wave of CSR development in China, the Chinese government and industry desired to establish their own version of CSR. Through positing CSC9000T, China has wrestled ownership of CSR in China from Western civil society and created its own version of factory certification.[1666]

China's introduction of CSC9000T can be regarded as a positive move to increase the enforcement of labour conditions in China. If CSC9000T has a reasonably high level of enforcement, then arguably this scheme has the potential of decreasing the instance of labour abuses in the Chinese textile industry. If the instance of sweatshops does diminish, then corporations in Australia would be able to rely upon CSC9000T performance evaluation reports. States can thereby discharge their human rights' duties under the complicity principle through ensuring corporations in their jurisdictions only trade with factories which have CSC9000T performance

[1663] Responsible Supply Chain Association, *About CSC9000*: < http://www.csc9000.org.cn/en/CSC9000T.asd> at 30 December 2008.
[1664] Lin Bai, 'Improving the Non-governmental System of Outsourcing Labour Regulation in China' (2007) 13 *European Law Journal* 6, 772; Ruth Domoney, *Briefing on the Chinese Garment Industry* (Labour Behind the Label, Report, 2007) 7, 8; Marina Thorborg, 'Chinese Workers and Labor Conditions from State Industry to Globalized Factories. How to Stop the Race to the Bottom' (2006) 1076 *Annals of the New York Academy of Sciences* 1, 893.
[1665] China Textile and Apparel Industry, *Annual Report on Social Responsibility 2006* (2007) 16.
[1666] 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) 160.

evaluation reports. Therefore, if China enforces CSC9000T effectively, China will largely negate the threat from Western-driven corporate codes, certification schemes or mandatory regulation.

Conversely, if China does not ensure CSC9000T is enforced, then this will create increased pressure upon States, such as Australia, to regulate supply chains and for corporations to utilize non-Chinese controlled certification schemes. The introduction of CSC9000T was intended to attract the attention of the world's States, corporations and civil society associations. Once China has attracted the world's attention, China has placed itself in a position where the success or otherwise will be closely monitored. As mentioned earlier in this chapter, India and Pakistan have facilitated their domestic factories to become SA8000 certified to increase their competitiveness. If SA8000 certifications emerge to be valid and CSC9000T performance evaluation reports are proven to be invalid, then reliance upon CSC9000T will be reduced. States and corporations have human rights' obligations to utilize regulatory vehicles which provide greater validity. States and corporations have moral duties to take reasonably practicable steps to discharge the complicity principle. If States and corporations can rely upon the internationally-based SA8000 certifications and not upon the state-based CSC9000T performance evaluation reports, then corporations will be pressured by the CSR movement to seek factories which are SA8000 certified and States may again consider mandatory supply chain regulation of some description. Even though China has a history of under enforcing their labour laws, it is submitted that the pressure from blue trade barriers and SA8000 may motivate China and the Chinese textile industry to improve their level of compliance.

9.5 Conclusion

Chapter 2.4.4 demonstrated that Australia has a moral obligation to take reasonably practicable steps to ensure corporations which are subject to Australia's jurisdiction discharge their human rights' obligations. Chapters 3 and 4 demonstrated that existing hard law vehicles were not ensuring workers' right to safety and health was being adequately protected. Chapters 5, 6 and 7 analysed whether the soft law

alternative of CSR was a viable alternative regulatory vehicle. After identifying substantial limitations of market-driven, unregulated CSR, chapter 8 analysed whether Australia could directly regulate corporations' supply chains through supply chain regulation. The first part of chapter 8 demonstrated how this model could substantially increase the protection of outworkers in Australia. The second part of chapter 8, however, demonstrated that Australia could not introduce extraterritorial supply chain regulation without the consent of China. Chapter 9 has analysed whether Australia could work with either the UN, ILO or with China through existing public law vehicles to improve the safety of work of Chinese-based employees in Australian-based supply chains.

This chapter was divided into three parts. The first part analysed if Australia could work with the UNGC to improve the safety at work of Chinese-based employees in Australian-based supply chains. One of the most critical problems with the UNGC is this scheme's coverage. The UNGC has the considerable support of the UN General Assembly, nevertheless this scheme has extremely low corporate representation in both Australia and China. This part explored one of the most substantial limitations of the UNGC: assurance. The UNGC is primarily a platform to facilitate CSR and is not a certification scheme. The UNGC does not perform factory inspections or audits of Communications on Progress. As a consequence, concerns have been raised that corporations are participating with the UNGC to portray the image of an ethical corporation when, in fact, the corporation does not alter its conduct. In response to the concern that corporations are merely bluewashing their image, the UNGC introduced a complaints procedure. This procedure has improved the assurance procedures of the UNGC slightly, however as noted in chapter 7.3, relying upon NGOs and other civil society groups to identify breaches in corporations is not a viable option. Ultimately, this part argues that the UNGC may develop into the central point for CSR in the future, but currently this vehicle is not sufficiently developed to enable Australia to discharge its duty by merely relying upon the activities of the UNGC.

Secondly, this chapter analysed how Australia, China and the ILO could work together to improve the safety of workers working in China for Australian-based supply chains. This part first examined how the ILO has worked with USA and

Cambodia to improve the safety at work of Cambodian-based employees working for USA-based supply chains. Following an agreement between the USA and Cambodian governments, the ILO conducted inspections of Cambodian factories to ensure they were compliant with Cambodian labour laws and with ILO standards. Research demonstrates that this Better Factories Cambodia Project has substantially improved the labour conditions of Cambodian workers. Secondly, this part considered whether Australia could reach a similar agreement with China, as the USA did with Cambodia. Ultimately, this section argued that China would be unlikely to agree to allow the ILO to inspect its factories..

The third part then analysed the CSC9000T scheme in detail. While China has historically failed to enforce its domestic labour laws, it is possible that CSC9000T may represent a turning point in China's approach to enforcing labour laws. This Chinese government-supported scheme was developed partially to counter the threat that foreign States and corporations would link trade to auditing reports performed by entities that China could not influence. As one of the reasons CSC9000T was created was to reduce the need for non-Chinese social auditing of Chinese factories, it submitted that there is a reasonable probability that China would welcome moves by Australia to rely upon CSC9000T.

CHAPTER 10

10 Conclusion

10.1 Conclusion and summary of findings

The central hypothesis of this thesis argues that Australia is not discharging its obligation to protect workers' safety and health in Australian based supply chains. This hypothesis was tested in three phases.

The first phase asked whether Australia has an obligation to protect workers' right to safety and health. It was essential to find Australia did have such an obligation and to clearly define this obligation in order to establish a standard by which Australia's current conduct and potential conduct could be judged. Phase 1 of this thesis argued that Australia has a duty to take reasonably practicable steps to ensure workers in Australian based supply chains have their right to safety and health protected. This argument was developed in chapter 2 in three parts. First this chapter analysed the how human rights were developed under international law and how the development of universal laws could correspond with State sovereignty. This analysis demonstrated that human rights which bind States are provided legal force through State conduct. As both Australia and China had ratified the relevant human rights instruments then judging conduct in these jurisdictions against mutually agreed standards was held not to unreasonably interfere with State sovereignty.

After establishing the legal basis for using human rights to judge Australia's conduct against the second and third parts of chapter 2 focused upon articulating the relevant standards based upon human rights laws. This thesis has focused on workers' safety at work and accordingly chapter 2 argued that workers have a right to safety and health under human rights law. To prove this argument the second part of chapter 2 analysed how several human rights conventions already expressly recognise workers' right to safety and health. As Australia is not bound by these conventions this part then demonstrated how workers' right to safety and health is a necessary right if workers are to enjoy their right to work and right to life. On the basis a large number of States have recognised this right by introducing OHS laws and after exploring the

human rights arguments supporting the right to safety and health, this chapter argued that Australia had an obligation to protect workers' right to safety and health.

The final part of chapter 2 posited Australia's duties to protect workers' right to safety and health. This part analysed International Labor Organization (ILO) treaties, State conduct and human rights developments and argued that Australia had an obligation to take reasonably practicable steps to protect workers' right to safety and health domestically and internationally. Australia's duty to protect workers' right to safety and health domestically requires Australia to introduce hard laws and enforce those laws. The nature of the duty alters where Australia is called upon to enforce workers' right to safety and health in international supply chains. As Australia has limited territorial jurisdiction to pass laws impacting upon other States this part argued that the duty requires Australia to take reasonably practicable steps to ensure corporations comply with the complicity principle. This duty requires Australia to take reasonably practicable steps to ensure corporations uphold human rights within those corporations' domestic and international spheres of influence.

Phase 1 explained how Australia was obliged under human rights laws to take reasonable steps to ensure that corporations subject to Australia's jurisdiction discharged their human rights' obligations. The human right which was the focus of this thesis was workers' right to safety and health. Australia does not have an absolute responsibility to ensure workers in Australian-based supply chains have their right to safety and health respected. The obligation upon Australia is to take reasonable steps to ensure this right is realised. The obligation upon Australia is to ensure this right is protected domestically through adequate laws and to take reasonable steps to ensure corporations comply with the complicity principle in their international supply chains.

In chapters 3 to 7, Phase two analysed whether Australia was currently discharging its obligations to take reasonable steps to ensure the right to safety and health of employees in Australian-based supply chains. The second phase of this thesis used the standard developed in phase 1 to test whether Australia's current conduct was protecting workers' right to safety and health. Phase 2 focused upon identifying whether Australia was currently discharging its obligations and whether there was

the need for greater regulatory intervention. If this phase determined that Australia was currently discharging its human rights obligations then the hypothesis would have proven false and phase 3 would not focus upon additional regulatory options.

Chapters 3 and 4 analysed whether hard law occupational health and safety "OHS" laws in Australia and China respectively were protecting workers right to safety and health. Chapters 3 and 4 focused on the hard law protection afforded to the most vulnerable parties in the supply chain business model: Outworkers in Australia and workers in Chinese Special Economic Zones (**SEZ**).

Chapter 3 analysed the OHS protection afforded to outworkers by first analysing who has OHS duties to ensure outworkers' safety. This part found that there was considerable formal protection afforded to outworkers. The laws which create deemed employment relationships between traders and outworkers, the potential of pushing OHS duties up supply chains to impose duties over retailers, employers duties for non-employees and significant legal sanctions for non-compliance arguably provides outworkers considerable formal protection. Chapter 3 argued that while outworkers enjoyed formal protections there is a considerable gap when it comes in enforcing those laws. Primary research demonstrated that traders and retailers were not performing risk assessments, providing outworkers OHS training or managing outworkers systems of work. The failure of regulators to enforce OHS protections largely negated the deterrent value of OHS laws which led this chapter to submit that the lack of enforcement was unreasonable and that Australia was not discharging its duty to protect outworkers' right to safety and health.

Chapter 4 focused on the plight of workers in SEZs in China. This chapter analysed how Chinese OHS laws provided Chinese workers some formal OHS protection but systematic failures resulted in these OHS laws not being enforced. SEZs were established with the intent of reducing labour regulations to increase profits. This has created a culture where labour rights are often not enforced by local councils. The final part of chapter 4 reviewed a significant body of research which reported that workers in Chinese SEZ were systematically placed in extreme safety risks which had resulted in serious disabling injuries and death. Based upon the amount of quality research reporting labour abuse it is arguable that corporations which

outsource work to Chinese SEZ have constructive knowledge that the work may be performed in dangerous sweatshops. According to the complicity principle this constructive knowledge places an obligation upon corporations to engage in above compliance activities and take reasonably practicable steps to increase the respect for human rights within their spheres of influence. The imposition of this obligation upon Australian corporations creates a corresponding duty upon Australia to take reasonably practicable steps to ensure Australian corporations satisfy their human rights obligations under chapter 2.4.4.

As corporations are not being effectively forced to implement OHS to protect outworkers in Australia or workers in Chinese SEZs the safety of those workers will depend upon corporate good will. To determine whether corporations are likely to engage what is effectively above compliance activities the remaining three chapters in phase 2 focused on corporation's participation in the corporate social responsibility movement (CSR).

CSR involves corporations engaging in activities which focus upon the social good, rather than entirely upon maximising profits. Chapter 5 explained that corporations exist to maximise profits and that some directors and commentators have claimed directors have no authority to engage in activities which do not maximise profits. Other commentators have argued that directors do not have sufficient training to discriminate between the thousands of social causes. Despite this problems chapter 5 argued that directors are permitted by Australian law to devote corporate resources to CSR. The business judgment rule will protect almost all directors who wish to engage in CSR. The existence of this confusion however does create a problem which arguably regulators should clarify.

Even though corporations are permitted to engage in CSR this does not mean corporations are engaging in any above compliance activities which will result in improved labour conditions. The research findings of chapter 6 demonstrate that corporations in Australia are not embracing the CSR movement. This chapter first analysed primary research to determine the impact of CSR upon corporations. After analysing primary research which demonstrated CSR provided mediocre benefits to many corporations it was argued that market driven unregulated CSR did not

motivate a sufficient number of corporations to render CSR a viable regulatory vehicle. This argument was supported by primary research which demonstrated directors were reluctant to engage in CSR and that many Australian corporations were not willing to join CSR reporting indices. In response to the limited coverage of CSR in the retail industry advocates focused their efforts on motivating corporations with highly identifiable brand names. Arguably the high profile of branded corporations rendered them especially vulnerable to the primary deterrent aspect of the CSR movement, negative media attention. Despite this strategic focus chapter 6 reported that the largest discount retail chain in Australia was not involved in the CSR movement but rather focused upon price maximisation. On the basis CSR has such low coverage in Australia it is submitted Australia cannot rely upon CSR to motivate corporations to respect human rights.

Even if more corporations embraced CSR this would not discharge Australia's obligations. Chapter 7 argued that the current unregulated status of CSR auditing largely confounded the effectiveness of this movement. While financial audits are strictly audited according to guidelines CSR audits are entirely unregulated. Some CSR reports are audited by large multi-national accounting firms while some reports have no independent auditing. Chapter 7 argued that there are substantial problems with social auditing of factories. Research reports that some factories force their workers to lie to auditors, some factories fraudulently alter records and that some auditors have insufficient time and training to detect labour breaches. Due to the inconsistencies in CSR reporting stakeholders have no way to determine if corporations who claim to act ethically are in fact acting ethically. The inability of stakeholders to determine which corporations are ethical and unethical means stakeholders cannot identify and therefore punish unethical corporations. Arguably the failure to provide regulations to ensure the quality of CSR reporting and auditing confounds the deterrent aspect of the CSR movement. Based upon these findings it is argued that market driven unregulated CSR cannot be relied upon by Australia to discharge its human rights obligations.

Phase 2 demonstrated that Australia's current approach is not enabling workers to realize their right to safety and health. Phase 3 performed an analysis in chapters 8 and 9 to determine if there was a regulatory vehicle which Australia could reasonably

practicably utilize to increase workers' right to safety and health. Chapter 8 asked whether Australia could implement State-based supply chain regulation to protect workers' in Australian based supply chains. Chapter 8 first analysed how New South Wales and South Australia have implemented mandatory retail codes to protect outworkers labour conditions within Australia. This chapter argued that these codes were providing outworkers increased protection for other labour conditions and that these codes should be expanded to cover OHS and adopted nationally. It is submitted that expanding the mandatory retail codes in this manner would improve the protection of domestic workers through increasing the ability of regulators and unions to inspect and enforce the OHS duties as discussed in chapter 3.

While State-based supply chain regulation provided a remedial option to protect domestic workers chapter 8 argued that this option could not be effectively expanded to protect workers outside Australia. The second part of chapter 8 analysed the considerable problems Australia would have in enforcing State-based regulation of international supply chains. The enforcement of such laws would create considerable problems in detecting breaches and prosecuting any infringements. This chapter analysed in detail the problems the USA has had with prosecuting claims under their *Alien Tort* Statute. Chapter 8 argued that the considerable justicibility problems which confronted the USA would similarly confound the operation of any Australian State-based supply chain regulation. This chapter argued that Australia should not introduce State-based supply chain regulation and should seek to identify alternative regulatory vehicles to respond to violations of workers' right to safety and health.

Where chapter 8 focused upon what action Australia could unilaterally take to protect workers' right to safety and health chapter 9 asked whether public international law vehicles could protect workers' right to safety and health. This chapter tested three vehicles to determine whether they constituted a viable regulatory option.

The first regulatory vehicle analysed in chapter 9 was the United Nations Global Compact (**UNGC**). The UNGC is the world's largest CSR initiative and has the considerable support of the UN General Assembly. Corporations which participate

in the UNGC are required to uphold ten overarching principles which are drawn from, inter alia, international human rights and ILO treaties. UNGC participants are required to provide communications on their progress in implementing the ten principles into their business activities. These Communications on Progress however, are not certified. The UNGC does not certify factories or perform CSR audits. The UNGC is primarily a business platform to provide support for corporations which desire to engage in CSR. The failure to provide assurance is arguably a considerable limitation with the UNGC. Chapter 7 demonstrated that many CSR reports made claims based on invalid social audits. Due to the fact the UNGC has weak assurance procedures it is submitted this model does not significantly improve the regulatory potential of CSR as discussed in chapters 5, 6 and 7. Despite these limitations it is submitted that as a long term strategy however, Australia should work with the UNGC to improve further the potential of the world's largest CSR movement.

While the UNGC has long term potential, Australia should consider exploring alternative regulatory models. An alternative regulatory model is represented by the ILO's Better Factory Project. This Project commenced following an agreement between the USA and Cambodian governments. The Better Factory Project involved the ILO auditing and certifying labour conditions in Cambodian textile and apparel factories. The high quality of these audits and the public use of factory ratings have arguably resulted in considerable improvements in Cambodian labour conditions. While the Better Factory Project model would be likely to result in considerable improvements in Chinese labour conditions, it is submitted that China would refuse to agree to this arrangement and subject its factories to audits. China has historically resisted external auditing of their factories and has recently developed a CSR scheme in response to domestic and international concerns about labour conditions. Rather than seeking to attempting to impose external supervision over Chinese factories this chapter argued that Australia should seek to improve workers' right to safety and health in China through supporting China Social Compliance for Textile and Apparel Industry (**CSC9000T**).

Chapter 4 identified that there were serious problems with China's auditing of their own factories and that Australia was required to identify additional avenues to protect workers within Australian corporations' spheres of influence. The last part of

chapter 9 analysed a developing CSR regulatory scheme in China to determine whether Australia could assist China to implement this scheme to discharge Australia's human rights obligations. The CSR scheme which is being implemented in China is called CSC9000T. As discussed in chapter 9, CSC9000T involves Chinese auditors inspecting factories and publishing these reports on a publicly available database. When fully implemented, CSC9000T will require all factories in the textile and apparel industry to participate in this scheme. If CSC9000T is enforced, then arguably this scheme will provide an extremely powerful vehicle in improving labour conditions in China.

To date, the Chinese government and industry officials have expressed concern that Western-based, mandatory supply chain regulation could be used as blue trade barriers to reduce the competitiveness of Chinese exports. Largely in response to this threat, the China National Textile and Apparel Council developed and implemented CSC9000T with the support of the Chinese government. If CSC9000T is not enforced to a sufficient level, then calls for mandatory supply chain regulation will likely increase. As explained in chapters two and nine, some USA States already impose labour conditions extraterritorially. Chapter 9 explains that several Northern and Southern States have become involved with SA8000 auditing which increases the possibility that schemes of this nature may become binding. As a consequence, China is facing considerable pressure to ensure CSC9000T is enforced to a reasonably high level. It is submitted that rather than Australia or the ILO attempting to perform audits in China, Australia and the international community should work with China to ensure CSC9000T is fully implemented and enforced. Australia could support China's moves to enforce CSC9000T, through a bilateral agreement linking increased trade access to the Australian market to the successful implementation of CSC9000T. This move would arguably respect China's sovereignty while providing China an economic incentive to successfully implement CSC9000T. It would be reasonably practicable for Australia to approach China to determine if a bilateral agreement could be reached.

As this thesis has analysed international supply chains it has been impossible to devote attention to issues surrounding the bifurcation of OHS laws from other laws relating to workers health at work. This bifurcation exists in Australia where

important issues about workers health at work are covered in separate legislative regimes.[1667] Where workers are injured at work the obligation to ensure health and safety are protected under OHS laws and workers rights to rehabilitation are covered in entirely different legislative regimes. Workers in Australia are entitled to compensation for workplace injuries unless the worker's cause, by their own serious or wilful misconduct and the employer had not expressly or implicitly authorised such conduct.[1668] In addition employers are required to manage their injured workers return to work through formal programs and are prohibited from dismissing the injured worker for varying periods of time.[1669] Future research should seek to determine whether this bifurcation is negatively impacting upon workers right to health and safety and if so what are the potential regulatory responses to address this problem.

The complex issues of regulating international supply chains are beyond one thesis. This thesis has identified several areas for further exploration. In chapter 1.4 it was explained why this thesis focused upon Sino-Australian supply chains and not upon supply chains to Australia's other key trading partners. The conclusions reached in this thesis may not be transferable to all of Australia's trading partners. For example, while Australia does not have the economic power to pressure China to agree to ILO auditing, the power relationship between Australia and Fiji is considerably

[1667] Richard Johnstone, Regulating Occupational Health and Safety in a Changing Labour Market' in Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell (Eds.), *Labour Law and Labour Market Regulation* (2006) chapter 32.

[1668] *Workers Compensation Act 1951* (ACT) s 82(3); *Workers Compensation Act 1987* (NSW) s 14(2); *Workers Rehabilitation and Compensation Act* (NT) s 57; *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 130; *Workers Rehabilitation and Compensation Act 1986* (SA) s 30B(2); *Workers Rehabilitation And Compensation Act 1988* (Tas) s 25(2); *Accident Compensation Act 1985* (Vic) s 82; *Workers' Compensation and Injury Management Act 1981* (WA) S 22.

[1669] *Workers' Compensation Act 1951* (ACT) ss 100; *Workplace Injury Management And Workers Compensation Act 1998* (NSW) ss 52 and 53 and 241 - 243; *Workers Rehabilitation And Compensation Act* (NT) s 75A; *Workers' Compensation And Rehabilitation Act 2003* (Qld) ss 232B and 226 – 228; *Workers Rehabilitation And Compensation Act* (NT) ss 75A and 76; *Workers Rehabilitation And Compensation Act 1986* (SA) Ss 28A – 28D; *Workers Rehabilitation And Compensation Act 1988* (Tas) ss 138A, 138B and 139; *Accident Compensation Act 1985* (Vic) ss 156 and 160; *Workers' Compensation And Injury Management Act 1981* (WA) ss 84AA and 155C; In Queensland employers are prohibited from dismissing workers injured at work until 12 months have passed from the accident. In New South Wales the worker cannot be dismissed until six months have passed since the workplace accident but if the worker becomes able to perform suitable duties within 12 months then the employer must reinstate the worker. While the statutes in Tasmania, Victoria and Western Australia do not prevent employers from dismissing workers who are injured at work, the relevant statutes do require employers to keep the injured workers positions open if they become fit for duties within 12 months of the accident. Workers injured at work in the Australian Capital Territory receive slightly less protection in the foregoing jurisdictions. In the Australian Capital Territory employers are permitted to dismiss injured workers but must reinstate the worker if they are able to perform suitable duties within six months of the workplace accident. The jurisdictions which provide the least protection to workers who desire to return to work following an occupational accident are South Australia and the Northern Territory. In South Australia employers must give the worker and Workcover SA 28 days notice prior to terminating injured workers and in the Northern Territory there is no obligation to keep injured workers positions open subject to Federal laws.

different.[1670] To determine the applicability of these models and conclusions to Australia's other trading partners is an area for future research.

In addition the release of ISO26000 and the expansion and improvement of SA8000 and the UNGC will have substantial impacts upon supply chain regulation. How these developments will impact upon the regulation of supply chains will be topics for future research.

Ultimately there is 'no single silver bullet' that will resolve the business and human rights challenge created by extraterritorial supply chains.[1671] Australia, however, has an obligation to take reasonably practicable steps to improve the health and safety of workers in Australian-based supply chains. It is submitted Australia can take extensive action to improve domestic labour conditions and has a range of potential regulatory vehicles which could improve the respect of rights within Australian based supply chains. Corporations are arguably motivated by profits and are guided in their conduct by the actions of States. Accordingly Australia should use legislative and political vehicles to take reasonably practicable steps to improve the realisation of workers' right to safety and health in Australian-based supply chains.

[1670] 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.
[1671] John Ruggie, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability in Corporate Acts* (Report of the Special Representative of the United Nations Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 24; John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights* (Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises to the Human Rights Council Eighth session, 7 April 2008. 7.

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