



Strategic ‘Co-enforcement’ in Supply Chains: The Case of the Cleaning Accountability Framework

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This article examines the development of the Cleaning Accountability Framework (CAF) in Australia. The CAF is a multi-stakeholder initiative comprising of representatives from along the cleaning supply chain. A growing body of evidence suggests there is a need for a consistent industry-wide approach to employment standards in the cleaning industry. Given the extent of noncompliance in the industry and price/cost pressures along the supply chain, it would appear that some form of co-enforced supply chain regulation might be warranted. This article assesses the extent to which the CAF is a multi-stakeholder version of such regulation. The article draws on enforcement theories with a focus on ‘co-enforcement’ to assess the CAF and highlights the implications of the CAF case study for that approach. The article uses this analysis to identify the preconditions for co-enforcement within supply chains in an unsupportive or complex political environment.

Introduction

In this article, we investigate the establishment of a new multi-stakeholder framework in Australia called the Cleaning Accountability Framework (CAF) which is designed to regulate supply chains in the private sector commercial cleaning industry.¹ The CAF is an initiative comprising of representatives from throughout the cleaning supply chain — including property investors, property owners, facility managers, cleaning companies, employee representatives and industry associations. On a spectrum of types of regulation, the CAF is a multi-stakeholder initiative lying between ‘hard’ mandatory schemes and ‘soft’ self-regulatory schemes.² A growing body of evidence suggests there is a need for a consistent industry-wide approach to issues concerning the employment standards of cleaners and the viability of business models in the cleaning industry. These issues can have several consequences: the disruption of tenant operations, underpayments and the loss of superannuation payments to cleaners, sham contracting arrangements and uncertainty and financial hardship for cleaners. The extent of noncompliance

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1 In this article, we focus on private sector cleaning supply chains. Our analysis may need adaptation to public sector cleaning supply chains, given that the state plays the dual role of enforcer and lead firm in that sector.

2 See C Parker and J Braithwaite, ‘Regulation’, in P Cane and M Tushnet (Eds), *The Oxford Handbook of Legal Studies*, Oxford University Press, Oxford, 2003, p 119 at p 129.

within the industry and cost pressures emanating down the supply chain can result in negative outcomes for cleaners.³

The need for improved regulation to address these kinds of supply chain pressures in the cleaning industry arises within the context of widespread outsourcing of work, and the replacement of the unitary employer with more complex business network structures, such as supply chains. These business structures comprise a number of interconnected organisations; for example, supply chains commonly involve a series of contracts for the provision of goods or services extending from the commercial party at the top of the chain through interposed commercial parties and down to those who do the work at the bottom. Current research reveals the adverse consequences of outsourcing within supply chains for those vulnerable workers within them (known as supply chain labour).⁴ There is now substantial evidence showing that dictation of various aspects of the delivery of production and services (notably times and costings) by commercial entities at or near the top of supply chains has contributed to poor working conditions for some of the workers at the bottom.⁵ This has generated significant problems for conventional regulatory regimes which tend to focus on the relationship between a direct employer and its employees. Indeed, a failure of traditional regulation vis-à-vis supply chain labour is marked by the fact that the direct contractual relationship is often wrongly identified as being the principal relationship warranting regulation, given that, in reality, it is the commercial parties at or near the apex of supply chains that influence work parameters for this type of workforce.⁶

Given the serious policy issues regarding the role that supply chains play in influencing the working conditions of supply chain labour, it is now widely

3 See S Holley and A Rainnie, 'Who Cleans Up? The Declining Earnings Position of Cleaners in Australia' (2012) 23 *ELRR* 143 at 155.

4 See, eg, C Wright and J Lund, 'Supply Chain Rationalization: Retailer Dominance and Labour Flexibility in the Australian Food and Grocery Industry' (2003) 17 *Work, Employ Soc* 137 at 142–51; P James et al, 'Regulating Supply Chains to Improve Health and Safety' (2007) 36 *ILJ* 163 at 166–70; M Quinlan, *Supply Chains and Networks*, Safe Work Australia, Canberra, July 2011; D Walters and P James, 'What Motivates Employers to Establish Preventive Management Arrangements within Supply Chains?' (2011) 49 *Saf Sci* 988 at 989.

5 Quinlan, above n 4, at 4.

6 M Rawling and S Kaine, 'Regulating Supply Chains to Provide a Safe Rate for Road Transport Workers' (2012) 25 *AJLL* 237 at 238. These kinds of developments have led a large number of scholars to highlight the narrowness of business responsibility under conventional employment laws: see, eg, J Fudge, 'The Legal Boundaries of the Employer, Precarious Workers, and Labour Protection', in G Davidov and B Langille (Eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work*, Hart Publishing, Oxford, 2006, p 295 at p 298; P Davies and M Freedland, 'The Complexities of the Employing Enterprise', in G Davidov and B Langille (Eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work*, Hart Publishing, Oxford, 2006, p 273 at p 284; M-L Morin, 'Labour Law and New Forms of Corporate Organization' (2005) 144 *ILR* 5 at 22; J Rubery, J Earnshaw and M Marchington, 'Blurring the Boundaries to the Employment Relationship: From Single to Multi-Employer Relationships', in M Marchington et al (Eds), *Fragmenting Work: Blurring Organizational Boundaries and Disordering Hierarchies*, Oxford University Press, Oxford, 2005, p 63 at p 65; J Prassl, *The Concept of the Employer*, Oxford University Press, Oxford, 2016; T Hardy, 'Who Should Be Held Liable for Workplace Contraventions and on What Basis?' (2016) 29 *AJLL* 78 at 80.

accepted that strengthened regulation of supply chains is needed.⁷ For some time now, researchers have highlighted how the supply chains in question have the potential to counter adverse outcomes by harnessing the influence of dominant business entities at or near their apex to address low pay and poor working conditions further down.⁸ Research on what form that regulation should take has been less emphatic (although some research has concluded that mandatory regulation of supply chains is necessary to address poor working conditions in some sectors).⁹ What is clear is that instances in which supply chains have been used to positively influence health and safety have involved external pressures from wider social, political and regulatory sources.¹⁰

Nevertheless, two theoretical models of regulation and enforcement may be helpful in enlightening the path for future direction of supply chain regulation: the strategic enforcement model (SEM) and the co-enforcement model. SEM¹¹ advocates for a more strategic path for the enforcement of labour standards,¹² and for labour inspectorates to leverage the structural features of industries to change the behaviour of employers throughout that industry. SEM has begun to inform state agencies' enforcement practices with regard to supply chains¹³ by, for instance, suggesting that public agencies concentrate on influential lead firms at or near the top to effect compliance along their chains.¹⁴ The second model examines the potential of 'co-enforcement' of

7 See, eg, J Bair, 'Global Capitalism and Commodity Chains: Looking Back, Going Forward' (2005) 9 *Compet Change* 153 at 161; S Barrientos et al, 'Decent Work in Global Production Networks: Framing the Policy Debate' (2011) 150 *ILR* 297 at 306; Organisation for Economic Co-operation and Development, World Trade Organization and United Nations Conference on Trade and Development, *Implications of Global Value Chains for Trade, Investment, Development and Jobs*, Report, G20 Leaders' Summit, Saint Petersburg, September 2013, at 7.

8 See, eg, I Nossar, R Johnstone and M 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 *AJLL* 137; I Nossar, 'The Scope for Appropriate Cross-Jurisdictional Regulation of International Contract Networks (Such as Supply Chains): Recent Developments in Australia and their Supra-National Implications', Working Paper No 1, Business Outsourcing and Restructuring Regulatory Research Network, 2007; Quinlan, above n 4; Walters and James, above n 4, at 988; C Wright and W Brown, 'The Effectiveness of Socially Sustainable Sourcing Mechanisms: Assessing the Prospects of a New Form of Joint Regulation' (2013) 44 *IRJ* 20; D Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*, Harvard University Press, Cambridge, 2014; T Hardy and J Howe, 'Chain Reaction: A Strategic Approach to Addressing Employment Noncompliance in Complex Supply Chains' (2015) 57 *JIR* 563; P James et al, 'Regulating the Employment Dynamics of Domestic Supply Chains' (2015) 57 *JIR* 526; C F Wright and S Kaine, 'Supply Chains, Production Networks and the Employment Relationship' (2015) 57 *JIR* 483.

9 M Rawling, 'Cross-Jurisdictional and Other Implications of Mandatory Clothing Retailer Obligations' (2014) 27 *AJLL* 191.

10 Quinlan, above n 4, at 3–4.

11 Hardy and Howe, 'Chain Reaction', above n 8; D Weil, *Improving Workplace Conditions through Strategic Enforcement: A Report to the Wage and Hour Division*, Report, Boston University, Boston, May 2010 (*Improving Workplace Conditions*); Weil, *The Fissured Workplace*, above n 8.

12 Weil, *Improving Workplace Conditions*, above n 11.

13 Hardy and Howe, 'Chain Reaction', above n 8.

14 James et al, 'Regulating Supply Chains', above n 4.

labour standards, in which ‘government partners with organizations that have industry expertise and relationships with vulnerable workers ... [to] manage the shifting and decentralized structures of twenty-first-century production’.¹⁵ Within this co-enforcement model, concerns have been raised that neither strategic enforcement nor an increase in the size of labour inspectorates would be sufficient to bridge the gap between minimum legal labour standards and their enforcement.¹⁶ Recent contributions in this area have focused on the role that worker organisations¹⁷ play in enhancing enforcement.¹⁸ Yet these contributions, beyond a brief acknowledgement that business has a part to play, have overlooked a central feature of SEM: the role of lead firms in business networks.

These two models may overlap in various ways. This article accommodates this overlap by integrating the ‘lead firm’ aspect of SEM into the co-enforcement model. We acknowledge the importance of SEM in ensuring labour standards in supply chains — for example, co-enforcement could be seen as an element of SEM — but our focus is on the co-enforcement model because of its greater recognition of the significance of worker involvement in enforcement. Indeed, an essential component of the CAF is a worker verification process devised to ensure compliance with standards. This component, designed to enhance ‘worker agency’, is central to the co-enforcement theory and is largely absent in SEM.

The purpose of the article is to engage in a productive interaction between the case study of CAF and co-enforcement theory. Our overall contribution is threefold. First, rather than assuming that CAF is an example of co-enforcement, we briefly consider the extent to which CAF can legitimately be viewed as a co-enforcement measure. Second, CAF has features which extend the co-enforcement model. On this point we contribute to the development of the co-enforcement model by building into our analysis SEM insights about the role of lead businesses in regulating supply chains. Third, we examine the development of the CAF and consider the significance of a supportive political environment in establishing co-enforcement. In turn, this leads to the identification of the boundary conditions for co-enforcement within supply chains in an unsupportive or complex political environment.

In this article, we use the CAF case study to address gaps in the co-enforcement model and consider how co-enforcement can be applied and developed so it is instructive for future directions in supply chain regulation.

The motivations for a new approach

The CAF was created because the federal government enforcement agency — the Fair Work Ombudsman (FWO) — and the union that represents cleaners

15 J Fine, ‘Enforcing Labor Standards in Partnership with Civil Society: Can Co-enforcement Succeed Where the State Alone Has Failed?’ (2017) 45 *PAS* 359 at 359.

16 M Amengual and J Fine, ‘Co-enforcing Labor Standards: The Unique Contributions of State and Worker Organizations in Argentina and the United States’ (2017) 11 *Regul Gov* 129; Fine, above n 15.

17 We take ‘worker organisation’ to mean any collective organisation representing workers including unions and worker advocacy groups. However, as discussed later, we note that in the Australian context, worker advocacy groups have not reached the scale or had the same impact compared to those in the USA: see Amengual and Fine, above n 16.

18 *Ibid.*

(United Voice (UV)) had not managed to reduce the high levels of noncompliance with labour standards in commercial cleaning supply chains. In this sector, owners of large buildings and their tenants outsource work to cleaning companies who may engage workers and/or outsource the work to smaller cleaning businesses, creating a structural pressure that contributes to low pay and poor working conditions (and often poor quality cleaning for clients and unsustainable cleaning contractor business models).¹⁹ At the bottom end of cleaning supply chains is a workforce of vulnerable, low-paid cleaners, a significant proportion of whom experience work-related issues including underpayment, underemployment, sham contracting practices (under which employees are wrongly engaged as contractors) and work intensification.²⁰ The CAF aims to improve their working conditions by involving all parties concerned in the monitoring and enforcement of work standards, including the building owners at the top of the chain. Moreover, the CAF has assistance from UV and the government regulator, the FWO. However, given the involvement of companies from all tiers of the supply chain, a key question is what were the drivers of that involvement for organisations beyond UV and FWO? For cleaning companies, an alternative to the patchy coverage of enterprise bargaining was attractive (which is discussed in a later section). For building owners and facilities managers, it was an increasing concern about social sustainability and supply chain risk, most recently in the form of developments addressing modern slavery.²¹

This article traces the development of the CAF and characterises it as a sector-based attempt at co-enforcement (especially given the involvement of UV and the FWO). However, the CAF has additional elements to Fine's²² three conditions for sustainable enforcement because the CAF involves parties beyond the state and worker organisations. Therefore, we consider how the example of the CAF might supplement Fine's explanation of co-enforcement, articulating in more detail the unique role that lead firms in supply chains might play, in addition to the unique enforcement capabilities of the state and worker organisations.²³ Furthermore, we contend that, especially in the absence of a supportive political environment,²⁴ the participation of dominant business agents is a scoping condition for co-enforcement.²⁵ That is, lead firms can play a role that no other party in the supply chain can. This does not imply the privatisation of regulation by giving lead firms formal status as co-enforcers. Instead, it suggests that lead firms, who have the economic capacity to influence work standards in supply chains, are encouraged to

19 I Campbell and M Peeters, 'Low Pay, Compressed Schedules and High Work Intensity: A Study of Contract Cleaners in Australia' (2008) 11 *AJLE* 27 at 28.

20 Ibid. See also Fair Work Ombudsman (FWO), *National Cleaning Services Compliance Campaign 2014/15*, Report, Commonwealth of Australia, Melbourne, March 2016.

21 Investa Property Group, *ESG Risks in Property Supply Chains*, Discussion Paper, 2014; Property Council of Australia (PCA), 'A Common Language for Social Sustainability', March 2018, at <https://files.propertycouncil.com.au/hubfs/_Communications/ACommonLanguageforSocialSustainability.pdf> (accessed 14 September 2018).

22 Fine, above n 15.

23 Ibid; Amengual and Fine, above n 16.

24 That being an environment in which there is governmental support for robust enforcement measures and the participation of worker representatives in compliance activities.

25 Fine, above n 15.

participate in improving the labour standards of their indirect/supplier workforce. Our specific contribution on this point is to consider the threshold conditions under which this participation occurs and how the CAF proposes that lead firms become involved in multi-stakeholder regulation of supply chains in an unsupportive political environment.

The first part of the article covers the conceptual issues from the literature that frame our discussion of the implications of the CAF case study. The second part examines the three chronological phases in our CAF case study. The first of these phases includes an examination of the main features of the cleaning industry, the working conditions of cleaners therein and the structural elements that drive down their working conditions. The second phase discusses the Clean Start campaign as a precursor to the CAF. The third phase analyses the establishment of the CAF. The final parts of the article examine the implications of co-enforcement theory for CAF and the implications of the CAF case study for co-enforcement theory.

Multi-Stakeholder Co-Enforcement and Non-Substitutable Elements in Supply Chains

Contractual relationships common to supply chains give rise to a situation in which the working arrangements that exist at the bottom are influenced by the demands of the dominant economic actors at the top. The inability of the union or the state regulator to overcome the structural pressures present in the commercial cleaning sector suggests that traditional forms of labour regulation and enforcement have not adequately addressed this dynamic. The inadequacy of conventional enforcement is not unique to the Australian commercial cleaning sector. Amengual and Fine build their case for co-enforcement of labour standards²⁶ on the premise that '[l]abor law enforcement in much of the world has been inadequate to counter the growth of a vulnerable workforce and the ensuing global reality of poor labor standards'.²⁷ Likewise, the 'strategic enforcement model' or SEM recognises the limited resources available for enforcement and accepts that public agencies, or isolated actors, cannot address noncompliance on a case-by-case basis.²⁸ SEM focuses on regulatory techniques that trigger systemic effects that cannot be obtained through disjointed efforts. However, despite the influence of SEM on state agency practices, concerns remain about the extent to which it harnesses the capacity of worker organisations that might be leveraged to amplify the scale of labour standards enforcement.²⁹

The debate about co-enforcement and SEM measures in supply chains has occurred within the context of a broader discussion about 'responsive' or 'reflexive' regulation, and what makes for effective regulation generally.³⁰ This discussion has centred on the potential for less formal and direct regulatory mechanisms as a better modality of regulation across the board, and

26 Amengual and Fine, above n 16; *ibid.*

27 Amengual and Fine, above n 16, at 2.

28 Weil, *Improving Workplace Conditions*, above n 11; Weil, *The Fissured Workplace*, above n 8; Hardy and Howe, 'Chain Reaction', above n 8.

29 Amengual and Fine, above n 16.

30 J Braithwaite, 'The Essence of Responsive Regulation' (2011) 44 *UBC L Rev* 475.

as a means of improving labour standards.³¹ One key aspect of responsive regulation has been the development of the 'enforcement pyramid' which articulates a hierarchy of enforcement measures, ranging from softer persuasion and assistance with compliance including education and advice at the bottom of the pyramid, through to intermediate devices such as warning letters and improvement notices and finally on to sanctions such as those resulting from court orders at the top of the pyramid.³²

The role of improved responsive regulation of supply chains has also been contemplated for some time.³³ Recent contributions to the debate have included attempts to 'map' actors involved in the implementation of labour standards³⁴ and to consider the interactions between public and private labour standard regulation.³⁵ These contributions have led to developments in the longstanding and increasing interest in private regulation or 'soft law', including compliance initiatives such as corporate social responsibility (CSR) or triple bottom line reporting,³⁶ codes of conduct, internal compliance monitoring, external monitoring and certification and independent investigations and verification.³⁷

It is important to recognise innovation in private enforcement of standards but, as an initial starting point in our discussion of voluntary multi-stakeholder initiatives such as the CAF, we emphasise the continued essential role of mandatory standards, given that competitive market pressures tend to lead to an undercutting of purely voluntary measures, thereby driving down labour standards. Much more can be achieved with hybrid or voluntary measures if they take place within the shadow of public regulation (or 'hard law', which is the 'collective steering through rules laid down by governmental actors').³⁸ Thus, multi-stakeholder measures are best seen as part of a push for more effective voluntary measures to improve labour standards in supply chains, given the limitations of self-regulatory codes of conduct, the paucity of legislative measures regulating supply chains and limited political support for mandatory regulation. With greater support from formal regulatory institutions, including governments, multi-stakeholder initiatives could be

31 O Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought' (2004) 89 *Minn L Rev* 342.

32 A Stewart et al, *Creighton & Stewart's Labour Law*, 6th edn, Federation Press, Sydney, 2016, p 40; I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, New York, 1992, p 35.

33 D O'Rourke, 'Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring' (2003) 31 *PSJ* 1 at 1; J Howe, 'The Regulatory Impact of Using Public Procurement to Promote Better Labour Standards in Corporate Supply Chains', in K Macdonald and S Marshall (Eds), *Fair Trade, Corporate Accountability and Beyond: Experiments in Globalizing Justice*, Ashgate, Farnham, 2010, p 329 at p 329.

34 T Hardy, 'Watch This Space: Mapping the Actors Involved in the Implementation of Labour Standards Regulation in Australia', in J Howe, A Chapman and I Landau (Eds), *The Evolving Project of Labour Law: Foundations, Development and Future Research Directions*, Federation Press, Sydney, 2017, p 145 at p 145.

35 L Fransen and B Burgoon, 'Introduction to the Special Issue: Public and Private Labor Standards Policy in the Global Economy' (2017) 8 *GP* 5.

36 Howe, above n 33.

37 O'Rourke, above n 33; S Mena and G Palazzo, 'Input and Output Legitimacy of Multi-Stakeholder Initiatives' (2012) 22 *BEQ* 527.

38 Fransen and Burgoon, above n 35, at 7.

used to further promote compliance with public regulation of supply chains or, indeed, to raise standards above mandatory minimums.

On the spectrum of regulation, multilateral measures stand between public regulation and self-regulatory measures; that is, there is a clear distinction between multi-stakeholder initiatives involving external auditing or certification, and single-organisation activities, such as CSR reporting and internal monitoring (of which the CAF uses neither, given its multi-stakeholder nature). Multi-stakeholder initiatives have been characterised as collaborative processes that bridge organisational and ‘public-private and profit-nonprofit boundaries’.³⁹ Roloff’s definition of multi-stakeholder networks is instructive:

[Multi-stakeholder networks are] networks in which actors from business, civil society and governmental or supranational institutions come together in order to find a common approach to an issue that affects them all.⁴⁰

Amengual and Fine differentiate co-enforcement from multi-stakeholder networks or tripartism by identifying that, in addition to collaboration and negotiation in the development of regulatory rules and processes, co-enforcement ‘leverages the non-substitutable capabilities of state and society’.⁴¹ This analysis, which assumes that there is a bifurcation of responsibilities between the state and worker organisations, is perhaps less compelling in the Australian context, given that unions also have the authority to pursue coercive sanctions against employers for contraventions of industrial legislation.⁴² More to the point, in both of these examinations of co-enforcement, emphasis is placed on the unique capacities of the state and worker organisations rather than other stakeholders that might engage in collaborative governance,⁴³ despite the acknowledgement that collaborative governance should utilise processes whereby a broad range of stakeholders work to ‘make or implement public policy’.⁴⁴ Specifically, Fine argues that co-enforcement works best when three conditions are met. First, she asserts that state agencies and organisations representing workers must ‘recognize each other’s unique capacities, rather than attempt to substitute for one another’.⁴⁵ The state’s non-substitutable capacity is its coercive power coupled with its authority to delegate powers of enforcement, while employee organisations have a unique connection to the voice of the ‘shop-floor’

39 L W Fransen and A Kolk, ‘Global Rule-Setting for Business: A Critical Analysis of Multi-Stakeholder Standards’ (2007) 14 *Organization* 667 at 684.

40 J Roloff, ‘Learning from Multi-Stakeholder Networks: Issue-Focussed Stakeholder Management’ (2008) 82 *JBE* 233 at 234.

41 Amengual and Fine, above n 16.

42 Under the Fair Work Act 2009 (Cth) (FW Act) s 540, a union can apply for an order regarding a contravention or proposed contravention of a civil remedy provision if the union is entitled to represent an employee who is or will be affected by the contravention: T Hardy and J Howe, ‘Partners in Enforcement? The New Balance Between Government and Trade Union Enforcement of Employment Standards in Australia’ (2009) 23 *AJLL* 306 at 330.

43 Amengual and Fine, above n 16; Fine, above n 15.

44 Fine, above n 15, at 363.

45 *Ibid*, 362.

worker.⁴⁶ The second condition is that enforcement attempts should be industry-specific, and the third condition is that the 'collaboration receives strong political support'.⁴⁷

Yet the example of the CAF (outlined below) challenges Fine's prerequisites for co-enforcement. The emergence of the CAF could be interpreted as having two implications. First, in attempting co-enforcement in the context of a supply chain and in the absence of strong political support, the non-substitutable resources of lead firms (those at the top of the chain) are also a necessary precondition. Second, the definition of co-enforcement needs to be expanded beyond collaboration between *two parties* to capture *multi-stakeholder* variations. Furthermore, it points to a need for a nuanced assessment of current political opportunity structures to identify favourable conditions for co-enforcement. The opportunity structures that exist within a particular polity are shaped by a suite of factors, including the degree to which the political process is open or closed, the political cleavages and alliance structures that exist and the 'specific configurations of resources, institutional arrangements, historical precedents for social mobilization'.⁴⁸ As we discuss below, changes to the legal framework that have reduced the enforcement capacity of worker organisations represent the key development in the Australian political environment that restricts co-enforcement (as defined by Fine to involve worker organisations and the state) making a version of multi-stakeholder co-enforcement necessary.

Case Study of the Cleaning Industry and the CAF

In this section, we provide a case study of the CAF in three chronological phases. First, we outline the cleaning industry prior to the Clean Start campaign and the creation of the CAF. Specifically, we outline features of the commercial cleaning sector in Australia that warrant the introduction of an industry-specific scheme of regulation. Second, we examine the Clean Start campaign as the precursor to the CAF before we go on to outline the development of the CAF.

Features of the commercial cleaning sector in Australia

Overall, the commercial cleaning industry in Australia was expected to generate \$8.6 billion in revenue (and a profit of \$1 billion) in 2016/17. With annual growth predicted to be 2.7% in the next five years, that revenue is estimated to reach \$9.8 billion in 2021/22, and part of this growth will be driven by the continuing outsourcing of cleaning, not only by households, but

46 Amengual and Fine, above n 16, at 3. In Australia, although unions have the authority to exercise certain coercive powers by way of rights of entry and legal standing they largely derive these powers from the state. In this regard, the state's role is still non-substitutable. However, once powers are delegated to unions, some enforcement can be pursued by unions alone without the assistance of state agencies.

47 Fine, above n 15, at 359.

48 H P Kitschelt, 'Political Opportunity Structures and Political Protest: Anti-Nuclear Movements in Four Democracies' (1986) 16 *B J Pol S* 57 at 58; D S Meyer, 'Protest and Political Opportunities' (2004) 30 *Annu Rev Sociol* 125.

also by businesses.⁴⁹ The Construction and Property Services Industry Skills Council divided the cleaning sector in Australia in 2014/15 into seven services: residential cleaning; industrial cleaning; exterior building and window cleaning; washroom services; street and road cleaning; interior cleaning services; and 'other cleaning services'. Of these, interior building cleaning (offices, shopping centres and universities) represented 42% of total cleaning services.⁵⁰ This is the largest portion of the cleaning market (31% of industry revenue estimated in 2016/17). It is known to be highly price competitive and one in which property owners pursue lower contract pricing and better service levels.⁵¹ The initial phase of the CAF targets this part of the sector, which is itself fragmented, with buildings graded A, B or C depending on the quality of the space (position, outlook, presentation, security, access and maintenance). While there are no formal standards for classifying buildings, the quality grading of the buildings is determined by the Property Council of Australia (PCA), whose levels are indicative of 'a building's ability to attract occupants and sustain rental performance'.⁵² Grades have implications for cleaning services: Level 'A' buildings demand a higher standard of service than 'B' or 'C' buildings. Consequently, the nature and requirements of the tender for cleaning contracts vary depending on the grade of the building and the expected productivity rates of individual cleaners.

The industry overall employs around 122,900 workers.⁵³ Cleaning work is low-paid with the vast majority of workers relying on minimum award pay and conditions. In this sector, the aggressive price-competitive environment, combined with minimal skill requirements and low barriers to new business entrants, result in downward pressure on wages and conditions. Award noncompliance is a significant issue whereby it is evident that practices have been designed to avoid minimum pay and conditions.⁵⁴ In 2011, the FWO found that 21.5% of businesses were engaging in sham contracting by misclassifying employees as contractors, and audits uncovered a significant proportion of cleaning business that were underpaying their employees, as well as not providing the required superannuation payments.⁵⁵ Wages are estimated to amount to just over 42% of revenue in 2016/17, with average wage growth lagging behind revenue growth over the past five years and predicted to decline as a proportion of revenue.⁵⁶ A study by Holley and

49 A Allday, *IBIS World Industry Report N7311: Commercial Cleaning Services in Australia*, Report, IBIS World, November 2016.

50 Construction and Property Services Industry Skills Council (CPSISC), *Cleaning Services Sector Snapshot: Environmental Scan 2015–2016*, at <www.cpsisc.com.au/resources/CPSISC/Industry%20Snap%20Shot/Cleaning%20Industry%20Snapshot.pdf> (accessed 27 October 2017).

51 Allday, above n 49.

52 Property Council of Australia, *About the OMR*, at <www.propertycouncil.com.au/Web/Events__Services/Research_Services/OMR_About.aspx> (accessed 1 February 2019). See also Property Council of Australia, *Guide to Office Building Quality 2012* (Property Council of Australia, 2012).

53 FWO, *National Cleaning Services Compliance Campaign 2014/15*, above n 20.

54 Campbell and Peeters, above n 19, at 33.

55 FWO, *National Cleaning Services Compliance Campaign 2014/15*, above n 20.

56 Allday, above n 49.

Rainnie⁵⁷ has provided quantitative evidence that there is an increasing gap between the pay of full-time employee cleaners and other full-time employees in Australia. Underemployment is also an issue, with some cleaners working as little as two hours per day.⁵⁸ Evidence suggests that cleaning work is characterised by compressed work schedules, large workloads and increased work intensity,⁵⁹ with a high incidence of reports from cleaners about musculoskeletal injuries.⁶⁰ UV is the union with coverage of cleaning workers in Australia. It has around 120,000 members who are dispersed across a broad range of industries such as cleaning, early childhood education, hospitality, manufacturing, aged care and security. But even for a union of this size, the commercial cleaning industry remains difficult to organise due to its fragmented nature with small groups of cleaners working separately across several sites. As such, union density rates of cleaners in Australia remain low.

The cleaning supply chain

Campbell and Peeters argue that cost-cutting and the lowering of work standards are embedded in the structure of the cleaning industry.⁶¹ In Australia, major restructuring of the cleaning industry occurred from the late 1980s onwards and involved the outsourcing of work in both the private and public sectors. As a result, the commercial cleaning industry is fragmented and characterised by a supply chain structure.⁶² At the apex of this structure in the private sector are the building owners and their tenants. Property owners in central business districts (CBDs) include retail banks, investment banks and property development and construction companies,⁶³ and tenants are often powerful business entities. Building owners and their tenants rarely have any direct responsibility for the working conditions of cleaners, instead outsourcing cleaning services to businesses that specialise in offering cleaning contracts. Sometimes, the tenants themselves hire businesses that provide cleaning contracts.⁶⁴ At other times, the building owner (or their facilities manager) engages directly with the cleaning contractor, and in some buildings it can be a combination of both, with the building owners organising the cleaning of common areas and tenants organising the cleaning of their office space.

The cleaning industry comprises around 27,500 companies with a growing

57 Holley and Rainnie, above n 3, at 143, 154.

58 Campbell and Peeters, above n 19, at 34.

59 Ibid, at 36.

60 F Weigall et al, *Assessment of the Repetitive Manual Tasks of Cleaners*, Research Report, WorkCover NSW, Sydney, November 2006, cited in Campbell and Peeters, above n 19, at 37.

61 Ibid, at 28.

62 The professional cleaning industry typically involves the cleaning of large residential and commercial premises, such as offices and public buildings like schools. It does not include small-scale domestic cleaning services where a private individual engages a cleaner to clean their own home.

63 There are also building owners from the public sector, such as public bodies that own schools, at the apex of supply chains.

64 Cleaning is typically included in commercial leases as an 'outgoing' which must be paid by tenants. For legislation that allows landlords to specify outgoings in a lease which the tenant must then pay, see the Retail Leases Act 1994 (NSW) s 22, sch 2.

number of franchise operators.⁶⁵ There are many small cleaning contractors⁶⁶ and a handful of medium and large-sized operators.⁶⁷ The largest is ‘Spotless Group Holdings Limited’, with a 6.4% market share and expected revenue of \$552.9 million.⁶⁸ These cleaning contractors create another link in the supply chain. A further link in the chain is created when a larger cleaning firm outsources work to a smaller one.⁶⁹ At the bottom end of these supply chains lies a workforce of cleaners who are low-paid, award-reliant and largely unorganised. This workforce comprises ‘international students or middle-aged immigrant workers attempting to get a foothold in the Australian job market and/or women with domestic duties that limit their ability to work in other positions’.⁷⁰

Competition for contracts amongst cleaning contractors is fierce,⁷¹ with the business offering the lowest price frequently being successful.⁷² As many clients of the industry view cleaning as a necessary cost to be minimised, there is considerable supply chain pressure on contractors to reduce costs.⁷³ Moreover, the few large cleaning contractors, who set the tone and pace of competition, frequently bid for contracts at a loss to squeeze out competitors.⁷⁴ Then, given that labour is the main cost of a cleaning business, those large contractors attempt to mitigate any losses by subcontracting work to cheaper providers, thereby reducing labour costs.⁷⁵ For cleaning contractor businesses, competition and supply chain pressures have led to unreasonably low contract prices and profit margins. For workers, the ‘intensely competitive’ nature of the cleaning industry can ‘encourage or even necessitate’ reductions in pay and conditions.⁷⁶ Rates of pay, which are already low, have been cut at the same time as workloads have increased, cleaning jobs have become more insecure, work rosters have become less predictable and the incidence of work-related injuries in the cleaning industry

65 FWO, *National Cleaning Services Compliance Campaign 2014/15*, above n 20.

66 97.4% of contract cleaning firms employed 19 or fewer employees or were non-employers: Allday, above n 49. Fewer than 10 people and 48% of contract cleaning firms are sole proprietors or partnerships: S Ryan and A Herod, ‘Restructuring the Architecture of State Regulation in the Australian and Aotearoa/New Zealand Cleaning Industries and the Growth of Precarious Employment’ (2006) 38 *Antipode* 486 at 491–2. See also Holley and Rainnie, above n 3, at 147, where they state that ‘small firms that employ less than five people constitute 60% of the firms in the industry, but only employ 10% of the industry workforce’.

67 A Herod and L L M Aguiar, ‘Introduction: Cleaners and the Dirty Work of Neoliberalism’ (2006) 38 *Antipode* 425 at 425, 430; Ryan and Herod, above n 66, at 491–2.

68 Allday, above n 49.

69 Ryan and Herod, above n 66, at 492.

70 Holley and Rainnie, above n 3, at 148–9.

71 As a result, the average profit rates in the Australian cleaning industry are between 1% and 5% per annum: Ryan and Herod, above n 66, at 491.

72 Campbell and Peeters, above n 19, at 29.

73 Ryan and Herod, above n 66, at 495–6. Using a survey conducted by the Property Council of Australia, United Voice (UV) indicates that cleaning contract prices fell by as much as 21% in real terms between 1998 and 2006: United Voice, *Fact Sheet: Subcontracting and Illegal Practices*, at <www.unitedvoice.org.au/tender/fact-sheets/subcontracting-and-illegal-practices> (accessed 20 January 2017).

74 Ryan and Herod, above n 66, at 491–92.

75 UV, above n 73.

76 Holley and Rainnie, above n 3, at 155.

has increased to more than twice the national average.⁷⁷ Holley and Rainnie report that one result of outsourcing is reduced paid working hours but cleaners are still 'expected to do at least as much work — often more work and harder work — in less time'.⁷⁸ Cost pressures also create incentives to circumvent award standards through sham contracting arrangements or underpayment.⁷⁹ To summarise, the predominant supply chain structure of the industry has resulted in high levels of industrial noncompliance, intensified exploitation of cleaning workers and poor outcomes for businesses.⁸⁰

The CAF's origins: The Clean Start campaign

The CAF developed as a response to the structural issues in the commercial cleaning supply chain that resulted in the types of labour issues outlined above. It developed specifically as a recognition by a variety of parties along the supply chain that labour practices were unsustainable. There were previous attempts to improve these practices which were initiated largely by UV or the FWO. The Clean Start campaign was launched by UV, then known as the Liquor, Hospitality and Miscellaneous Workers Union (LHMU), in 2006 to 'highlight the crisis in the cleaning industry and improve jobs for cleaners'.⁸¹ The campaign featured three key aspects: obtaining assent from various tiers of the cleaning supply chain for a set of principles for fair contracting;⁸² negotiating Clean Start Agreements with employers; and committing building owners to engage Clean Start contractors.⁸³ The first round of the campaign was aimed at commercial property owners in CBDs, while the second round targeted retail shopping centres.

The campaign enjoyed some success with up to 50 cleaning contractors⁸⁴ signing a Clean Start Agreement as well as leading to the Rudd/Gillard Labor Government 'joining' the Clean Start campaign and making the commitment that 'only those cleaning contractors which meet our new Fair Work Principles⁸⁵ will be awarded new Commonwealth Contracts'.⁸⁶ However, with the defeat of the Labor Government in 2013, the Fair Work Principles (and the Commonwealth Cleaning Services Guidelines contained within) were

77 Liquor, Hospitality and Miscellaneous Workers Union (LHMU), *Clean Start Campaign Fact Sheet*, at <https://svc033.wic567dp.server-web.com/_dbase_upl/Clean%20Start%20Facts.doc> (accessed 17 December 2008); Herod and Aguiar, above n 67.

78 Holley and Rainnie, above n 3, at 48.

79 Campbell and Peeters, above n 19, at 39–41.

80 Cleaning Accountability Framework (CAF), *About the Cleaning Accountability Framework*, 30 June 2016, at <www.cleaningaccountability.org.au/about-us> (accessed 29 March 2018).

81 LHMU, *A Clean Start for Australia's Shopping Centres*, Redfern, 2010.

82 A Bibby, *Responsible Contracting: An Approach Aimed at Improving Social and Labour Practices in the Property Services Sector*, Working Paper No 282, Sectoral Activities Programme, International Labour Office, 2011.

83 LHMU, above n 81.

84 Bibby, above n 82.

85 The Fair Work Principles required federal government procurement decisions to not only abide by the FW Act but also to 'provide a model of fairness in the workplace for those who are performing work for the Commonwealth whether as employees of a Commonwealth agency, or as employees of a contractor to the Commonwealth': J Gillard, *Contractors Must Meet Fair Work Principles to Secure Government Work*, Media Release, 31 July 2009.

86 J Gillard, quoted in LHMU, above n 81, at 20.

rescinded. Furthermore, there was ongoing hostility from significant stakeholders within the sector. By 2015, the Building Services Contractors Association of Australia (BSCAA) was claiming the support of the PCA and the Shopping Centre Council of Australia in their opposition to the renewal of Clean Start Agreements. Specifically, BSCAA objected to the proposed ongoing 4% annual wage increase on the basis that the agreements ‘create an uneven playing field ... and cleaners working in the same or adjoining buildings doing the same tasks can be paid at significantly different levels, depending upon whether their employer is a Clean Start signatory or not’.⁸⁷ BSCAA cited the downward pressure placed on contractors by ‘clients’ — building owners and managers — noting that ‘clients are opting to pay rates determined by the Cleaning Services Award, and Clean Start signatories are uncompetitive in the marketplace’.⁸⁸

The Clean Start campaign, initiated by the union, while successful in improving the wages and conditions of some cleaners, was unable to address the structural pressures in the industry and possibly even exacerbated competitive pressures for those cleaning companies attempting to provide decent work standards for their workers. While UV did attempt to engage with other stakeholders, Clean Start could not be characterised as a multi-stakeholder initiative as it did not involve a collaboration between all stakeholders in the supply chain (including building owners) in standard-setting.⁸⁹ This may, in part, explain the opposition of some parties as it did not allow for the ‘benefit of “inclusiveness” that increases the ‘authority of decision making and [establish] good governance’.⁹⁰ It also highlights a difference between the Clean Start campaign and the CAF. The Clean Start campaign focused more on *standard-setting* and agreement-making to improve pay and conditions, whereas the CAF is aimed at using the influence of lead firms to better *enforce* existing standards (although, as we explain below, there is some new ‘soft’ law associated with the CAF in the form of a code of conduct which, just before this article was due to be published was replaced with a set of CAF principles).

The CAF

The CAF is an independent, not-for-profit, multi-stakeholder entity run by a steering committee. The CAF comprises representatives from across the cleaning supply chain, including property owners, property investors, property managers, cleaning businesses, UV and industry associations.⁹¹ The FWO is also represented on the steering committee. Not every business within cleaning supply chains is a member of the CAF; rather, certain lead property owners and other businesses constitute a significant proportion of its membership. CAF membership is not currently open to all Australian businesses in those supply chains. Indeed in August 2018 CAF suspended

87 B Connolly, *The Australian Cleaning Industry: A Clearer Perspective*, Facility Management, 5 March 2015, at <www.fmmagazine.com.au/sectors/the-australian-cleaning-industry-a-clearer-perspective/> (accessed 27 October 2017).

88 Ibid.

89 Fransen and Kolk, above n 39, at 4.

90 Ibid.

91 CAF, *About the Cleaning Accountability Framework*, above n 80.

membership and recently decided to move towards becoming a certification rather than a membership body. The objectives of the CAF are to recognise stakeholders that have implemented standards of best practice approaches to tendering and compliance approaches that promote fair wages and conditions and quality-focused cleaning services.⁹²

The CAF Code of Conduct

A regulatory framework consisting of two main layers has been developed by the steering committee and its subcommittees. The first layer is a certification scheme, in which a property owner can have the quality of their cleaning services in their building audited by an independent auditor engaged by the CAF. The audit was to be facilitated by a system whereby each party in the supply chain submits a report to the level above it. That is, cleaning companies were to submit an annual report to facility managers, those facility managers were to submit an annual report to property owners, and those property owners were to submit an annual report to the CAF. This would have established the CAF as the overseer of cleaning supply chains and the repository of information about them. It also would have established a direct relationship between the CAF and the property owners at the apex of the supply chain, preparing the ground for improving labour standards and creating sustainable business models. However, in a significant weakening of the scheme, this reporting was later abandoned. Furthermore, CAF does not directly receive any information about the cleaning supply chain. The independent auditors receive the information and provide a report to CAF.

Under the scheme, a property owner who is a CAF member can have a particular site certified as being of a three-star standard, indicating that the cleaning company at that particular site meets its legal obligations regarding labour standards in the cleaning industry. These obligations include compliance with the Fair Work Act 2009 (Cth) (FW Act) and the relevant award or enterprise agreement, work health and safety, record keeping and superannuation.

Also included in the three-star standard is a worker involvement component, which gauges whether workers are sufficiently educated about CAF standards to verify that their employer complies with those standards. The CAF is developing a number of initiatives to include worker feedback⁹³ in auditing and other CAF processes and, as part of the worker involvement component, a CAF representative has an opportunity to conduct a CAF education session with each cleaner who commences work at the site. This worker component fits within the co-enforcement model underlining that the everyday experience of workers is a significant means of identifying noncompliance.⁹⁴

Monitoring of subcontracting practices is essential in a scheme designed to address labour standards because further outsourcing is conducted by

92 Ibid.

93 Cleaning Accountability Framework, *Worker Engagement Protocol*, 17 November 2016, at <<https://d3n8a8pro7vhmx.cloudfront.net/cleaningaccountability/pages/23/attachments/original/1485231193/CAF-WorkerEngagementProtocol-web1.pdf?1485231193>> (accessed 28 March 2018).

94 Amengual and Fine, above n 16.

principal cleaning companies for cost reasons, and this raises questions about whether the subcontractor is paid enough for cleaning services to meet labour standards. One possible result of subcontracting is that the price paid for services is so low that the subcontractor might flout legal obligations regarding pay rates to ensure they still make a profit. If monitoring of subcontracting practices were to be overlooked, the principal cleaning companies could outsource cleaning work to avoid the obligation to meet labour standards themselves while still complying with the CAF audit. However, under the CAF arrangements the auditors only look at a sample record of invoices from any subcontractor. There is no audit as such on subcontractors unless requested. So there is no thorough auditing of the cleaning contractor's subcontracting practices. This raises questions as to whether or not monitoring of subcontracting practices is rigorous enough to counteract noncompliance in the form of shifting responsibility for pay and conditions to businesses further down the supply chain. Nevertheless, the audit will also check that a CAF pricing schedule is used for cleaning services.

Given the high levels of noncompliance in the industry at present, application of the three-star standard could improve working conditions by achieving compliance in those supply chains that are audited (assuming a degree of noncompliance beforehand). Monitoring the price that cleaning companies are paid for their services will add a further crucial dimension to the supply chain audit. The efficacy of the certification scheme, however, relies not only on how rigorous auditing is but also on its frequency, given the rapid change of practices within the cleaning supply chain and in ways that require further auditing for compliance. Furthermore, the three-star standard does not aim to establish minimum standards but focuses on achieving the less ambitious goal of ensuring that existing standards are complied with. However, the CAF is developing a four-star standard that indicates a level of practice higher than the minimum, and a five-star standard that signifies industry best practice.

The second layer of CAF regulation consists of a code of conduct that highlights the CAF's core principles. As a standalone document, the code of conduct appears to be an aspirational statement of principles 'applicable to all stakeholders in the industry',⁹⁵ rather than a binding agreement between particular stakeholders. This stands in contrast to some other multi-stakeholder initiatives, namely the Australian Homeworkers' Code of Practice⁹⁶ and the Bangladesh Accord,⁹⁷ which are multi-stakeholder in practice but also legally binding agreements signed by company signatories and relevant union officials. To achieve a particular CAF-starred standard,

95 CAF, *Code of Conduct*, at <http://d3n8a8pro7vhmx.cloudfront.net/themes/577c4fa878b8e2622e000001/attachments/original/1468220178/Cleaning_Accountability_Framework_Code_of_Conduct_26.11.13.pdf?1468220178> (accessed on 27 November 2018).

96 See Australian Competition and Consumer Commission, *Determination: Applications for Revocation of A91252-55 and Substitution of Authorisations A91354-57 lodged by the Homeworker Code Committee Incorporated in respect of Homeworkers Code of Practice*, 3 October 2013, Attachment C 'Homeworkers Code of Practice', at 60.

97 *2018 Accord on Fire and Building Safety in Bangladesh: May 2018*, at <<http://bangladeshaccord.org/wp-content/uploads/2018-Accord-full-text.pdf>> (accessed 28 March 2018).

however, the CAF website states that property owners and those in the cleaning supply chain for certain sites are required to agree to the code.⁹⁸

Principles of best practice are detailed in the code, emphasising that it is the responsibility of all stakeholders, including property owners, to ensure that: the workplace is free of harassment, bullying and discrimination; freedom of association and the right to collective bargaining are respected; working conditions are safe and hygienic and in compliance with work health and safety laws. These are all obligations that already bind the direct employer under relevant legislation. Furthermore, it is arguably the case that property owners would already be legally responsible for ensuring compliance with work health and safety laws (even though they are not direct employers).⁹⁹ But the code is novel in the sense that it extends the obligations of parties in the supply chain beyond work health and safety requirements. The code of conduct states that '*all of the parties throughout the cleaning supply chain*', including those who do not directly hire cleaning workers, are responsible for all of these matters. In particular, '*property owners at the apex of the supply chain*' bear these responsibilities under the code. In the code, a substantive supply chain obligation to encourage cleaning companies to comply with minimum standards, including terms and conditions of work specified under the FW Act, the relevant award¹⁰⁰ or any applicable enterprise agreements, is that the contract price be sufficient to allow contractors to comply with these standards. So, although property owners are not directly responsible for complying with minimum wage laws (as they are not the direct employer), they have an indirect responsibility to encourage their contractors to comply. Moreover, principles of best practice are also stipulated in the code that, if complied with by a cleaning company, would lead to above-minimum standards from a direct employer. In particular, the code of conduct specifies that direct employers that provide wages and conditions that are above minimum standards are to be recognised as best practice. There is also a requirement that the workloads of employees and their performance indicators are reasonable. Finally, the code is designed to promote labour standards beyond the first-tier contractor level because it stipulates that, where subcontracting takes place, 'employment conditions provided to subcontracted staff' must be no less favourable than those provided to employed staff directly.¹⁰¹ Late in the writing of this article in October 2018 the CAF standards subcommittee agreed to replace the CAF code of conduct with a set of CAF principles.

In addition to the certification scheme and code of conduct principles, the CAF has developed best practice procurement tools and guidance notes, which CAF member cleaning companies, facility managers and property owners can use to aid them in the process of tendering for cleaning contracts.

98 CAF, *How CAF Works*, at <www.cleaningaccountability.org.au/how_caf_works> (accessed 28 March 2018).

99 See R Johnstone, 'Regulating Health and Safety in "Vertically Disintegrated" Work Arrangements: The Example of Supply Chains', in J Howe, A Chapman and I Landau (Eds), *The Evolving Project of Labour Law: Foundations, Development and Future Research Directions*, Federation Press, Sydney, 2017, p 130.

100 *Cleaning Services Award 2010 [MA000022]* (at 7 November 2018).

101 CAF, *Code of Conduct*, above n 95.

This includes separate pricing schedules for commercial and retail cleaning, allowing for transparency of wages, overheads, hours worked and productivity rates.¹⁰²

To What Extent Are the Components of Co-Enforcement Present in CAF?

At a minimum co-enforcement involves the coercive role of a state agency pursuing compliance measures to improve the pay and conditions of workers in partnership with, or with the assistance of, worker organisations — in Australia, the unions — who are at the ‘coalface’ in the sense that they have a presence in the workplace representing workers, can press for business compliance with regulation and who have the legal standing to sue to secure compliance with legislated standards.¹⁰³ We will now consider the extent to which these elements of co-enforcement are part of CAF.

Involvement of state agency (FWO) in CAF

The state agency (FWO) sits on the CAF steering committee and has seen CAF as an opportunity to take a SEM approach by pro-actively persuading CAF supply chain participants, including building owners to encourage compliance with minimum employment standards in the cleaning industry (in addition to reacting to complaints about underpayments). Although this is not a ‘hard’ enforcement measure such as engaging in legal proceedings to enforce legislative requirements, such softer enforcement measures (down the enforcement pyramid short of harder procedures such as litigation) operate within the shadow of tougher procedures and are nonetheless compliance oriented measures which signify that the coercive role of the state is still evident. This point would suggest that CAF would fall squarely within the co-enforcement model within which state coercion plays a key role. Even that aside, the FWO (and union) role on the CAF steering committee is significant. It has shaped the evolution of CAF standards and procedures. Moreover, as we more fully examine below, the CAF involves co-operation between the state and unions, as well as supply chain participants such as lead firm owners; enforcement is not just about the state directly sanctioning firms for labour law violations. It also involves channelling the state’s coercive powers through lead firms by encouraging those firms to exercise their commercial power to secure compliance with minimum standards by their cleaning contractors. However, it is, as yet, uncertain how a finding of evidence of worker exploitation within CAF supply chains might be escalated in the event that CAF is unable to adequately address the exploitation alone. For example, it remains unclear in what circumstances the FWO’s role in conducting litigation to enforce legislated minimum standards might be triggered from within CAF, what procedures there are within CAF that would lead a matter to be referred to the FWO, and who (within CAF or otherwise) the FWO might proceed against. As such, the softer compliance measures at the bottom of the enforcement pyramid remain more developed within CAF than more coercive

¹⁰² CAF, *How CAF Works*, above n 98.

¹⁰³ Fine, above n 15, at 364–5.

enforcement measures at the top of the enforcement pyramid. The threat of coercion frequently can be as effective (or even more effective) than actual state coercion such as formal legal proceedings. However, if there is a lack of clearly articulated CAF procedure for escalating a matter up the enforcement pyramid, a question will remain about the substantive adherence to the co-enforcement framework of the state coercion aspect of CAF.

Involvement of worker organisation (UV) in CAF

In addition to its role on the CAF steering committee, UV has a significant role in the implementation of CAF standards within each building. Specifically, UV attends and addresses an initial onsite stakeholder meeting that includes cleaners, facilities managers and cleaning contractors. Additionally, two CAF meetings are held annually at each site with the first meeting involving a CAF representative, the building owner or facilities manager, the cleaning contractor, cleaners and UV with the aim of informing cleaners about what it means to work at a CAF certified site and seeking nomination of a CAF workplace representative. The second meeting takes place two weeks after the first without building owners or contractors and has the purpose of answering questions about CAF, confirming nominations for CAF workplace representatives and completing the collection of information about labour standards at the site. The purpose of these meetings is to ensure that cleaners are sufficiently educated about CAF that they are able to verify if their employer and the building is compliant with CAF standards. In order for the building to be certified the auditor was required to 'obtain [a] statement signed by United Voice or nominee noting that employees are educated about CAF standards and that any workplace concerns related to noncompliance have been addressed'.¹⁰⁴ This was changed in August 2018 so that CAF receives the report rather than the auditors. Even more recently the worker engagement protocol has been changed so that CAF and UV will do a joint report on worker engagement to form part of the assessment alongside the auditor's report.

Given the significant involvement of the union and coercive powers of the state embodied through FWO, CAF represents a version of co-enforcement. However, the example of the CAF does not necessarily neatly match Fine's three conditions — namely state/worker organisation co-operation; industry-specific application and strong political support — for sustainable application of co-enforcement discussed above. While it is industry-specific, the CAF is reliant on a broader range of stakeholders than just the state and worker organisations or even 'high-road firms', given that property owners and investors are stakeholders in the CAF.¹⁰⁵ It might be said that the CAF does not include worker advocacy organisations in addition to unions, unlike co-enforcement initiatives in the United States. Initiatives reported on by Amengual and Fine in San Francisco and Austin, Texas involve a broad range

¹⁰⁴ Cleaning Accountability Framework, *Worker Engagement Protocol: Attachment A: Worker Involvement element of CAF Three-Star Standard*, at <<https://d3n8a8pro7vnm.cloudfront.net/cleaningaccountability/pages/23/attachments/original/1485231193/CAF-WorkerEngagementProtocol-web1.pdf?1485231193>> (accessed 13 September 2018).

¹⁰⁵ Fine, above n 15, at 364.

of community organisations with an interest in workers' rights, including migrant groups, organisations for young people and non-union worker advocacy groups such as the Workers Defense Fund, which aims to 'empower low-income workers to achieve fair employment through education, direct services, organizing, and strategic partnerships'.¹⁰⁶ However, cultural differences between the jurisdictions partly explains why this kind of stakeholder has not yet been included in the CAF. Worker advocacy organisations beyond unions, while in existence in Australia,¹⁰⁷ have not yet developed to the same extent as in the United States, given the historical strength of unions in Australia (as discussed below). Indeed, UV remains by far the predominant representative of cleaners in Australia.

What Does the CAF Tell Us about Co-Enforcement?

We argue that, although the CAF might be characterised as 'co-enforcement', it has additional elements to the overseas examples discussed by Fine. In particular, the CAF is designed to harness the non-substitutable resources (enforcement capacity) of other stakeholders in the commercial cleaning supply chain. That is, it leverages 'industry-specific' features. The rationale of the CAF is that dominant business agents (those organisations at the apex of the supply chain) have a non-substitutable feature: market power. The market power of dominant participants in the commercial cleaning supply chain (those organisations at the top) represents a different and unique enforcement lever. While the state has an enforcement capacity endowed by its capacity to regulate and punish through hard law, it does not have the same capacity (in the case of private sector supply chains) to use economic dominance as an enforcement tool. In other words the enforcement capacities of each actor differ and cannot be replicated by other actors (although they may have alternatives) making them 'non-substitutable'.

While Fine notes that high-road firms have the capacity to influence 'the practices of firms throughout their supply chains' and non-substitutable capacities, she laments that there does not seem to be enough 'will' amongst such firms.¹⁰⁸ Yet, this assessment does not consider certain structural characteristics of the market that militate against such efforts. In commercial cleaning, attempts by 'high-road firms', prompted by the union through the Clean Start campaign, to improve labour standards were thwarted by the market disadvantage those firms gave themselves when tendering for work with higher labour costs than did 'low-road' firms. Enrolling those organisations that had a direct employment relationship with the workers did not address the competitive forces that exert downward pressure on standards. Neither the FWO, UV nor high-road cleaning firms could alleviate that pressure. To do so, it was necessary to introduce the market-shaping capacity specific to building owners at the top of the supply chain whose tender conditions set market boundaries. In the absence of a legislative regime prepared to regulate the entire market, the involvement of powerful economic

¹⁰⁶ Amengual and Fine, above n 16; Fine, above n 15, at 367.

¹⁰⁷ Examples include Asian Women at Work and Concerned Families of Australian Truckies.

¹⁰⁸ Fine, above n 15, at 365.

agents that have the ability to shape the market (or portions of it) and set market conditions, as was the case in the CAF, is, therefore, a threshold issue.

Co-Enforcement, Politics and Incentives

A supportive political, legal and administrative context has been identified as a requirement for co-enforcement.¹⁰⁹ In the case of the CAF, the FWO provides administrative support, but this does not mean the political climate is in favour of co-enforcement. The following section considers the political and legal context within which the CAF was developed and examines, in the absence of a supportive political environment, what the incentives are for businesses to apply themselves to co-enforcement, particularly for those organisations in supply chains that may not have direct liability for compliance with labour standards, including minimum pay and conditions under the FW Act.

For the most effective co-enforcement to occur, there would be an environment in which the main co-enforcers (state agencies and worker organisations) are well resourced and have their enforcement role underpinned (or at least not too restricted) by the legal framework. Also, collaboration amongst the co-enforcement partners would be seen positively and a framework that inspires competition and distrust amongst them would be absent.

Historically, in Australia, the conciliation and arbitration system supported the function of unions in inspecting and enforcing labour rights and entitlements under legislation and awards.¹¹⁰ Under this system, unions had inspection rights and the standing to prosecute award breaches. Until 1928, unions were the only enforcement agents within the federal arbitration system. After World War II, the state inspectorate played an increasingly important role and unions remained an integral part of the enforcement regime¹¹¹ in what has been described as a genuine enforcement partnership.¹¹² However, the shift in Australian labour law away from arbitration and towards enterprise bargaining from 1993 onwards¹¹³ saw unions diverted from enforcement to bargaining. In 1996, with the passing of the Workplace Relations Act (Cth) (the WR Act) these trends were intensified as employment relations were individualised¹¹⁴ and unions excluded, sowing the seeds for the de-unionisation of the workforce.¹¹⁵ Legal support for trade unions was further undermined after the Workplace Relations Amendments (Work

109 Amengual and Fine, above n 16; Fine, above n 15.

110 Hardy and Howe, 'Partners in Enforcement?', above n 42, at 306–7; L Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law*, Lawbook, Sydney, 1994, p 136.

111 Bennett, above n 110.

112 Hardy and Howe, 'Partners in Enforcement?', above n 42, at 307.

113 D Peetz, 'Coming Soon to a Workplace Near You: The New Industrial Relations Revolution' (2005) 31 *ABL* 90 at 91.

114 S Deery and R Mitchell, 'The Emergence of Individualisation and Union Exclusion as an Employment Relations Strategy', in S Deery and R Mitchell (Eds), *Employment Relations: Individualisation and Union Exclusion — An International Study*, Federation Press, Sydney, 1999, p 1 at p 10.

115 A Coulthard, 'The Decollectivisation of Australian Industrial Relations: Trade Union Exclusion under the *Workplace Relations Act 1996* (Cth)', in S Deery and R Mitchell (Eds),

Choices) Act 2005 (Cth) amended the WR Act.¹¹⁶ At the same time, there was increased emphasis on government enforcement of federal labour law, signalling a significant change in the balance between the enforcement partners.¹¹⁷ The FW Act did not reinstate many aspects of conciliation and arbitration that supported the enforcement role of unions.¹¹⁸ A restrictive union rights of entry framework was largely retained,¹¹⁹ the centrality of enterprise bargaining has focused union resources on representative functions rather than enforcement and there is no ability of unions to recover costs from successful enforcement proceedings.¹²⁰ Even the representative functions of unions are in decline with collective bargaining becoming more difficult¹²¹ and collective agreements becoming less common. The decrease in trade union coverage over the last two decades means that the majority of the workforce now relies upon state assistance from the FWO to uphold employment standards.¹²² It appears that the long-term efforts of conservative governments to reduce the power of unions and shift the political debate about the role and efficacy of unions has been effective.¹²³

The FWO has attempted to occupy the gap; it has for some time now recognised the need for a strategic enforcement approach designed to maximise the systemic effects of state enforcement but predicated on the assumption that there are not enough resources to uphold employment standards economy-wide.¹²⁴

Consequently, it has sought to develop proactive methods of enforcement and support initiatives that seek systemic change. The CAF accords closely with the focus on strategic enforcement and supply chain strategy¹²⁵ being pursued by the FWO, and the FWO has recently taken enforcement measures in the industry, including a cleaning industry compliance campaign in 2014/15¹²⁶ and a blitz on supermarket chain cleaning contractors in Tasmania (which revealed noncompliance by 90% of Woolworths' cleaning contractors).¹²⁷

Moreover, government sensitivities to public opinion regarding the

Employment Relations: Individualisation and Union Exclusion — An International Study, Federation Press, Sydney, 1999, p 48 at p 50.

116 Hardy and Howe, 'Partners in Enforcement?', above n 42, at 307.

117 Ibid.

118 Ibid, at 308; M Bray and J Macneil, 'Individualism, Collectivism, and the Case of Awards in Australia' (2011) 53 *JIR* 149.

119 Hardy and Howe, 'Partners in Enforcement?', above n 42, at 327.

120 Ibid, at 334.

121 M Janda, 'Enterprise Bargaining Collapse a Likely Cause of Wages Weakness: Think Tank', *ABC News*, 22 January 2018, at <www.abc.net.au/news/2018-01-22/enterprise-bargaining-collapse-behind-wage-weakness/9348070> (accessed 23 January 2019).

122 Hardy and Howe, 'Partners in Enforcement?', above n 42, at 333.

123 R Cooper and B Ellem, 'The Neoliberal State, Trade Unions and Collective Bargaining in Australia' (2008) 46 *BJIR* 532.

124 Hardy and Howe, 'Chain Reaction', above n 8.

125 Ibid.

126 FWO, *National Cleaning Services Compliance Campaign 2014/15*, above n 20.

127 FWO, *Fair Work Ombudsman Inquiry Uncovers Rampant Exploitation of Woolworths Cleaners*, Media Release, 14 February 2018, at <www.fairwork.gov.au/about-us/news-and-media-releases/2018-media-releases/february-2018/20180214-ww-cleaners> (accessed 6 April 2018).

mistreatment of workers may result in a willingness to legislate for better labour standards, even by administrations previously resistant to these initiatives. This is evident, currently, in the Australian example in which the widely publicised abuses of workers in franchise stores resulted in the conservative federal government passing amendments to the FW Act. The amending Act¹²⁸ extends franchisor and holding company liability regarding the exploitation of vulnerable workers within franchises or corporate groups. Furthermore, it increases penalties for noncompliant companies where there is a serious contravention and increases the inspection powers of the FWO.¹²⁹

At face value, this legal context appears to provide protection for workers, through the provisions of the FW Act, its recent amendments and the enforcement role of the FWO, but the conditions for co-enforcement (and, therefore, for effective enforcement overall) remain weak given that the existing framework and political environment diminish union enforcement capability. The establishment of the Registered Organisations Commission (ROC) and the re-establishment of the Australian Building and Construction Commission (ABCC) by the current conservative government is set to keep the pressure on unions and further weaken their enforcement capacity. The ROC (which is an independent office within FWO) was established in the wake of the Royal Commission into Trade Union Corruption and Governance and increased reporting and governance requirements on registered organisations, including unions. The ABCC is a politically contentious agency that has been re-established by the current conservative government (it was abolished by the last Labor government) as a 'watchdog' to 'police illegal activity in the construction industry but has been branded by Labor and the Greens as "anti-union".¹³⁰ These developments are indicative of a hostile political environment for unions as potential regulators of labour standards and renders difficult a version of co-enforcement based only on collaboration between the state and unions.

Furthermore, the current conditions for successful co-enforcement partnerships between the FWO and unions is undermined by the FWO's role in bringing enforcement proceedings against unions for unlawful industrial action. The FWO has recently commenced legal proceedings against the Maritime Union of Australia for such industrial action.¹³¹ This conflict could create distrust between co-enforcers who might otherwise have a mutual interest in upholding minimum employment standards.

Enforcement motivations/incentives

In lieu of constant and predictable political support, an environment is needed in which enforcement initiatives can be motivated through public opinion or

128 The amending Act, amongst other things, inserted ss 558A–C into the FW Act: Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 (Cth).

129 The amending Act, amongst other things, amended various penalty provisions in the FW Act and inserted ss 712A–F into the FW Act: Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 (Cth).

130 H Belot, 'ABCC: Malcolm Turnbull Hails Passing of Key Industrial Relations Bill', *ABC News*, 30 November 2016, at <www.abc.net.au/news/2016-11-30/abcc-passes-the-senate/8078242> (accessed 23 January 2019).

131 FWO, *MUA and Individual Crew Members Face Legal Action*, Media Release, 7 April 2017.

regulator activity (that may or may not reflect broader political opinion/trends). There has been some consideration of business incentives regarding global supply chains and labour standards, though incentives for businesses to participate in such efforts are related to how they assess risk.¹³² These risks are most often cited as potential disruption to the supply of goods or services, concern about damage to brand reputation¹³³ or the consequences of noncompliance.¹³⁴ Additionally, a desire to develop their position in the market as an ethical business, or the strengthening of their ‘social licence’ to operate, may also provide motivation.¹³⁵

The power of the various incentives or risks differ, depending on the position of the business in the supply chain. For businesses in a domestic cleaning supply chain, incentives to comply with labour standards vary and are related to how those businesses rate risk. For investors/property owners and managers, there is a danger of generating adverse publicity if it becomes known that there are issues with cleanliness, safety and treatment of workers. Tenants are also susceptible to reputational damage through the mistreatment of workers.¹³⁶ Contract cleaning companies are the least publicly visible of the business participants in the cleaning supply chain and, as such, are less likely to be motivated by reputational risk. The intensely competitive market means that financial incentives are significant for contract cleaning companies. Consequently, the intent of the CAF is to ensure that only those cleaning companies that comply with minimum labour standards or above are eligible to tender for cleaning contracts.

Accessory liability and business involvement in CAF

In the case of supply chains, the FWO has attempted to build a risk for all levels of business through the use of ‘accessorial liability’ provisions of the FW Act (s 550), which means that ‘a person who is involved in a contravention of the Act is held responsible for that contravention’.¹³⁷ In a media release, explaining s 550, the FWO uses cleaning as an example:

132 D Berliner et al, *Labor Standards in International Supply Chains: Aligning Rights and Incentives*, Edward Elgar Publishing, Cheltenham, 2015; E Josserand and S Kaine, ‘Labour Standards in Global Value Chains: Disentangling Workers’ Voice, Vicarious Voice, Power Relations, and Regulation’ (2016) 71 *RIIR* 741.

133 J Donaghey et al, ‘From Employment Relations to Consumption Relations: Balancing Labor Governance in Global Supply Chains’ (2014) 53 *HRM* 229.

134 Berliner et al, above n 132.

135 O’Rourke, above n 33.

136 Investa Property Group, above n 21; M Heffernan, ‘Fair Work Ombudsman Sues Myer Cleaner Pioneer Personnel over Alleged Underpay’, *Sydney Morning Herald*, 29 May 2016; M Heffernan, ‘Fair Work Takes Myer to Cleaners over Underpaid Wages’, *Sydney Morning Herald*, 30 May 2016; N Toscano, ‘Woolworths’ Cleaning Contractors Face Underpayment Case’, *Sydney Morning Herald*, 23 June 2016.

137 FWO, *What is Accessorial Liability?*, at <www.fairwork.gov.au/about-us/news-media-releases/newsletter/august-2016/what-is-accessorial-liability> (accessed 6 April 2018). There have been a number of cases where s 550 has been relied upon in circumstances where vulnerable cleaners have been exploited: see, eg, *Fair Work Ombudsman v Grouped Property Services Pty Ltd* (2016) 152 ALD 209; [2016] FCA 1034, where individuals involved in the management of a cleaning company were held to be accessories to contraventions of the FW Act. Regarding the liability of lead firms of supply chains for contraventions in circumstances where the lead firm is not the direct employer of the

under section 550 a company that is not the employing entity, may be found to be involved in a contravention and may also have penalties imposed by a court.¹³⁸

This is important for companies to consider especially in their supply chain and procurement processes. Effectively, it means that companies cannot outsource their noncompliance. For example if one company contracts another company to supply cleaning staff and those cleaners are underpaid, both companies may be held accountable by a court.¹³⁹

While the FWO may not have the necessary resources to uncover and litigate every case of noncompliance in the commercial cleaning sector (and prosecution is complicated by statutory requirements to prove knowledge or other kinds of involvement the contravention),¹⁴⁰ what they are doing with regards to enforcement is creating an environment in which the risk of punishment for noncompliance might motivate lead firms to become involved in co-enforcement initiatives. While the impact of this is difficult to measure, this 'deterrent effect' is central to their use of a strategic enforcement approach and is a key aspect of the enforcement pyramid described above in which the risk of being punished for noncompliance may be minimal but the perception that it is likely encourages compliance with 'softer-types' of regulatory options¹⁴¹ — in this case, CAF.

Building Sustainable Co-Enforcement

The following diagrams illustrate the difference between co-enforcement where there is a requirement for a supportive political environment and co-enforcement in a supply chain context where the non-substitutable capacity of lead business is leveraged.¹⁴²

employees affected by the contravention, the FWO initiated legal proceedings against Coles for underpayment to trolley collectors directly engaged by subcontractors to Coles. The substantive issues of the case including whether Coles was involved in the contraventions were not fully resolved because the FWO entered into an enforceable undertaking with Coles: Hardy, 'Who Should Be Held Liable for Workplace Contraventions and on What Basis?', above n 6, at 88; Hardy and Howe, 'Chain Reaction', above n 8.

138 FWO, *What is Accessorial Liability?*, above n 137.

139 *Ibid.*

140 FW Act s 550(2).

141 Ayres and Braithwaite, above n 32.

142 Amengual and Fine, above n 16; Fine, above n 15.

Diagram 1: Co-enforcement in a supportive political environment

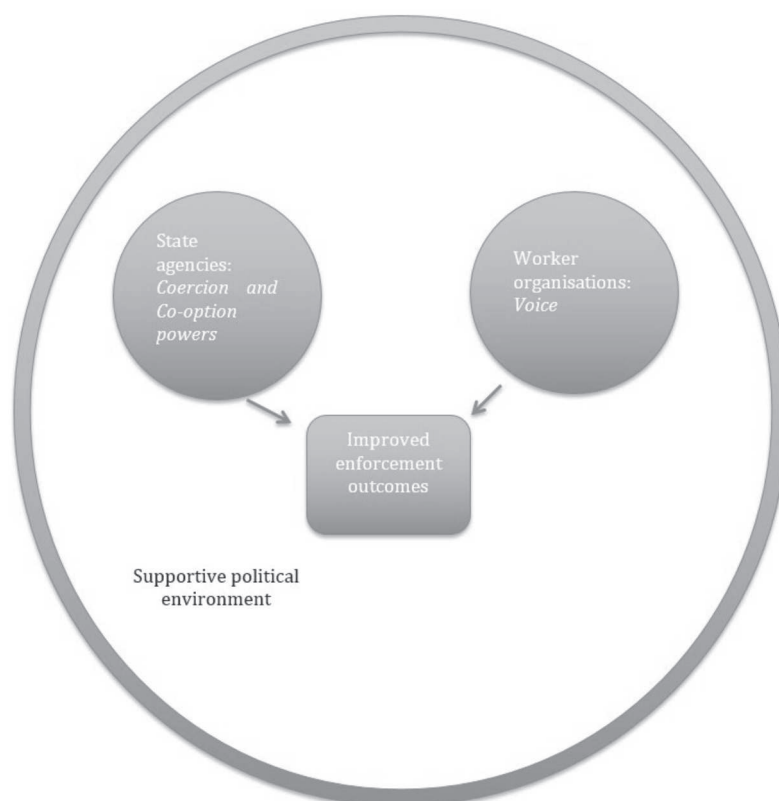


Diagram 1 is representative of Amengual and Fine's explanation of the conditions under which 'co-enforcement is most enduring'.¹⁴³ Essentially, this version of co-enforcement relies on the non-substitutable *coercion* of the state, as well as the non-substitutable resource of worker organisations, what we have termed *worker voice*.¹⁴⁴ That is, the state can penalise noncompliance and can delegate enforcement to other actors. This is combined with the 'shop floor' knowledge of workers who have everyday experience of working conditions.¹⁴⁵ These actors collaborate on enforcement activities, with that collaboration fostered by a supportive political environment.

Nevertheless, co-enforcement, if reliant on a supportive political environment, is vulnerable to unravelling in the event that the environment changes, or that a government is elected that is hostile to robust enforcement initiatives or is beholden to business interests that are hostile. Consequently,

¹⁴³ Fine, above n 15.

¹⁴⁴ Although it is difficult to organise in the cleaning industry and union density rates are low, UV still has enough presence and engagement with workers in the sector to warrant the application of the worker voice aspect of the co-enforcement analysis here.

¹⁴⁵ Fine, above n 15, at 6.

it is necessary to consider how to buffer against political change when building sustainable co-enforcement initiatives. One such buffer is the involvement of business. The CAF involves a state agency, worker representatives and businesses. Thus, it overcomes one of the weaknesses of Fine's emphasis on worker organisation and state enforcement (Diagram 1). Specifically, it de-emphasises the importance of a supportive political environment, as another lever is available if political support proves inadequate or not to scale. So, co-enforcement without business is missing a key lever in a supply chain context: the non-substitutable capacity of lead firms.¹⁴⁶

146 Having said that, it remains to be seen whether or not lead firms would remain committed to the CAF where the FWO was not willing to actively litigate the FW Act s 550 (under which, lead firms may be accessories involved in the contraventions of their contractors). There could be better enforcement of minimum terms and conditions in the cleaning industry if there was a more robust legislated scheme of supply chain responsibility. Such a robust scheme of supply chain regulation exists for the textile clothing and footwear industry under Part 6-4A of the FW Act and State legislation: see I Nossar et al, 'Protective Legal Regulation for Home-based Workers in Australian Textile, Clothing and Footwear Supply Chains' (2015) 57 *JIR* 585.

Diagram 2: Threshold conditions for co-enforcement in an unsupportive political environment

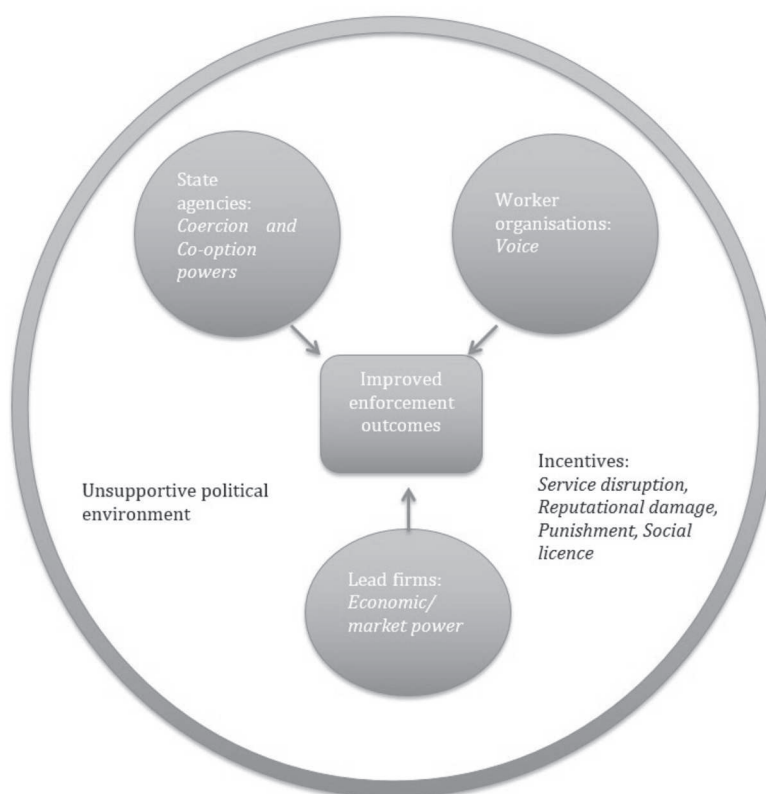


Diagram 2 is illustrative of threshold conditions for co-enforcement in an unsupportive political environment, adding the non-substitutable capacity of business which, in a supply chain context, corresponds to the *economic power* of the lead firms. For example, key to the CAF is the ability to motivate lead firms (property owners) to become involved in order to harness their economic resources. Building owners and property investors are increasingly aware of reputational risks posed by ‘supply chain controversies’ — which might include a combination of media investigations and union campaigns (or even the initiation of proceedings by the FWO under the FW Act s 550). Consequently, lead firms are demanding greater monitoring and are considering ‘the management of non-financial risks’.¹⁴⁷

Nevertheless, business is not monolithic and different organisations might respond to different incentives as a way of engaging in co-enforcement (as per Diagram 2), in which incentives for business involvement are included as an aspect of the context. Therefore, constructing an effective co-enforcement

¹⁴⁷ Investa Property Group, above n 21, at 7.

program requires the identification and targeting of these incentives (as discussed above). Diagram 2 shows non-substitutable capacities of state agencies, worker organisations and business. These complement each other when the political environment or other motivations are insufficient on their own to force compliance. Specifically, while state agencies can create an environment of reputational risk and worker organisations can pursue individual businesses for mistreatment of workers, these factors do not provide constant incentives for all businesses. In a supply chain context where reputational risk is not a key motivator, such as non-public-facing commercial cleaning, and in a context where workers are dispersed in small numbers across many worksites (making union organising difficult), the non-substitutable enforcement capacity of lead firms needs to be triggered. By using their economic power to award contracts on the fulfilment of certain conditions, lead firms can create an economic risk for contract cleaning companies, thus providing incentives to engage with attempts at co-enforcement.

Conclusion

In a context in which significant increases in resources are unlikely to be allocated to public labour regulators, and where unions have struggled to overcome barriers to organising — such as fragmented working arrangements and dispersed workplaces — co-enforcement initiatives involving business can contribute to improved outcomes for workers. It would be naive to assume that the actions of a small number of 'high-road' firms seeking to 'do the right thing' to enhance their reputation or avoid scandal would be enough to effect change across an entire industry. Therefore, we have argued that a critical component of co-enforcement that includes business is an understanding of the various risk and incentive structures operating in a particular market so that they can be leveraged to put upward rather than downward pressure on working conditions.

Even with its understanding and utilisation of incentives and leverage points, however, the CAF is a voluntary scheme and, as such, is subject to the previous critiques of multi-stakeholder initiatives and of 'self-regulation' more generally. In some cases, voluntary codes have been used to avoid 'more legally-based action, at national or international level, following public campaigns and pressure from community, worker and human rights groups, and NGOs'.¹⁴⁸ Furthermore, it has been shown that voluntary schemes, including unilateral processes (for example, company codes of conduct and self-auditing processes) and multi-stakeholder initiatives (such as the CAF) tend to place the more ethical supply chain participants at a commercial disadvantage because they agree not to profit from worker exploitation, while less ethical businesses not covered by the voluntary scheme continue to profit from such exploitation.¹⁴⁹ While this disadvantage may be overcome in a supply chain context by the triggering of the non-substitutable capacity of lead firms (that is, their economic power) to shape the behaviour of other businesses in the chain, this itself depends on lead businesses volunteering to

148 James et al, 'Regulating Supply Chains', n 4, at 177.

149 Nossar, Johnstone and Quinlan, above n 8.

better regulate work standards in their chains which, in turn, may rely on external incentives and pressures on those businesses. It also involves the diffusion of regulatory power across a number of private as well as public actors and mechanisms, creating a crowded and potentially complex regulatory space.¹⁵⁰

Involving a greater range of stakeholders in voluntary schemes to improve labour standards is not new, nor is consideration of the motives for involvement by organisations.¹⁵¹ Yet the CAF represents an attempt to expand traditional multi-stakeholder efforts by leveraging the non-substitutable elements of business at the top of supply chains, in addition to utilising the capacities of state agencies and worker organisations rather than replacing them. Whether this will be enough to sustain the CAF and improve compliance in the longer term is, as yet, unknown. Aside from questions as to the future effectiveness of the CAF, what can be said is that the establishment of the CAF is an important development in the absence of mandatory, industry-wide regulation of cleaning supply chains. It has served to illustrate the non-substitutable role of lead firms in multi-stakeholder co-enforcement efforts to regulate supply chains and improve labour standards in complex and non-supportive political environments.

150 Hardy, 'Watch This Space', above n 34.

151 Ibid.