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Regulation and the futures of work

In the movie *Sliding Doors*, the life of the main character changes radically according to which of the two seemingly innocuous scenarios takes place at the beginning: either she gets onto the train before the carriage doors close behind her, or they close in time to prevent her boarding. A seemingly random event shapes how the rest of her life plays out. And it is true that much of what eventually happens to us—more than we like to imagine—is shaped by random events outside our control.¹ But it would be false to think that *everything* is outside our control. Although the sliding doors in that movie were outside the control of the protagonist, much of what happens in the future is not. It is much more like the scene in *The Circle*, where Mae has the opportunity to reveal and confront the true nature of the organisation, and consciously chooses not to, than that at the beginning of *Sliding Doors*. Critical junctures² shape futures, and these are a result of conscious decisions by one or more parties.

As the world has become more complex and ‘globalised’, private and public policy-makers have felt more like events are outside their control. Public policy has always had a problem of translating ideas into practice,

1 Daniel Kahneman, *Thinking, Fast and Slow* (New York: Farrar, Straus and Giroux, 2011). See also Chapter 5 of this book.

2 Ruth Berins Collier and J. David Collier, *Shaping the Political Arena: Critical Junctures, the Labour Movement and Regional Dynamics in Latin America* (Princeton NJ: Princeton University Press, 1991).

and many fine aims have been frustrated in implementation.³ But now the problems are intensified by the seeming power of the market, and the reconstruction of transnational capital, in neo-liberal times. Regulation has appeared increasingly difficult—to some, hopeless. Some have sought innovative approaches by new means of regulation, either public or private. Others have had to deal with the difficulty of implementing regulations that presently exist.

In this chapter we look at regulatory responses to changes in the world of work, particularly those arising from the shift towards ‘not there’ employment discussed in Chapter 6. ‘Not there’ employment has several effects.

One is that it redefines the formal protections applying to workers. Some workers end up excluded from the formal protection of labour law because they are no longer defined as employees—typically as contractors. Other workers end up still covered by labour law but working under the terms of an agreement with or policies administered by a different organisation—typically as ‘labour hire’ (the term used in Australia) or ‘temporary agency’ workers (the term used in Europe where, if sent to another EU country, they are ‘posted’ workers). This almost never means better conditions and usually means inferior conditions.

A second effect is that, within the host country of capital, ‘not there’ employment encourages noncompliance with laws on minimum pay and conditions, because it puts responsibility for employment onto that part of capital which is least knowledgeable about those laws and which is most tempted, or encouraged, by the logic of cost-minimising market competition to circumvent those laws anyway.

A third effect is that ‘not there’ employment encourages both noncompliance with and exclusion from labour law protections by use of global supply chains, where much of the work is undertaken in developing countries by entities that are technically and often practically separate from the organisation at the top of the capital chain.

3 Jeffrey L. Pressman and Aaron Wildavsky, *Implementation: How Great Expectations in Washington Are Dashed in Oakland; or Why It's Amazing That Federal Programs Work at All, This Being a Saga of the Economic Development Administration as Told by Two Sympathetic Observers Who Seek to Build Morals on a Foundation of Ruined Hopes* (Berkeley: University of California Press, 1973).

Some of the effects mentioned above interact with changes in technology. For example, the emergence of platform-based ‘gig’ work is naturally dependent on the development of relevant platform technology. In turn, it enables a particular form of ‘not there’ employment that allows a shift in worker status from employee to purported independent contractor, because of the particular form of control that platform technology allows. On a larger scale, the emergence of global supply chains has already been facilitated by technological developments that have enabled rapid transportation, almost instantaneous communication, efficient record-keeping and hence coordination on a global scale.

So in this chapter we look at the above aspects as case studies of the challenges facing regulation in the future of work, and of the policy choices to be made. We examine the challenges posed by future types of work, including through the gig economy. We investigate the problem of noncompliance (sometimes referred to as ‘wages theft’), the factors that promote it and the changing methods used in enforcement. And we peer into the maintenance of labour standards in global value chains or global production networks. Before that, we contextualise it by considering the purpose of regulation, the different forms of regulation by the state (such as the laws of employment and work, the welfare state, trade agreements and international law), which leads into discussion of innovation in regulation (e.g. through international codes of conduct applied to transnational firms) and the potential of and limitations on those innovations, drawing on the example of the response to the Rana Plaza collapse in Bangladesh. How can and will parties respond to increasing pressures for codes of conduct and corporate social responsibility? While technology has posed challenges for regulation, we will also make brief mention of some of the technologies that will assist in regulation.

Purpose and forms of regulation

The aim of regulation, put crudely, is to bring about outcomes different to those that would occur in its absence. In effect, this means outcomes different to those that would be delivered by a market.

It would be noble to say that this was in order to create outcomes that alleviated inequality in opportunities and power and improved the lot of the vulnerable. In practice, much regulation is for a different purpose: frequently, to strengthen or entrench the position of those in power.

Those with the most resources have the greatest capacity to influence government, and the wealthy and large corporations have the greatest financial resources. In *The Circle*, the corporation used its power ruthlessly to ensure that no regulation adversely affected it. A body of literature in the Marxist tradition argues that it is inevitable that the state will act in the interests of capital, either because the state is dominated by members of the ruling class or people with close ties to it, or because the structure of economic power ensures that, in the end, the state will act for capital.⁴ Divisions within the ruling class complicate but do not in themselves refute this interpretation.⁵ Many instances can be cited of the state acting to serve interests of the wealthy and large corporations with great financial resources.⁶

However, workers and other groups outside the ruling class also mobilise and put pressure on the state to act in *their* interests. If the pressure is strong enough, particularly if those in the state feel their legitimacy and claim to power is threatened, the state responds by making concessions. So it is that improvements in workers' conditions—ranging from reductions in the working week, improved leave or higher minimum wages—are achieved. Indeed, we theorised in Chapter 8 that one factor (not the only one) that may reduce gender gaps is the proximity of an occupation to regulation, as regulation reduced the capacity for the norms of those with power to determine the distribution of power and rewards.⁷ Policy-makers in the state vary in their ideological perspectives and orientations,

4 Nicos Poulantzas, *State, Power, and Socialism*. Translated by Patrick Camiller (London: Verso, 1980); Ralph Miliband, *The State in Capitalist Society* (New York: Basic, 1969); Nicos Poulantzas and Ralph Miliband, 'The Problem of the Capitalist State'. In *Ideology in Social Science: Readings in Critical Social Theory*, ed. R. Blackburn (New York: Pantheon Books), 238–62.

5 For example, conflicts between mining and non-mining capital, between financial and industrial capital, or between national and transnational capital. See references in previous footnote plus William Carroll, 'The Corporate Elite and the Transformation of Finance Capital: A View from Canada'. *Sociological Review* 56, no. s1 (2008): 44–63; William Carroll, *The Making of a Transnational Capitalist Class* (London: Zed Books, 2010); Richard Deeg and Iain Hardie, 'What Is Patient Capital and Who Supplies It?'. *Socio-Economic Review* 14, no. 4 (2016): 627–45; Georgina Murray, *Capitalist Networks and Social Power in Australia and New Zealand* (Aldershot: Ashgate, 2006); Jean Philippe Sapinski, 'Climate Capitalism and the Global Corporate Elite Network'. *Environmental Sociology* 1, no. 4 (2015): 268–79.

6 For example, Thomas Stratmann, 'The Market for Congressional Votes: Is Timing of Contributions Everything?'. *Journal of Law and Economics*. 41, no. 1 (1998): 85–114; Allan Holmes et al., *Did Billionaires Pay Off Republicans for Passing the Trump Tax Bill?* (Washington DC: Centre for Public Integrity, 7 February 2019), publicintegrity.org/business/taxes/trumps-tax-cuts/did-billionaires-pay-off-republicans-for-passing-the-trump-tax-bill/.

7 David Pettez and Georgina Murray, *Women, Labor Segmentation and Regulation: Varieties of Gender Gaps* (New York: Palgrave Macmillan, 2017).

and some enter that arena specifically to advance the interests of those they see as underprivileged, though in most developed countries most are constrained in what they can do by political possibilities.

One problem facing policy-makers, especially politicians, from both left and right is that it may sometimes undermine their legitimacy (especially with voters or commentators linked to the other side) if others see them as being driven by ideological or interest-driven objectives. So policies will often be advanced in terms of the purported benefit they produce for the greater, public good—often by claims of boosts to productivity growth, which provide the potential for increases in living standards (a potential that, of course, is not always realised).⁸ So the true purpose of policies will often be obfuscated.

This chapter, however, does not focus on the prevarications of politicians. Rather, it looks at some specific aspects of the regulation of work that, in particular, attempt to use regulation to overcome some of the problems identified in earlier chapters. That is the purpose of the type of regulation of interest here.

Regulation takes a number of forms. The obvious way in which work is affected by regulation is through employment law or labour law. Employment law may focus on collective issues: what happens when an employer plans to or takes action to retrench or otherwise dismiss a group of employees; what collective rights to information do employees have; what happens when employees have a collective grievance; when they want to strike and when they do strike; when an employer takes industrial action, and so on. Employment law may also focus on individual issues: what happens when an individual is dismissed, what happens when discrimination against a particular employee has occurred, and so on. Over recent decades, this ‘individual’ employment law has generally expanded in developed countries, but (on average) little has happened to expand collective employment law, and in some countries collective employment law has been in retreat.⁹ That said, there is little empirical reason to believe that, in the developed world outside Australia, there has been any

8 David Peetz, ‘Does Industrial Relations Policy Affect Productivity?’. *Australian Bulletin of Labour* 38, no. 4 (2012): 268–92.

9 Alan Bogg and Tonia Novitz, ‘Links between Individual Employment Law and Collective Labour Law: Their Implications for Migrant Workers’. In *Migrants at Work: Immigration and Vulnerability in Labour Law*, ed. Cathryn Costello and Mark Freedland (Oxford: Oxford Scholarship Online, 2014).

reduction in the right to strike available to employees.¹⁰ If anything, most shifts have been in the opposite direction (mainly through improvements in the rights of Eastern European workers), though the most common pattern is of stability in the broad nature of the law on the right to strike. However, a number of governments, in Anglophone countries especially, have passed laws that make it easier for employers to bypass unions and have undertaken administrative action to weaken unions.¹¹

State regulation affecting work is not restricted to employment or labour law. Welfare or social security law affects work, by influencing the incentives on people to enter the labour force, find work, return to work after pregnancy, work longer or shorter hours and in some cases to undertake industrial action. The provision of social services affects the availability of people to undertake work (e.g. through availability of childcare). Indeed, as we saw in the opening chapters, the range of liberal market regulations that affect the operation of product and financial markets without any obvious relationship to labour markets can nonetheless have a major impact on work. These latter areas—those associated with product and financial markets—might have had a greater impact on work and workers than employment law itself.

International law, through conventions of the International Labour Organization, the United Nations, the World Trade Organization or other bodies, affects numerous aspects of work. Trade agreements may affect the capacity of nation-states to regulate employment, and the extent to which workers in one country are seen to be in competition with workers from another country.

Although regulation is something normally seen as being associated with the state, other actors may also seek to regulate work. As mentioned in Chapter 8, unions aim to regulate work through the making of collective agreements with employers, even if those agreements might not be formalised or have the full force of the law. Employers, especially larger ones, establish rules and procedures to make sure that managers

10 David Peetz, 'Industrial Action, the Right to Strike, Ballots and the Fair Work Act in International Context'. *Australian Journal of Labour Law* 29 (2016): 133–53, using data from Jelle Visser, 'Data Base on Institutional Characteristics of Trade Unions, Wage Setting, State Intervention and Social Pacts, 1960–2011 (ICTWSS), Version 4.0' (Amsterdam: Amsterdam Institute for Advanced Labour Studies, University of Amsterdam, 2013).

11 David Peetz, *Unions in a Contrary World: The Future of the Australian Trade Union Movement* (Cambridge: Cambridge University Press, 1998).

and supervisors do things in ways that are consistent with the aims of the employer. This is often referred to as ‘internal regulation’, and so the shift to ‘deregulation’ is often analysed as instead being a shift from external to internal regulation.¹² Governments may sometimes seek to encourage or ‘incentivise’ particular behaviours from employers, rather than passing laws requiring or prohibiting particular behaviours, and so this is sometimes referred to as ‘soft’ regulation, in contrast with the more traditional form of ‘hard’ regulation—that is, laws that require or prohibit something.¹³

The challenges arising from changes in corporate organisation, state regulation and work itself have made traditional employment law more difficult, including by challenging the traditional conception of employee or traditional forms of accountability in employment, and these have led to various attempts to find new ways of regulating in ways that affect work. They are the focus of the rest of this chapter.

New forms of work and workers

As discussed in earlier chapters, there has been a lot of recent controversy about the use of ‘independent contractors’ in place of employees, something potentially encouraged by the expansion of ‘not there’ employment.¹⁴ ‘Independent contractors’ may be subject to protection through workplace health and safety legislation, for example in Australia and some other countries, but are not entitled to other employee benefits such as minimum wages or workers’ compensation. There is considerable international evidence that workplace health and safety outcomes are poorer for contractors than for employees.¹⁵ Indeed, a related effect arises

12 For example, John Buchanan and Ron Callus, ‘Efficiency and Equity at Work: The Need for Labour Market Regulation in Australia’. *Journal of Industrial Relations* 35, no. 4 (1993): 515–37.

13 Keith Sisson and Paul Marginson, ‘Soft Regulation’—*Travesty of the Real Thing or New Dimension?* ESRC ‘One Europe or Several’ Programme, Working Paper 32/01 (Brighton: University of Sussex, Sussex European Institute, 2001).

14 Some of the material in this section first appeared in David Peetz, *The Operation of the Queensland Workers’ Compensation Scheme*. Report of the Second Five Yearly Review of the Scheme (Brisbane: Parliament of Queensland, June 2018).

15 Michael Quinlan, *The Effects of Non-Standard Forms of Employment on Worker Health and Safety*. Conditions of Work and Employment Series No. 67 (Geneva: International Labour Office, Inclusive Labour Markets, Labour Relations and Working Conditions Branch, December 2015).

with labour-hire workers: workplace health and safety outcomes are poorer for labour-hire workers—often referred to as ‘temporary agency workers’ in the literature—than for conventional employees.¹⁶

So questions arise as to whether particular people should be classed as employees rather than independent contractors under employment law, and therefore be treated as employees not only for workers’ compensation purposes but also for purposes of minimum hourly wages and other entitlements under employment law. Criteria (or ‘indicia’) have been developed by tribunals, the courts and even the taxation authorities to determine whether workers are employees or independent contractors. When firms portray people who are clearly employees as independent contractors, and thereby withhold from them one or more of their employee entitlements (such as minimum hourly wages, leave or superannuation), they may be prosecuted for engaging in what is termed ‘sham contracting’ in Australia.

Often the indicia lead to ambiguous outcomes, at least in the eyes of lawyers, so cases contesting whether particular people are employees or independent contractors still end up before the tribunals or courts.

One recent development in case law occurred in the California Supreme Court. It broadened the meaning of ‘employee’ there, redefining the test used in determining whether a worker was an employee or independent contractor by replacing an assessment against various indicia with an ‘ABC test’. Under the ABC test, a worker is assumed to be an employee unless the employer can prove *all* of three criteria:

1. The worker is free from direction and control in the performance of the service, both under the contract of hire and in fact;
2. The worker’s services must be performed either:
 - i. outside the usual course of the employer’s business; or
 - ii. outside all the employer’s places of business (e.g. a firm engaging seamstresses to make clothing could not call them independent contractors);

16 Ibid.; Anthony Forsyth, *Victorian Inquiry into the Labour Hire Industry and Insecure Work: Final Report* (Melbourne: Industrial Relations Victoria, Department of Economic Development, Jobs, Transport & Resources, 2016).

3. The worker must be customarily engaged in an independently established trade, occupation, profession, or business of the same nature as the service being provided.¹⁷

The ABC test brings more workers under the definition of ‘employee’ than do most other indicia. It has the advantage of covering most groups of workers who would be thought as being under the ‘employ’ of a more powerful organisation. At time of writing, the ABC test applied in three US states for aspects of workers’ compensation or unemployment insurance. However, law in these states does not normally set precedent in other countries. Still, an option available to policy-makers is to legislate the ABC test or some variant of it.¹⁸ It would have the advantage of bringing within the scope of employment law a wider group of workers who could be seen to be vulnerable to exploitation by more powerful organisations, those engaging in ‘not there’ employment. Doing this might, however, reducing certainty for some other workers as to whether they are covered by employment law.

A related matter is the question of who is responsible for the welfare of labour-hire employees, who are in a ‘triangular relationship’ with the host employer and the labour-hire firm that is their employer at law. For example, in Québec, Canada, premiums for workers’ compensation are the responsibility of whichever, out of the host employer or the labour-hire firm, is considered to have the greater control over the employee.¹⁹ While ideal at a theoretical level, the practical impact is to lead to a substantial amount of litigation over who is responsible for premiums, and it becomes almost a case-by-case issue for determining who pays. It is

17 *Dynamex Operations West, Inc. v. Superior Court*, discussed in Michael S. Kun and Kevin D. Sullivan, ‘California Supreme Court Adopts “ABC Test” for Independent Contractors’. Wage and Hour Defense Blog, Epstein Becker Green, 30 April 2018, www.wagehourblog.com/; Todd Lebowitz, ‘California’s Top Court Creates New Test for Independent Contractor vs. Employee, Re-Interprets 102-Year Old Definition’. Who Is My Employee?, Baker Hostetler LLP, 30 April 2018, whoismyemployee.com/.

18 The *Dynamex* decision formed the model for Bill AB5 in California. An example of a variant is that applied by Justice Bromberg in Australia, though this is probably less likely to see people defined as independent contractors, rather than employees, than the ABC text. *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3)* (2011) 214 FCR 82, discussed in Andrew Stewart et al., *Creighton & Stewart’s Labour Law*, 5th ed. (Sydney: Federation Press, 2016). Other cases cited there were *FWO v. Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346, *Fenwick v. World of Maths* [2012] FMCA 131, *FWO v. Metro Northern Enterprises Pty Ltd* [2013] FCCA 216 and *Predl v. DMC Plastering Pty Ltd* [2014] FCCA 1066.

19 Katherine Lippel et al., ‘Legal Protections Governing the Occupational Safety and Health and Workers’ Compensation of Temporary Employment Agency Workers in Canada: Reflections on Regulatory Effectiveness’. *Policy and Practice in Health and Safety* 9, no. 2 (2011): 69–90.

hardly, then, a satisfactory solution. One option for other jurisdictions might be to have the premiums still paid by the labour hire firm but the experience rating (i.e. the discount or addition to premium liabilities, based on claims paid) of the host employer to also partially include the effects of injuries incurred by labour-hire workers while on the premises of or working for such a firm (i.e. the effects would be at least shared between the host employer and the labour-hire firm).

What about ‘gig economy’ workers? The issue of whether platform economy workers are employees or independent contractors has been tested in courts, tribunals and administrative bodies in a number of jurisdictions. The end result has been far from conclusive. On the one hand, a number of cases have led or could lead to some workers in platform industries being classed as employees. This includes several cases in the UK;²⁰ France;²¹ one in New York City, USA;²² a ruling in the European Court of Justice, which held that Uber was a transportation company, not a technology company, raising questions about whether its workers would be treated as employees;²³ and a case about Foodora in Australia—though the local offshoot went into voluntary administration, enabling the international firm to avoid its employment-related liabilities.²⁴

20 Gregor Gall, ‘Is Uber Ruling the Beginning of the End for Bogus Self-Employment?’. *The Conversation*, 5 November 2016; Robert Booth, ‘UK Government Delays Possible Reforms to Gig Economy Practices’. *Guardian*, 6 December 2017; Natasha Bernal, ‘Uber Heads for Supreme Court after Losing Appeal on Worker Rights’. *Telegraph*, 19 December 2018, www.telegraph.co.uk/technology/2018/12/19/uber-heads-supreme-court-losing-appeal-worker-rights/; BBC, ‘Bike Courier Wins “Gig” Economy Employment Rights Case’. *BBC News*, 7 January 2017; Ben Chapman, ‘Gig Economy Ruling: Couriers Carrying Blood for NHS Win Right to Collective Bargaining’. *Independent*, 1 March 2018, www.independent.co.uk/news/business/news/nhs-gig-economy-couriers-blood-transfusions-union-recognition-the-doctors-laboratory-a8235446.html; Robert Booth, ‘Addison Lee Wrongly Classed Drivers as Self-Employed, Tribunal Rules’. *Guardian*, 26 December 2017; Jamie Grierson and Rob Davies, ‘Pimlico Plumber Loses Appeal against Self-employed Status’. *Guardian*, 11 February 2017.

21 Laura Kayali, ‘French Court: Uber and Drivers Tied by “Work Contract”’. *Politico*, 11 January 2019, www.politico.eu/article/french-court-uber-and-drivers-tied-by-work-contract/.

22 Matt Hamilton, ‘Judge Finds NYC Uber Drivers to Be Employees; Upstate Impact Debated’. *Timesunion*, 12 September 2016, www.timesunion.com/allwcm/article/Judge-finds-NYC-Uber-drivers-to-be-employees-11220139.php.

23 Zeeshan Aleem, ‘Europe’s Top Court Just Said Uber Isn’t a Tech Company—It’s a Cab Company’. *Vox*, 20 December 2017, www.vox.com/world/2017/12/20/16800476/uber-eu-europe-taxi-regulation.

24 Workplace Express, ‘FWO Drops Foodora Test Case’. *Workplace Express*, 3 September 2018, www.workplaceexpress.com.au/nl06_news_selected.php?act=2&nav=10&selkey=57119 (subscription required).

On the other hand, different cases have led, in effect, to their being classed as nonemployees. This included cases in the USA²⁵—though one judge commented that Uber and Lyft ‘present a novel form of business that did not exist at all ten years ago’ and added, ‘With time, these businesses may give rise to new conceptions of employment status’²⁶—plus the UK²⁷ and Australia.²⁸ In one of the Australian cases, however, the tribunal observed it might be that notions about what was necessary for an employment relationship to be established ‘are outmoded in some senses and are no longer reflective of our current economic circumstances’.²⁹ The comments coming out of some cases, and the variety of outcomes, suggest the law is far from settled and changes in statute law may yet be forthcoming.

Among mainstream employers, organisational control of employees’ working time has become less important over recent decades than organisational control of the product employees generate for the employer. It is an aspect of the two paths towards increased hours or work intensity identified in earlier chapters: yes, one involves tighter direct control over employees’ hours, but the other involves a loosening of direct control of hours and tasks and replacing it with internalisation of the need to work longer hours to ‘get the job done’.³⁰ Yet control of working time remains one of the indicia used to determine whether someone is an employee or a contractor. The Philadelphia US District Court decision acknowledged that Uber could terminate a driver’s access to the Uber app; deactivate a driver for cancelling trips, failing its background check policy, falling short of the minimum required 4.7-star driver rating, or soliciting payments outside of the Uber app; make deductions against a driver’s

25 Lawrence J. Hanley, ‘Inside Uber’s Latest Move to Exploit Its Drivers and Hide Behind the Court’, *Huffington Post*, 6 April 2017.

26 *Razak v. Uber Technologies Inc.*, U.S. District Court for the Eastern District of Pennsylvania, Case No. 2:16-cv-00573, p. 25.

27 Sarah Butler, ‘Deliveroo Wins Right Not to Give Riders Minimum Wage or Holiday Pay’, *Guardian*, 15 November 2017.

28 *Kaseris v. Rasier Pacific V.O.F* [2017] FWC 6610 (21 December 2017); *Pallage v. Rasier Pacific* [2018] FWC 2579 (11 May 2018); [2019] FWC 4807 (12 July 2019).

29 [2017] FWC 6610 (21 December 2017), at [66].

30 Mentioned in Chapters 3, 5 and 7 of this book. See Griffith Work Time Project, *Working Time Transformations and Effects* (Brisbane: Queensland Department of Industrial Relations, 2003); David Peetz et al., ‘Race against Time: Extended Hours in Australia’. *Australian Bulletin of Labour* 29, no. 2 (2003): 126–42; David Peetz, Cameron Allan, and Michael O’Donnell, ‘Are Australians Really Unhappier with Their Bosses Because They’re Working Harder? Perspiration and Persuasion in Modern Work’. Paper presented at Rethinking Institutions for Work and Employment, Selected Papers from the XXXVIIIth Annual Canadian Industrial Relations Association Conference, Quebec, 26–28 May 2001.

earnings; and limit the number of consecutive hours that a driver may work. Yet against the more traditional indicia, Uber was not considered an employer and its drivers were independent contractors.³¹

Perhaps the best indication of who holds power in the relationship between Uber and its drivers lies in the pay the drivers receive. The rates of pay and conditions many ‘gig economy’ workers receive would be illegal were they treated as employees,³² and for some at least the means by which they are classified as contractors rather than employees appears to have an element of contrivance about it. Thus, for example, Uber’s declaration that it is not in the business of passenger transport, it is merely a technology company acting as a client to drivers,³³ appears to defy commonsense understandings of what Uber does—why would it be competing with taxi companies and testing driverless cars if it was not involved in transport?—and designed to enable a particular definition of its workers.³⁴

There may also be flow-on effects that affect many other workers. If firms that provide substandard pay and conditions outcompete those providing standard pay and conditions, then the latter group will be forced to match the former or go out of business (leading to greater noncompliance with laws). If the latter go out of business, the former group would be able to raise prices as its market share increases. This appears to be the strategy of some platform firms—for example, Uber has never made a profit despite undercutting competitors,³⁵ but appears to anticipate profitability when it has achieved sufficient market share. (We’ll come back, in Chapter 11, to what ‘market’ is relevant here.) The strategy of increasing market shares, to achieve dominance, appears to be gaining traction. Dominant firms now appear to embody a lower labour share in income than other firms. Increasing concentration in product markets within industries is associated with greater declines in the labour share in

31 *Razak v. Uber Technologies Inc.*, 27–8.

32 See Chapter 6.

33 Tom Brant, ‘Uber to European Court: We’re Not a Transportation Company’. *PCMag*, 29 November 2016, www.pcmag.com/news/349940/uber-to-european-court-were-not-a-transportation-company.

34 For example, Caspar, ‘Sydneyiders Have Spoken—and They Choose Ridesharing!’. *Uber Newsroom*, Uber, 10 October 2015, www.uber.com/en-AU/newsroom/sydney-has-spoken/.

35 Ryan Felton, ‘Uber Is Doomed’. *Jalopnik* (2017), 24 February, jalopnik.com/uber-is-doomed-1792634203; Andrew J. Hawkins, ‘Uber Reportedly Lost \$1.27 Billion in Just Six Months’. *The Verge*, 25 August 2016, www.theverge.com/2016/8/25/12647814/uber-loss-billion-2016-travis-kalanick-lyft.

those industries.³⁶ The implications of that for other firms' labour shares would be significant. Many people working for firms in those sectors could be low paid and vulnerable.

The distinction between workers who do 'crowdwork' and those who do 'work on-demand via apps' is important from both an analytical and policy perspective.³⁷ Most of the policy possibilities focus on extending coverage to those who do 'work on-demand via apps'. This includes platforms like Deliveroo, Foodora, Uber, Uber Eats and Airtasker. This is because of the greater difficulties in providing coverage for crowdwork, when much crowdwork is undertaken across borders internationally. For example, an American app may facilitate an Indian crowdworker performing work for a client organisation or individual in, say, the UK one hour and Spain the next. By contrast, for those platform workers doing work on-demand via apps, the worker and the client are located near each other, regardless of where the app is owned, and this occurs through multiple uses of the app. This commonality of location is crucial for the potential of regulation.

An example of what is possible in labour regulation, and the complexities of it, for 'gig economy' workers is in the area of workers' compensation. The development of the technologies that enable the development of platform work, and more importantly enable the platform intermediaries to command a portion of the payment to the worker, provide an opportunity for regulatory intervention. If payment can be deducted for the intermediary, it can also be deducted for other purposes. A platform that controls 'contractors' provides a more accessible mechanism for regulation of the work and conditions of 'contractors' (whether by the state or by unions) than would be the case if workers were fragmented through thousands of unrelated contracts.³⁸ That said, the treatment of gig economy workers in terms of other aspects of labour law (such as those relating to minimum wages) is more complex.

Various people have called for a set of protections, including in some cases a minimum wage, to apply to all workers predominantly dependent on one organisation for earnings, regardless of whether they are employees or contractors. The difficulty with a minimum wage rate is

36 David Autor et al., 'Concentrating on the Fall of the Labor Share'. *American Economic Review* 107, no. 5 (2017): 180–85.

37 Defined in Chapter 6 of this book.

38 Chris Burns, 'Can a New Nordic Online Portal Help Protect Digital Economy Workers?'. *Equal Times*, 13 July 2017, www.equaltimes.org/can-a-new-nordic-online-portal?lang=en#.XHiuPdhKhvd.

that payments for many contractors are based on completion of the task rather than the time it takes. New York City sought to deal with this issue for drivers for ‘rideshare’ firms (Uber, Lyft and the like) by using a standardised ‘utilisation rate’ to convert piece rates to hourly pay.³⁹ This was immediately challenged by Lyft, but not by Uber, probably because both saw the former would be disadvantaged in competition with the latter due to Lyft’s lower utilisation rate. For Uber, removing competition may be more important here than obtaining the cheapest possible labour.

The lesson is that, if we are to apply minimum standards outside the employment relationship, we need to be creative as it may be difficult to draft a single, comprehensive law. One option for a national government might be to declare a national minimum wage—and that it applies to a wide range of workers, not just employees—but establish a tribunal to determine how it is to be implemented, in each sector, outside the traditional employment relationship. It would make determinations on application from interested parties who would lodge proposals on how implementation in their sector should occur. Implementation of a minimum wage on each section would not rely on new legislation being passed, just a new tribunal decision. Naturally, parties and tribunals would learn from the successful and failed experiences of other sectors and countries.

The same principle could be applied to other types of minimum standards, not just minimum hourly wages.

Noncompliance

An apparently growing issue for regulators of employment is the problem of noncompliance—referred to by Australian unions as ‘wage theft’ as it concerns money that rightfully belongs to the employees after they have worked the requisite hours. It has implications not just for those workers directly affected: if one group of workers can be paid well below the legal minimum, that opens opportunities for employers to apply pressure to other workers, using the implicit or explicit threat of replacing them with

39 Grace Dobush, ‘Lyft Claims That NYC’s New Driver Minimum Wage Makes It Even Harder to Compete with Uber’. *Fortune*, 31 January 2019, fortune.com/2019/01/31/lyft-uber-nyc-driver-minimum-wage-lawsuit/.

lower-paid workers. This section mainly focuses on Australian examples, but the observations about the factors facilitating underpayment have international application.⁴⁰

There are many ways in which this specific type of exploitation can occur. Examples include being underpaid for regular hours; not receiving premiums for work at unsocial times on nights or weekends (penalty rates); unpaid working hours or overtime; unpaid trials or internships; failing to receive entitlements like pension contributions (superannuation); having illegal deductions made from pay for alleged poor performance or breakages; being sexually harassed; being unlawfully or unfairly dismissed; inadequate breaks; mistreatment or excessive control; or being exposed to danger. Only some are caught in published statistics.

One group often not defined as employees are interns. These are people—usually young—who work for an employer for a defined period of time without payment. Interns, like other people on ‘work experience’ or ‘volunteers’, would be unlikely to be categorised as employees by an ABC test or anything similar because of the absence of a beneficial contract (i.e. a contract that involves payment to the volunteer or intern). Internships and work experience have long been part of the educational experience and often formalised into the curricula of educational institutions. Volunteering has been around for as long as society. The group of concern here, though, is that affected by the newly emerging trend in labour markets: the growth of ‘work experience’ without pay in commercial organisations, as a way of gaining entry into the labour market for that particular industry. Sometimes interns are promised that there would be an educational or training component that does not eventuate, and they end up doing menial tasks; other times they end up doing work that more directly generates surplus for the organisation. Shorter-term arrangements might be referred to as ‘trials’.

This is a relatively recent phenomenon, and reflects changes in labour markets as underemployment and credentialism have grown, especially among young workers. Such internships are seen as a way by which individuals can gain a competitive edge in the labour market. However, as corporations increasingly take advantage of the opportunity provided by free labour through such internships, and demand ‘experience’ in the

40 Some of the material in this section was originally published in David Peetz, ‘Debt in Paradise: On the Ground with Wage Theft’, *Griffith Review* 61 (2018): 185–91.

industry as a prerequisite for entry-level paying jobs—as already occurs in some industries (e.g. broadcast and print media)⁴¹—the competitive edge largely disappears. The factor that was once a ‘competitive edge’ becomes a new (higher) standard—an example itself of credentialism.⁴² There is reason to believe that ‘a growing number of businesses are choosing to engage unpaid interns to perform work that might otherwise be done by paid employees’.⁴³ The legality of unpaid commercial internships is highly dubious.

Some groups of employees are disproportionately likely to be underpaid. Those most vulnerable are those most likely to be afraid or tolerant of mistreatment, and least likely to complain. They include workers with temporary migration visas, where the employer has the upper hand in making it not worthwhile to complain. People on a backpacker’s visa in Australia, for example, need to work 88 days in their first year to be entitled to an extra year in Australia. Those days are certified by their employer. So underpaid workers are unlikely to complain to an authority. Many workers worry about losing their jobs if they complain.⁴⁴

The outcomes affect others working in retail or hospitality, including students (for whom it is often their only source of income), sole parents or single-income earners working full-time.⁴⁵

Some examples from Australia show how it works. One study that interviewed 21 international students in Melbourne cafes and restaurants found all were in casual jobs, all were underpaid and some did work for which they weren’t paid at all.⁴⁶ Ashleigh Mounser, a student at the University of Wollongong, starting with a university chat room, compiled a list of 60 underpaying employers near that university. Many paid either \$10 or \$15 per hour, well below the legal minimum.⁴⁷ Newspaper

41 Andrew Stewart and Rosemary Owen, *Experience or Exploitation? The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia*. Report for the Fair Work Ombudsman (Adelaide: University of Adelaide, 2013), 245.

42 See Chapters 1 and 4.

43 Stewart and Owen, *Experience or Exploitation?*, 245.

44 Others may find alternative redress. See the film *88 Days*, made by a British backpacker in Australia who experienced this sort of treatment: www.88daysdocumentary.com/.

45 David Peetz, *The Impact of the Penalty Rates Decision on Australian and Victorian Workers in Retail and Hospitality Industries* (Melbourne: Department of Economic Development, Jobs Transport and Resources Commissioned Research Report, 2017).

46 Iain Campbell, Martina Boese, and Joo-Cheong Tham, ‘Inhospitable Workplaces? International Students and Paid Work in Food Services’. *Australian Journal of Social Issues* 51, no. 3 (2016): 279–98.

47 Anna Patten, ‘The Great Student Swindle’. *Sydney Morning Herald*, 9 December 2016.

stories contain repeated variations on this theme: a special investigation of underpayments of Vietnamese students and migrants, with some staff paid as little as \$6 per hour;⁴⁸ an Indian family who were threatened with deportation after their ‘sponsor’ demanded \$30,000 for the visa and insisted on free labour for over two years;⁴⁹ or 90 Korean backpackers underpaid thousands for work on a farm.⁵⁰ Underpayments became so common among restaurateurs that when one was caught the excuse was that underpayment is ‘normal’.⁵¹ Hence a tour operator told an online newsletter that unpaid work in exchange for accommodation, meals or experiences were not uncommon there, ‘not because businesses up here are greedy capitalist pigs but because it’s necessary to survive in this socialist Australian economy’.⁵² Some businesses treat ‘wage theft’ as legitimate business practice in the face of tight competition. In January 2014, the chief executive of a major employer body was reported as saying that thousands of retailers and restaurants were paying workers in cash and reaching illegal private agreements about conditions, to avoid award minimums.⁵³ It was an attempt to persuade policy-makers to cut those award minimums. But it was also an admission of illegal behaviour by thousands of his constituents.

Migrant workers—especially temporary migrant workers—lack power. Language limitations mean that many do not know their rights, are not confident to enforce them, or find there are very few places where they are wanted. They work in industries where workers are easily replaced, where unfair dismissal is hard to prove and with few meaningful remedies, and collective organisation is difficult. An agent or employer with the same

48 Olivia Nguyen and Trinh Nguyen, ‘Exclusive: Exploitation of Vietnamese Students Rampant among Melbourne Businesses’. SBS Vietnamese (Special Broadcasting Service), 20 April 2017, melbournetoday.net/exclusive-exploitation-of-vietnamese-students-rampant-among-melbourne-businesses/.

49 Adele Ferguson, ‘Blackmail, Extortion and Slavery at a Restaurant near You’. *Sydney Morning Herald*, 25 March 2017.

50 Felicity Caldwell, ‘Korean Backpackers Underpaid Thousands of Dollars on Qld Farm’. *Canberra Times*, 11 September 2016.

51 David Marin-Guzman, ‘Popular Restaurant Chain Caught in Underpayments Scandal’. *Workplace Insight* (Thomson Reuters, 2016), 19 January.

52 Travel Today, ‘Qld Tour Operator Hits Back at “Enemies”’. *Travel Weekly*, 6 January 2015, www.travelweekly.com.au/article/qld-tourism-operator-hits-back-at-enemies/.

53 John Lehman, ‘Businesses Forced to Pay Workers in Cash and Strike Black Market Labour Deals to Survive Workplace Laws’. *Daily Telegraph*, 22 January 2014.

background (‘co-ethnicity’) may seem like their best opportunity, maybe the one person they can trust, someone who will make them an offer they cannot refuse. So a common theme in exploitation is co-ethnicity.⁵⁴

Visa conditions give employers considerable power. In countries like Australia, international students can only work a certain number of hours per week, but with low wages this is often not enough. An employer can then threaten to disclose actual hours worked to immigration authorities. This not only affects migrant workers from non-English speaking backgrounds. It is not as if most of these temporary migrants do not know their rights. One online survey of temporary migrants showed a majority knew they were receiving less than the minimum wage.⁵⁵ More important was the power imbalance.

Franchisees of 7-Eleven—an Australian franchise that was the focus of some major media investigations—commonly hired international students, because of these visa restrictions. At times, they worked twice the allowed hours, and received half the award pay. The business model of the head firm made it almost inevitable that franchisees had to underpay staff, or they would go bust.⁵⁶ This is the logic of franchising in ‘not there’ employment. Similarly, oil company Caltex,⁵⁷ also the subject of a major investigation for underpayment of workers, was able to put the blame back onto franchisees: it set up a \$20 million compensation scheme for workers, but four months later no worker had been paid out while 116 stores had been thrown out of the franchise. Allan Fels, formerly in charge of 7-Eleven’s compensation scheme until that company found a better way to accommodate its corporate objectives, described Caltex’s compensation fund as a ‘public relations stunt’.⁵⁸

54 Workplace Express, ‘Ombudsman Cautions against Exploitation of Overseas Workers by Their Own’. *Workplace Express*, 7 February 2017; Selvaraj Velayutham, ‘Precarious Experiences of Indians in Australia on 457 Temporary Work Visas’. *Economic and Labour Relations Review* 24, no. 3 (2013): 340–61; YaoTai Li, ‘Constituting Coethnic Exploitation: The Economic and Cultural Meanings of Cash in Hand Jobs for Ethnic Chinese Migrants in Australia’. *Critical Sociology* 43 no. 6 (2017): 919–32.

55 Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* (Sydney: Migrant Worker Justice Initiative, 2017).

56 Adele Ferguson and Klaus Toft, ‘7-Eleven: The Price of Convenience’. *Four Corners*, ABC, 30 September 2015, www.abc.net.au/4corners/7-eleven-promo/6729716.

57 Until 2015, Chevron was a 50 per cent shareholder in Caltex.

58 Mario Christodoulou, ‘Caltex Announces \$20m Compensation Fund but Admits No Liability for Underpaid Workers’. *Sydney Morning Herald*, 1 May 2017; Adele Ferguson, ‘Caltex Cleans up in Worker Compo “Hoax”’. *Newcastle Herald*, 16 September 2017.

And yet, for all the cases brought against employers, it remains a viable option for employers to underpay workers as part of their business model. It is rare for a prosecution to occur, when weighed against the number of underpayment cases that come to the inspectorate's attention. If an employer gets caught, but then provides back-pay, they normally escape prosecution; or they might be asked to commit to an 'enforceable undertaking' to back-pay staff. Some firms doing that have been simultaneously underpaying other workers.

The responses of policy-makers vary between jurisdictions, influenced by the choices and strategies of policy-makers and also the extensiveness of the legal safety net. Some issues apply across a number of jurisdictions, including the limited level of resources available to labour inspectorates in the context of public sector cutbacks, a tendency for inspectorates to focus on educating and cooperating with employers rather than prosecuting lawbreakers, except for the most recalcitrant, and the reluctance of policy-makers to change the provisions in temporary migration schemes to minimise the incentive to give or accept underpayment. Some other issues are more specific to jurisdictions. For example, in Australia some states have introduced legislation to license labour-hire operators, excluding from licenses those who have a record of underpaying employees. Federal 'vulnerable workers' legislation introduced in 2017 imposes some liability on franchisors for the behaviour of their franchisees, but there are loopholes if the franchisor did not 'know' that breaches were occurring.

A major problem in Australia is conflicting interests: the main labour inspectorate (the Fair Work Ombudsman) is also responsible for regulating unions and enforcing their compliance with industrial procedures. Its record of kid-glove treatment of corporate offenders is such that it would likely be better to abolish it and start again with a new, focused and untainted labour inspectorate. The problems of labour inspection are not unique to Australia. They cause concern in many countries. Many years ago, when I was doing a report on minimum wages in a developing country, the local labour inspectorate cheerfully took me to talk with an employer that they said was paying below the minimum wage. In some places, labour laws are seen as targets, not requirements. In many, labour inspectors develop a cosy relationship with the people they have to deal with, the employers, and whom they do not want to send out of business. If regulators took the same approach to product safety or chemicals there would be more employers in business and fewer live workers. A reason unions in Australia campaign with the rhetoric of 'wage theft' is to confront

this idea that financial crimes against workers are not really crimes, not in the same league as financial crimes against others—or financial crimes *by* workers. It is why that hospitality employer body was happy to report that thousands of retailers and restaurants were acting illegally:⁵⁹ it was defining and defending the legitimate, if not necessarily legal, interests of capital.

Unions in many countries, including Australia, usually cannot take action against underpayment because the workers affected are not members. They also have less power in contemporary times, due to changes in labour and product markets, legislation and declining membership. Under earlier legislative regimes, unions could inspect workplace records to seek out underpayments, but that is no longer permitted in Australia. Another approach taken by unions has been to try to put pressure on the value chain (supply chain). In the textiles, clothing and footwear (TCF) industries, over two decades unions sought to persuade governments to treat outworkers (technically independent contractors) as employees. They achieved some success in this, with New South Wales the first to pass laws that in effect deemed TCF outworkers as employees.⁶⁰ In building cleaning, Australian unions sought to achieve supply-chain regulation by the state and by lead companies (initially building owners), most recently through the Cleaning Accounting Framework.⁶¹ This built on David Weil's concept of 'strategic enforcement' in the face of limited resources and the fissuring of employment.⁶² That same idea is evident in attempts by unions to achieve regulation of international supply chains, discussed in the next section.

59 Lehman, 'Businesses Forced'.

60 Igor Nossar et al., 'Protective Legal Regulation for Home-Based Workers in Australian Textile, Clothing and Footwear Supply Chains'. *Journal of Industrial Relations* 57, no. 4 (2015): 585–603; Igor Nossar, Richard Johnstone, and Michael Quinlan, 'Regulating Supply Chains to Address the Occupational Health and Safety Problems Associated with Precarious Employment: The Case of Home-Based Clothing Workers in Australia'. *Australian Journal of Labour Law* 17 (2004): 137–64.

61 Sarah Kaine, Emmanuel Jossierand, and Martijn Boersma, 'How to Stop Businesses Stealing from Their Employees'. *The Conversation*, 8 September 2017.

62 David Weil, 'Creating a Strategic Enforcement Approach to Address Wage Theft: One Academic's Journey in Organizational Change'. *Journal of Industrial Relations* 60, no. 3 (2018): 437–60.

Codes of conduct and beyond

As we saw in earlier chapters, the growth of international trade has enabled corporations to externalised damage to the community while internalising profits.⁶³ In recent decades the externalising of harm has attracted substantial criticism and has led to the emergence of the corporate social responsibility (CSR) movement. The CSR movement pressures corporations to reject the pure form of the shareholder primacy model of corporate governance in favour of an approach that factors in the community's interests as well as profits. CSR pressure demands that transnational corporations (TNCs) ensure labour standards are upheld in their supply chains. Supply chains include procurement of raw materials, manufacturing, distribution, marketing and sales. Under this business model, use of separate, often unrelated legal entities reduces legal obligations and costs.⁶⁴ Sitting at the top of the supply chain are often retailers or large brand names. Suppliers—unrelated corporate entities—often in turn further outsource eventually to factories where workers are employed.⁶⁵ The cost savings and distancing benefits to lead corporations are substantial but they also affect the conditions of employment of workers, and resistance to this puts pressure on head corporations to demonstrate some CSR.

As part of the emergence of CSR, discussed in Chapter 9, recent years have seen the substantial growth in codes of conduct for corporations. These typically apply to large TNCs and encompass their supply chains, as many points on the supply chain are subcontracted rather than owned by TNCs, a common form of 'not there' employment. They usually relate

63 Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (London: Constable & Robertson, 2004).

64 Paul Harpur, 'Labour Rights as Human Rights: Workers' Safety at Work in Australian-Based Supply Chains' (Queensland University of Technology, 2009), citing Lisa M. Fairfax, 'The Impact of Stakeholder Rhetoric on Corporate Norms'. *University of Iowa Journal of Corporation Law* 31 (2006): 675–8; Jędrzej Frynas, Scott Pegg, and J. George Frynas, eds, *Transnational Corporations and Human Rights* (New York: Palgrave Macmillan, 2003), 53–78; Benita Beamon, 'Measuring Supply Chain Performance'. *International Journal of Operations and Production Management* 19 (1999): 275–92; Richard Johnstone and Therese Wilson, 'Take Me to Your Employer: The Organizational Reach of Occupational Health and Safety Regulation'. *Australian Journal of Labour Law* 19 (2006): 3–26; Paul Harpur, 'Clothing Manufacturing Supply Chains, Contractual Layers and Hold Harmless Clauses: How OHS Duties Can Be Imposed over Retailers'. *Australian Journal of Labor Law* 21, no. 3 (2008): 316–39.

65 Nossar, Johnstone, and Quinlan, 'Regulating Supply Chains'; Paul Harpur, 'Regulating Multi-National Corporations through State-Based Laws: Problems with Enforcing Human Rights under the Alien Tort Statute'. *Australian International Law Journal* 13 (2006): 233–46.

to employment matters—though they can also cover environmental or other social issues. The codes may require that employees have certain rights (e.g. to organise) or require certain safety standards be enforced.

While in practice corporations are being pressured through the CSR movement to uphold human rights and general values, corporations are not legally bound to adhere to such standards.⁶⁶ Corporations are pressured to be seen to uphold such values arguably due to a threat to their corporate image and profits.⁶⁷

Corporations may respond to CSR pressure by targeting those areas that give them the most kudos for the least cost. Walmart, for example, focuses on building up its reputation on environmental CSR and downplaying the significance of labour standards. Its drive for environmentally friendly practices extends to Walmart seeking to purchase its products from suppliers who are environmentally friendly. Walmart claims it ‘helped’ one of its suppliers adopt more environmentally friendly manufacturing practices.⁶⁸ Walmart links this focus on environmental concerns back to its drive for profits, claiming that caring for the environment makes ‘good business sense’.⁶⁹ In relation to labour practices, Walmart has a far poorer record. It shows little sign of ensuring labour conditions in its supplier factories are protected⁷⁰ and actively suppresses its own employees’ labour rights. Managers were told, ‘you are our first line of defense against unionization’⁷¹ and provided with a *Manager’s Toolbox to Remaining Union Free*. There was a union-busting team of staff to fly into any Walmart outlet which attempted to unionise.⁷² It appears Walmart was attempting to minimise the negative media attention of their violations of employees’ labour rights through promoting their high ethical standards in relation to the environment and focusing upon their low consumer prices. This might succeed, as some researchers claimed customers only altered their

66 Harpur, ‘Regulating Multi-Nationals’.

67 Michael K. Addo, ‘Symposium: Human Rights Perspectives of Corporate Groups’. *Connecticut Law Review* 37 (2005): 667–89.

68 Wal-Mart, ‘Home Page’ (2008), Wal-Martstores.com/GlobalWalmartStoresWeb/navigate.do?catg=217 (site discontinued).

69 Ibid.

70 Charles Kernaghan et al., *Making Barbie, Thomas & Friends, and Other Toys for Wal-Mart: The Xin Yi Factory in China* (National Labor Committee (USA), 2007).

71 Wal-Mart Stores Inc., ‘A Manager’s Toolbox to Remaining Union Free’ (unpublished company document, 1997).

72 Benedict Sheehy, ‘Corporations and Social Costs: The Wal-Mart Case Study’. *University of Pittsburgh Journal of Law and Commerce* 24 (2004): 1–39.

purchasing practices if they felt unethical conduct may impact upon them.⁷³ The abuse of workers may not affect many customers, while environmental degradation affects the survival of the planet. This means customers may react negatively to environmental abuse, but may have a lesser reaction to labour abuses.

True, corporations have recognised that adverse publicity could hurt their profits.⁷⁴ In response to the media attention, some corporations have made a public show of improving working conditions in their supplier factories.⁷⁵ As the main motivator of corporations is negative publicity, most corporations engage in socially responsible conduct primarily as a marketing strategy.⁷⁶

So a common criticism of codes of conduct is that they are often more show than substance, providing a public relations front for a company but without bringing about genuine change.⁷⁷ In response, pressure may be applied to TNCs to sign agreements to make their codes enforceable and in particular to expose them to independent audit (e.g. a factory visit by an agreed team of inspectors who are independent of the company, rather than appointed by it). These agreements typically are made where the net costs of signing up are less than the net costs to the firm of not signing up. This occurs when workers in the home (usually developed) country of the TNC have sufficient bargaining power and motivation to do this; or where the brand name of the company is sufficiently well known that it is susceptible to brand damage from campaigns waged against it.

73 Jeffrey Mercer, 'Corporate Social Responsibility and Its Importance to Consumers' (The Claremont Graduate University, 2003).

74 Adrian Barnes, 'Do They Have to Buy from Burma? A Pre-Emption Analysis of Local Anti-Sweatshop Procurement Laws'. *Columbia Law Review* 107 (2007): 426–56.

75 Ibid.; Wang Chuanli and Dong Gang, 'Social Responsibilities of Transnational Corporations'. *Frontiers of Law in China* 2, no. 3 (2007): 378–402.

76 Peter Jones, Daphne Comfort, and David Hillier, 'What's in Store? Retail Marketing and Corporate Social Responsibility'. *Marketing Intelligence & Planning* 25, no. 1 (2007): 17–30; Jack Yan, 'Corporate Responsibility and the Brands of Tomorrow'. *Brand Management* 10, no. 4–5 (2003): 290–302.

77 Naomi Klein, *No Logo: Taking Aim at the Brand Bullies* (New York: Picador, 2000); Duncan Pruett, *Looking for a Quick Fix: How Weak Social Auditing Is Keeping Workers in Sweatshops* (Amsterdam: Clean Clothes Campaign, 2005).

Unions in many industries thus establish global union federations and seek to negotiate 'international framework agreements' with TNCs.⁷⁸ Some activist campaigns are directed at large, developed-nation brand-name retailers who stock products made in Third World countries.

Action along these lines began to emerge in response to the Rana Plaza collapse in Bangladesh, through demands on retailers and label owners to sign a five-year commitment to conduct independent safety inspections of factories and pay up to \$500,000 per year toward safety improvements.⁷⁹ The local and international unions were able to use the publicity arising from the building collapse to pressure the brand corporations. Many had initially denied any involvement with the factory, but activists were able to provide proof—labels and invoices—gathered from the rubble.

Eventually two competing models emerged there. The first was the Accord on Fire and Building Safety in Bangladesh, signed by 10 union federations and 163 garment manufacturing and retail corporations from 20 countries. It provided for independent inspections of factories, obligations to pay for safety repairs and renovations, and protections for the right to refuse dangerous work or to enter dangerous buildings. Importantly, there was legal enforceability of these rights in the home country of the brand corporation (i.e. if the brand corporation did not force its suppliers to take the above action, it in turn could be sued in its home country). The International Labour Organization (ILO) provided the independent chair of the governing body.⁸⁰

The second model, in response to concerns by corporations like Walmart and Gap that they did not want to face the higher costs the Accord might imply, was the Alliance for Bangladesh Worker Safety, signed by 26 corporations (mostly from North America) but no unions, with corporate-controlled factory inspections, no guarantees of safety repairs or renovations, no guaranteed rights to refuse dangerous work or to enter

78 For example, Ruth Barton and Peter Fairbrother, 'The Local Is Now Global: Building a Union Coalition in the International Transport and Logistics Sector'. *Relations Industrielles* 64, no. 4 (2009): 685–703; Elizabeth Cotton and Rebecca Gumbrell-McCormick, 'Global Unions as Imperfect Multilateral Organizations: An International Relations Perspective'. *Economic and Industrial Democracy* 33, no. 4 (2012): 707–28.

79 Huff Post Business, 'Bangladesh Factory Safety Accord: At Least 14 Major North American Retailers Decline to Sign'. *Huffington Post*, 17 May 2013, www.huffingtonpost.com/2013/05/17/bangladesh-factory-safety-accord_n_3286430.html.

80 bangladeshaccord.org/; Clean Clothes Campaign, 'Comparison: The Accord on Fire and Building Safety in Bangladesh and the Gap/Walmart Scheme'. 4 July 2013, www.cleanclothes.org/resources/background/.

dangerous buildings, and no legal enforceability (other than the payment by manufacturers of fees to the Alliance).⁸¹ The Alliance is therefore seen by labour activists as an attempt by corporations to give the appearance of action (its website claims it is the ‘driving force for creating a safer garment industry for all factory workers’) in a highly emotive area without actually doing anything.

The difference between the two approaches is critical. The Accord had around 50 staff, including engineers who undertook safety audits. Under the Accord, some 1,104 factory inspections were undertaken up to September 2014, finding a total of 80,000 safety breaches. Only two factories were closed, but all factories had at least one major safety problem. These had to be remedied. For example, if a worker activist showed an inspector around a factory and was sacked the next day for doing so, under the Accord he or she had to be reinstated or the brand corporation must sever its ties with that factory. Under the Alliance, by contrast, the factory owner would get a letter.⁸² I imagine it would go into the round file.⁸³

Many relevant Australian corporate groups are covered by the Accord (Cotton On Group, Forever New, Kmart, Pacific Brands, Pretty Girl Fashion Group, Speciality Fashions, Australia’s Target and Woolworths), as are many international brands (including Esprit, H&M, Zara, C&A, Adidas, Loblaw, Tesco, Benetton and Mango). However, the Just Group (chaired by Solomon Lew, with CEO Mark McInnes, a controversial hire from David Jones,⁸⁴ and which owns the brands Just Jeans, Jay Jays, Jacqui E, Portmans, Dotti, Peter Alexander and Smiggle) joined Walmart and Gap’s Alliance (along with companies like Macy’s, US Target, The Warehouse, Costco, Canadian Tire and a number of North American employer associations).

81 Ibid.; www.bangladeshworkersafety.org/en.

82 Juliane Reinecke and Jimmy Donaghey, ‘After Rana Plaza: Building Coalitional Power for Labour Rights between Unions and (Consumption-Based) Social Movement Organisations’. *Organization* 22, no. 5 (2015): 720–40.

83 The bin.

84 John Durie, ‘David Jones CEO Mark McInnes Resigns after Sexual Harassment Complaint’. *The Australian*, 18 June 2010; Stephen Mayne, ‘McInnes is back, but is Lew’s blokey board ready for backlash?’, *Crikey*, 25 March 2011, www.crikey.com.au/2011/03/25/mcinnis-is-back-but-is-lew%e2%80%99s-blokey-board-ready-for-the-backlash/.

Bangladeshi labour activists said, in effect, ‘don’t stop buying garments made in Bangladesh, but put pressure on the labels’ to guarantee safety and working conditions. The extent to which this is successful depends on which of these two ‘models’ succeeds. The difficulty for consumers who have not read this book, and hence for this form of action, is knowing which code of conduct has substance and which is a facade.

The Accord and its successor led to restructuring of the Bangladeshi garment industry, with a number of city-based small manufacturers closing as production for the West is increasingly concentrated in larger factories on urban fringes. Ties with over 500 factories were terminated for non-compliance.⁸⁵ Still, much of the industry was not affected, as significant exports also went to China, which did not engage in such processes. That said, it is a model that might find salience in other countries (e.g. corporations that are willing to abide by good practice find it less costly to go through the Accord inspection processes than to have multiple audit teams from different organisations inspecting at different times, even if the former have legal enforceability).

What happens after the initial five-year Accord expired in 2018 will be important but is, at time of writing, uncertain. Bodies like Human Rights Watch and other activists and unions wanted the Accord to stay in place; the government and especially local employers wanted it terminated or at least replaced by something with less independence. There was support from overseas to maintain the Accord. The matter was to be heard by the Bangladesh Supreme Court in mid-2019,⁸⁶ with much concern focused on the need to build local institutions to enable effective labour regulation in light of what some saw as the “shocking unreadiness” by Bangladeshi regulators to oversee the ready-made garment industry.⁸⁷ There was no such problem for Walmart and Gap’s Alliance. The public relations crisis having passed, as always planned, the Alliance ceased to exist in December 2018.⁸⁸

85 BDApparel News Desk, ‘Bangladesh’s Factories Must Never Become Death Traps Again: HRW’. *BDApparel News*, 5 February 2019, www.bdapparelnews.com/Bangladeshs-factories-must-never-become-death-traps-again-HRW/270.

86 Ibid.

87 UNI global union, ‘Six Years after Rana Plaza: Remembering What was Lost and Protecting the Progress That Has Been Made’. *News*, 24 April 2019, www.uniglobalunion.org/news/six-years-after-rana-plaza-remembering-what-was-lost-and-protecting-progress-has-been-made.

88 ‘The Alliance for Bangladesh Worker Safety has ceased operations as planned on December 31, 2018. All email directed to the Alliance will not be received.’ www.bangladeshworkersafety.org/.

Alternative grievance mechanisms

A different approach that has been taken to international regulation of TNCs is the grievance mechanisms established through the Organisation for Economic Co-operation and Development (OECD) guidelines on TNCs. These enable interested parties (including individual unions or global union federations) to raise complaints with ‘national contact points’ (usually a bureaucrat in a government department) in home countries of the TNCs. These differ from codes of conduct in an important respect: rather than the question of engagement being up to the company, they are up to the national government of the country in which the company is domiciled, and a company can be dragged into the process even where it does not wish to be, if the government is determined to participate.⁸⁹ Not all countries participate with equal enthusiasm, and in the USA, for example, it appears that if a TNC does not wish to participate then the home government does not push it. Analysis by Ford and Gillan suggests that roughly three-fifths of complaints get accepted as being able to be heard, and of those about half produce positive outcomes for the complainant.⁹⁰ While the process has many problems, its existence shows that there are multiple avenues available for those seeking to regulate the labour activities of transnational capital.

Conclusions

The state still has a key role to play in creating and enforcing the rights associated with workplace citizenship, the rights applying under codes of conduct, and the management of social and systemic sustainability via such issues as the redistribution of income, wealth and power, the pricing of externalities such as carbon and the way in which financial regulation affects the focus on short- and long-term rates of return.

Yet regulation is increasingly difficult as the effects of globalisation spread and render nation-states less powerful, and as neo-liberalism renders the state less willing to intervene anyway. Developments in technology provide additional challenges.

89 Michelle Ford and Michael Gillan, ‘The OECD Guidelines as a Supranational Mechanism of Labor Conflict Resolution’. Paper presented at *Conflict and its Resolution in the Changing World of Work: A Conference and Special Issue Honoring David B. Lipsky* (DigitalCommons@ILR, 2017).

90 Ibid.

This chapter shows three ways in which parties have responded, and can respond, to changes in the economic environment and labour market that provide regulatory challenges.

On the first issue (the definition of workers), it appears that changes in the labour market, including those driven by new technology and the growing emphasis on ‘not there’ employment, have run ahead of both statutory law and judge-made law. The judiciary tries to respond but appears at times to be waiting for legislators to catch up. There are opportunities for legislators to do that, by expanding the reach of employment law and (perhaps in different ways) of particular aspects of labour law (such as in workers’ compensation). This includes revisiting the definition of a ‘worker’ or at least the possibility of some minimum standards applying to all employees, and thinking innovatively about how such aims might be achieved. A good approach seems to be to establish general minimums at law, while leaving it to specialised bodies to determine the detail in areas where employment status is not demonstrable.

On the second issue (noncompliance), inspectorate compliance action appears increasingly inadequate, and hampered in Australia and elsewhere by inadequate resources and/or conflicting responsibilities for the inspectorate. Unions, largely now locked out of active labour inspection in Australia, have sought to achieve supply-chain regulation through pressuring the state and corporations.

On the third issue (international value chains), states are reluctant to act for fear of losing investment, but unions use leverage where they can to force accountable regulation across the value chain, under the auspices of the lead company that heads the value chain. In this context, we need to take account of the role of regulation in bringing about sustainable and ethical behaviour. There are genuine doubts about the efficacy of ‘internal’ regulation by corporations, due to the nature of the logic of the corporation (typically profit-maximisation). Some campaigns (such as those promoting codes of conduct) seek to affect or shape internal regulation and even the internal logic of corporations. Some researchers see this as a new form of regulation that may supplant state regulation in an era where the state is in retreat. But there is considerable evidence that it matters a great deal whether any internal codes of conduct are ultimately enforceable. If they remain within the control of the corporation, with no external enforceability under law, then there is genuine doubt as to their longevity—their sustainability. An example is the differences between

the 'Accord' and the now defunct 'Alliance' on Bangladesh worker safety, the former imposing legal rights and obligations and being the subject of continuing contestation between capital, labour and the state, while the latter was a classic example of something ephemeral established as public relations crisis management. To the extent that it succeeds in undermining the imposition of legal rights and obligations, public relations crisis management threatens workers' lives.

All of these are about different, but related, aspects of labour regulation. Labour regulators are finding it increasingly difficult to respond to the critical issues in today's labour markets. But as discussed in early chapters, labour regulation is not the only aspect of regulation that affects labour. There are broader questions about other types of regulation, of society and the economy that are also highly relevant to labour. And there are major issues about how the regulatory environment responds to climate change and what this means for the future of work. We looked at some of that in Chapter 9, and we turn to broader issues of responding to the world outside the workplace in the final chapter.

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