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# Transnational Business and the Politics of Social Risk: Re-Embedding Transnational Supply Chains through Private Governance

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## I. Introduction

Throughout recent economic history, social struggle over the regulation and distribution of social costs, benefits and risks associated with capitalist economic relations have been both pervasive and continually evolving. Such contestation surrounding how capitalist forms of accumulation, production and exchange are constituted and regulated by broader social norms and relationships has often been characterised as a struggle over the terms on which capitalist economies are ‘socially embedded’—in Karl Polanyi’s influential language. These regulatory processes draw on state and non-state actors, a range of formal organisations and social institutions, as well as broader and more nebulous features of the social environment.<sup>1</sup> Importantly, the concept of embedding also entails a particular normative view of how the costs, benefits and risks associated with participation in capitalist economic relations should be managed and distributed. The normative view usually associated with a Polanyian concept of embedding has tended to stress the value of reducing or at least more fairly allocating relevant social costs and risks.

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<sup>1</sup> For example, Stewart conceptualises the ‘macro-environment’ as encompassing ‘the norms and political economy prevalent in a society – that is it includes the manifold influences – economic, political and social – to which individuals and groups are subject by the environment in which they operate.’ Frances Stewart, ‘Why Groups Matter’ in EVK Fitzgerald (ed), *Social Institutions and Economic Development: A Tribute to Kurt Martin* (Kluwer Academic Publishers, 2002) 27.

Analysis of embedding and disembedding has also provided a framework for understanding the societal dynamics through which large-scale patterns of economic regulation and distribution have evolved within capitalist political economies. In *The Great Transformation*, originally published in 1944, Karl Polanyi gave us perhaps the most vivid account on record of historical shifts in the regulation and governance of markets.<sup>2</sup> For Polanyi, the rise of free markets was a process in which markets became disembedded from public control, such that the competitive pursuit of short-term profit became the primary logic governing social relations. Eventually, however, this provoked a societal response in which markets became re-embedded—at least until a renewed push for free markets emerged again.

Political struggles over competing norms and institutions of economic regulation have continued to evolve through subsequent stages of global capitalist expansion. In the contemporary context, patterns of economic ‘disembedding’ and associated struggles to re-embed economic relations in norms of social protection and equality have taken some distinctive forms. Importantly for the concerns of this volume, there have been significant increases in recent years in social consciousness concerning various forms of ‘social risk’ associated with participation in capitalist economic formations. On the one hand, such social risk has been *intensifying*, as capitalist economic processes become larger-scale, more complex, and harder for traditional state regulators to control. In some respects, such patterns reflect a more generalised decline in the capacity of social institutions to control the forms of risk that capitalist economic relations generate. On the other hand, such patterns reflect instead the *redistribution* of control over such forms of risk away from state regulators and towards private actors, who seek strategically to transfer such risk away from themselves to other parties.

Rising risk consciousness, together with visible failures of state regulation to appropriately manage distributions of risk, has been associated with increased demand for new forms of regulation capable of protecting citizens from the most harmful consequences of contemporary social risk. Our analysis in this chapter focuses on one context in which these processes of disembedding and re-embedding have been particularly visible and contested—the organisation and regulation of capitalist production within global supply chains. In this context, evolving strategies of embedding have relied importantly on private systems of supply chain governance and regulation.

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<sup>2</sup> Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 1944).

We focus on two contrasting private regulatory schemes which differ in the types of social risk and the patterns of social control that they seek to regulate, as well as the governance strategies they adopt. Our first case study examines supply chains in the garment industry, in which traditional forms of state-based labour regulation interact with a range of private governance initiatives. Our analysis in this first case focuses on one innovative multi-stakeholder regulatory initiative in this sector, which operates through the organisation Ethical Clothing Australia. We contrast this to a case study of social risk regulation within global coffee supply chains, in which the fair trade system seeks to govern economic relationships all the way from production to retail stages of the supply chain in accordance with norms of equality and social protection.

Our analysis identifies some distinctive features of the regulatory strategies adopted by these non-state governance schemes, which enable them to directly tackle dispersed patterns of social risk and control. While traditional forms of state regulation have often been premised on assumptions about the centralisation of regulatory responsibility, these private mechanisms acknowledge the importance of *multiple* state and non-state parties in shaping distributions of social risk, and influencing the extent to which such distributions comply with prevailing regulatory norms. In other words, both of the private regulatory schemes that we examine here respond to the increased diffusion of *control* over social risk distributions by institutionalising a correspondingly broader distribution of *responsibility* for its regulation.

However, these two regulatory schemes adopt different strategic responses to the challenge of regulating the mix of dispersed and concentrated distributions of social control and risk that they confront. In the garment sector, regulatory strategies are driven by the logic of locating and holding accountable a broader range of actors beyond the state that wield control over working conditions—in effect mirroring dispersed forms of control with an increasingly pluralised regulatory structure. Regulatory strategies adopted by the fair trade system in the coffee sector similarly disperse regulatory responsibility more broadly among private as well as public actors. However, compared with regulatory strategies adopted in the garment sector, the fair trade system attempts to build more collectivised institutions of supply chain governance, capable of performing a broader range of governance functions, and tackling a correspondingly broader range of social risks. The downside of this more ambitious strategy of private risk regulation is that it proves difficult to sustain beyond the boundaries of a niche system of production and regulation, thereby constraining the scope of what can be achieved. These contrasting strategies highlight some important tensions confronting those

devising risk regulation strategies in the context of dispersed control over patterns of contemporary social risk.

## II. Embedding and Disembedding in a Risk Society

Before we move to discussing these emerging forms of private risk governance in more depth, it is useful to say a little more about the ways in which the embedding of social risk has traditionally occurred over much of the last century, and how this both parallels and differs from manifestations of disembedding within a contemporary ‘risk society’.

Tendencies to inequality and commodification that are produced through the process of capitalist processes of accumulation and wealth generation have – throughout the history of capitalism – given rise to the demand for a range of regulatory and redistributive interventions to constrain and compensate for the more exploitative and commodifying tendencies of the system.<sup>3</sup> During different phases of its development, and within different national and sub-national contexts, capitalism has been sustained and contained by formal and informal modes of regulation of varying kinds.

For much of the last century or so the modern state has been understood to have primary responsibility for managing risk, particularly in relation to labour protection and social insurance functions. Governments have aimed to reduce or reallocate costs, risks and inequalities associated with participation in capitalist production relations, embedding social relations in values of social protection and equality. They also seek to reduce individual’s exposure to the more harmful effects of the market, performing the decommodification of labour.<sup>4</sup> A variety of laws and policies have been enacted to this end, depending on the style of governance or variety of capitalism in place. For example, states have offered unemployment benefits, and compelled both employers and employees to contribute to insurance schemes that employees can draw upon in the event of unemployment. In relation to labour and employment, states set minimum wages, thereby removing wages from market forces to some extent, and smoothing out the risk of wage fluctuations that workers

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<sup>3</sup> Sean O’Riain, ‘States and Markets in an Era of Globalization’ *26 Annual Review of Sociology* 187.

<sup>4</sup> Gosta Esping-Anderson, *The Three Worlds of Welfare Capitalism* (Princeton University Press, 1990).

experience when wages are entirely linked to the profits and losses of the businesses that employ them. States also create institutions which mediate risks associated with unequal bargaining power. States provide education, training, apprenticeship programs and structural adjustment programs to encourage movement of employment from one area to another. All of these policies are aimed at managing the risk that workers will not have sufficient skills to move from one sector of the labour market to another, or that labour markets will remain overly rigid, making workers unemployable.

States also manage risks through a number of labour market institutions, including standard setting processes, and institutions that enforce and encourage compliance. Here, the state plays a role in distributing risk between parties. Rules regarding hiring and firing in labour law, for example, distribute risk by stipulating who bears the cost of financial downturns for an organisation. Where the ease of firing is high, workers may bear the risk of a financial downturn as labour can be shed quickly and alternatives—such as drawing upon financial reserves or withholding dividends from owners—are not seriously considered. Where the ease of firing is low, the risk of financial downturns can be distributed to other stakeholders. In practice, societies balance this risk in a variety of ways, and buffer the risk of job loss as a consequence of hiring and firing rules with a range of social security schemes. In these ways, labour law and other social protections in the post war period have embedded capitalism by creating a social pact between labour and capital.<sup>5</sup> Such regulatory systems have provided both an incentive to, and compensation for, participating in a risky system in which workers lend their labour power for the profits of business.

However the state has been floundering in its role as embedder and risk redistributor during recent years. Labour market regulation, in particular, has been failing. Many narratives around embedding highlight an ideological unwillingness to employ the state to redistribute risk away from labour and small producers in the neo-liberal period. Also of central importance are the structural dynamics through which organisation of production has become more complex and diffused (in organisational and geographical terms)—undermining in important ways the state's capacity to control and redistribute risk in conventional ways.

These contemporary processes of structural change are clearly illustrated within globalising systems of production. There has been an important trend in recent decades

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<sup>5</sup> Allain Supiot, 'Introduction' in Allain Supiot (ed), *Au-delà de l'emploi, transformations du travail et devenir du droit du travail en Europe* (Flammarion, 1999).

towards increasingly globalised production systems in many labour intensive industries.<sup>6</sup> Beginning in the 1970s and accelerating through the 1980s and 1990s, production of apparel and textiles, toys, footwear, home electronics and other consumer goods destined primarily for consumer markets in the industrialised world has spread throughout the world, with manufacturing tending to cluster in a range of developing countries.<sup>7</sup> Such trends reflect both a geographical globalisation of production, and the organisational disintegration of units of production, whereby functions that were once conducted within the one firm are now spread between multiple suppliers around the world.

These forms of vertical disintegration—the breaking up of large, multi-function corporations into smaller units—have been importantly associated with changing distributions of economic and social risk. When one firm conducted a range of functions, including production, marketing, design and so on, that firm bore the risk that any or all of those functions would fail. In other words, the same firm bore the risk for producing the various components that go together in one good. These risks might include an increase in labour unit costs or production stoppages of various types, whether due to industrial unrest or machine breakdowns. Such firms would also bear the risk of reading the market correctly, designing goods with sustained demand, and maintaining cutting-edge technology in every field required for the success of their product.<sup>8</sup> Vertical disintegration and outsourcing have allowed firms to share that risk—in many cases by passing it on to other less powerful actors within the supply chain. In this way, the practice of outsourcing production and service functions into a network of subcontractors and suppliers has offered more powerful firms a means of reducing exposure to certain forms of economic risk.

For the core businesses that have cast off employees, this has been an important risk management strategy, enabling business to relinquish responsibility for continuing to uphold wages for workers, to maintain work space, desks, machinery of a safe standard and so on, regardless of fluctuations in working capital or customer demand. Indeed, many firms have

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<sup>6</sup> G Gereffi and Olga Memedovic, 'The Global Apparel Chain: What Prospects for Upgrading for Developing Countries?' <http://www.intigovar/cadenasdevalor/ApparelUNIDONew2Feb03pd>; Andrew Ross, *No Sweat : Fashion, Free Trade, and the Rights of Garment Workers* (Verso, 1997); Dorothy McCormick and Hubert Schmitz, *Manual for Value Chain Research on Homeworkers in the Garment Industry* (2002).

<sup>7</sup> Richard Appelbaum, 'Giant Retailers and Giant Contractors in China: Emergent Trends in Global Supply Chains' March 9–11, 2006 Working paper prepared for Princeton University Conference, Observing Trade: Revealing International Trade Networks. Around 70% of global clothing exports now come from developing countries. Angela Hale and Jane Wills, *Threads of Labour: Garment Industry Supply Chains from the Workers' Perspective* (Blackwell, 2005) 17.

<sup>8</sup> Ronald Gilson, Charles Sabel and Robert Scott, 'Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration' 109 *Columbia Law Review*.

been actively encouraged by consultancy firms and others to fracture into functional entities that are loosely connected in terms of contract and responsibility (in the sense that relationships between them can be instantaneously terminated), but tightly tied together in terms of control of the production process or product. The flipside to these processes of risk externalisation has been the corresponding growth of subcontractors—who are commonly firms that establish themselves in a relationship with a large transnational company with the precise aim of taking up the slack that is diffused in a lean production system. These firms, usually small and medium sized enterprises, but in some cases also large agents producing for multiple brands, absorb many of the risks displaced by their client firms.<sup>9</sup>

In some sectors, subcontractors in turn pass on the risk they have incurred from their client firms to home-based and sweatshop-based industrial outworkers—a particularly vulnerable category of worker. This process has resulted in an increasing diversity of arrangements in which businesses deal with outsourced companies and participate in supply chains and franchises. As a result, many workers who would previously have been regarded as employees of the core business become disassociated from it or associated in alternative ways, through what are regarded as independent contracts or independent businesses. In some agricultural sectors, similar processes have occurred in the form of reliance on short-term and arms-length contracts with smallholder farmers, who then find themselves bearing significant risks associated with both fluctuations in production yield, and widely variable market prices for the goods they produce.

The diffusion of economic risks of these kinds, then, translates in many cases into intensified *social risk*, in the form of threats to wellbeing, life and livelihood for the less powerful and sometimes highly vulnerable workers and producers situated further down the global supply chain. In Amoore's words, 'The consultants' representation of outsourcing as a means to share risk (with connotations of collaboration and risk pooling) is revealed in practice to displace and reallocate risk, with disproportionate effects on particular worker groups.'<sup>10</sup>

In the face of such intensification and redistribution of social risk, dynamics of 'disembedding' have been compounded by weakened state capacity to effectively manage such risk. State capacity to redistribute risk has been weakened in part by increased

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<sup>9</sup> Louise Amoore, 'Risk, Reward and Discipline at Work' 33 *Economy and Society* 174, 189.

<sup>10</sup> *Ibid* 188.

complexity and informality associated with post-fordist processes of capitalist development.<sup>11</sup> Such complexity and informality make regulation increasingly difficult in part because of the increased organisational complexity of production,<sup>12</sup> and also because of the pluralisation of the actors involved in driving the relevant economic relationships and outcomes. Such pluralisation has taken the form of both (a) a proliferation of corporate forms and relations; and (b) a proliferation of people who would previously have been employed inside a firm being engaged in alternative ways, including as dependent contractors, independent contractors, employees or contractors of labour hire agencies, or as part of their own businesses.<sup>13</sup>

The restructuring of supply chains in these organisationally complex and pluralised ways can make it very difficult for state-based regulators to *identify a clear locus of power and control*, and thus to determine appropriate regulatory subjects and agents. One dimension of this regulatory challenge relates to the informational problems that states increasingly confront in the presence of societal complexity and informational diffusion—characterised by Beck in the following way:

In relation to the state and parliament, industry possesses a double advantage. It has autonomy in investment decisions and a monopoly on the application of technology. Politicians are in a bad position, struggling to catch up with what is going on in technological development. ... Thus the division of power leaves the industries with the role of primary decision maker without responsibility for risks to the public. Meanwhile, politics is assigned the task of democratically legitimizing decisions that it has not taken and doesn't know about, especially since the privatization of industries which were previously run by the state.

This regulatory challenge is compounded by an emerging disconnect between *transnational* control within supply chains and nationally bounded institutions of political governance. This disconnect has been driven in large part by extension of the geographical scope over which production is organised beyond the boundaries of the nation-state. This kind of disjuncture between the boundaries of social and economic interconnection and of political institutions has been widely identified within broader debates about globalisation and cosmopolitan

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<sup>11</sup> David Harvey, *The Condition of Post-Modernity: An Enquiry into the Origins of Cultural Change* (Blackwell, 1990).

<sup>12</sup> Hugh Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' 10 *Oxford Journal of Legal Studies* 353.

<sup>13</sup> Shelley Marshall, 'An Exploration of Control in the Context of Vertical Disintegration, and Regulatory Responses' in Chris Arup and others (eds), *Labour Law and Labour Market Regulation: Essays in the Construction, Constitution, and Regulation of Labour Markets and Work Relationships* (Federation Press, 2006).



governance.<sup>14</sup> Such concerns have also been analysed through a risk-based lens—Beck suggesting that

the nation state, which attempts to deal with global risks in isolation, resembles a drunk man, who on a dark night is trying to find his lost wallet in the cone of light of a street lamp. To the question: did you actually lose your wallet here, he replies no, but in the light of the street lamp I can at least look for it. In other words global risks are producing failed states even in the West.<sup>15</sup>

There are at least two divergent ways in which the implications of such trends for regulatory strategy can be interpreted. On the one hand, some analysts have emphasised the *diffusion of control* over relevant patterns of risk within these globalised production systems, and the associated difficulties in attributing causation, blame and responsibility for resulting risk distributions. Beck has argued that the complexity of social systems within a risk society mean that ‘risks that were calculable under industrial society become incalculable and unpredictable in the risk society. Compared to the possibilities of adjudging blame and causality in classical modernity, the world risk society possesses no such certainties or guarantees’.<sup>16</sup>

In contrast, others have claimed that the notion that markets are ungovernable is a ruse created as part of neoliberal ideology to legitimise and present as inevitable power relations associated with more traditional forms of capitalist relationships. Amoor for example has stated that ‘The manufacture of specific kinds of uncertainty is central to neo-liberal programs of the restructuring of labour and working practices’.<sup>17</sup> On this view, the central regulatory problem within the contemporary risk society is not that the locus of control over risk allocation processes cannot be located, but rather that such control has simply shifted away from the state and towards an array of powerful transnational businesses. According to this interpretation, transnational businesses are now in some senses out of control, holding ‘positions of extraordinary power and equally extraordinary lack of accountability to anyone or anything except their shareholders’.<sup>18</sup> If they are to be reined in, then what we need is

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<sup>14</sup> See David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Polity Press, 1995); and David Held, ‘Regulating Globalization? The Reinvention of Politics’ 15 *International Sociology*.

<sup>15</sup> Ulrich Beck, *Living in the World Risk Society* (2006) *ibid*.

<sup>16</sup> Ulrich Beck, ‘Politics of Risk Society’ in Jane Franklin (ed), *The Politics of Risk Society* (Polity Press, 1998) 16.

<sup>17</sup> Amoor (n 9).

<sup>18</sup> IRENE, *Controlling Corporate Wrongs: The Liability of Multinational Corporations: Legal Possibilities, Initiatives and Strategies for Civil Society* (Report of the international IRENE seminar on corporate liability and workers’ rights, 2000).

tougher mechanisms of regulation and accountability that are capable of holding dispersed, corporate power-holders to account for the power they already wield over the generation and distribution of social risks and harms.

### III. Re-Embedding through Private Regulation?

The particular balance struck between these overlapping but somewhat competing interpretations of the distinctive regulatory challenges of a ‘risk society’ has important implications for the design of corresponding regulatory strategies. These two divergent narratives have played a particularly important role in informing the logic of emerging systems of private regulation, which have attempted to forge new ways of regulating the distinctive patterns of social risk generated by reorganised global production. We illustrate some of the key features of these new regulatory forms with reference to two case studies. Ethical Clothing Australia regulates the working conditions within garment supply chains in Australia, while the fair trade system operates globally to regulate the living conditions and terms of trade experienced by smallholder farmers within coffee supply chains.

In one important sense, these two private regulatory schemes share a common regulatory logic, which contrasts in some respects to that of traditional state regulation. While state mechanisms imagine that a single entity is responsible for driving allocations of risk (labour law for example focusing exclusively on regulation of the employer-employee relationship), these private schemes acknowledge that multiple parties can influence such distributions. Correspondingly, they recognise the multiple parties to whom responsibilities for influencing the conditions of workers and producers can be assigned. In this sense, both regulatory schemes represent a shift towards a more pluralised logic of risk regulation within global supply chains.

In another sense, however, the logic of the two schemes differs. The regulatory strategy adopted by Ethical Clothing Australia focuses on locating and holding accountable a broader range of actors beyond the state that wield control over working conditions—in effect mirroring dispersed forms of control with an increasingly pluralised regulatory structure. In contrast, the fair trade system attempts to build more collectivised institutions of supply chain

governance, capable of performing a broader range of governance functions, and tackling a correspondingly broader range of social risks. These two approaches prioritise responsiveness to different elements of the regulatory challenge identified earlier, and as a result, experience different strengths and weaknesses as regulatory tools.

## IV. Ethical Clothing Australia

Ethical Clothing Australia is a regulatory innovation designed to improve the working standards of home-based industrial outworkers in the garment industry of Australia.<sup>19</sup> It represents a distinctive regulatory strategy seeking to counter the processes of economic ‘disembedding’ that have been prominent within the global textile, clothing and footwear (TCF) industry.

Supply chains in this sector have been particularly notable for their reliance on strategies of sub-contracting, described in more general terms above. Supply chains in this sector in Australia tend to be highly vertical—described by Gereffi as ‘retailer or brand led supply chains’.<sup>20</sup> The use of homeworkers in processes of clothing and footwear production is widely entrenched. By the mid-1990s, the number of homeworkers and sweatshop workers working in the TCF industry in Australia was anywhere between 23,650<sup>21</sup> and 329,000,<sup>22</sup> depending on the source of the estimate. The Textile, Clothing and Footwear Union of Australia (the Union or the TCFUA) estimated that outworkers outnumbered factory workers by 12 to 1 by 1994.<sup>23</sup>

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<sup>19</sup> For a more thorough exposition of this regulatory initiative see Marshall and Shelley Marshall, ‘Australian Textile Clothing and Footwear Supply Chain Regulation’ in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing, 2010).

<sup>20</sup> See Gary Gereffi, John Humphrey and Timothy Sturgeon, ‘The Governance of Global Value Chains’ 12 *Review of International Political Economy*; and Gary Gereffi, ‘Global Commodity Chains: New Forms of Coordination and Control Among Nations and Firms in International Industries’ 1 *Competition and Change*.

<sup>21</sup> Industry Commission, *The Textile, Clothing and Footwear Industries* (1997).

<sup>22</sup> Textile Clothing and Footwear Union of Australia, *The Hidden Cost of Fashion* (1995).

<sup>23</sup> *Ibid.* Figures are likely to be unreliable due to the informal, sporadic and seasonal nature of outworker employment, and the difficulty of documenting this work. Unfortunately, we have no more recent figures, but these numbers are likely to have shrunk with the contraction of clothing production in Australia, although industry insiders believe the proportion of outworkers compared with factory workers has continued to grow.

The high incidence of homeworker employment in this sector is a product of precisely the strategies of risk externalisation by more powerful economic actors described above. In response to the import penetration that has followed Australia's reduction of tariff and non-tariff protections, brands and manufacturers have pursued two strategies of outsourcing to increase competitiveness—one off-shore to low labour cost countries and one within Australia to industrial outworkers. Ethical Clothing Australia is concerned with the latter. Manufacturers engage middlemen or agents to contract work out to home- and sweatshop-based workers within Australia, setting a price per garment. They thus avoid the additional costs associated with adhering to labour and occupational health and safety laws, and pass on the risks associated with labour management to the middle person. Workers are drawn primarily from Vietnamese and Chinese immigrant and refugee communities. Workers tend to be isolated and have low legal literacy, making it easy to pass risk onto these workers regardless of 'on paper' labour laws.

Important dimensions of social risk are transferred to vulnerable workers within these production systems. A 2001 study of pay and conditions suggested that homeworkers, on average, received around AUD 0.50 to AUD 5.00 an hour for their work—less than half the legal minimum—once piece rates were converted to hourly rates.<sup>24</sup> Around 62 per cent of the workers who responded to Cregan's study worked seven days a week and 95 per cent of respondents did not receive holiday leave, sick leave or public holiday pay.<sup>25</sup> Another study comparing the occupational health and safety experiences of factory-based workers and outworkers in the clothing industry found that outworkers suffered three times the level of injuries experienced by factory-based workers. The two main reasons for the differences in injury rates were the use of a piecework payment system and the long hours worked by outworkers.<sup>26</sup> Workers had little knowledge of their legal rights, and the work was largely occurring 'informally'.

In response to these distinctive regulatory challenges, Ethical Clothing Australia adopts an innovative regulatory response. In part it engages a form of private regulation—

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<sup>24</sup> Christina Cregan, *Vietnamese Outworkers in the Australian Garment Industry: Sweated Labour and the Social Wage* (IREC, 2011)

<sup>25</sup> *Ibid.*

<sup>26</sup> C Mayhew and M Quinlan, *Outsourcing and Occupational Health and Safety: A Comparative Study of Factory-based and Outworkers in the Australian TCF Industry* (Industrial Relations Research Centre, 1998); Richard Johnstone, Claire Mayhew and Michael Quinlan, 'Outsourcing Risk? The Regulation of Occupational Health and Safety where Subcontractors are Employed' 22 *Comparative Labor Law & Policy Journal* 351; 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' 17 *Australian Journal of Labour Law* 137.

bringing new *non-state actors* into a web of control and influence over actors in the regulated community, overseen by a multi-stakeholder industry body.<sup>27</sup> It also draws in part on *non-state regulatory instruments*, harnessing market-based tools as a means of holding companies in the industry accountable for their labour practices (as explained further below).

Although the regulatory scheme is in these ways private in character, its central objective remains bolstering the functioning of the existing state-based regime of labour law. In this sense it aims to harness new sources of norms and incentives from the broader societal sphere as a means of bringing a broader range of regulatory tools to the hands of state based and private regulatory agents. For this reason, understanding how Ethical Clothing Australia can contribute to processes of economic re-embedding requires analysis of both its distinctions from, and interactions with, traditional forms of state regulation, which have struggled in important ways to adapt to the challenges of regulating dispersed patterns of social control and risk within global production systems.

In Australia, as in most jurisdictions around the world, labour laws are based on a narrowly conceived notion of the employment relationship. Various protections flow from being identified as an ‘employee’ and responsibilities flow from being identified as an ‘employer’. However, it is becoming increasingly difficult to identify an ‘employer’ who is the subject of regulation. Labour law in most jurisdictions centres on the idea that an employer ‘controls’ an employee.<sup>28</sup> Because of the vertical disintegration identified in the previous section of this chapter, however, there is often no identifiable employer or employee. Or alternatively, the identifiable employer is not the controlling entity in the supply chain. Control may be shared between a number of key players in a supply chain, or wielded primarily by a party removed from the worker and outside of the ‘employment relationship’ that labour law regulates.

As a result, labour law is ill-equipped to regulate the complex relations of production that are now commonly seen around the world. Increasing numbers of workers toil outside the reach of labour regulation and the social protections and welfare benefits that are most often attached to this legal relationship. In important respects, labour law is now failing to conduct the risk redistribution that it has traditionally carried out.

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<sup>27</sup> Peter Drahos, ‘A Networked Responsive Regulatory Approach to Protecting Traditional Knowledge’ in Daniel Gervais (ed), *Intellectual Property, Trade and Development* (Oxford University Press, 2007).

<sup>28</sup> International Labour Office, *The Employment Relationship, Report V(I)* (95th Session, 2005).

This failing is deeply entrenched in the way that labour law is currently constituted. Labour law has been very narrowly established as a means of regulating the exercise of ‘control’ and ‘subjugation’ by an employer over an employee, and as such it does not recognise as within its purview the forms of control and subordination exercised through market-based supply chain relationships such as those mapped out above. The legal consequence is that special intervention to address issues of fairness or inequality of bargaining power is not seen to be required, and labour law remains ill-equipped to regulate the distinctive kinds of economic relationships through which social risk is being intensified and distributed to vulnerable parties within contemporary global supply chains.

The creation of Ethical Clothing Australia can be understood in large part as a response to these failures of state regulation in the face of reorganised patterns of risk and control within global production systems. In the mid-1990s, the Textile, Clothing and Footwear Union of Australia came together with an alliance of community groups coordinating under the banner of ‘FairWear’ to develop a market-based mechanism designed to bolster the existing legal system. This mechanism is framed by a Homeworkers Code of Practice and overseen by Ethical Clothing Australia. Australian manufacturers, brands and retailers become accredited under the Code after showing that all suppliers in their supply chain are complying with the Award. Eighty seven brands and manufacturers were accredited as of August 2013.<sup>29</sup> This mechanism has a number of notable features.

First, the Code builds on the outworker provisions of the relevant labour laws as its base. Its aim is to *enhance* and *complement* the operation of labour laws. Common criticisms of voluntary Codes of Conduct are that they are inefficient regulatory forms because they are often company based, rather than industry wide, and draw away from public law, rather than bolstering it.<sup>30</sup> Because it is Australia-wide and based on the Award standards, the Homeworkers Code of Practice is not subject to these criticisms.

Second, the Code operates as a form of ‘co-regulation’—marshalling a dispersed array of social actors towards a common regulatory project.<sup>31</sup> It draws on the power of private

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<sup>29</sup> See [www.ethicalclothingaustralia.org.au/consumer/accredited-brands-full](http://www.ethicalclothingaustralia.org.au/consumer/accredited-brands-full) for a full list of accredited companies.

<sup>30</sup> Adelle Blackett, ‘Corporate Codes of Conduct as a Regime of Labour Market Regulation’ in John J Kirton and Michael J Trebilcock (eds), *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Ashgate, 2004).

<sup>31</sup> See Jeroen van der Heijden, ‘Friends, Enemies, or Strangers? On Relationships Between Public and Private Sector Service Providers in Hybrid Forms of Governance’ 33 *Law and Policy* 367 for an understanding of co-regulation from the regulatory literature. See Cynthia Estlund, *Regoverning the Workplace: From Self-*

players—transforming them into private regulators. Ethical Clothing Australia oversees the operation of the Code. The relevant union is responsible for receiving complaints from outworkers and monitoring compliance with the Code. If a problem is not rectified within a reasonable period of time, the Committee is able to revoke a manufacturer’s accreditation, and the signatory or member brand or manufacturer must stop giving work to the offending supplier. In these ways, the economic power of retailers and manufacturers is called on in the regulatory process, increasing the efficacy of the overall regulatory system.

Third, as well as creating disincentives for non-compliance, the Code creates incentives for compliance. Manufacturers that complete the accreditation process are licensed to display the Ethical Clothing Australia label on their goods.<sup>32</sup> In this way, the Code mobilises market power in the service of state-based regulatory norms. Because market power is so concentrated in the Australian TCF industry amongst a small number of retailers and large fashion houses, the survival of smaller manufacturers depends on receiving ongoing contracts for supply to these big players. If the brands and fashion houses will not order from them so as to maintain their accreditation, this functions as a powerful sanction. These aspects of the Code allow market power to be captured in the service of enhanced labour standards, reinforcing the signalling that the existing laws were sending to businesses to guide their behaviour.

Moreover, the private Homeworkers Code of Practice has now been mirrored by mandatory codes in two states.<sup>33</sup> The Federal *Fair Work Act 2009* (Cth) makes provision for the creation of a mandatory code by regulation (s789DA) though no regulation had been passed as of August 2013. These mandatory codes encourage companies to opt into the voluntary code by allowing companies to avoid the scope of the mandatory codes if they join Ethical Clothing Australia.

In these ways, Ethical Clothing Australia is able to recognise the responsibility of multiple parties wielding influence over distributions of social risk, and to hold this plurality of actors to account for such influence. Moreover, by mobilising the influence of private

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*Regulation to Co-Regulation* (Yale University Press, 2010) for an application of this idea in the labour law literature.

<sup>32</sup> See [www.ethicalclothingaustralia.org.au/business/how-to-apply](http://www.ethicalclothingaustralia.org.au/business/how-to-apply), accessed 16 August 2013.

<sup>33</sup> By 2012, three states had enacted mandatory codes, but one of the first steps undertaken by the newly elected conservative state government in Queensland was to repeal the mandatory code on 9 November 2012, see: [www.justice.qld.gov.au/fair-and-safe-work/industrial-relations/codes-of-practice-and-guidelines/mandatory-code-of-practice-for-outworkers-in-the-clothing-industry](http://www.justice.qld.gov.au/fair-and-safe-work/industrial-relations/codes-of-practice-and-guidelines/mandatory-code-of-practice-for-outworkers-in-the-clothing-industry), accessed 3 September 2013.

actors and incentives in support of state-based regulatory norms and instruments, the scheme has contributed to strengthened incentives for compliance, while maintaining broad regulatory coverage across the sector as a whole (strengths that are not shared by many voluntary mechanisms).

Nevertheless, there remain important limits to the effectiveness and legitimacy of this type of private regulatory initiative. First, the job of monitoring supply chains has been given to the relevant trade union under the Code's rules. This is an important feature of the mechanism as it strengthens the position of the union as a regulatory agent, and connects homeworkers to other workers represented by the union. However, it is an extremely difficult and time consuming job to track and visit various suppliers to ensure compliance with the standards, despite the supply chain transparency that the mechanism provides. The Union is under-resourced and vastly overstretched in performing this regulatory role. Furthermore, there may be a conflict of interest for the union in conducting this role, as it has a large stake in broad industry acceptance of the mechanism.

A second problem flows from the initiative's reliance on market mechanisms of consumer preference to redistribute risk throughout the supply chain. One of the strengths of the initiative is that consumer power acts as a counterbalance to brand power. Yet as long as it is voluntary, the effectiveness of the ethical label depends on the goodwill of brands to seek accreditation, and consumers to shop ethically. Ethical Clothing Australia only applies to apparel manufactured in Australia, and Australian-made clothes account for around 10 per cent of clothes sold in Australia. As long as only a small number of brands have been accredited, the label will continue to appear on a very small proportion of all clothes for sale in Australia—weakening the signalling associated with ethical purchasing. It may be that there is a tipping point for Ethical Clothing Australia: when a sufficient number of companies have become accredited it will offer a real choice for consumers, and this in turn will put more pressure on those brands that remain outside the scheme. However, this tipping point has not yet been reached. Moreover, the initiative's coverage of only a small proportion of supply chains means that although the scheme has been greatly beneficial for workers within the supply chains of accredited brands,<sup>34</sup> it has so far improved the conditions of only a small proportion of workers it could potentially assist.

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<sup>34</sup> Shelley Marshall, 'Is the Regulation of Supply Chains in the Textile Clothing and Footwear Industry in Australia a Model for the Expansion Labour Market Regulation?' <http://ssrn.com/abstract=2341352> SSRN.



A third problem with this regulatory initiative in its current form is that it lacks legitimacy amongst manufacturers, whose compliance with the Code is imperative for its effectiveness. It is often assumed in the regulatory literature that regulation that is more responsive to its context and voluntarily adopted will be more embedded in local or industry norms, and thus more legitimate. Yet, manufacturers, in particular, report feeling singled out by state and private regulation in an industry which is struggling to survive import penetration, compared with other industries that do not have similar private mechanisms.<sup>35</sup> Manufacturers are already under great pressure from brands to deliver goods at ever cheaper prices, with ever shorter turnaround times. Instead of seeing this initiative as a way to lift some of this pressure and redistribute risk, many manufacturers see it as another source of costs and reduced competitiveness. As a result, Ethical Clothing Australia remains highly contested and is often attacked in industry journals.<sup>36</sup>

Nevertheless, the initiative remains relatively new, and as it evolves it appears to be becoming more competent and effective, and expanding its legitimacy and ‘buy-in’ amongst industry players as well as consumers. As such, it provides a useful example of social re-embedding through private regulation of an industry in which supply chains are characterised by diffuse control, and pervasive failures of state-based regulation.

## V. Fair Trade

The Fair Trade system differs from Ethical Clothing Australia not only in terms of the forms of social risk on which its regulatory activities focus, but also the regulatory strategies that it employs. Because patterns of risk and control within global supply chains vary significantly between sectors, we focus our analysis here on the supply chains of one particular product—

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<sup>35</sup> Oral submission of Jen Layton, The Ark, Fair Work Commission, ‘Transcript of Proceedings, Application by The Ark Clothing Co Pty Ltd (AM2012/93) Textile, Clothing and Footwear and Associated Industries Award 2010, Review of all Modern Awards after First 2 years’ (*Fair Work Commission*, 2013) [www.fwc.gov.au/documents/transcripts/070313am201293.htm](http://www.fwc.gov.au/documents/transcripts/070313am201293.htm), Thursday 7 March 2013, at PN369 to PN375.

<sup>36</sup> See for example, Dawn Adams, ‘Union is Exporting Jobs’ *Textile Source* [www.textilesource.com.au/news/union-is-exporting-jobs-20130725-22219.html](http://www.textilesource.com.au/news/union-is-exporting-jobs-20130725-22219.html) accessed 27 August 2013, and various other articles in this journal.

coffee—which has been subject to extensive forms of private regulation in the form of fair trade sourcing.

Viewed from a regulatory or governance perspective, fair trade can be characterised as a self-consciously ‘alternative’ normative and institutional system to both organise and govern production and trade of certain products. In this sense, its central aim is to establish an alternative market through which commodities can be produced and traded on terms that promote sustainable social development among marginalised workers and producers,<sup>37</sup> particularly those in the global South. Both producers and consumers concerned about the ‘unfair’ terms on which conventional coffee is produced and traded can thereby at least partially opt out from conventional systems of capitalist economic relations, instead participating in production, consumption and exchange activities through fair trade sourcing systems that are governed according to norms favouring stronger social protections, and more equalising and development-oriented terms of exchange.

To facilitate this alternative system of production and trading relationships, the fair trade system has created its own supply chain systems linking producers to participating fair trade buyers in countries where the products are consumed. The institutional core of the fair trade system is built around the so-called Alternative Trading Organisations that manage its trading activities, as well as the producer (and in some product sectors, also worker) organisations from whom the fair trade product is sourced. This core institutional structure then has loose links with a broad collection of organisations and networks with wider ‘social movement’ characteristics.

An increasingly formalised governance system has been built to facilitate and regulate these core activities. Formal certification systems have operated since 1997, when alternative trading organisations operating within consuming countries in North America and Europe formed an overarching international body to coordinate their activities: the Fairtrade Labelling Organization (FLO). Increasing volumes of fair trade coffee are now traded within the framework of this formal certification system, though more informal networks of fair trading continue.

Implicit in the rationale for the formation of the fair trade system is a critique of mainstream capitalist economic relations, and the way that production and trade within conventional agricultural supply chains has been disembedded from norms supportive of

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<sup>37</sup> In the coffee sector, on which we focus, the fair trade system focuses almost exclusively on the certification of smallholder production.

social protection and development. For those sharing this critical view of mainstream economic relations, fair trade offers a means of producing and trading coffee through institutions that incorporate stronger mechanisms of risk regulation and governance. The forms of social risk that fair trade seeks to regulate are various.

First, and most centrally in the eyes of many, fair trade aims to regulate inequalities (or ‘unfairness’) in the way that income (in the form of profit) is distributed through market and contractual relationships within global supply chains. Within conventional coffee supply chains (as in supply chains for many agricultural commodities), prices fluctuate widely based on prevailing market conditions, exposing producers to significant forms of risk *vis a vis* their levels of income in a given time period. The influence of global market conditions over the livelihoods of coffee producing communities was particularly visible, for example, during what has often been referred to as a global ‘coffee crisis’—the period of very low prices from 1999–2003 when prices fell to their lowest levels in 100 years.<sup>38</sup> The central idea that fair trade guarantees a ‘fair price’ for products sold under its label is an expression of its desire to regulate distributions of social risk of this kind.

For many small producers, instability of income is only one element of the vulnerability and insecurity that they experience. These difficulties are often compounded by lack of access to social infrastructure and services, and frequently, insecurity of land tenure.<sup>39</sup> Many are also hampered by lack of access to credit and to the technical assistance necessary to support efficient and sustainable production and trading activities. Such problems are typically underpinned by a lack of *control* over their material conditions, resulting from their lack of power within existing labour and market relations, and lack of sufficient resources and opportunities to escape or transform the terms of these relations.

The unequal distribution of social risks of these kinds is intensified by weaknesses in conventional forms of state-based governance in the agricultural sectors of many producer countries. Government provision of social services and infrastructure, shaping of wider economic and sectoral policies and regulation of labour conditions all constitute important

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<sup>38</sup> Christopher Bacon, ‘Confronting the Coffee Crisis: Nicaraguan Farmers Use of Cooperative, Fair Trade and Agroecological Networks to Negotiate Livelihoods and Sustainability’ (University of California Santa Cruz, 2005) 20.

<sup>39</sup> Rikke Broegaard, ‘Land Tenure Insecurity and Inequality in Nicaragua’ 36 *Development and Change*; Jose Luis Rocha, ‘The Chronicle of Coffee: History, Responsibility and Questions’ (2001) *Envio*; Jon Jonakin, ‘The Impact of Structural Adjustment and Property Rights Conflicts on Nicaraguan Agrarian Reform Beneficiaries’ 24 *World Development*.

strategies through which states have traditionally sought to regulate social risks encountered by vulnerable coffee producers. However, the reach of these strategies has been constrained not only by political, administrative and budgetary constraints at local and national levels, but also by pressure on many producer governments to engage in liberalisation programs involving the dismantling of a range of institutions and policies designed to secure higher prices and profits for farmers.<sup>40</sup>

In the context of widespread liberalisation and deregulation of the sector, and associated patterns of corporate concentration at key points of the supply chain, control over the conditions experienced by vulnerable smallholders is now importantly influenced by the decisions of transnational corporate buyers and roasters. Increased corporate concentration has enabled the organisation of coffee production and trade within buyer-driven supply chains, which are controlled in important respects by roasting and retail companies based in the US and Europe.<sup>41</sup> These actors can exercise significant influence over the prices (and associated incomes) received by farmers. They can also determine the extent to which private regulatory codes designed to influence broader social and environmental conditions of production are implemented in supply chains through which their coffee is sourced. At the same time, many social risks experienced by vulnerable producers continue to be shaped by the more diffuse influences of global market forces—as many corporate buyers of coffee continue to choose arms-length market institutions as their preferred means of sourcing large volumes of commodity-grade coffee. As a result of these parallel processes of both diffusion and concentration of influence, control over relevant forms of social risk has become highly fragmented—diffused through arms-length market relations, as well as distributed across both corporate and government actors in multiple countries.

The way in which fair trade operates as a transnational regulatory mechanism can be understood in part as a response to these patterns of both concentrated and diffused risk and control. Yet the regulatory strategies adopted by the fair trade system tackle the challenge presented by dispersed control over social risk distribution in a distinctive way. Like Ethical Clothing Australia, the system establishes the capacity to isolate and hold accountable a plurality of responsible parties for their impact on the income and conditions of producers.

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<sup>40</sup> Stefano Ponte, 'The Latte Revolution? Winners and Losers in the Re-Structuring of the Global Coffee Marketing Chain' Centre for Development Research, Copenhagen CDR Working Paper 01; Kate Macdonald, *The Politics of Global Supply Chains: Power and Governance Beyond the State* (Polity, 2013).

<sup>41</sup> Stefano Ponte, 'Brewing a Bitter Cup? Deregulation, Quality and the Re-Organization of Coffee Marketing in East Africa' 2 *Journal of Agrarian Change*; JM Talbot, 'Where Does Your Coffee Dollar Go?: The Division of Income and Surplus along the Coffee Commodity Chain' 32 *Studies in Comparative International Development* 56.

Regulatory modes of governance play a central role in promoting this purpose, taking the form of standard-setting, auditing, and certification functions. Fairtrade standards regulate social, labour, environmental, and democratic standards at the producer level, and also require the direct buyers of fair trade products to comply with standards regulating issues such as payment of a ‘fair’ minimum price and social premium, pre-financing arrangements, and the stability of trading arrangements. Fair trade consumers and activists recognise their distinctive responsibilities to support fair trade principles through the act of participating in the scheme. In these ways, the plurality of economic actors who wield influence over relevant patterns of social risk are able to be held responsible for the way their power is exercised.

The fair trade system goes further than simply enforcing minimum standards of rights-compliance against a pluralised array of responsible actors. Fair trade also embraces the rather more ambitious governance objectives of performing *redistributive* and *capacity building* functions, intended to support the broader socio-economic development and ‘empowerment’ of marginalised producers and workers. The required payment of a ‘fair price’—calculated for specific products and regions or countries on the basis of the estimated cost of sustainable production—is the system’s main instrument for mobilising financial resources for social development. Beyond this core mechanism of income protection, fair trade also seeks to bolster broader institutions of social protection for vulnerable producers.

Central to fair trade’s strategy for promoting these broader kinds of risk management is support for strengthened organisational capacities among smallholder producers. The establishment of democratically operated producer organisations is a prerequisite for participation in fair trade coffee supply chains. Many alternative trade organisations operating as fair trade buyers provide direct training and capacity building opportunities for these organisations. In some cases this also enables producer organisations to access additional support from government or international development agencies outside of the fair trade system. Strengthened organisational capacity and increased access to external resources can then enable producer organisations to perform a range of governance functions related to the management of social risk. Of particular importance in this regard has been the provision of credit and technical assistance to participating producers, as well as basic social services and infrastructure. In some cases, strengthened smallholder knowledge and experience concerning production, trading, managerial, and community organising activities can also enable them to access wider income-generating opportunities within mainstream markets.

In these ways, the fair trade system is able to help insulate participating producers from social risk of multiple kinds. The multiple dimensions of social risk that fair trade tackles is an important strength of the regulatory strategy it adopts. However, the impact of this regulatory breadth is limited by the fact that the social processes shaping producer access to amenities such as social services and infrastructure, access to credit and technical support, and often also security of income, can only be controlled in partial ways by participants in fair trade supply chains. For example, for many producers, the redistributive impact of the price floor and social premium is constrained by the very small percentage of total goods traded under the Fairtrade label in most product groups, and the small differences in income differentials between Fairtrade and conventional products during periods of high market prices.

Stronger forms of social protection and risk insurance governing social risks in all of these domains would require much more extensive interaction and coordination between fair trade participants and other government and development actors. The dispersion of influence over many social conditions experienced by coffee producing communities means that advancing the wellbeing of these communities is not a task that can be achieved by any single actor or intervention. Yet while individual cooperatives have often worked effectively with local and international non-governmental organisations, coordination with government and industry actors has tended to be much less developed.<sup>42</sup>

Like Ethical Clothing Australia, Fair trade's attempt to operate an 'alternative' institutional system within the terms of a broader market economy also encounters significant limits with regard to the numbers of producers reached by the system. The desire to widen the system's impact by securing expanded fair trade markets for certified products has led to an increasing preoccupation with engaging large corporate buyers, a trend that some see as linked to a dilution of fair trade standards, particularly in relation to long-term trading relationships or pre-financing. Increasing influence of corporate buyers is also viewed by many as threatening both the integrity of the system's democratic processes and the critical edge of the system's political agenda.

The need for fair trade to survive within external market environments constrains the capacity of the fair trade system to effectively manage social risk on a larger scale within the

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<sup>42</sup> Kate Macdonald, 'Globalising Justice within Coffee Supply Chains? Fair Trade, Starbucks and the Transformation of Supply Chain Governance' 25 *Third World Quarterly*: Special Issue on 'Beyond CSR? Business, Poverty and Social Justice' 793.

capitalist political economy as a whole—despite the fact that the internal logic of the system possesses the right kinds of resources to tackle the distinctive dynamics of disembedding experienced within a so-called ‘risk society’. These continuing tensions demonstrate the deep contradictions entailed in operating an ‘alternative’ economic system within the normative and motivational structures of market capitalism.<sup>43</sup>

## VI. Lessons for Re-Embedding Diffuse and Transnational Networks of Production

The case studies examined in this chapter suggest that private systems of transnational risk regulation are attempting to tackle distinctive patterns of social risk within global supply chains in ways that state-based regulation has so far failed to do. They may thus provide useful insights into how transnational networks of production can be re-regulated in accordance with the goals of strengthened social protection and increased equality. Both the private initiatives examined in this chapter aim to reflect and influence the dispersed loci of control of contemporary structures of production. They attempt to redistribute risk throughout the entire supply chain, so as to benefit those at the bottom—workers and small-hold producers. Finally, these private mechanisms harness consumer based market power as a counter-balance to other forms of private business power within supply chains so as to redistribute control and risk in accordance with social goals.

A comparison of the strengths and weaknesses of the regulatory strategies examined in this chapter suggest that they possess distinctive assets which could be replicated in other regulatory initiatives. In some regards, the risk governance strategy adopted by fair trade is more ambitious than that of narrower regulatory schemes such as Ethical Clothing Australia. In particular, fair trade seeks to mitigate a relatively broader range of social risks, encompassing not only compliance with minimum standards regarding production and working processes, but also more equitable distributions of income or profit within markets, and the broader empowerment of marginalised worker and producer groups. Moreover, the Fairtrade initiative has transnational reach, which state regulation has rarely achieved in

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<sup>43</sup> Erik Olin Wright, *Envisioning Real Utopias* (Verso, 2010).

relation to re-embedding of the social relations of production. However, fair trade's reliance on governance institutions contained within the tightly delimited 'niche' of an 'alternative' supply chain system in some respects constrains its influence over the dimensions of social risk it targets, as well as its capacity to reach a broader range of producers—given the constraints of the wider capitalist political economy in which the fair trade system continues to operate.

The Ethical Clothing Australia initiative, in contrast, enforces a more limited range of standards and, as a consequence, performs a narrower form of risk redistribution. One reason for this is that it draws entirely on existing state-based labour laws for its standards in relation to workers. These state-based standards are detailed and cover many aspects of the productive process and working relationship, but they do not address the bigger issue of equitable distributions of income or profit within markets. They require transparency from brands and fashion houses, but they do not intervene in the price setting function which these parties perform. As we have seen, by employing private governance, brands and fashion houses are able to put significant downwards pressure on the unit price of goods supplied to them. This, in turn, reduces workers' pay and conditions. Without addressing this important factor, the power of the mechanism to redistribute risk throughout the supply chain remains limited. On the other hand, the initiative has the advantage of drawing in some ways on the legitimacy of state-based rules, and complementing existing state-based power. It supplements the existing regulatory system with additional regulatory instruments and new regulatory agents—bolstering the traditional system of labour law enforcement.

Both private initiatives suffer from a limited capacity to reach and impact the lives of the majority of target workers and producers, because they depend on the voluntary participation of companies (except in two states of Australia). While state-based labour law operates on the basis of the principle of universality (at least within the relevant geographical jurisdiction), fair trade and Ethical Clothing Australia operate on the basis of exclusivity or exception. This is both a strength and a weakness of these systems. Consumers are willing to pay a little extra on the basis that the goods are distinguished from other 'less ethical' goods. However, as we have seen, the absence of universality not only limits their reach, it can also undermine their legitimacy.

These initiatives provide lessons for both state and private initiatives. Perhaps the most important of these is that the notion that markets are ungovernable because control is dispersed is flawed. If transnational business holds a position 'of extraordinary power and



equally extraordinary lack of accountability to anyone or anything except their shareholders’,<sup>44</sup> this is partly because regulatory systems have not adapted to the new multipolarity of loci of control in production systems. It may be true, as Amoore claims, that the ‘manufacture of specific kinds of uncertainty is central to neo-liberal programs of the restructuring of labour and working practices’.<sup>45</sup> But this is only one aspect of the restructuring of production processes that has resulted in the disembedding of the social relations of production from state control and regulation. The strategy of passing risk onto other parties in supply chains is not just for the purpose of creating uncertainty and avoiding regulation. It is an essential aspect of broader business strategies of cost reduction and increasing competitiveness in increasingly transnational markets.

Thanks to the authority of the principle of ‘freedom of contract’ and ‘contract at will’ in common law jurisdictions in particular, states have generally been reluctant to intervene in the operation of supply chains to redistribute risk in accordance with norms of equality. Nevertheless, there are no fundamental legal barriers to states employing many of the regulatory strategies adopted by the initiatives examined in this chapter—though jurisdictional barriers to transnational regulation persist. More effective systems of risk regulation within contemporary capitalism require not only stronger enforcement, but an expanded range of influence over more dispersed loci of control. The systems of risk regulation examined in this chapter engage both state and private actors, and a diversity of regulatory instruments—at the very least, they can help guide some productive first steps along a pluralised regulatory pathway.

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<sup>44</sup> IRENE (n 18).

<sup>45</sup> Amoore (n 9).





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