Imagine this. You are a senior operations manager for an Australian miner. Your department is responsible for sourcing (among other things) drilling fluid for exploration drilling and batteries for a range of equipment.

A major TV network screens an exposé alleging your organisation is complicit in the use of child labour to source cobalt used in the batteries you purchase and that your drilling fluid is riddled with harmful carcinogenic materials. You have no idea where these products came from, or the conditions in which they were made – should you?

In this article, we explore the shadows at the end of the supply chains, setting out the current work health and safety legal duties and ask the question: what might be next?

WHAT ARE THE ISSUES?

The issues stem from the complexity of supply chains. This is caused by their length, the lack of visibility that the ‘final consumer’ has to the end points of the chain and the disparate legal requirements across borders.

The issues fall into two broad categories:

- the risk of exploitation of workers, poor working conditions and adverse impacts on health, safety and welfare of workers that are ‘out of sight and out of mind’; and

- the safety of end consumers caused by the product.

On the worker side

Securing health and safety through global supply chains is not a new concept. As early as 1999, Naomi Klein in her seminal work, ‘No Logo’, painted a gloomy picture of the impacts of globalisation on the health and safety of workers at the end of far flung supply chains. Several tragic events including the collapse of the Rana Plaza building in Bangladesh in 2013 have
continued to highlight the issues that workers at the end of the chain suffer.

We have also seen increasingly agile NGOs and media outlets (quite rightly) seeking to shed light on working conditions for those at the end of global brand name supply chains. Perhaps most poignantly with secret footage (ironically probably filmed on a smart phone) of the poor working conditions in factories producing electronic consumer goods to be shipped and sold far away from where they are produced.

On the consumer side

Closer to home, building products containing asbestos have made their way across the Australian border to be used in the construction of (among other things) new hospitals.

And who could forget ‘Raspberrygate’ of 2015 where frozen berries potentially infected with hepatitis A led to widespread recalls of frozen fruit.

What are the common threads?

These very different issues share a common cause: those relying on dispersed supply chains don’t necessarily have enough visibility over the source of the product and, as a result don’t know what they are ultimately getting or how it has come to them.

WHAT IS THE LEGAL POSITION?

On the consumer side

The law in Australia in this space is in its relative infancy – although its reach is certainly growing. The Model Work Health and Safety Act (which has been enacted in all jurisdictions with the exception of Victoria and Western Australia) imposes duties ‘upstream’ so that designers, suppliers and importers all owe duties to ensure, so far as is reasonably practicable, that goods they supply do not pose a risk to the health and safety of the end user.

Supply chain safety has also been declared to be a priority area for Safe Work Australia’s strategy to 2022.

In road transport, specific laws have been adopted which require all parties in the transport chain to take reasonable steps to ensure that the way they require goods to be transported does not create risks to health and safety. It is proposed that these laws be expanded so that directors and other officers face increased responsibility for actions within the supply chains of their businesses (see the Heavy Vehicle National Law and Other Legislation Amendment Bill 2016 (Qld)).

However, these laws remain locally focused. The work health and safety regulators do not have extraterritorial powers and can only investigate matters occurring within their state or territory (with limited powers to obtain documents from other jurisdictions). This does not facilitate enforcement through complex supply chains. It remains to be seen how the regulators will respond to issues of imported products and whether the courts will decide that it is reasonably practicable for the importer to do more than obtain a certificate to show that the goods do not contain harmful materials.

Interestingly, new laws proposed in the resources industry in Western Australia appear to extend the obligations of an end user, by proposing a specific provision that the resources facility operator must ensure that any plant or structure design meets the safety and health requirements before the plant is
On the worker side

Further afield, steps have been taken to drive greater transparency in supply chains with a view to empowering end-consumers and regulating the behaviours of those involved in the supply chain. Examples are:

- The *Transparency in Supply Chains Act 2010* (California) which requires retailers and manufacturers that do business in California (and that have a worldwide turnover of more than USD100m) to disclose on their websites efforts to eradicate slavery and human trafficking from their direct supply chain for tangible goods offered for sale. Reporting is required in relation to 5 areas: verification; audits; certification; internal accountability; and training.

- The *Modern Slavery Act 2015* (UK) similarly requires all businesses supplying goods or services operating in the UK with global turnovers of GBP36m and above to report on processes to combat slavery and trafficking. It goes further than the Californian legislation by (among other things) covering:
  - all sectors, not just retail and manufacturing; and
  - both goods and services (not just supply chains for goods).

**WHAT MIGHT THE FUTURE HOLD?**

In some respects, the future is already here – some Australian companies are within the ~12,000 businesses estimated to be caught by the provisions of the UK legislation and must therefore report on the steps they have taken to combat slavery and trafficking.

Further legislation may also be forthcoming. In Australia, a Joint Standing Committee on Foreign Affairs, Defence and Trade reported in 2013 on the inquiry into Slavery, Slavery-like conditions and People Trafficking in its report *Trading Lives: Modern Day Human Trafficking*. It recommended (among other things) that a review be undertaken with a view to introducing legislation to improve transparency in supply chains. The Government agreed with the recommendation in principle. A legislative response may follow in time.

In America, there is growing activism with claimants relying on statements that have been made in transparency disclosures such as those required by the Californian and UK laws to bring claims against organisations arguing that the disclosures were in some way misleading.

**WHAT STEPS CAN BE TAKEN?**

So back to our example: should you know how the batteries were manufactured and where the drilling fluid came from? The answer to both those questions is likely yes – if not to comply with legal obligations then to comply with good corporate citizenship requirements.

But this level of knowledge is hard. It likely requires:
ongoing reviews and audits of the supply chain – whether through ‘on the ground’ assessment or through the provision of detail information from your supply chain partners and a ‘dip sample’ of this information;

assessment that key products do not pose a risk to health and safety including checks to verify the accuracy of compliance certificates for materials that potentially contain harmful substances;

appropriate due diligence and reporting to senior members of the organisation so that the leaders of the business can demonstrate they are across supply chain safety; and

transparent reporting to external stakeholders to satisfy ongoing corporate citizenship requirements.

Undoubtedly, each of these steps adds costs. There is a balance to be struck between the steps advocated for and the costs to the business of implementing those steps. In this case, there is most likely a good business case for implementing the above steps because the costs must be balanced against the reputational damage and resultant costs that can flow if that TV exposé materialises.

It may therefore be timely to shine a light into the dark spaces at the edge of your supply chain before an activist or aggrieved consumer does.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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