

# **Fair Trade, Corporate Accountability and Beyond: Experiments in ‘Globalising Justice’**

THE REGULATORY IMPACT OF USING PUBLIC PROCUREMENT TO  
PROMOTE BETTER LABOUR STANDARDS  
DRAFT PAPER

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## **Introduction**

Economic globalization has, among other things, reduced the political willingness of governments to safeguard the welfare of workers and communities through the maintenance of conventional labour law systems. In many developed economies, governments have reduced their traditional legal protection of labour rights and standards. Many developing countries maintain strong labour laws, but lack resources and adequate institutional frameworks to properly enforce labour standards.

Poor job quality and labour abuses continue to be major causes of poverty and human degradation around the world, especially in developing countries. One response to the ‘ossification’ of labour law and enforcement (Estlund 2002) in light of the ongoing importance of labour standards and rights has been a proliferation in private or non-governmental labour regulation and governance. A common example is where NGOs and trade unions persuade and/or pressure multinational corporations to sign on to codes of conduct or other voluntary standards as forms of supply chain regulation, often within the rubric of ‘corporate social responsibility’ (CSR). As well as being used to enhance domestic observance of better labour practices, these non-governmental approaches are commonly used to supplement or enhance international labour regulation in relation to the operations of transnational corporations in developing countries.

Questions have been raised about the effectiveness of non-governmental regulation and CSR as a strategy for improving labour standards in the absence of state regulation (eg Heeks and Duncombe 2003, 1). The challenge facing state and non-state actors willing to locate and hold businesses accountable to labour standards – whether these are enshrined in law, are above the floor of minimum standards, or are more aspirational goals – is the perceived conflict between these standards and the main drivers of corporate business activity, profit-seeking and shareholder value (Parker 2007).

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One mechanism by which governments can leverage corporate responsibility for labour standards in order to meet this challenge without using mandatory legal regulation is through government procurement: making government purchasing of goods and services conditional upon contractor and supply chain observance of desired labour practices linked to job quality criteria. The significant role of government as a purchaser of goods and services provides the necessary economic leverage against corporate resistance, while procurement has the advantage of being more politically palatable to governments in that it avoids the use of law to mandate broadly applicable standards. While procurement can be used to promote better labour standards domestically, it also has the advantage of allowing governments of developed countries to influence observance of labour standards by businesses operating in developing countries.

This paper will examine the potential impact of government procurement as a mechanism for improvement of job quality and alleviation of poverty. While the paper will consider government procurement initiatives which seek to promote better labour practices by suppliers of goods and services in a domestic context, the focus is on the use of procurement to promote better labour standards in developing countries. The paper will consider the extent to which developed countries link procurement with supply chain governance mechanisms. In assessing the potential impact of this approach, the paper draws on the regulation and governance literature to identify and examine a number of issues procurement as a mechanism of inter-state labour regulation. One is the tension between social objectives and economic efficiency values inherent in any attempt to use government purchasing to address social concerns, especially in light of the proliferation in multilateral and bi-lateral 'free trade' agreements. Further, the paper investigates the extent to which this mechanism of regulation is likely to be a legitimate and effective means of bringing about greater organisational commitment to better labour standards. In doing so, the paper also analyses the actual and potential interaction between procurement and other strands of regulation and governance, including traditional state labour regulation and non-governmental approaches.

Government procurement is an interesting site for analysis of these issues, as it is both a symptom of the transformation of the state from 'public provider' to a phase of 'regulatory capitalism' (Braithwaite 2005), where the state plays more of a role in enabling or facilitating economic activity and self-regulation. Examining Government procurement as a technique of labour regulation is also an opportunity to discuss the maintenance and extension of the notion of government as 'model employer' at a time when there is a rising level of interest in procurement as a regulatory mechanism (McCrudden 2007).

### **Government Procurement as Regulatory Technique**

In this section, procurement is identified as a particular regulatory technique or approach available to the state. It is distinguished from direct legal regulation and private regulation or voluntary CSR.

In order to evaluate procurement as a regulatory tool, this paper draws on perspectives from regulatory theory and the 'new governance' movement. This paper adopts a broad understanding of regulation

as any process or set of processes by which norms are established, the behaviour of those subject to the norms monitored or fed back into the regime, and for which there are mechanisms for holding the behaviour of regulated actors within the acceptable limits of the regime (whether by enforcement action or by some other mechanism) (Scott 2001, 331).

In this paper, I am most interested in the role of the state in regulating labour standards. Having said this, I recognise that regulation may occur ‘above and beyond the state’ (Morgan and Yeung 2007). The promulgation of labour standards by the International Labour Organisation (ILO) is an example of such international regulation. Some consideration will be given to the interaction between state regulation and regulation by the ILO later in this paper.

In seeking to influence behaviour through the establishment, monitoring and enforcement of norms, the state has available to it a number of regulatory techniques beyond the conventional ‘command and control’ style of regulation, in which formal rules are created, monitored and enforced by the state through orders and sanctions (Ogus, 2001). Of these alternative techniques, ‘soft’ or ‘light touch’ approaches to regulation are distinguished from ‘hard’ legal or centred ‘command and control’ regulation on the basis that the former are less reliant on imposition by the state of generally applicable mandatory legal standards as a means of regulating behaviour. Moreover, it is recognised that regulation is ‘...multifaceted, differentiated and increasingly “shared” by a range of public and private actors’ (Lucio and Mackenzie 2004, 78).

The wide range of regulatory tools or approaches available to, and used, by governments to regulate labour standards is well illustrated through the concept of a ‘spectrum’ of labour regulation. Between the regulatory extremes of ‘hard’ command and control legal regulation and voluntary self-regulation or ‘corporate social responsibility’ (no direct role for the state) are a number of regulatory approaches which can be classified as ‘hard’ or ‘soft’ according to the extent of government involvement and the coerciveness of that involvement (Ogus 1995; Salomon 2002). Across this spectrum, approaches vary. For example, many initiatives rely on government deployment of its wealth resource to secure behavioural change, such as attaching conditions to procurement contracts, or through the offering of financial incentives or rewards (Howe, 2006). Other approaches rely on ‘procedural regulation’, or in other words, facilitation of ‘co-regulation’ or corporatist arrangements and/or ‘self-regulation’ by requiring or encouraging firms and stakeholders to develop standards of behaviour which are better than state sanctioned minima. Another broad area of government action is use of information and education strategies (Weiss, 2002). Information strategies include those which impose public disclosure requirements on firms, including ‘triple bottom line’ reporting, as well as governmental use of information as a regulatory instrument, including dissemination of voluntary codes of practice, ‘best practice guidelines’ or ‘case studies’ designed to promote or encourage take up of decent work practices by presenting them in a way which suggests consistency with ideals of good corporate (self) governance.

There is a growing interest in some of these alternative techniques, including procurement, as government ‘drivers’ of CSR, including labour standards (Moon, 2004; Barnard, Deakin and Hobbs, 2004). This extends to consideration of the role that some of these regulatory approaches might take in influencing the labour practices of multinational corporations beyond the borders of the host state (Cooney,

2004). CSR tends to encapsulate voluntary initiatives, or at least initiatives adopted by companies as a result of pressure from social movements rather than as a result of government regulation. The basic assumption of CSR campaigns is that enterprises will respect labour standards if this respect is shown to be a relevant factor in maintaining or enhancing competitiveness and higher productivity. However, while ‘command and control’ regulation frequently fails to ensure that corporations comply with important social policy goals, it is also true that many corporations, when left to their own devices, fail to take CSR seriously (eg. Cooney 2006; Jones, Marshall and Mitchell 2007). This failure is exacerbated when it comes to corporate responsibility to employees, where studies have suggested that employers will often conceive of CSR as ‘incorporating a set of external issues concerning the image and reputation of the company rather than the issue of its employment conditions’ (Barnard, Deakin and Hobbs 2004, 30). The difference between light touch regulation, such as the use of targeted monetary incentives, and CSR is the role played by the state in seeking to steer or leverage corporate governance to internalise public policy goals such as better labour standards through the different tools at its disposal.

Soft or light touch approaches to state regulation (often described as forms of ‘self-regulation’) have become increasingly popular with government in the era of regulatory capitalism. It is arguable that this is because, in the context of economic globalization and increased competition among nation states for private investment, governments are either fearful of, or ideologically opposed to, the use of command and control regulation for fear of causing corporate flight. Moreover, because soft forms of regulation are not always subject to the same jurisdictional and/or constitutional limitations as more formal law, these initiatives can be seen operating at more than one level of government – for example, within a federal system, by federal, state and local government. The key issue here is whether these alternative forms of regulation do enough to induce the desired responses from firms.

### **Evaluating Procurement as Regulation**

There are a number of different criteria by which different regulatory techniques and systems can be evaluated when viewed through the lens of regulatory theory. In this paper, the potential impact of procurement as a technique for promoting better labour standards will be assessed in terms of the overlapping concepts of effectiveness and legitimacy.

Regulatory scholars and those influenced by discourse around systems theory argue that alternative forms of regulation are more likely to be effective if used in a manner which is reflexive or responsive to existing power and resource distribution among economic and social actors (Ayres and Braithwaite, 1992; Teubner, 1983). These discourses reflect some common themes. One of the most significant of these is the contention that state regulation is simply one of a number of interacting and competing regulatory systems (Cooney 2006). Many scholars have argued that states should be seeking to harness or enlist these non-state systems in order to achieve public policy objectives, rather than seeking to interfere in or override those systems, because the latter approach is frequently ineffective at changing non-state behaviour. In other words, government should ‘work with the grain of things’, seeking to shape and steer forms of private ordering or self-regulation such as corporate governance

rather than demanding change through mandatory legal regulation or ‘command and control’, which is prone to avoidance (Braithwaite 2005; Cooney 2004; Arup 2001).

In doing so, regulation should be designed to facilitate or encourage ‘de-centred’ models of regulation, whereby non-state actors are responsible, empowered participants in norm creation, implementation and monitoring and enforcement (Black 2001). Indeed, it has been argued that an important criteria of effectiveness in any regulatory regime is its legitimacy, in the sense that it is ‘worthy of public support’ (Baldwin and Cave 1999). While this can be assessed in a number of ways, in this paper I will be arguing that the legitimacy and therefore the effectiveness of any government policy will be influenced by the quality of public deliberation and participation by stakeholders in the determination of regulatory objectives and the mechanisms for achieving those objectives (Vincent-Jones, 2006).

Some models which draw on these ideas are based on ‘enforced self-regulation’ or ‘co-regulation’, where ‘instead of insisting on corporate compliance with state-mandated rules, governments can instead require corporations to institute internal systems designed to promote socially desirable outcomes’, often with mandatory involvement of stakeholders (Cooney 2006, 194-195).

It is important to note that theories of responsive or reflexive regulation do not necessarily leave development of these internal systems entirely in the hands of non-state actors. Barnard, Deakin and Hobbs have argued that ‘[a] crucial aspect of reflexive law is that it involves not simply an attempt to delegate rule-making authority to self-regulatory mechanisms such as collective bargaining, but also an effort to use legal norms, procedures and sanctions to ‘frame’ or ‘steer’ the process of self-regulation’ (Barnard, Deakin and Hobbs 2004, 4).

This would not necessarily require legislation. It has also been suggested that states can facilitate development of internal systems involving multiple stakeholders by deploying their wealth resource as an incentive to corporations to internalize public policy norms or more democratic decision-making processes (Parker 2002, 29; Cooney 2004).

What else is likely to be effective in convincing an organization to embrace public policy goals and values such as improvement of labour standards? Johnstone and Jones (2006) suggest that the answer to the more general question of regulatory effectiveness lies in regulation which is constitutive at the level of the firm. Their study of OHS, dismissal, discrimination and sexual harassment regulation suggests that constitutive regulation exists where ‘demands are placed on employers to discover and understand regulatory requirements, engage appropriate personnel (including advisers), establish and implement appropriate policies and procedures, and monitor and evaluate the implementation of those procedures to ensure that the organization complies with these regulatory requirements’ (Johnstone and Jones 2006, 501).

Finally, it must be born in mind that pluralism in regulation will not necessarily be productive and effective. The overlaying of procurement or other alternative regulatory approaches over existing mechanisms of labour regulation may lead to ‘regulatory collision’ which undermines the objective of using procurement in this

way (Johnstone and Mitchell 2004). Design of regulation must take account of the potential for unproductive regulatory conflict if it is to be legitimate and effective.

### **Procurement as a Form of Labour Regulation**

Government procurement is an extremely significant area of government economic activity. In Australia alone, it has been estimated that the Commonwealth Government annual procurement budget is in excess of \$16 billion dollars, which does not take into account State and Local Government procurement expenditure (Cooney 2004, 340). In larger economies, the government procurement budget is of course even more significant. For example, while annual central government expenditure in the UK amounts to £15 billion, total public sector procurement exceeds £150 billion (Bell and Usher 2007). The extent of public procurement is in itself a sign of the transformation in government – governments have moved away from direct provision of goods and services, and are instead purchasing those services from the private sector.

While it might be argued that the immediate purpose of procurement is the purchase of goods and services necessary for the administration of government, and that this is largely an economic purpose which should be subject to evaluation by economic efficiency criteria, government procurement has a long history as a form of social regulation. In particular, since at least the early 20<sup>th</sup> century, procurement has been used to regulate labour practices, and governments in many countries continue to do so, including Australia, Canada, the United States and the UK (McCrudden, 2007).

The International Labour Organisation promotes the inclusion of labour considerations within public procurement contracts. *The Labor Clauses (Public Contracts) Convention 1949* provides that all public procurement contracts awarded by central public authorities shall include clauses ensuring wages, hours of work and other conditions of labour which are no less favourable than those established for work of the same character in the trade or industry concerned, in the district where the work is carried on (ILO 1949).

This latter requirement begs the question of the *reach* of labour regulation through procurement. Given our concern for the use of procurement as a tool for achieving better labour standards, we have to distinguish between procurement which is used to achieve better labour conditions in the ‘home’ country, and procurement which seeks to influence labour standards in other countries, especially countries where labour standards are lower than the home country.

It became apparent when researching this paper that procurement is not as extensively used as a form of labour regulation as it might be. Before looking at the way in which procurement can be used to regulate labour practices, it is first necessary to consider some of the different forms and geographies of procurement. That is, government procurement can be categorised according to whether it is public works, goods or services that are purchased. This categorisation will be relevant to whether procurement can be used to impact on labour standards, and the extent of regulation possible. For example, procurement of public works such as construction will normally be limited to domestic companies and workers. In this context, linking

labour criteria to procurement will only impact on the conditions of domestic workers. Procurement linkages with labour standards in respect of purchase of public works and services are relatively common. However, where government purchases goods such as equipment, clothing, stationary and so on, suppliers of those goods may have sourced products or components from overseas. It is in this context that governments of developed economies can do most to influence labour conditions in developing countries. However, as will be shown, this is also a much more difficult proposition for governments, and examples of linkages between goods procurement and labour standards are relatively rare.

There are three stages in the procurement process at which governments can impose labour standards: qualification, or eligibility to tender for a government contract; the tender assessment process; and the contractual requirements imposed on the successful tenderer.

First, by imposing standards as ‘qualification’ criteria, Government can restrict the tendering process to those companies that already comply with social objectives such as labour standards, thus providing an incentive for companies wishing to obtain government contracts to observe the desired minimum standards.

There are various ways in which governments can integrate labour standard considerations into the tender assessment process. A programme could identify a quota of contracts which are ‘set aside’ for contractors of a particular type; there may be a ‘price preference’ for certain types of contractor whereby the bid which bidder A submits, for example, although higher than that of tenderer B, is regarded as equal to that of B, if A undertakes to implement a particular social policy. The past practice or the willingness of a past bidder to implement the social objectives may be taken into account as a ‘tie-breaker’ where otherwise equal tenderers are in competition. Alternatively, the social criteria may be either just one consideration to take into account, or determinative where tenders are otherwise equal. Another approach may be to ‘offer back’ to preferred tenderers, to allow them to match the lowest bid of the non-preferred tenderer.

The approach of many Australian governments, however, is to include labour standards as one of a number of different criteria, including value for money, upon which tenders will be assessed. Such an approach leaves considerable space for labour-related considerations to be subsumed within, or overlooked by, government administrators under pressure to secure best value for money.

Finally, Government and its procuring agencies can require successful tenderers to demonstrate ongoing compliance with labour standards as a performance condition of the contract. Contracts might provide a mechanism for monitoring of compliance, such as contractor reporting, and termination of the contract can be used a penalty for non-compliance, thus aiding enforcement of any labour-related conditions.

Of course, the effectiveness of all of these approaches will depend on the veracity of information provided to procuring authorities, and on the adequacy and effectiveness of monitoring mechanisms. This will be discussed later in the paper, as it is an issue which also arises in relation to non-governmental mechanisms for promoting better labour standards.

Assuming that labour standards are included in public procurement tender assessment and contractual performance criteria, there are two broad types of labour standard may be linked to public procurement programmes (Howe, 2006). First, procurement may be used as a method of enforcing *existing* legal obligations domestically, or in a supplier's host country: that is, as a supplement to existing mechanisms for enforcement of minimum rights and standards set by legislation and/or applicable industrial instruments, including ILO conventions or the ILO's Core Labour Standards (CLS). Secondly, procurement may be used to advance desired modes of labour relations *above and beyond* those required by applicable laws. Thus, for example, a country may not have a legally enforceable right to collective bargaining, yet recognition of trade unions and the practice of collective bargaining may be something which procurement seeks to encourage.

In Australia, public procurement by the Commonwealth and the various State Governments and their agencies is governed by a complex web of policies, frameworks, codes and guidelines (see generally Howe and Landau 2006, 8-15). In each jurisdiction, there is a broad procurement policy or framework that sets out general principles applying to government procurement contracts. Both Commonwealth and State Governments include at least some labour conditions in their procurement criteria. In the case of Victoria, one of the broad policies requires all businesses that tender for government contracts to adhere to an 'ethical employment standard' (Victorian Government Purchasing Board 2003). Queensland and Victoria also have codes of best practice that set out specific labour standards and industrial relations practices with which all businesses in particular industries that tender for government contracts must comply. Queensland has codes of practice for the building and construction industry, call centres and the clothing industry (Howe and Landau, 2006). Victoria has codes of practice for the building and construction industry and for call centres. In NSW, since 2005, there has been a single code of practice governing all types of government procurement, which sets out standards of behaviour expected of government agencies, tenderers, service providers, employer and industry associations and unions (Howe and Landau, 2006).

While Australian governments use public procurement as a means of promoting labour standards, their policies differ according to the type of contract or firm to which the policy applies, the precise standards promoted, the sanctions imposed for breach, and the use of monitoring mechanisms (Howe and Landau 2006). In all cases, compliance is limited to onshore businesses – participation in procurement is not made dependent on offshore suppliers meeting labour standards. There have been isolated examples of the procurement policies which have extended to offshore labour used in the production of goods, such as in the Victorian Government's efforts to ensure that Commonwealth Games clothing merchandise was sourced ethically, but these examples are rare. **[Further consideration will be given to this]**

There have been some more innovative developments in other developed countries. The incorporation of social policy goals including labour standards within public procurement has long been a matter of debate in the European Union (McCrudden 2007), and there is a growing interest in the incorporation of labour standards into procurement by all levels of government in the UK (Bell and Usher 2007). However, use of procurement to regulate labour standards beyond the borders of the purchasing

country is more common in the United States, where the activist network Sweatfree Communities has recently persuaded many US State and local governments to adopt 'sweatfree' procurement policies. Although these policies vary, they frequently require contractors to procure goods from manufacturers which meet local minimum standards, whether in the US or in another country (Sweatfree Communities 2007; Sweatfree Communities 2006). Sweatfree Communities argues that if possible, procurement contracts should require compliance with a 'non-poverty wage' because legal minimum wages in many countries do not necessarily provide sufficient income to allow workers and their families to avoid poverty. As of March 2007, according to Sweatfree Communities, 6 States and 38 Cities in the US had adopted some form of Sweatfree procurement policy (Sweatfree Communities 2007). **[Further details to be provided]**

### **Studying the Impact of Procurement as Labour Regulation**

In this section of the paper, I give consideration to some of the obstacles to successful use of procurement as labour regulation. I then draw on the regulation and governance literature and assessments of non-government labour regulation to outline some possible strategies for the effective and legitimate use of procurement to promote better labour standards in developing countries.

#### *Possible limitations to use of procurement*

There are various challenges and potential limitations or restrictions on the use of public procurement to promote better labour standards which must be considered in any study of the impact of procurement as labour regulation.

The first limitation is the view of procurement as being a commercial function of government which must be carried out efficiently in order to ensure 'value for money' for taxpayers (McCrudden, 2007). Value for money is often assessed in narrow cost-benefit terms, that is, choosing the contractor that will provide the best service at the lowest cost to the public purse, thus excluding consideration for social concerns. Moreover, from the perspective of contractors, if procurement imposes too great a cost on a business in terms of compliance with labour standards, then the legitimacy of the procurement criteria will be undermined. **[Further discussion and analysis to be provided]**

Another (related) potential restriction arises from the promotion of competition and free trade, both at domestic and international regulatory levels. For example, in Australia the *Trade Practices Act 1974* (Cth) ('*TPA*') has been identified as a potential restriction on the capacity of a state government to use procurement to impose social obligations on businesses supplying goods or services to the government (Queensland Government 2006, 8.4). A number of commentators, however, have suggested that the *TPA* does not apply to public procurement (eg. Seddon 2004, Ch 6). Nevertheless, doubts about the extent of the *TPA*'s application may be a reason for state government hesitation to strengthen labour conditions attached to public procurement policies.

Perhaps more significantly, both multilateral and bilateral free trade agreements and regulatory frameworks have been identified as restrictions on the use of procurement

to 'discriminate' between businesses on the basis of labour standards, such as the World Trade Organisation's Government Procurement Agreement (GPA). Once again, the restrictions posed by such rules may be more perceived than real. In the European Union, both the EU Treaty and the EU Public Procurement Directive 2004 are intended to assure free movement of goods and services and non-discrimination against contractors on grounds of national origin. This has not prevented national governments of member states from including labour standards as part of public procurement processes (Bovis 2007).

Another possible difficulty with the use of procurement as labour regulation pertains to the potential for regulatory complexity, which in turn may undermine the legitimacy and effectiveness of procurement as a mechanism for promoting better labour standards. Where used domestically to improve labour standards by requiring firms to adopt labour standards and/or employment practices 'above the floor' of standards set by statute, labour criteria in procurement contracts add another layer of regulation to what is, in Australia at least, an already complex area.

The use of procurement as a form of 'inter-state' regulation of labour standards in developing countries also raises a number of concerns, many of which have been canvassed in relation to non-government regulatory mechanisms. For example, the any standards set through procurement contracts must be sensitive to local conditions. Governments must be sensitive to the possibility that requiring supplier businesses to observe higher labour standards than is their practice could lead to a loss of jobs by workers in developing countries, with those workers 'squeezed' into worse jobs as a result (Heeks and Dunscombe 2003; Doorey 2005, pp 386-387).

Another concern that has been expressed with respect to private regulation such as supply chain regulation through codes of conduct and such-like is that such initiatives crowd out or undermine domestic labour law and labour regulation institutions in developing countries (Heeks and Duncombe 2003). The same concerns could be raised in relation to attempts to use procurement as a form of inter-state labour regulation. **[This discussion will be extended]**

In my view many of these challenges can be overcome through appropriate regulatory design and implementation. The next section of the paper gives some consideration as to how procurement processes could be designed to enhance legitimacy and effectiveness. To a great extent, this requires a combination of public and private regulatory approaches and mechanisms.

#### *Procurement Strategies for the Legitimate and Effective Promotion of Better Labour Standards*

Accepting that use of public procurement as a tool for promoting better labour standards is desirable, it is important to give careful consideration to the design and implementation of this tool. Failure to do so may lead to unintended consequences, such as the problem described above where the intended beneficiaries of these initiatives end up worse off than they were beforehand (Doorey 2005, 358).

In order for government procurement to be a legitimate and effective tool of labour regulation and poverty alleviation, it is important that regulatory design incorporates

the involvement of stakeholders in the development of standards, as well as monitoring and enforcement of those standards (Vincent-Jones 2006). Procurement must be used to supplement existing forms and processes of regulation, and avoid overriding or conflicting with existing mechanisms. A combination of public and private regulation has been shown to be effective in securing actual outcomes in terms of better labour standards (Weil and Mallo 2007). Thinking about effective strategies for promotion of labour standards through procurement also requires engagement with the literature on private regulation and monitoring in this area. To some degree, when considering government purchasers as supply chain regulators, there is a significant overlap with supply chain regulation by private purchasers in terms of the issues which must be confronted.

There are a number of elements that must be considered in the design of a legitimate and effective procurement process. The first is agreement on appropriate labour rights and standards to be enforced through the procurement process; the second concerns disclosure of information; and the third is an adequate system of monitoring and enforcement of the agreed norms and standards. This last area is where the experience with non-governmental mechanisms of international supply chain regulation and 'ethical trade' initiatives might inform regulatory design of an appropriate procurement process.

First, to ensure the legitimacy of any use of procurement to promote or secure better labour rights and standards, government must work responsively with its own financial officers, trade unions and their international affiliates, the ILO, relevant NGOs and potential contractors to agree on appropriate labour rights and standards to be incorporated into eligibility criteria, tender assessment processes and the actual contracts themselves. These standards must be adaptive to local regulation and labour market conditions.

There have been a number of different approaches to this challenge incorporated into voluntary codes of conduct or firm-level/industry-level CSR initiatives (eg Nike, Reebok) and 'multi-stakeholder' non-government regulatory schemes. Many, such as an example of a multi-stakeholder scheme, the *OECD Guidelines for Multinational Enterprises* (for an overview, see Cooney 2004), prepared in consultation with business, trade unions and NGOs, reflect the core ILO Conventions. Some require compliance with the labour law of the country where work is performed. However, the problem with the latter approach is that minimum labour standards, especially wages, in developing countries may not be sufficient to serve as a mechanism of poverty alleviation. Thus, while there is concern that labour standards in codes of conduct and so on are not so high as to have unintended consequences, they should not be so low as to be ineffective in improving working conditions. The standard procurement contract developed by Sweatfree Communities in the US allows for this by including a clause which requiring payment of a 'living wage' assessed on the basis of local conditions (Sweatfree Communities, 2006).

The next element of a legitimate and effective procurement regime would be a mechanism to ensure information disclosure by companies regarding their suppliers' compliance with the set labour standards (Cooney, 2004). If government is to ensure that only companies with suppliers observing the minimum standards are considered for government contracts, there must be some mechanism by which companies must

provide this information, and where this information is subjected to some sort of accountability process. Such a process would serve the purpose of prompting firms to give consideration to the regulatory purposes behind such a requirement, which might enhance the likelihood of internalisation of these norms.

Finally, the procurement process must incorporate specifications regarding monitoring and enforcement of compliance with the agreed labour rights and standards. A model monitoring regime is built into the Sweatfree Communities procurement 'Toolkit', for example (Sweatfree Communities, 2006). Monitoring might take the form of an audit of factory compliance with specified standards as part of the tender assessment process, through to monitoring of ongoing compliance with labour standards agreed to in procurement documentation. These processes should supplement or complement private monitoring by trade unions and NGOs, ILO and local labour regulation (Kolben 2007). The specifications must also ensure that firms take responsibility for putting in place internal planning and management processes which emphasise the importance of compliance with labour criteria in procurement contracts (Graham and Woods 2006, 878). In other words, it is expecting too much for governments to devote significant resources to monitoring compliance with labour standards as part of its procurement functions. However, government could encourage development of self-regulatory mechanisms, and draw on non-government monitoring and evaluation mechanisms by requiring contractors to agree to monitoring by trade unions, local government agencies or independent auditing bodies.

With respect to enforcement, one of the advantages of government procurement over non-government supply chain regulation with respect to labour standards is the extent to which effective sanctions are available. For many businesses, especially those dependent on government buyers to provide a market for their goods, exclusion from government contracts on the basis of failure to comply with labour standards may be a significant penalty. This nevertheless requires a commitment from government to enforce sanctions where breaches are discovered in relation to suppliers who have been long-term, preferred contractors, or where suppliers are few and far between.

In concluding this discussion, I would not want it to seem like I am suggesting effective and legitimate use of procurement to promote better labour standards is a technocratic process of optimal regulatory design. The barriers and challenges –laid out in the previous section of this paper – whether real or perceived – present a significant obstacle to the development and implementation of procurement policies linked with labour standards. In some contexts, especially in Australia where the use of procurement to secure better labour standards is relatively under-developed, an incremental approach to the implementation of these ideas is probably the best that can be expected.

It seems to me that one option which would be relatively straightforward for governments to implement in the short term is to require factory list disclosure as a condition of eligibility and as a tender condition for procurement contracts. That is, companies wishing to tender for government work could be required to disclose a list of the names and addresses of the factories which form part of the corporation's supply chain (Doorey 2005; see also Kolben 2007). This proposal does not go as far as requiring companies to list their supplier factories as well as provide information

regarding the labour standards observed by those factories. However, Doorey, the proponent of this approach, argues that the factory list disclosure proposal could address some of the challenges facing the use of procurement to improve labour standards. For example, it would overcome the problem that the expense of collecting and monitoring compliance information is too great for many businesses. He also argues that disclosure of both factories and their level of compliance in fact can lead to some of the harmful unintended consequences for workers described earlier (Doorey 2005, 384-388). By limiting disclosure to the list of supplier factories, there is a lower cost to the potential contractor and the government because of the relative ease of providing this information and the reduction in monitoring requirements. According to Doorey, the information can nevertheless empower the local state and local workers and institutions in a way which does not force workers to be involved in something which may ultimately disadvantage them.

## **Conclusion**

This paper has outlined some ways that government procurement is and could be used to achieve better labour standards and alleviate poverty in developing countries. However, even where the challenges facing this particular approach to labour regulation are overcome, it is important that procurement be seen as a step along the way in the achievement of better labour standards in developing countries, and not the ultimate goal. **[Further conclusions to be developed]**

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