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The Victorian Inquiry into Labour Hire and Insecure Work: Addressing Worker Exploitation in Complex Business Structures

Anthony Forsyth ¹

Abstract Purpose. This paper highlights the growing evidence over the last 3 years of systemic non-compliance with workplace laws in Australia, and considers a range of reform options.

Design/methodology/approach. The paper draws upon scholarly evidence presented to the independent Inquiry into Labour Hire and Insecure Work carried out in the state of Victoria, Australia (2015-16), along with other sources, to examine the connection between complex business structures and exploitation of vulnerable workers.

Findings. Non-compliance with workplace laws, including underpayments and health and safety breaches, are commonly associated with the use by businesses of various structures through which they are effectively distanced from direct responsibility for employment obligations.

Research limitations/implications. The research contributes to international debates on the 'fissuring' of work and regulatory responses to worker exploitation.

Originality/value. The paper collates recent evidence on the nature and extent of exploitative labour practices within labour hire arrangements, franchising and supply chains in Australia.

Paper type. Law and policy paper.

Keywords: *Worker Exploitation, Vulnerable Workers, Business Structures, Labour Hire, Franchising, Supply Chains, Victorian Labour Hire and Insecure Work Inquiry*

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1. Introduction

For the last 25 years or so, the employment and workplace relations debate in Australia has focused primarily on the broad shape of the legislative framework. Conservative (Coalition) and Labor governments have engaged in periodic ‘re-writes’ of the federal labour statute, with the pendulum swinging back and forth between intervention in the labour market and deregulation/flexibility. Frequently, the debate is about the extent to which labour law should prioritise collective bargaining and the representational role of unions. In the wake of radical deregulatory reforms which operated between 2006 and 2009,² much attention has also been centred on the impact of reducing legislative protections on individual workers. The main federal legislation regulating employment, the *Fair Work Act 2009* (Cth) (Fair Work Act) was introduced by the former Labor Government to restore those protections and the primacy of collective bargaining. The Coalition Government which has held office since 2013 has not yet made any more than marginal amendments to the Fair Work Act.

Until recently, however, there has been far less focus on the plight of vulnerable workers operating in the ‘black labour market’. This has shifted dramatically over the last 3 years, with widespread media coverage of many examples of blatant worker exploitation, for example:

- An ABC ‘Four Corners’ program in May 2015 revealed the exploitation of horticultural and food-processing workers, by a number of labour hire suppliers in the fresh food supply chain.³
- This was followed by ABC and Fairfax Media’s joint exposé of significant underpayments affecting employees in 7-Eleven franchises, many of whom are overseas students.⁴ Both the Chairman and CEO of 7-Eleven resigned over the scandal. In its wake, Hardy and others raised concerns that the franchising business model creates an incentive for franchisees to underpay workers and engage in visa breaches.⁵

² *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

³ ABC *Four Corners*, ‘Slaving Away’, 4 May 2015.

⁴ A Ferguson, ‘7-Eleven: Head office is not fooling anyone’, *The Sydney Morning Herald*, August 31, 2015.

⁵ T Hardy, ‘Franchising – all care and no responsibility’, *The Conversation*, October 29, 2015.

- Major retailer Myer faced allegations that cleaners engaged through a series of sub-contractors were on ‘sham contracts’ intended to deprive them of minimum employment entitlements.⁶

This high quality investigative reporting has brought to the public’s attention the role of major brands in overseeing labour hire arrangements, franchising and complex supply chains through which workers are exploited. Academic commentators in Australia have also examined the connections between these business models and the incidence of employer non-compliance with workplace laws.⁷ These various models have been used increasingly to distance employers from legal responsibility for workers’ minimum employment standards, shifting that burden to smaller business units operating in highly competitive markets.⁸ Underpayments, health and safety breaches, and non-compliance with taxation and superannuation legislation are now quite widespread, affecting large numbers of vulnerable workers (many of whom are overseas backpackers or international students).⁹ Regulatory intervention to address these practices has taken some time to emerge. However, both major parties took policies to the 2016 federal election aimed at increasing the levels of protection for vulnerable workers and the penalties for non-compliance. These policies are considered further in this paper, along with the increasing vigilance of the federal enforcement agency, the Fair Work Ombudsman (FWO). It has signalled very clearly to Australian businesses that they must take responsibility for workplace law breaches occurring within their supply chains – even if they are not strictly *legally* responsible.¹⁰

⁶ ‘Myer cleaners accuse retailer of underpayment, denying entitlements with ‘sham contracting’ practice’, *ABC News*, October 22, 2015; M A Tranfaglia, ‘Law allows Myer to outsource responsibility for labour hire workers’, *The Conversation*, October 28, 2015.

⁷ T Hardy, ‘Who should be held liable for workplace contraventions and on what basis?’, in *Australian Journal of Labour Law*, 2016, vol. 29, n. 1, 78; T Hardy and J Howe, ‘Chain Reaction: A Strategic Approach to Addressing Employment Non-Compliance in Complex Supply Chains’, in *Journal of Industrial Relations*, 2015, vol. 57, n. 4, 563.

⁸ R Johnstone and A Stewart, ‘Swimming against the Tide? Australian Labor Regulation and the Fissured Workplace’ in *Comparative Labor Law and Policy Journal*, 2015, vol.37, 60.

⁹ See Fair Work Ombudsman, *Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program*, October 2016; I Campbell, M Boese and J Tham, ‘Inhospitable workplaces? International students and paid work in food services’, in *Australian Journal of Social Issues*, vol. 51, n. 3, 279.

¹⁰ Speech by FWO Chief Counsel, Janine Webster, to the Australian Chamber of Commerce and Industry, September 20, 2016.

Two federal parliamentary inquiries have also examined exploitation affecting migrant workers in particular. In March 2016, the Senate Education and Employment References Committee concluded its inquiry into the impact of Australia's temporary work visa programs on the Australian labour market and on temporary work visa holders. The Labor-Greens Majority Report '*A National Disgrace: The Exploitation of Temporary Work Visa Holders*'¹¹ made several recommendations for regulatory reform, including in respect of the labour hire industry (where it found significant evidence of mistreatment of migrant workers). These recommendations included the introduction of a national licensing regime for labour hire contractors, requiring demonstrated compliance with all workplace, employment, tax and superannuation laws; and providing that businesses can only use a licensed labour hire contractor, including where labour hire is subcontracted.¹² Government members of the Senate Committee supported some aspects of the majority report, but rejected a number of the key recommendations, including the introduction of labour hire licensing.¹³

The Commonwealth Parliament Joint Standing Committee on Migration released the report of its *Inquiry into the Seasonal Worker Programme* in May 2016. The inquiry reported on: '... media coverage over the alleged mistreatment of seasonal worker participants. These reports alleged that seasonal workers were underpaid, housed in substandard accommodation, refused medical access and pastoral care, and verbally abused and underfed.'¹⁴ The report sets out substantial evidence of unlawful practices by labour hire operators. The Committee was 'of the view that labour hire companies and, in particular, the so called 'phoenix' operators are particularly harmful to the industry and seasonal workers.'¹⁵ The report included a recommendation, significant because it was supported by all members of the Joint Standing Committee, that the Senate *Temporary Work Visa Report* proposal for a national labour hire licensing scheme be adopted by the federal Government.¹⁶

¹¹ Commonwealth of Australia, Senate Education and Employment References Committee, *op. cit.*

¹² *Ibid*, 328.

¹³ *Ibid*, from 331.

¹⁴ Parliament of Australia, Joint Standing Committee on Migration, *Seasonal Change - Inquiry into the Seasonal Worker Programme*, May 2016, 135. The Seasonal Worker Programme provides low-skilled, temporary migrant workers from designated Pacific Island countries to employers, predominantly in the Australian agricultural industry.

¹⁵ *Ibid*, 149.

¹⁶ *Ibid*, 149-150.

Another response has come from three Labor state governments around Australia, which established inquiries in 2015 to examine the labour hire industry. The Parliament of Queensland, Finance and Administration Committee, *Inquiry into the practices of the Labour Hire Industry in Queensland*, was established on 2 December 2015 and released its report in June 2016.¹⁷ The Parliament of South Australia, Economic and Finance Committee, *Inquiry into the Labour Hire Industry*, was established on 11 June 2015 and reported on 18 October 2016.¹⁸

The Victorian Government took a different approach, establishing an independent *Inquiry into the Labour Hire Industry and Insecure Work* in September 2015, which I was appointed to chair.¹⁹ In summary, the Inquiry's Terms of Reference required me to examine:

- the extent and nature of the labour hire sector in Victoria, and insecure work more broadly (e.g. the increasing use of casuals, contractors and fixed-term workers);
- allegations that labour hire and sham contracting arrangements are being used to avoid workplace laws and other statutory obligations; and
- the implications of labour hire and insecure work for workers, businesses and the Victorian economy.

I was also requested to make recommendations based on my findings,²⁰ taking into account relevant international standards and the delineation of

¹⁷ Parliament of Queensland, Finance and Administration Committee, *Inquiry into the practices of the labour hire industry in Queensland*, Report no. 25, 55th Parliament, June 2016.

¹⁸ Parliament of South Australia, *Final Report: Inquiry into the Labour Hire Industry*, 93rd Report of the Economic and Finance Committee, October 2016.

¹⁹ See: <http://economicdevelopment.vic.gov.au/inquiry-into-the-labour-hire-industry> (accessed January 12, 2017).

²⁰ The Inquiry was conducted as a Formal Review under the *Inquiries Act 2014* (Vic). The final report was provided to the Victorian Premier and Minister for Industrial Relations on 31 August 2016 and tabled on 27 October 2016. The paper on which this article is based was written prior to the report's release; therefore the findings and recommendations of the Inquiry are not traversed herein. See further A Forsyth, *Victorian Inquiry into the Labour Hire Industry and Insecure Work: Final Report*, Department of Economic Development, Jobs, Transport and Resources: Melbourne, August 2016; and Victorian Government, *2017 Victorian Government Response to the Victorian Inquiry into the Labour Hire Industry and Insecure Work*, Department of Economic Development, Jobs, Transport and Resources: May 2017.

legislative powers as between Commonwealth (i.e. federal) and state governments.²¹

In the sections that follow, as well as providing a more detailed examination of labour hire, franchising and complex supply chains, and some of the non-compliance issues connected with each of these business models, this article outlines various regulatory options for addressing these problems. These include labour hire licensing schemes; and affixing lead firms and head contractors in franchises and supply chains with various forms of liability. The article concludes with an assessment of likely future directions for more effective enforcement of the minimum workplace standards of Victorian/Australian workers.

2. Labour Hire

The nature of labour hire

Labour hire employment arrangements typically involve a ‘triangular relationship’²² in which a labour hire agency supplies the labour of a labour hire worker to a third party (host) in exchange for a fee. In a labour hire employment arrangement, there is no direct employment or contractual relationship between the host and the labour hire worker. Instead, the worker is engaged by the labour hire agency, either as an employee or as an independent contractor. What is termed ‘labour hire’ in the Australian context is referred to as ‘agency work’ in the United Kingdom and much of continental Europe.

Stewart et al explain the ‘usual’ labour hire arrangement in more detail, as follows:

... [it] involves the agency entering into an agreement with the worker, and arranging to hire out their services to a host, or to a series of hosts. The worker generally performs these services at the host’s premises, and may be supervised (if their work requires supervision at all) either by the host’s staff or by other workers supplied by the same, or a different, agency. The worker is paid by the

²¹ Under the Australian Constitution, legislative power over employment and industrial relations is shared between the Commonwealth and the states. In practical terms, however, most Australian employers and employees are covered by the federal workplace relations system operating under the Fair Work Act. Victoria is unique among the states, in having referred almost all of its legislative power in this area to the Commonwealth.

²² R Johnstone, S McCrystal, I Nossar, M Quinlan, M Rawling and J Riley, *Beyond Employment: The Legal Regulation of Work Relationships*, The Federation Press: Annandale, 2012, 60.

*agency, but aside from any requirement to submit timesheets may have relatively little contact with it. The host, on the other hand, pays a fee to the agency which covers the worker's remuneration and any associated on-costs. ... In many instances the nature of the arrangement is such that there is no obligation on either side to give or accept work. If an assignment is accepted, a contract is formed (usually on the agency's standard terms). But in between assignments, there may be no mutuality of obligation and hence no contract.*²³

Growth and extent of labour hire

Labour hire employment arrangements have been a feature of the Australian labour market since the 1950s, in the form of 'temping' agencies to fill short term vacancies for hosts.²⁴ However, from the late 1980s and throughout the 1990s there was dramatic growth in what has been referred to as the 'pure' labour hire industry, which offers contract labour as a flexible alternative to ongoing employees or workforces across a wide range of industries.²⁵ This industry has become well established in Australia in the past two decades.²⁶

In a 2005 paper, Underhill²⁷ described how labour hire arrangements had evolved to take many forms, including:

- the supply of short-term placements;
- outsourcing of specific functions such as maintenance;
- providing a substantial proportion of an organisation's workforce for an extended period of time, including in call centres and retail businesses; and
- providing the entire workforce for a host.

In the May 2016 IBISWorld industry report on Temporary Staff Services in Australia,²⁸ the main activities of the industry are described as: contract

²³ A Stewart, A Forsyth, M Irving, R Johnstone and S McCrystal, *Creighton and Stewart's Labour Law*, 6th edition, The Federation Press: Annandale, 2016, [10.23] (references omitted).

²⁴ R Hall, *Labour Hire in Australia: Motivation, Dynamics and Prospects*, Working Paper 76, ACIRRT, University of Sydney, April 2002.

²⁵ P Laplagne, M Glover and T Fry, *The Growth of Labour Hire Employment in Australia*, Productivity Commission Staff Working Paper, Melbourne, February 2005.

²⁶ A Allday, *Temporary Staff Services in Australia*, IBISWorld Industry Report N7212, May 2016, 4.

²⁷ E Underhill, The importance of having a say: Labour hire employees' workplace voice, *Reworking work: Proceedings of the 19th conference of the Association of Industrial Relations Academics of Australia and New Zealand*, Sydney, February 9-11, 2005, 528.

²⁸ Allday, *op. cit.*

labour services; labour on-hiring services; labour staffing services; labour supply services; and temporary labour hire services. The industry is distinguished from employment placement and recruitment services, which are businesses that provide employment placement services or recruit staff for permanent positions for client companies.²⁹

The growth in temporary staffing industries over the past two decades has been fuelled by a general trend towards outsourcing of non-core activities. Whilst growth in the past five years has slowed, it remains moderate due to comparatively low unemployment and increasing client demand for a flexible workforce.³⁰

Australian Bureau of Statistics (ABS) data provide an indication of the number of people, in particular industries and occupations, who found their job through and were paid by a labour hire firm or employment agency.³¹ If a person has found their job through such firms/agencies and then continues to be paid by them, this category of worker can reasonably be construed as a 'labour hire employee', in that the hiring agency becomes the employer (albeit the work being paid for is undertaken for another business/organisation).³²

The data indicate that approximately 1.1% of all employed persons across Australia are labour hire employees.³³ Labour hire employees are most prevalent in the following industries:

- Administrative and support services (5.4% of the workforce)
- Mining (2.8%)
- Manufacturing (2.6%)
- Electricity, gas and water services (1.8%)
- Public administration and safety (1.7%)
- Information, media and telecommunications (1.4%).

Current regulation of labour hire

Labour hire is entirely lawful both in Victoria and across Australia. There is little specific regulation of the labour hire sector. Cochrane and

²⁹ Ibid, 2.

³⁰ Ibid, 6.

³¹ ABS, *Characteristics of Employment, Australia*, Cat. No. 6333.0, August 2014, released October 27, 2015, First Issue.

³² ABS, *Australian Labour Market Statistics, Jan 2010: Labour Hire Workers*, Cat. No. 6105.0, January 2010, derived from the 2008 Forms of Employment Survey (ABS, *Forms of Employment*, November 2008, Cat. No. 6359.0), 2.

³³ ABS, Cat No 6333.0, *op. cit.*

McKeown describe Australia as having a 'lightly regulated framework' for agency work. They note that there are few national regulations surrounding agency work, such as sectoral limitations or limitations on reasons for hire, maximum duration of hire, maximum renewal or total duration.³⁴

Generally speaking, employment laws in operation in Victoria/Australia do not differentiate between labour hire employment and any other type of employment. In a direct employment relationship, the employer and the party controlling the day-to-day work of an employee are one and the same. However, in a labour hire employment arrangement, the party with de facto control over the employee's work is not the labour hire agency employer, but the host. The employee commences and concludes work in accordance with the requirements of the host, works at the direction of the host, at the host's workplace, and in many cases alongside direct employees of the host.

These inherent features of labour hire employment arrangements mean that despite the equal application of employment regulation to labour hire employment and non-labour hire employment in a formal sense, there are quite different substantive consequences for the obligations of labour hire employers and hosts, and the rights of labour hire employees. As the national industrial tribunal, the Fair Work Commission (FWC), has observed:

The diversity of labour hire arrangements is considerable, reflecting the need for flexibility in modern workplaces. However, these arrangements can be a minefield for all concerned, both in practical terms and in terms of rights and obligations arising under legislation, industrial instruments and contracts of employment. The actions of a host employer – particularly when its managers and supervisors engage in disciplinary action against labour hire employees – can have a direct and fundamental impact on the rights and obligations, as between the labour hire agency and its employees.³⁵

The overwhelming majority of labour hire employees are engaged on a casual (rather than full-time or part-time) basis. ABS statistics indicate that compared to employees generally, labour hire workers were more likely to be without paid leave entitlements (79% compared to 23% of employees overall), which is commonly used as an indicator of casual employment.³⁶ Further, the data show that a greater proportion of labour hire workers

³⁴ R Cochrane and T McKeown, 'Vulnerability and agency work: from the workers' perspectives', in *International Journal of Manpower*, 2015, vol. 36, n. 6, 947, 948.

³⁵ *Kool v Adecco Industrial Pty Ltd* [2016] FWC 925, [46].

³⁶ ABS, Cat. No. 6105.0, *op. cit.*, 4.

were engaged on a fixed-term contract basis compared to all employees (15% compared with 3%).³⁷

As casuals, most labour hire employees are not entitled to annual leave, paid personal/carer's leave, paid compassionate leave, paid jury service leave, notice of termination, payment in lieu of notice or redundancy pay under the National Employment Standards (NES) provisions of the Fair Work Act.³⁸ Other minimum standards which only apply in limited circumstances include the right to request flexible working arrangements, the right to unpaid parental leave and public holidays. The loading of 20-25% on base hourly pay rates, which casual employees are entitled to under most awards, is intended to compensate for the absence of some of these minimum terms and conditions.

Award regulation of labour hire

The Fair Work Act provides for the making, application and enforcement of modern awards.³⁹ These instruments, which set minimum terms and conditions for employees in particular industries or occupations, are enforceable under the legislation. There are currently 122 modern awards in operation, and the majority of these are industry based.⁴⁰ Typical features of a modern award include a wage and skill-based classification system, arrangements for when work is performed, rostering, overtime and weekend penalty rates, allowances and dispute resolution and consultation processes.

Most modern awards include the following labour hire/on-hire provisions:

'on-hire means the on-hire of an employee by their employer to a client, where such employee works under the general guidance and instruction of the client or a representative of the client.'

[and]

'This award covers any employer who supplies labour on an on-hire basis in the industry (or industries) set out in clause (clauses) xxxx in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry (those

³⁷ Ibid.

³⁸ Fair Work Act Part 2-2.

³⁹ Fair Work Act Part 2-3.

⁴⁰ See: <https://www.fwc.gov.au/awards-and-agreements/awards/modern-awards/modern-awards-list> (accessed January 16, 2017).

industries). This sub-clause operates subject to the exclusions from coverage in this award.'

Through these provisions, modern awards play a critical role in ensuring that labour hire employees have the protection of minimum hourly rates of pay, and certain other minimum conditions which vary depending on whether they are engaged as casuals or fixed-term employees. For example, labour hire employees engaged to work for a host business in a manufacturing plant would be entitled to the minimum pay and conditions set out in the *Manufacturing and Associated Industries and Occupations Award 2010*.

The on-hire provisions in most modern awards appear to operate effectively to ensure the extension of award terms and conditions to labour hire employees performing work covered by the relevant award. However, there is also considerable evidence of non-compliance with minimum award wages and other conditions in certain sectors of the Victorian (and Australian) economy, which is discussed further below.

Enterprise agreements and labour hire

The Fair Work Act also provides for the making of enterprise agreements. These are collective agreements negotiated between employers and their employees, sometimes with the involvement of unions, which prescribe enterprise-specific wages and other employment conditions.⁴¹ The legislation also contains a framework which facilitates bargaining in good faith for enterprise agreements, provides for representation during bargaining (including by unions) and permits industrial action to be taken in support of bargaining claims.⁴²

When an enterprise agreement applies to an employer and employee, it has the effect of displacing the application of the modern award which would otherwise apply to that employer and employee.⁴³ Employees must be better off overall under an enterprise agreement than the applicable modern award (this is known as the 'BOOT test').⁴⁴

Nothing in the Fair Work Act prevents a labour hire employer and its employees from making an enterprise agreement which would cover the performance of work by the labour hire employees on a host's site.

⁴¹ Fair Work Act Part 2-4.

⁴² Fair Work Act Parts 2-4 and 3-3.

⁴³ Fair Work Act s 57.

⁴⁴ Fair Work Act Part 2-4 Division 4 Subdivision C.

However, this tends to occur mainly in highly unionised sectors such as construction and manufacturing.

Some labour hire agencies which seek to implement their own enterprise agreements have had proposed agreements rejected by the FWC because they did not pass the BOOT test.⁴⁵ In *MP Resources Pty Ltd*, the FWC made the following observations in considering an application to approve a labour hire employer's agreement in the meat industry:

There have been a number of applications for approval of enterprise agreements covering labour hire agencies in the same industries which appear to be competing against each other on the basis of inferior terms and conditions. No unions or other employee representatives are involved in the negotiation of these enterprise agreements, which are poorly drafted and involve complex wages provisions. The employees are geographically dispersed from each other and from the employer. The agreements are broad reaching in the scope of work covered and in their geographical application.

A common feature of the applications for approval of these agreements appears to be reliance on exceptional circumstances in a small area of the proposed coverage of the agreement to justify the inferior conditions that will apply to all employees.

This approach is contrary to the objects of the [Fair Work] Act which provide for the guaranteed safety net of "fair, relevant and enforceable minimum terms and conditions" through, among other things, modern awards and achieving "productivity and fairness" through an emphasis on enterprise agreements. At best, the repeated attempts to gain approval of agreements in terms that have previously been rejected by the Commission or modified by the provision of undertakings is careless, at worst it lacks integrity.⁴⁶

In contrast to the approach outlined above in respect of modern awards, where the applicable terms and conditions for labour hire workers are determined with reference to the conditions applicable under the award for direct employees of the host, the framework for enterprise agreement-making under the Fair Work Act does not readily facilitate the application of a host's enterprise agreement to a labour hire employee working in that business.

Labour hire employees are not permitted to take part in bargaining for a host's enterprise agreement. Agreements may only be made between the

⁴⁵ See e.g. *Mk2 Recruitment Pty Ltd* [2015] FWC 6600; this agreement was subsequently approved, see *Mk2 Recruitment Pty Ltd* [2015] FWCA 6915.

⁴⁶ [2015] FWC 6820, [37]-[39]. The FWC referred (at [28]) to several other similar decisions: *Top End Consulting Pty Ltd* [2010] FWA 662; *Mondex Group Pty Ltd* [2015] FWC 1148; *Agri Labour Pty Ltd* [2015] FWC 5332.

host and its direct employees.⁴⁷ Once approved, enterprise agreements apply only to the relevant employer and its direct employees.⁴⁸ Further, the permissible content of enterprise agreements is limited to matters pertaining to the relationship between an employer and its own employees; and the relationship between the employer and a union covered by the agreement.⁴⁹ Accordingly, a host's enterprise agreement cannot include conditions for labour hire employees unless there is a sufficient connection between those conditions and the relationship between the host and its own direct employees or their union. Limits or qualifications on the employer's ability to utilise labour hire employees generally do not have the requisite connection.⁵⁰

Notwithstanding the limits on host enterprise agreement application to labour hire workers outlined above, some agreements include 'parity,' 'site rates,' or 'jump-up' clauses. The effect of a parity clause is to provide that where a labour hire worker is performing work which is the subject of an enterprise agreement, that employee is entitled to be paid at the same rate, and receive the same conditions, as a direct employee performing that work. Parity clauses are a fairly common feature of labour hire arrangements in unionised sectors like construction and manufacturing.

Parity clauses may be included in enterprise agreements where they sufficiently relate to the job security of the host's direct employees.⁵¹

However, terms of a host's enterprise agreement relating to use of, or conditions relating to, labour hire employees are not able to be directly enforced by the labour hire employees who are supposed to benefit from a parity clause in the agreement. As those employees do not fall within the scope of the agreement, they are not considered to be 'covered' by it within the meaning of s 53(1) of the Fair Work Act, a necessary prerequisite for being able to enforce the agreement. Only a union that is also covered by the agreement could take enforcement action if the parity clause in a host's enterprise agreement is not being observed in respect of particular labour hire employees.

⁴⁷ Fair Work Act s 172(2)(a).

⁴⁸ Fair Work Act ss 51-53.

⁴⁹ Fair Work Act s 172(1)(a)-(b).

⁵⁰ *R v Commonwealth Industrial Court; Ex parte Cocks* (1968) 121 CLR 313.

⁵¹ Commonwealth of Australia, *Fair Work Bill 2008 Explanatory Memorandum*, [672]; *Asurco Contracting v Construction, Forestry, Mining and Energy Union* (2010) 197 IR 365; *Australian Industry Group v Fair Work Australia* (2012) 205 FCR 339.

Non-compliance with workplace laws in the labour hire sector

Various studies, media reports and recent inquiries have revealed considerable evidence of labour hire practices which are not compliant with employment and workplace laws, across various sectors of the Australian economy. This evidence shows that non-compliance amongst labour hire agencies is particularly prevalent in industries such as horticulture, meat processing, cleaning and security.⁵² However, the following discussion focuses only on the horticulture sector.

Labour hire is used extensively, and relied upon heavily, in the horticulture industry (including the picking and packing of fresh fruit and vegetables). The main reasons for this are the seasonal nature of the work, unpredictable and variable workplace needs, domestic labour shortages, and the lack of time and human resources capabilities amongst growers.⁵³

There is a significant body of evidence demonstrating that many labour hire operators in the horticulture industry do not comply with their legal obligations towards their workers. For example Underhill and Rimmer, on the basis of their 2013-14 study of the Australian horticulture industry (including Victoria), examined the comparative working conditions for workers engaged directly by farmers (198 workers) and those engaged through labour contractors (75 workers). They found that:

- the mean hourly earnings for workers paid by contractors (A\$12.66) was less than that of workers paid by farmers (A\$14.86), and substantially less than A\$21.09, the minimum award hourly rate of pay for a casual employee at the time of the study;
- non-payment of wages was a significant problem for workers engaged by contractors – 15% of survey respondents had experienced not being paid for work performed, and working for a contractor rather than a farmer directly more than doubled the likelihood of non-payment of wages;
- very short working hours were twice as likely amongst contractor employees, resulting in an inadequate income, and conversely, around a fifth of all workers reported long hours – dissatisfaction

⁵² See e.g. Commonwealth of Australia, Senate Education and Employment References Committee, *op. cit.*, Chapter 7.

⁵³ See e.g. E Underhill and M Rimmer, 'Layered Vulnerability: Temporary migrants in Australian Horticulture', in *Journal of Industrial Relations*, 2016, vol. 58, n. 5, 608-626; Parliament of Queensland, Finance and Administration Committee, *op. cit.*, 17.

with the number of working hours was considerably greater amongst employees of contractors;

- seasonal workers employed by contractors endured far harsher conditions of employment than when working for a farmer, being more likely to work in extreme heat and miss drink breaks; and
- workers, hostel owners and migrant community representatives reported a high level of violence, and threats of violence, by contractors supplying labour in horticulture.⁵⁴

The Queensland Labour Hire Inquiry found the existence of ‘rogue operators in the horticulture industry’ in that state, engaging in the ‘undercutting’ of labour hire workers’ employment conditions such as paying below award rates, unsafe working conditions (e.g. long hours with few breaks), and non-payment of superannuation, tax and workers’ compensation premiums.⁵⁵ The two recent federal parliamentary inquiries found that, frequently, similar kinds of abuses involve vulnerable migrant workers on working holiday or student visas – or participating in the federal Government’s Seasonal Workers Programme – who are engaged to work in the horticulture sector via labour hire contractors/agencies.⁵⁶

FWO compliance activity: horticulture/labour hire

The extent of non-compliance with workplace laws in the horticulture industry has seen a considerable increase, in recent years, in the FWO’s compliance activities focused upon this sector (including the use of labour hire arrangements).⁵⁷

In 2010, FWO established a Horticulture Industry Shared Compliance Program. The six-month program consisted of an education phase and a compliance phase. As at November 2010, the program had recovered

⁵⁴ E Underhill and M Rimmer, ‘Itinerant foreign harvest workers in Australia: the impact of precarious employment on occupational safety and health’, in *Policy and Practice in Health and Safety*, 2015, vol. 13, no. 2, 24.

⁵⁵ Parliament of Queensland, Finance and Administration Committee, *op. cit.*, 17, 19-21, 24-25.

⁵⁶ Commonwealth of Australia, Senate Education and Employment References Committee, *op. cit.*, Chapters 4, 7 and 8; Parliament of Australia, Joint Standing Committee on Migration, *op. cit.*, Chapter 10.

⁵⁷ In addition to the initiatives discussed below, see also the report of the Ombudsman’s extensive inquiry into the mistreatment of overseas backpackers (arising largely from the requirement to perform at least 88 days’ work in regional Australia, to obtain a second year on the working holiday visa): FWO, *op. cit.*

A\$227,308 for 585 workers. It conducted 277 audits, and of these found 36% of employers were contravening workplace laws nationally.⁵⁸ In August 2013, FWO commenced a three year 'Harvest Trail Campaign'. The Harvest Trail is a Commonwealth Government initiative linking jobseekers to jobs in the horticulture industry around Australia.⁵⁹ This FWO campaign was established to review compliance within the fruit and vegetable industry 'as a result of persistent complaints and underpayments in the horticulture sector'.⁶⁰ It summarises these complaints as follows:

Being ripped off on transport or accommodation costs – this is usually encountered through new arrivals agreeing to enter into arrangements with someone (normally an unscrupulous labour hire provider) who meets them at a regional airport or bus depot and promises work, accommodation and transport for a certain sum of money. They are then normally driven to the accommodation via an ATM and asked to provide money in advance for bond, transport and accommodation costs. They are also promised work, normally at a farm that has some sort of arrangement with the so-called labour hire provider. The work is normally at a piece rate so low that it is not possible to pick enough fruit to make at least the minimum hourly rate required. When they complain or raise the issue with the provider they may be bullied or told that they will not get their bond back, nor would they have their visa extension signed off.⁶¹

FWO has also highlighted the role that growers and accommodation providers play, with some growers accepting offers from labour hire agencies which offer to supply labour for less than the minimum hourly rate, and some accommodation providers bonding backpackers to a particular hostel and requiring them to work for non-compliant labour hire agencies.⁶²

FWO's compliance activity as part of this campaign has included initiatives in Victoria. In 2014, FWO conducted inspections of strawberry growers in the Yarra Valley. It reported that many strawberry growers in the region use the services of contractors to source pickers and other seasonal workers. One farmer was paying a labour hire contractor a fee

⁵⁸ FWO, *Horticulture Industry Shared Compliance Scheme*, Final Report, November 2010.

⁵⁹ National Harvest Labour Information Service, *Harvest Guide – Work your way around Australia*, 13th Edition, June 2016).

⁶⁰ FWO, *Growers, hostels, labour-hire contractors cautioned over backpacker, seasonal worker entitlements*, Media Release, January 5, 2015.

⁶¹ *Ibid.*

⁶² *Ibid.*

per worker equating to A\$2.00 less than the minimum wage.⁶³ FWO has also recently reported on underpayments by labour hire contractors in horticulture in regional Queensland⁶⁴ and South Australia.⁶⁵

FWO compliance activity is continuing to occur in respect of labour hire arrangements in the horticulture industry across Australia. Examples include:

- FWO proceedings against a family farm and its manager in Queensland, who were fined A\$60,000 in the Federal Court of Australia for setting up sham companies to avoid overtime obligations for fruit pickers.⁶⁶
- An enforceable undertaking entered into between FWO and a NSW mushroom grower caught using overseas workers who had been significantly underpaid. Gromer Enterprise Pty Ltd signed up to the undertaking after FWO said it must share responsibility for underpayments by labour provider TDS International Investment Group. FWO had found that TDS engaged 52 Chinese and Taiwanese nationals, most of whom could not speak English, to pick mushrooms at the farm at a flat rate of A\$16.37 an hour, resulting in A\$92,381 in underpayments in 2013-14.⁶⁷

Regulatory responses to labour hire internationally

As indicated earlier in this article, in Australia there is little in the way of specific regulation of labour hire arrangements, beyond the application of laws applicable to employment generally. In contrast, the laws of many other countries impose registration, licensing or other regulatory requirements on labour hire agencies.

The European Foundation for the Improvement of Living and Working Conditions (Eurofound) has provided the following overview of approaches to regulation of temporary work agencies (TWAs) across the European Union:

⁶³ FWO, *Results of Yarra Valley strawberry farm visits*, Media Release, November 10, 2014.

⁶⁴ FWO, *Lettuce farm contractor signs workplace pact after short changing almost 100 overseas workers*, Media Release, November 10, 2014.

⁶⁵ FWO, *Adelaide employer underpays visa-holder \$22,000*, Media Release, November 10, 2014.

⁶⁶ *Fair Work Ombudsman v Eastern Colour Pty Ltd (No 3)* [2016] FCA 186.

⁶⁷ A Patty, 'Chinese and Taiwanese mushroom pickers short changed \$92,000', *Sydney Morning Herald (Business Day)*, March 2, 2016.

... most [EU] Member States have some form of licensing, while over half of the countries (Austria, Croatia, Cyprus, the Czech Republic, Germany, Greece, Hungary, Latvia, Luxembourg, Malta, Portugal, Romania, Slovakia, Slovenia and Spain) require all TWAs – as a minimum – to have authorisation prior to commencing activity. A further seven countries (Belgium, Bulgaria, France, Italy, Netherlands, Norway and Poland) have registration systems ...⁶⁸

These various forms of regulation in many EU countries are imposed to ensure that relevant authorities are aware of who is operating as a labour market intermediary, and to safeguard against the risk to workers' and states' finances from unrestricted access to this sector (hence the common requirements to show no criminal convictions/civil violations and to pay financial bonds or guarantees).⁶⁹

Although there are many different approaches to regulating agency work, licensing or registration schemes applicable to TWAs and/or the businesses which source migrant workers are among the more common. Arguably the leading example of that approach is the United Kingdom's Gangmasters Licensing Authority (GLA), established under the *Gangmasters (Licensing Act) 2004* (UK) (GLA Act). The GLA scheme was introduced following the drowning deaths of 23 undocumented Chinese cockle-pickers, hired through a labour intermediary, at Morecambe Bay in February 2004.⁷⁰ This regulatory initiative was supported by all major political parties and key stakeholders including the major UK supermarkets and the National Farmers Union.⁷¹ Support from businesses in the regulated sectors continues now on the basis that GLA licensing 'promotes fair competition'.⁷²

The GLA licensing scheme requires organisations providing workers to employers in the agriculture and shellfish-gathering sectors, and associated processing/packaging activities, to register and obtain a licence through the GLA. Users of these labour provision services must not enter into arrangements with unlicensed gangmasters. The licensing standards

⁶⁸ Eurofound, *Regulation of labour market intermediaries and the role of social partners in preventing trafficking of labour*, Publications Office of the European Union: Luxembourg, 2016, 21.

⁶⁹ *Ibid.*, 22-23.

⁷⁰ K Strauss, 'Unfree Labour and the Regulation of Temporary Agency Work in the UK', in J Fudge and K Strauss (eds), *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work*, Routledge: New York, 2014, 164.

⁷¹ Professor D Whyte, *Submission to the Victorian Inquiry into Labour Hire and Insecure Work*, 4.

⁷² GLA, *Gangmasters Licensing Authority: Annual Report and Accounts: 1 April 2014 to 31 March 2015*, July 2015, 12.

include a ‘fit and proper test’ (relating to the persons involved in running a labour supply business), assessments of the applicant business’s arrangements in relation to payment and taxation, health and safety, and accommodation; and the prevention of forced labour. Criminal offences including fines and imprisonment can be imposed on gangmasters who operate without a GLA licence, and those who use their services.

Numerous studies have demonstrated the effectiveness of the GLA licensing scheme over the last ten years, in combating exploitation in the sectors to which it applies.⁷³ However, some concerns have been expressed about this sector-specific approach to regulation of labour supply, including the potential for non-compliant businesses to divert their operations into other industries.⁷⁴ Recently, the UK Government has implemented reforms⁷⁵ which are likely to see the GLA, now known as the Gangmasters and Labour Abuse Authority, addressing exploitation across the economy under the umbrella of a new Director of Labour Market Enforcement.⁷⁶

3. Franchising

Overview

Franchising is ‘a method of growing a business in which a franchise owner (franchisee) is granted, for a fee, the right to offer, sell or distribute goods or services under a business system determined by the business founder (franchisor). The franchisor supports the franchised business group by providing leadership, guidance, training and assistance in return for

⁷³ See e.g. M Wilkinson, G Craig and A Gaus, *Forced Labour in the UK and the Gangmasters Licensing Authority*, Contemporary Slavery Research Centre, Wilberforce Institute, University of Hull, undated; M Wynn, ‘Regulating Rogues: Employment Agency Enforcement and Sections 15-18 of the Employment Act 2008’, in *Industrial Law Journal*, 2009, vol. 38, n. 1, 64.

⁷⁴ Strauss, *op. cit.*; A Geddes, S Scott and K Nielsen, *Gangmasters Licensing Authority Evaluation Study Baseline Report*, GLA, 2007.

⁷⁵ Under the *Immigration Act 2016* (UK); see ACL Davies, ‘The Immigration Act 2016’, in *Industrial Law Journal*, vol. 45, no. 3, 431.

⁷⁶ Department for Business Innovation and Skills and Home Office, *Tackling Exploitation in the Labour Market: Consultation*, October 2015; BIS and Home Office, *Tackling Exploitation in the Labour Market: Government Response*, January 2016.

ongoing service fees.⁷⁷ In 2015-16, the franchise industry had revenue of A\$171.6 billion, and employed 570,000 people across Australia. There are 1,180 franchise enterprises comprising 92,950 establishments Australia-wide. Of these establishments, approximately 25.1% are located in Victoria.⁷⁸

The Franchise Council of Australia (FCA) indicates that the franchise sector has been a major contributor to the Australian economy.⁷⁹ At the core of the success of franchising as a business model is that franchisors and franchisees are able to focus on different business activities, so that small businesses are enabled to compete effectively against major corporations. Further, according to FCA, franchised businesses are often market leaders; and it is vital that the industry is not hamstrung by inappropriate legislation, regulatory duplication or red tape.⁸⁰

However, Johnstone et al see a number of risks for workplace law compliance arising from the franchise model:

This business model allows the work provider and business controller, the originator of a business concept, to derive profits, without investing in any of the tangible assets required for the business, and without taking on the risks and responsibilities of employing any staff. ...

Many if not most of the risks associated with operating the business will be borne by the franchisees.⁸¹

Legally, franchisees are the employers of workers engaged to work in their business, so these workers have no recourse against franchisors in the event of non-compliance with the FW Act or minimum award pay rates by franchisees.

7-Eleven

One of the major examples of worker exploitation in Australia recently has been the systemic underpayment of many temporary foreign workers

⁷⁷ Claudia Burgio-Ficca, *Franchising in Australia*, IBISWorld Industry Report, May 2016), 2.

⁷⁸ Ibid, 3.

⁷⁹ See FCA's website at: <http://www.franchise.org.au/> (accessed January 16, 2017); FCA, *Submission to the Senate Standing Committee on Education and Employment Inquiry into Australia's Temporary Work Visa System*, September 2015; FCA, *Submission to the Review of the Franchising Code of Conduct, 2013* February 2013.

⁸⁰ Ibid.

⁸¹ Johnstone et al, *op. cit.*, 70; see also A Kellner, D Peetz, K Townsend and A Wilkinson, "'We are very focused on the muffins?': Regulation of and compliance with industrial relations in franchises", in *Journal of Industrial Relations*, 2016, vol. 58, no. 1, 25, 29-30.

across the 7-Eleven convenience store franchise network. A 2015 joint Fairfax/ABC *Four Corners* investigation into 7-Eleven exposed widespread exploitation of its largely migrant workforce, throughout the franchise network, through underpayments and doctoring of payroll records.⁸² The investigation quoted a whistleblower who stated that:

*[7-Eleven] Head office is not just turning a blind eye, it's a fundamental part of their business. They can't run 7-Eleven as profitably as successfully as they have without letting this happen, so the business is very proud of itself and the achievements and the money it's made and the success it's had, but the reality is it's built on something not much different from slavery.*⁸³

A key allegation was that franchisees were conducting a 'half pay scam', whereby the franchisee would record and pay for only half the hours worked by the relevant employee. Many staff were international students, subject to a limit of 20 hours' work per week under their visas. Franchisees would threaten to report employees' visa breaches following any complaint about salary or working conditions. The range of illegal activity by franchisees was alleged to have extended beyond wage fraud to include blackmail and withholding passports and drivers' licences of staff. It was alleged that franchisees continued to underpay staff even after being caught out by investigators from FWO.⁸⁴

Shortly after the reports of exploitation were aired, 7-Eleven established an independent wage panel, chaired by Professor Allan Fels AO, to investigate claims for underpayment by current and former employees of its franchisees. At a Monash Business School seminar in October 2015, Professor Fels described a range of methods of underpayment that had been engaged in by 7-Eleven franchisees, including: simply underpaying by half of the required rate, only reporting half of the hours worked; unpaid training; deductions for losses such as robberies and petrol drive-offs; and the franchisee requiring repayment of salary by accompanying the employee to an automated teller machine. Some students engaged as employees paid the franchisee or their agent a considerable fee prior to coming to Australia, and worked for free to pay the fee off. As at October

⁸² ABC *Four Corners*, '7-Eleven: The Price of Convenience', August 30, 2015.

⁸³ See: <http://www.smh.com.au/interactive/2015/7-eleven-revealed/> (accessed January 16, 2017).

⁸⁴ Ibid.

2015, 430 underpayment claims had been processed by Professor Fels' panel.⁸⁵

However, in May 2016, 7-Eleven terminated the independent wage panel arrangements, reportedly due to the panel's refusal to accept conditions which it considered would compromise the independence of its processes.⁸⁶ 7-Eleven then established its own internal wage repayment program, supported by accounting firm Deloitte.⁸⁷ 648 wage claims had been determined as at mid-August 2016, to the value of almost A\$25 million.⁸⁸

A report by FWO following its inquiry into 7-Eleven found that several franchisees had breached the Fair Work Act through underpayment of employees and falsification of wages records.⁸⁹ Although finding that 7-Eleven head office was not liable for the franchisees' conduct, FWO was critical of the company's failure to implement measures to prevent the conduct from occurring. Despite this, FWO determined that it did not have a sufficient basis to bring proceedings alleging that 7-Eleven was liable as an accessory to the contraventions under section 550 of the FW Act.⁹⁰ On the other hand, FWO has brought a number of successful enforcement proceedings against 7-Eleven franchisees in respect of underpayments and other Fair Work Act breaches.⁹¹

The 7-Eleven underpayments scandal led to media speculation that other franchise enterprises may be similarly affected. For example in September 2015, *The Age* reported allegations of similar practices of underpayment in the franchise stores of Bakers Delight, United Petroleum, Subway, Dominos Pizza and Nando's.⁹²

⁸⁵ A Fels, Speech to Monash Business School Seminar, *Falling through the gaps: Employment regulation and the protection of international students, migrant and other vulnerable workers*, Melbourne, October 27, 2015.

⁸⁶ A Ferguson and S Danckert, '7-Eleven kills independent wage panel', *Sydney Morning Herald*, May 11, 2016; A Ferguson and S Danckert, '7-Eleven 'spooked' by large claims', *The Age*, May 14, 2016.

⁸⁷ 7-Eleven, *Wage Repayment Program*, at: <http://www.wagerepaymentprogram.com.au/> (accessed January 16, 2017).

⁸⁸ *Ibid.*

⁸⁹ FWO, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven*, April 2016.

⁹⁰ On accessory liability under FW Act section 550, see further below.

⁹¹ See e.g. *FWO v Mai Pty Ltd and Anor* [2016] FCCA 1481; *FWO v Hiji Pty Ltd* [2016] FCCA 1634.

⁹² A Ferguson, 'The labour market's dark side – the case for changing worker exploitation', *The Age*, September 26, 2015.

Proposals for further regulation of franchises

Presently, franchises are regulated by the *Franchising Code of Conduct* (Code), a mandatory industry code made pursuant to the *Competition and Consumer Act 2010* (Cth) and administered by the Australian Competition and Consumer Commission (ACCC). However, as indicated earlier, franchisors are not legally responsible for the employment arrangements of franchisees within their operations.

Hardy argues that the strategic position of head franchisors means they often exercise varying degrees of formal and informal control over the business practices of their franchisees. She notes that the Code limits the capacity of a franchisor to terminate its relationship with a franchisee, and argues that strengthening the termination rights of franchisors by amending the Code is one way to ensure that franchisors can promptly halt franchisee misconduct and prevent further worker harm. However, Hardy suggests another more controversial way to address some of the issues outlined above would be to make head franchisors more accountable for workplace contraventions that take place on their watch. She advocates for an approach which will change the ‘compliance calculus’ of all entities throughout the franchise network, supporting measures such as more rigorous monitoring of franchisee workplace practices and greater employment-related support and assistance for franchisees and workers.⁹³

Kellner, Peetz, Townsend and Wilkinson contend that franchises are based on transfer of risk – most obviously the transfer to franchisees of the financial risk involved in opening a branch of a business in a new location, but less obviously the transfer of industrial relations risk. They argue (based on three case studies of Australian food services franchises) that ‘to franchisors, ‘good IR’ was exhibited by a lack of known indiscretions. They were more focused on the muffins, on the internal regulation of product quality’, than on compliance with industrial relations laws.⁹⁴

In 2015, the Australian Greens introduced a bill into federal Parliament to enable employees of a franchisee to recover any unpaid wages or other entitlements from the franchisor or its head office entity.⁹⁵ This bill was

⁹³ Hardy, 2015, *op. cit.*

⁹⁴ Kellner, Peetz, Townsend and Wilkinson, *op. cit.*, 40-41.

⁹⁵ Fair Work Amendment (Recovery of Unpaid Amounts for Franchisee Employees) Bill 2015.

proposed largely in response to the 7-Eleven underpayments scandal and (according to the Greens): ‘would ensure that instead of leaving it to vulnerable workers to uphold the law through expensive legal action, head offices would take more responsibility for ensuring compliance with industrial laws in stores that carry their name’.⁹⁶ Franchisee employees would be able to seek recovery of unpaid entitlements (including pay, leave and superannuation) against the franchisor in a court – following an unsuccessful written demand seeking to recover those entitlements from the franchisee employer.⁹⁷

The Australian Labor Party (ALP) promised in the 2016 election campaign to increase protections for franchise workers, including by requiring franchisors (under the Code) to take reasonable steps to assist franchisees to comply with workplace laws; and enabling employees or FWO to bring underpayment claims against franchisors (as well as franchisees). The Labor policy also proposed a ten-fold increase in civil penalties for underpaying workers (to A\$540,000), in cases of ‘serious contraventions’.⁹⁸

The Liberal/National Coalition, which was re-elected at the July 2 poll, also adopted a policy to introduce new protections from exploitation for vulnerable workers, which included imposing additional liability for workplace law breaches upon franchisors.⁹⁹ The Coalition’s policy stated that:

The 7-Eleven scandal revealed not only a systemic underpayment of workers, but also a widespread practice of franchisees paying their employees the lawful rate, but then coercing them to pay back a certain proportion of their wages to the employer in cash.

*The Coalition will deliver stronger protection for vulnerable workers by: ... introducing new offence provisions that capture franchisors and parent companies who fail to deal with exploitation by their franchisees.*¹⁰⁰

The Coalition’s policy also indicated that new provisions would be introduced to apply to franchisors who fail to deal with exploitation by their franchisees:

The Fair Work Act will be amended to make franchisors and parent companies liable for breaches of the Act by their franchisees or subsidiaries in

⁹⁶ *Explanatory Memorandum for the Fair Work Amendment (Recovery of Unpaid Amounts for Franchisee Employees) Bill 2015*, 2.

⁹⁷ *Ibid*, 3-5.

⁹⁸ ALP, *Protecting Rights at Work Fact Sheet (Labor’s 100 Positive Policies)* (2016).

⁹⁹ Liberal/National Coalition, *The Coalition’s Policy to Protect Vulnerable Workers*, May 2016.

¹⁰⁰ *Ibid*.

*situations where they should reasonably have been aware of the breaches and could reasonably have taken action to prevent them from occurring. Franchisors who have taken reasonable steps to educate their franchisees, who are separate and independent businesses, about their workplace obligations and have assurance processes in place, will not be captured by these new provisions.*¹⁰¹

The ALP criticised the Coalition's policy on the basis that 'workers would have to prove that the franchisor should reasonably have been aware of the [workplace law] breaches'. Labor proposed, instead, to reverse the onus of proof so that a franchisor would have to prove that they could not have reasonably known or been aware of breaches by their franchisee.¹⁰² The Coalition's policy was implemented through legislation enacted by the Australian Parliament in September 2017 (see further the Conclusion below).

4. Outsourcing and complex labour supply chains

Overview

US scholar, Professor David Weil, has considered the major shift in the way businesses organise their production and delivery of goods and services, and its implications for labour standards compliance:

*By focusing on core competencies, lead businesses in the economy have shed the employment relationship for many activities, and all that comes with it. Shedding the tasks and production activities to other businesses allows lead companies to lower their costs It also does away with the need to establish consistency in those human resource policies, since they no longer reside inside the firm.*¹⁰³

Using the notion of 'the fissured workplace', Weil describes how these 'lead firms' have replaced the large workforces traditionally employed to fulfil their objectives with 'a complicated network of smaller business units', operating in highly competitive markets. This has created 'downward pressure on wages and benefits, murkiness about who bears responsibility for work conditions, and increased likelihood that basic labor standards will be violated'.¹⁰⁴

¹⁰¹ Ibid.

¹⁰² ALP, *op. cit.*

¹⁰³ David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014), 11-12.

¹⁰⁴ Ibid, 8.

In 2001, Johnstone, Mayhew and Quinlan identified that outsourcing grew substantially across a range of industries in most industrialized countries, including Australia, where survey data indicated that the number of contractors, agency workers, outworkers, and volunteers increased by almost 40% in the 5 years to 1997.¹⁰⁵ The authors noted that outsourcing alters legal relations between the organisation that previously used its own employees to provide the product or task and those now contracted to do this. The legal status of outsourced workers may vary substantially from self-employed individuals or groups, to employees of small firms, casual employees and temporary labour supplied by labour hire agencies.¹⁰⁶

In their 2012 book, Johnstone et al note that:

The supply chain is another business structure that by its nature obscures the real economic relationship between business controllers and the workers who actually carry out the work.

... These integrated supply chain systems are structured to insulate businesses at the apex of supply chains from liabilities towards workers at the base.

... These arrangements enable firms at or near the apex of the chain to avoid the legal proximity with workers that may attract various obligations and liabilities, but at the same time enable them to maintain effective commercial control over the work performed.¹⁰⁷

Johnstone et al point out that although supply chain structures are common in the Australian textile clothing and footwear (TCF), transport, construction and cleaning industries: 'beyond the regulation of clothing outwork and the trucking industry, there is little or no regulation specifically targeted at these supply chains to protect the workers at the base.'¹⁰⁸

Wright and Kaine observe that supply chains, production networks and other complex inter-organisational relationships are now defining features of contemporary business organisations. They note the structural shift in the nature of work and production from internal hierarchies contained

¹⁰⁵ R Johnstone, C Mayhew and M Quinlan, 'Outsourcing Risk? The regulation of occupational health and safety where subcontractors are employed', in *Comparative Labor Law and Policy Journal*, 2001, vol. 22, 351.

¹⁰⁶ *Ibid*, 352.

¹⁰⁷ Johnstone et al, *op. cit.*, 66 (reference omitted).

¹⁰⁸ *Ibid*, 68-69. TCF supply chain regulation is discussed briefly below; on the road transport industry, see e.g. R Johnstone, I Nossar and M Rawling, 'Regulating Supply Chains to Protect Road Transport Workers: An Early Assessment of the Road Safety Remuneration Tribunal', in *Federal Law Review*, 2015, vol. 43 397.

within organisations, to markets and networks stretching across multiple organisations.¹⁰⁹

Johnstone and Stewart argue that that ‘fissuring’ or leased labour, franchising, supply chains and sub-contracting have become commonplace in Australia. They note that some features of Australian labour law have played a part in countering some of the adverse effects of fissuring.¹¹⁰ These include: modern awards and the NES, which to some extent protect employees at the foot of franchise, sub-contracting and supply chain arrangements; the enforcement efforts of FWO (including enforcement proceedings based on the FW Act accessorial liability provisions); transfer of business laws; measures to protect against sham contracting; and the model work health and safety laws. They note that there has been some judicial acceptance of arguments that a worker at the foot of a fissured work structure is not a risk-taking entrepreneur but rather an employee protected by a safety net of minimum conditions.¹¹¹ However, they describe the overall protections against fissuring in the Australian context as ‘piecemeal’.¹¹²

Similarly, Hardy contends that while some Australian workplace statutes are innovative and inclusive, critical regulatory gaps remain.¹¹³ In her view, whilst the Fair Work Act prescribes a comprehensive safety net for employees, making it less appealing for lead firms to shed direct employment, its continued reflection of the binary notion of employment and the unitary concept of the employer makes it more difficult for regulators and others to hold lead firms responsible for workplace contraventions taking place in their supply chains or franchises.¹¹⁴ Hardy argues that harnessing the power, position and resources of lead firms is critical to addressing exploitation at the bottom of supply chains.¹¹⁵

¹⁰⁹ C Wright and S Kaine, ‘Supply chains, production networks and the employment relationship’, in *Journal of Industrial Relations*, 2015, vol. 57, n. 4, 483.

¹¹⁰ Johnstone and Stewart, *op. cit.*, 63-86.

¹¹¹ *Ibid.*, 87.

¹¹² *Ibid.*, 89.

¹¹³ T Hardy, *Reconsidering the notion of “employer” in the era of the fissured workplace: should labour law responsibilities exceed the boundary of the legal entity?*, 2016 JILPT Tokyo Comparative Labour Law Seminar, Country Report, Australia, 2016, 1.

¹¹⁴ *Ibid.*, 3-4.

¹¹⁵ *Ibid.*, 17.

Supply chain regulation in the Australian TCF industry

A significant body of academic literature has documented contracting chains and the use of home-based workers in the TCF industry.¹¹⁶ Labour supply chains in this sector are often long and complex, which can lead to a lack of transparency in contracting arrangements and make it difficult to identify and remedy instances of exploitation. Australia has developed a comprehensive regulatory framework for these supply chains, reflected in the Fair Work Act,¹¹⁷ the relevant modern award¹¹⁸ and complemented by a number of schemes established through State legislation.¹¹⁹ Key features of supply chain regulation in the textile industry include:

- a requirement that supply chain participants who arrange for work to be performed on their behalf be registered, and only deal with other registered participants;¹²⁰
- a requirement to keep and file quarterly lists detailing supply chain activity;¹²¹
- requirements to document the details of each engagement with a worker, directed at demonstrating compliance with the minimum award terms and conditions;¹²²
- provisions which require minimum terms and conditions to be afforded to TCF outworkers, irrespective of their formal status as employee or contractor;¹²³ and
- provisions allowing recovery of unpaid remuneration to be traced up the supply chain to parties other than the directly engaging party.¹²⁴

A voluntary code also exists in the TCF industry, which supplements these regulatory measures.¹²⁵

¹¹⁶ See e.g. R Burchielli, A Delaney and K Coventry, 'Campaign strategies to develop regulatory mechanisms: Protecting Australian garment homeworkers', in *Journal of Industrial Relations*, 2014, vol. 56, n. 1, 81 .

¹¹⁷ Fair Work Act Part 6.4A.

¹¹⁸ *Textile, Clothing, Footwear and Associated Industries Award 2010*.

¹¹⁹ See e.g. *Outworkers (Improved Protection) Act 2003* (Vic).

¹²⁰ *Textile, Clothing, Footwear and Associated Industries Award 2010*, F.3.1.

¹²¹ *Ibid*, F.3.3.

¹²² *Ibid*, F.3.2, F.4.2

¹²³ Fair Work Act Part 6.4A, Division 2.

¹²⁴ *Ibid*, Division 3; *Textile, Clothing, Footwear and Associated Industries Award 2010*, F.8.

¹²⁵ See: <http://ethicalclothingaustralia.org.au/> (accessed January 18, 2017).

FWO activity in regulating supply chains

FWO has been particularly active lately in seeking to ensure that lead firms take responsibility for underpayments and other breaches of workplace laws occurring within their supply chain. In 2016,¹²⁶ the Ombudsman described the FWO's findings about the role of Woolworths in addressing conditions of the contracted trolley collectors at its supermarkets,¹²⁷ as follows:

Once again we find a big, established company at the top of a chain that involves worker exploitation, reaping the benefit of underpaid labour while failing to keep sufficient watch on what its contractors are paying the workers.

...

Multi-tiered sub-contracting arrangements created a faceless workforce at some supermarket sites and an entrenched culture of non-compliance in the supply chain.

...

The community is tiring of established businesses claiming they 'did not know' what was going on in their networks and labour supply chains, while at the same time failing to put adequate governance arrangements in place.

You see no evil when you hold your hands over your eyes!

With so many unauthorised layers of contracting, there were cases where the underpayment of workers was inevitable, with the insufficient money being paid by Woolworths for all the contractors to make a profit while meeting their employees' entitlements.

Woolworths, like many other companies, says it takes its responsibilities under workplace laws very seriously. A decade after we first started investigating allegations of exploitation at its sites, I need more than words from Woolworths. It's time for Woolworths to show us all that it means it, and to commit to action.¹²⁸

FWO has also explained its supply chain focus as follows: 'It is now business as usual for us to investigate the drivers of behavior in complex supply chains and develop strategies to shine a light on and stamp out non-compliance with workplace laws.'¹²⁹

¹²⁶ N James, *You see no evil when you hold your hands in front of your eyes*, FWO Media Release, June 25, 2016).

¹²⁷ See FWO, *Inquiry into trolley collection services procurement by Woolworths Limited*, June 2016.

¹²⁸ James, *op. cit.*, emphasis added.

¹²⁹ FWO, 'The view from the top – building a culture of compliance in Australia's labour supply chains', *Address to the Australian Labour and Employment Relations Association National Conference by Natalie James, Fair Work Ombudsman*, May 27, 2016, 2 .

A key mechanism utilised by FWO in its campaign to increase responsibility for compliance with workplace laws in supply chains has been litigation based on the ‘accessorial liability’ provision, s 550 of the Fair Work Act, which provides as follows:

- (1) *A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision. ...*
- (2) *A person is involved in a contravention of a civil remedy provision if, and only if, the person:*
 - (a) *has aided, abetted, counselled or procured the contravention;*
or
 - (b) *has inducted the contravention, whether by threats or promises or otherwise; or*
 - (c) *has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or*
 - (d) *has conspired with others to effect the contravention.*

Over recent years, FWO has actively sought to utilise s 550 to establish legal responsibility for contraventions of workplace laws on the part of parties not directly responsible for compliance. In 2014-15, 26 of 33 civil penalty matters instigated by FWO, then decided by a court, involved penalty orders against an accessory.¹³⁰

On most occasions, the accessorial liability provision is used to attach liability to an individual director or officer involved in the decision-making which led to the relevant contravention.¹³¹ However, there have been a small number of matters in which a separate corporation has been held liable pursuant to s 550 for the employment law breaches of another corporation, including in a contracting chain.

Recent high profile examples of this can be found in a series of proceedings initiated in 2014 by FWO regarding the underpayment of trolley collectors who performed work, subject to supply chains with a number of parties, for Coles supermarkets. FWO commenced proceedings against Coles along with a number of other parties in the relevant supply chain, as well as the direct employers of the workers. This proceeding was resolved by Coles voluntarily entering an enforceable undertaking and agreeing to back-pay the employees of the subcontractors. However, the litigation against other contracting parties

¹³⁰ FWO, *Annual Report 2014-15*, 34.

¹³¹ See e.g. *FWO v Konsulteq and Ors* [2015] FCCA 1882; *FWO v Liquid Fuel Pty Ltd and Ors* [2015] FCCA 2694; *FWO v Singh* [2016] FCCA 1335; *FWO v Step Ahead Security Services Pty Ltd and Anor* [2016] FCCA 1482.

continued, and a number of other these parties have been held liable by the courts pursuant to s 550.¹³²

In addition, in November 2015, a security company was found liable pursuant to s 550 for underpayments by its subcontractor to the subcontractor's employees.¹³³

However, a key limitation with the current formulation of the accessorial liability provision is the degree of intentional involvement and specific knowledge which courts have held to be required by the accessory. For this reason, FWO determined not to pursue accessorial liability against the 7-Eleven head office, notwithstanding the systemic nature of franchisee breaches in that case.¹³⁴

5. Conclusion

Many different approaches to combating worker exploitation, arising from the utilisation by employers of complex business structures, have been discussed in this article. Which of these regulatory approaches is likely to be at the forefront of addressing the increasingly visible problem of Australia's 'black labour market' into the future?

We have now seen a significant increase in penalties and enhancement of FWO's investigatory and enforcement powers, following the implementation of the Coalition Government's election policy to protect vulnerable workers.¹³⁵ FWO has sought to reassure the business community that it will act responsibly, and 'with restraint and measure', in exercising its new compulsory evidence gathering powers.¹³⁶

The Government has implemented another policy commitment to establish a Migrant Workers Taskforce, headed by Professor Fels, which 'will identify further proposals for improvements in law, law enforcement and investigation, or other practical measures to quickly identify and

¹³² See e.g. *FWO v South Jin Pty Ltd* [2015] FCA 1456; *FWO v South Jin Ltd (No 2)* [2016] FCA 832; *FWO v Al Hilfi* [2016] FCA 193.

¹³³ See: <https://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/november-2015/20151120-sis>, accessed January 18, 2017 (the Federal Circuit Court's decision in this matter, involving Security International Services Pty Ltd, has not been published).

¹³⁴ FWO, April 2016, *op. cit.*, 70-72; see the detailed discussion of 7-Eleven above.

¹³⁵ *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth), passed by Parliament on 5 September 2017.

¹³⁶ 'New powers would be 'responsibly' wielded: FWO', *Workforce*, Issue No 20272.

rectify any cases of migrant worker exploitation'.¹³⁷ The Taskforce will also coordinate the activities of FWO, Department of Immigration and Border Protection, Australian Taxation Office, Australian Securities and Investments Commission and many other federal agencies involved in tackling migrant worker exploitation.

There appears to be a ground-swell of support building in favour of some form of registration or licensing scheme for labour hire companies in Australia. As discussed earlier, there are many successful examples of such schemes internationally, especially the GLA in the UK, and two federal parliamentary reports have endorsed mandatory labour hire licensing as a critical measure to stamp out unlawful practices.¹³⁸ However, as the Coalition Government does not support this approach, licensing schemes are now being implemented at state government level.¹³⁹

In the wake of the 7-Eleven scandal, there has also been a legislative response affixing franchisors (in certain defined circumstances) with liability for underpayments and other workplace law breaches occurring among their franchisees. Liability may be established where a franchisor has failed to take reasonable steps to prevent workplace law contraventions by its franchisees, e.g. by implementing arrangements for assessing franchisees' compliance with workplace laws.¹⁴⁰

Innovative supply chain regulation is unlikely to be extended beyond the TCF sector in Australia in the foreseeable future. That said, there is some indication of willingness in the business community to see Australian companies held more accountable for activity within their supply chains in the Asian region.¹⁴¹ In addition, the experimentation of FWO with enforcement proceedings under s 550 of the Fair Work Act is seeing an

¹³⁷ Australian Government, *Migrant Workers Taskforce (Terms of Reference and Administrative Arrangements)*, released October 4, 2016. This will include monitoring progress in relation to rectification of underpayments by 7-Eleven, and assessing the labour hire practices of companies employing migrant workers.

¹³⁸ See also ALP, *Protecting Rights at Work: Licensing Labour Hire*, Policy for the 2016 Election; ALP, *A Fairer Temporary Work Visa System – Fact Sheet*, 2016.

¹³⁹ The state of Queensland has now established such a scheme (see *Labour Hire Licensing Act 2017* (Qld)), with legislation now before the South Australian Parliament and under development in Victoria.

¹⁴⁰ See, again, *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth).

¹⁴¹ T Ingram, 'Andrew Forrest calls on government to lead regional response against slavery', *The Australian Financial Review*, October 17, 2016. Further, the federal Government is currently engaging in consultation over the introduction of legislation based on the UK's *Modern Slavery Act 2015*: see Australian Government, *Modern Slavery in Supply Chains Reporting Requirement – Public Consultation*, Attorney-General's Department: 16 August 2017.

extension of liability for workplace law breaches to a broader range of individuals and corporate entities.

There is another form of potential liability, or risk, that recent experience shows Australian businesses are exposed to and concerned to avoid: reputational damage. The 7-Eleven case, and many other instances of worker exploitation which have come to the fore in the last 3 years, illustrate that corporate brands suffer considerable damage when these reports are running in the media. It seems that the community is becoming less tolerant of corporate misconduct of this kind, and consumers simply associate worker exploitation with the brand (rather than the employer/business that is legally responsible).

In summary, the combination of greater visibility of mistreatment of workers through the media, a highly proactive regulator (FWO), and new forms of regulatory intervention at both federal and state levels add up to a decisive shift in momentum towards improved enforcement of workplace laws for Australian workers.

ADAPT International Network



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