Who should be held liable for workplace contraventions and on what basis?

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While it is generally now accepted that noncompliance with workplace laws is a pressing problem in Australia, there is far less consensus about what can be done and who should be held accountable. This article considers whether, and in what circumstances, firms beyond the direct employer should be made legally liable for workplace contraventions. By exploring alternative models of liability within Australia and beyond, the article addresses a number of conceptual and practical questions raised by third-party liability regimes. This article finds that forms of duty-based liability may hold the most promise in terms of curbing workplace contraventions in a fair and cost-effective way. In addition, it considers a number of more modest regulatory measures — such as reversing the onus of proof where employment records are apparently absent or inaccurate — which may serve to promote more effective enforcement of employment standards.

I Introduction

Minimum employment standards provide a floor of working conditions for the most disadvantaged and vulnerable workers in society.[1] But this floor rests on increasingly shaky foundations. Throughout 2015, a number of media investigations revealed that certain sectors of the Australian labour market, such as the horticulture and food processing industries, may be 'riddled with exploitation'.[2] In addition, and more recently, the 7-Eleven franchise has been grappling with allegations of serious and systemic underpayment of international student workers.[3] These separate investigations have had the combined effect of placing enforcement of employment standards squarely in the public debate and firmly on the political agenda. They have also prompted a number of inquiries at both federal and state levels.[4] While issues of exploitation and enforcement have attracted a great deal of attention in the

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1 In this article, and unless otherwise specified, the terms 'employment standards' or 'workplace standards' are generally used to refer to minimum rates of pay, hours of work, and leave and termination entitlements as set by the Fair Work Act 2009 (Cth), its regulations, awards and agreements.

2 C Meldrum-Hanna and A Russell, 'Slaving Away', *Four Corners*, 4 May 2015.

3 A Ferguson and K Toft, '7-Eleven: The Price of Convenience', *Four Corners*, 31 August 2015.

4 Senate Education and Employment References Committee, *Inquiry into the Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders*, Parliament of Australia, Canberra, 17 March 2016 (Senate Inquiry); Australian Government, Department of Immigration and Border Protection, Australian Customs and Border Protection Services and Fair Work Ombudsman, Taskforce Cadena, commenced on 1 July 2015; Victorian Government, Inquiry into Labour Hire and

past 12 months, there seems to be far less certainty about what can be done and who should be held accountable for worker exploitation in this country.

A number of leading companies have previously acknowledged that they have an 'ethical and moral responsibility' to require that all entities and individuals directly involved in the conduct of their enterprise comply with the law.[5] Many other corporations have committed to ethical sourcing — at least on paper.[6] The key question explored here is whether, and in what circumstances, lead firms should also be held legally liable for workplace contraventions occurring in their corporate group, supply chain or franchise network? Assuming lead firms should bear some legal responsibility, what level of liability is justified (that is, full or residual) and what legal mechanisms can and should be used to achieve this outcome?[7]

In order to develop a platform for regulatory reform in this area, and respond to these normative and instrumental questions, it is necessary to first have 'an understanding of why employers make the choices they do, and what is required to alter those decisions'.[8] To this end, Section 2 begins by surveying some of the factors which may have led employers to contravene workplace law, especially where this has occurred on a deliberate, rather than an unwitting, basis. While there is no conclusive data on the precise levels of employer non-compliance in Australia, there is anecdotal evidence to suggest that workplace contraventions continue to be both significant and persistent.[9]

Next, the article turns to some of the challenges facing regulators, such as the FWO, which is charged with responsibility for upholding the rights and obligations arising under the Fair Work Act 2009 (Cth) (FW Act).[10] Sections 3 and 4 argue that some of the enforcement challenges faced by the FWO may

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Insecure Work, due to report by 31 July 2016 (Victorian Inquiry); South Australian Government, Economic and Finance Committee, Inquiry into Labour Hire Industry, established on 11 June 2015.

5 Enforceable Undertaking between the Office of the Fair Work Ombudsman and Coles Supermarkets Australia Pty Ltd, 6 October 2014; Proactive Compliance Deed between the Office of the Fair Work Ombudsman and Baiada Poultry Pty Ltd and Bartter Enterprises Pty Ltd, 23 October 2015.

6 See, eg, Woolworths Ltd, *Ethical Sourcing Policy*, at <http://www.woolworthslimited.com.au/icms_docs/136824_Woolworths_Limited_Ethical_Sourcing_Policy.pdf> (accessed 18 April 2016).

7 G Davidov, 'Indirect Employment: Should Lead Companies be Liable?' (2015) 37 *Comp Lab L & Pol'y J* 5; B Rogers, 'Toward Third-Party Liability for Wage Theft' (2010) 31 *Berkeley Journal of Employment & Labor Law* 1.

8 D Weil, 'Crafting a Progressive Workplace Regulatory Policy: Why Enforcement Matters' (2007) 28 *Comp Lab L & Pol'y J* 125 at 138.

9 For example, in the last financial year, the Office of the Fair Work Ombudsman (FWO) received more than 25,000 complaints from workers and recovered $22.3 million for over 11,000 workers. Further, of the 4564 audits which were undertaken by the FWO as part of targeted campaigns in 2014–15, more than one-third of all businesses across a range of industries and regions were found to be noncompliant with workplace laws. Fair Work Ombudsman, *Annual Report 2014–15*, Australian Government, Melbourne, at 21 and 28.

10 While this article focuses on the difficulties faced by the FWO, many of the challenges which are identified in this article also apply with respect to trade unions. For further discussion of the enforcement role of trade unions, see T Hardy and J Howe, 'Partners in Enforcement? The New Balance between Government and Trade Union Enforcement of Employment Standards in Australia' (2009) 23 *AJLL* 306; I Landau et al, *Trade Unions and the Enforcement of Minimum Employment Standards in Australia*, Research Report, Centre for Employment and Labour Relations Law, University of Melbourne, 2014.

be exacerbated by practical and legal barriers which make it more difficult to effectively sanction and deter the person or entity driving the compliance behaviour.[11] The latter half of this article considers a range of ways in which lead firms have been held liable under alternative regulatory models adopted in Australia and elsewhere. It is not intended that this overview of different approaches is in any way exhaustive or complete. Rather, the article focuses on discrete and contrasting liability models to illustrate the potential and possible pitfalls of departing from more traditional enforcement approaches and paradigms. The article concludes with a preliminary assessment of the utility and viability of statutory additions and alterations.

Before beginning this analysis, it is first necessary to explain what is meant by 'lead firms' in the context of this article. Broadly-speaking, the term lead firm has been used to refer to '[l]arge businesses with national and international reputations operating at the top of their industries'.[12] Lead businesses are also seen to set 'significant product, performance, quality, and/or delivery standards on a network of other, usually smaller business entities operating in competitive markets'.[13] The various descriptions of lead firms are generally designed to capture those companies which sit at the top of a supply chain, the head of a corporate group or the apex of a franchise network.[14] In practice, however, identifying the relevant lead firm may not be straightforward. In some contexts, there may be more than one lead firm and they may not necessarily be positioned at the end of a supply chain. In relation to franchise relationships or triangular work arrangements, identifying the relevant lead firm (or firms) may be complicated by the fact that the franchisor or the client/host business is part of a larger corporate group. While it is important to acknowledge these factual complexities, it is equally critical to recognise that exploring alternative liability models is not necessarily conditional on developing a precise definition of 'lead firm'. Rather, as a first step, it is preferable to focus, as this article seeks to do, on the normative and instrumental basis on which liability is ascribed to entities beyond the direct employer.

II Drivers of employer noncompliance with employment standards

Historically, many regulators, policy-makers and commentators in Australia had assumed that 'the vast majority of employers are law abiding and fair except for an aberrant few . . . Such law breaking is likely to be explained as

11 The literature on the changing nature of the employment relationship and the challenges this poses for traditional forms of regulation is vast. See, eg, R Johnstone et al, *Beyond Employment: The Legal Regulation of Work Relationships*, Federation Press, Sydney, 2012.

12 D Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*, Harvard University Press, Cambridge, 2014, p 8. While many lead firms operate on a multinational basis, this article is especially focused on the liability of companies which are incorporated, and/or predominantly located in Australia.

13 D Weil, *Improving Workplace Conditions through Strategic Enforcement: A Report to the Wage and Hour Division*, US Department of Labour, Boston, 2010, at 49.

14 Private equity companies could also be classified as lead firms in some contexts, however, consideration of their role goes beyond the scope of this article. But see, J Prassl, *The Concept of the Employer*, Oxford University Press, Oxford, 2015, ch 2.

a moral evil rather than as a consequence of structural factors'.[15] However, it is increasingly difficult to sustain such assumptions in the face of growing evidence which suggests that the compliance behaviour of employers, and the increasing fragmentation of the traditional employment relationship, are often shaped by industry dynamics. In light of these trends, Professor David Weil, a United States (US) economist who currently leads the Wages and Hours Division (WHD) of the US Department of Labor, has developed a model of 'strategic enforcement' which essentially encourages regulators to 'pursue strategies that focus at the top of industry structures, on the companies that affect how markets operate and many of the incentives that ultimately affect compliance'.[16]

Indeed, it is unlikely to be a matter of mere coincidence that the cases which have been the subject of recent and intense public scrutiny — including those involving the Baiada Group[17] and 7-Eleven[18] — all display a set of common features. Despite their obvious differences, the specific sectors in which these cases arose, namely horticulture, food processing and convenience store franchises, appear to be characterised by intense price pressures, a concentration of market power in a limited number of lead firms and small and geographically dispersed employers, including labour hire providers and franchisees. Indeed, the strength of market power in the horticulture, food and grocery and franchise sectors is such that these three industries are subject to a specific code of conduct administered by the Australian Competition and Consumer Commission (ACCC).[19] These sectors are also characterised by a large proportion of vulnerable workers, including many temporary foreign workers, and relatively low levels of unionisation. Further, in all these sectors, key conditions of employment — such as recruitment, training, pay, working hours, supervision, performance monitoring and termination — may be determined and/or implemented by multiple organisations as a result of subcontracting, outsourcing, labour hire or franchising. These 'fissured'[20] forms of employment are not confined to the sectors identified above. While the problems identified in recent investigations are somewhat extreme, they are not necessarily exceptional. Rather, fragmented work structures appear to have become relatively common throughout the Australian labour market and can be seen in a diverse range of sectors that includes construction, cleaning,

15 L Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law*, Law Book Co, Sydney, 1994, p 151.
16 Weil, above n 13, at 3.
17 The Baiada Group — which includes Baiada Poultry Pty Ltd and Bartter Enterprises Pty Ltd — is the biggest poultry processing corporate group in Australia with a market share of more than 20%. It supplies many of its chickens to leading brands, including Coles, Woolworths, McDonald's and KFC.
18 In Australia, 7-Eleven Stores Pty Ltd — a private, family-owned company — has a license to operate and franchise 7-Eleven stores. The Australian arm of the 7-Eleven franchise currently operates over 600 stores. Internationally, the 7-Eleven brand is currently owned by a Japanese holding company, Seven & I Holdings Co Ltd.
19 See Horticulture Code of Conduct; Franchising Code of Conduct; Food and Grocery Code of Conduct. These codes are made under s 51AD of the Competition and Consumer Act 2010 (Cth) (CCA).
20 Weil, above n 12.

security and hospitality, among many others.[21]

While many of the so-called fissured forms of work are present in Australia, whether they also result in work that leads to contraventions of employment standards, may depend on a raft of other factors, such as: the nature and terms of the contract between the lead organisation and the employing company, the size and assets of the direct employer (for example, the subsidiary, the labour hire firm, the subcontractor or the franchisee) and/or the extent to which the company otherwise has a viable business that is independent of the lead organisation.[22]

Although it is important to bear these qualifications in mind, there seems to be at least some evidence that fissuring is now a feature of the Australian labour market and these working arrangements may be perpetuating some of the issues of employer noncompliance and magnifying some of the challenges of enforcement discussed in Section 3 below.[23] For example, the cases highlighted above suggest that in those industries where the fissuring of employment is most advanced, worker exploitation is also more likely.[24] Indeed, workplace contraventions are not only more prevalent in specific sectors, they also appear to be more pronounced among certain segments of the workforce, including temporary migrant workers,[25] and small businesses generally.[26]

Second, as a result of the dissolution of the traditional binary relationship between employer and employee, responsibility for workplace conditions (and workplace contraventions) has become 'blurred'.[27] Indeed, while subcontracting, outsourcing and franchising are all legitimate and distinct business strategies, the fragmentation of corporate structures and working arrangements into loosely connected networks underlines the limits of the existing legal framework, and poses significant challenges for ensuring

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21 Fair Work Ombudsman, *Sham Contracting and the Misclassification of Workers in the Cleaning Services, Hair and Beauty and Call Centre Industries: Report on the Preliminary Outcomes of the Fair Work Ombudsman Sham Contracting Operational Intervention*, Australian Government, Sydney, 2011; Fair Work Building and Construction, *Working Arrangements in the Building and Construction Industry*, Australian Government, Canberra, 2012 (FWBC Report); B Howe et al, *Lives on Hold: Unlocking the Potential of Australia's Workforce*, The Independent Inquiry into Insecure Work in Australia, ACTU, Melbourne, 2012.

22 R Johnstone and A Stewart, 'Swimming Against the Tide? Australian Labour Regulation and the Fissured Workplace' (2015) 37 *Comp Lab L & Pol'y J* 55 at 59.

23 See, eg, Fair Work Ombudsman, *A Report on the Fair Work Ombudsman's Inquiry into the Labour Procurement Arrangements of the Baiada Group in New South Wales*, Australian Government, Canberra, 2015 (FWO Baiada Inquiry).

24 Ibid.

25 In 2014–15, migrant workers were involved in 42% of the FWO's civil penalty litigations, close to half of enforceable undertakings signed, and around one-third of compliance and infringement notices issued. See, Productivity Commission, *Workplace Relations Framework,* Inquiry Report No 76, Australian Government, Canberra, 2015, at 918 (Productivity Commission Report).

26 For example, in the National Building and Construction Industry Campaign 2014–15, the audits undertaken by the FWO found that businesses with 14 or fewer employees had a 57% compliance rate, while those with 15 or more employees had a 68% compliance rate. See Fair Work Ombudsman, *National Building and Construction Industry Campaign Report 2014/15*, Australian Government, Canberra, 2015.

27 Weil, above n 12, p 7.

compliance with minimum employment standards.[28] It arguably does more than shift legal responsibility for employment-related entitlements to independent third parties. Rather, it potentially allows lead firms 'to avoid noncompliance risks while benefitting from labour at a price discounted by the lower probability of enforcement'.[29]

III An overview of key compliance and enforcement challenges

The shifts in the structures of work organisation summarised above create difficulties for regulators seeking to uphold minimum employment standards. In an era of limited resources, the detection of employer noncompliance is difficult and burdensome. Vulnerable employees, particularly those in low-wage industries, engaged under precarious or unlawful arrangements or working in regional or remote areas, may be reluctant or incapable of raising a complaint about their working conditions because of fear, ignorance or both.[30] Further, employment records may not be created or maintained, particularly where piece rate work is involved.[31] Inspector access to workers and records may be resisted by the employers and/or the owners of worksites.[32] Indeed, the forensic nature of the investigations into 7-Eleven — where employment records were manipulated in a way that disguised the real number of hours worked — underlines the difficulties that public and private regulators face in seeking to piece together an accurate and comprehensive picture of the relevant working reality.[33]

Even where employer noncompliance can be successfully identified, the subsequent enforcement litigation — the traditional way in which regulators achieve compliance, deterrence and compensation — may be derailed by problems of proof, particularly where employment records are absent and witnesses are reluctant to provide oral testimony. Formal court proceedings may be further undermined by the doctrine of limited liability, deliberate asset-shifting and so-called 'phoenix' behaviour.[34] The string of investigations into, and cases brought against, a raft of separate 7-Eleven franchisees

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28 R Johnstone, 'Regulating Occupational Health and Safety in a Changing Labour Market' in C Arup et al, *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships*, Federation Press, Sydney, 2006, p 617.

29 T Glynn, 'Taking the Employer Out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation' (2011) 5 *Emp Rts & Emp Pol'y J* 101 at 112.

30 C Wilson, 'Calls for Mandatory Employment Education Program for International Workers as Underpaid 7-Eleven Workers Receive Backpay', *ABC News*, 15 February 2016; N Woodley, '7-Eleven Workers Physically Intimidated and Beaten, Senate Inquiry Hears', *ABC News*, 5 February 2016; S Howells, *Report of the 2010 Review of the Migration Amendment (Employer Sanctions) Act 2007*, Department of Immigration and Citizenship, Canberra, 2010, at 54 (Howells Report).

31 Fair Work Ombudsman, *Horticulture Industry Shared Compliance Program 2010*, Australian Government, November 2010, at 12.

32 FWO Baiada Inquiry, above n 23, at 2.

33 Fair Work Ombudsman, *7-Eleven Franchisee Admits Doctoring Records and Underpaying Workers to Cut Operating Costs*, Media Release, 1 September 2015.

34 H Anderson, *The Protection of Employee Entitlements in Insolvency: An Australian Perspective*, University of Melbourne Press, 2014, ch 1.

illustrates some of these problems.[35] For instance, last year, the former operator of a 7-Eleven store was fined $6970 after it was found that a temporary foreign worker had been underpaid more than $21,000. The corporate employer was not fined because it had been wound up prior to final determination of the matter and the action against it was stayed.[36] As a result of the fact that the employer entity was effectively judgment-proof, the former owner was liable for a much reduced penalty amount and the former employee was left substantially out of pocket.[37] Similar issues were encountered in the Baiada case. In the course of the inquiry undertaken by the FWO, a large number of employer entities and subcontractors ceased trading. The effect of this systematic company collapse was to make the relevant entities immune to enforcement proceedings and the imposition of compensatory orders and pecuniary penalties.[38]

Indeed, an inherent limitation of traditional enforcement litigation is its focus on the direct employer entity. In light of the breakdown in the binary employment relationship discussed in Section 2 above, it is no longer readily apparent that punishment of the putative employer will be effective in addressing some of the key drivers of compliance behaviour, which may be determined by more powerful firms positioned higher in the supply chain or at the apex of the franchise network.[39]

For example, the FWO inquiry into the Baiada Group found that plant workers — many of whom were on working holiday visas and sourced through a complex chain of labour hire agents — were being routinely underpaid and forced to work long and arduous hours. While the FWO acknowledged that contracting out labour can be a convenient and legitimate business strategy, the regulator also recognised that competitive procurement processes and poor governance arrangements can (and did) combine to create an environment ripe for worker exploitation. This inquiry also highlighted that the questionable business practices of the Baiada Group may itself be linked, at least in part, to the fact that over half of Baiada's products were purchased by supermarkets and that '[i]ntensive discounting undertaken by the major supermarkets [may] have placed downward pressure on profit margins in the industry which has led to diminished profits at the processing level'.[40]

Similarly, in the 7-Eleven case, there was some evidence which supported the view that noncompliance with workplace laws was systemic and sustained within the 7-Eleven franchise network.[41] Professor Allan Fels — the former head of the ACCC — has previously noted that, in his view, the 7-Eleven 'business model will only work for the franchisee if they underpay or

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35 Fair Work Ombudsman, above n 33.
36 *Fair Work Ombudsman v Haider Pty Ltd* [2015] FCCA 2113.
37 Under the FW Act, natural persons are liable for a maximum penalty which is one-fifth of the penalty set for corporations.
38 FWO Baiada Inquiry, above n 23.
39 See Weil, above n 12, ch 1.
40 R Lin, 'Poultry Processing in Australia', *IBISWorld Pty Ltd*, February 2014, cited in FWO Baiada Inquiry, above n 23.
41 A Ferguson, S Danckert and K Toft, '7-Eleven: A Sweatshop on Every Corner', *Sydney Morning Herald*, 29 August 2015.

overwork employees'.[42] The Australian franchisor of the 7-Eleven chain, 7-Eleven Stores Pty Ltd, has continued to dispute the assertion that the franchise system is not financially viable. However, in the wake of the scandal, the franchisor has set up an independent panel to receive and process any claims from employees of its franchisees.[43] It has also changed key aspects of its business model, enhanced its monitoring of franchisees and has begun terminating agreements with wayward franchisees.[44]

The positive steps which have been taken by the 7-Eleven head office in the wake of the media scandal, and the various measures implemented by the Baiada Group since the conclusion of the FWO Inquiry, appear to demonstrate the power of informal sanctions, such as consumer disapproval and adverse publicity. Indeed, previous research, including Weil's model of strategic enforcement, suggest that reputational-based sanctions can prompt significant changes in compliance behavior beyond the relevant firm, particularly where companies have experienced a regulatory crisis.[45] On the basis of a growing awareness of the power of reputational concerns, and the strategic enforcement model more generally, the FWO has experimented with a whole raft of initiatives which are designed to harness the position, power and resources of lead firms. In this respect, the FWO has recently commented that if they:

> find a business underpaying workers and the business is part of a franchise or supply chain, we will look up to the business at the top, the franchisor, principal or purchaser, because they are the price-makers and they control the settings.[46]

Indeed, in the past few years, the FWO has successfully encouraged a variety of lead firms to voluntarily commit to take steps to ensure that employer businesses throughout the franchise network, corporate group or supply chain comply with their workplace obligations. These commitments have taken a range of different forms, including enforceable undertakings, proactive compliance deeds (now known as compliance partnerships), the National Franchise Program and public inquiries.[47]

While these new techniques may mitigate some of the underlying problems

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42 A Ferguson, S Danckert and K Toft, '7-Eleven: Allan Fels says Model Dooms Franchisees and Workers', *Sydney Morning Herald*, 31 August 2015.

43 Evidence to Senate Inquiry, Parliament of Australia, Melbourne, 20 November 2015, at 9 (Dr David Cousins, Panel Member, Fels Wage Fairness Panel).

44 In December 2015, 7-Eleven Stores Pty Ltd entered into a variation agreement with virtually all franchisees whereby it was agreed that the existing financial arrangements between the franchisor and franchisees would be adjusted in favour of franchisees. Evidence to Senate Inquiry, Parliament of Australia, Melbourne, 5 February 2016, 18 (Robert Baily, Chief Executive Officer, 7-Eleven Stores Pty Ltd).

45 C Parker and V Lehmann Nielsen, 'How Much Does it Hurt? How Australian Businesses Think About the Costs and Gains of Compliance and Noncompliance with the Trade Practices Act' (2008) 32 *MULR* 555 at 597.

46 N James, *A Compliant Supply Chain is Everyone's Business*, Media Release, 10 March 2016.

47 The FWO's 'inquiries' are designed to identify and address the structural and behavioural drivers that lead to serious widespread noncompliance: Fair Work Ombudsman, above n 9, at 31. For discussion of some of the other voluntary initiatives, see T Hardy and J Howe, 'Chain Reaction: A Strategic Approach to Addressing Employment Noncompliance in Complex Supply Chains' (2015) 57 *J Ind R* 563; T Hardy, 'Brandishing the Brand: Enhancing Employer Compliance through the Regulatory Enrolment of Franchisors', paper presented at the *Labour Law Research Network Conference*, Amsterdam, 25–27 June 2015.

that plague conventional compliance and enforcement techniques, which centre on the direct employer of workers, there are some potential obstacles to this approach. In particular, the existing regulatory enforcement literature suggests that to induce or compel lead firms and franchisors to commit to these types of voluntary initiatives, particularly in the longer term, it is necessary to have sufficient positive and/or negative incentives.[48] Without the relevant 'fear factor', however, it is not clear how the regulator can effectively leverage lead firms and others to commit to 'softer', self-regulatory measures.[49] The next section considers the extent to which the current FW Act provides the necessary incentives to support and sustain third party commitment to workplace compliance throughout the supply chain, corporate group or franchise network.

IV Ascribing liability under the Fair Work Act 2009

Many of the protections and entitlements under the FW Act apply only to 'employees' as defined at common law. A general premise of the FW Act is that a binary and direct employment relationship is in existence. As noted above, this statutory foundation is potentially compromised by the fact that it is not now uncommon for multiple organisations to be involved in shaping key working conditions. Further, the common law test for distinguishing between employees and independent contractors is somewhat uncertain in light of some recent, and not wholly consistent, decisions of the Full Court of the Federal Court.[50] In the past, these nuanced differences and distinctions were perhaps less consequential for the economy given that the boundaries of the firm were more concrete. However, as Weil points out, the 'more the workplace has fissured, the more the subtleties raised by definitions of employment matter'.[51]

In addition, it is arguable that laws which were originally intended to protect workers from exploitation are now being used to perpetuate such problems 'by focusing regulatory attention on the wrong parties'.[52] By positioning the direct employer entity as the primary wrongdoer, the civil remedy regime established under the FW Act does not fully account for the profound transformations to Australian workplaces. In this respect, Weil argues that:

> The failure of public policy makers to fully appreciate the implications of how major sectors of the society organize the production and delivery of services and products means that lead businesses are allowed to have it both ways. Companies can

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48 See generally I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, New York, 1992.

49 C Wright and W Brown, 'The Effectiveness of Socially Sustainable Sourcing Mechanisms: Assessing the Prospects of a New Form of Joint Regulation' (2013) 44 *Industrial Relations Journal* 20.

50 *On Call Interpreters & Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* (2011) 214 FCR 82; 206 IR 252; [2011] FCA 366; *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146; 235 IR 115; [2013] FCAFC 3; cf Jessup J in *Tattsbet Ltd v Morrow* (2015) 233 FCR 46; 249 IR 440; [2015] FCAFC 62.

51 Weil, above n 12, pp 185–6.

52 Ibid, p 4.

> embrace and institute standards and exert enormous control over the activities of subsidiary bodies. But they can also eschew any responsibility for the consequences of that control.[53]

The principal statutory mechanism by which to address the problem identified by Weil are the accessorial liability provisions of the FW Act, which provide that persons found to be ‘involved in’ a contravention of the Act may be liable under a civil remedy provision, even where they are not the direct employer of the worker whose rights have been breached. Broadly-speaking, a person will be taken to be ‘involved in’ a contravention if the person has:

(a) aided, abetted, counselled or procured the contravention; or
(b) induced the contravention (whether by threats or promises or otherwise); or
(c) been in any way, by act or omission, ‘knowingly concerned’ in the contravention; or
(d) conspired with others to effect the contravention.[54]

While contraventions of minimum employment standards normally give rise to strict liability in respect of the principal wrongdoer (that is, the employer entity), this is not the case for accessories. Rather, accessorial liability regimes operating under civil law generally require that the accessory was intentionally and knowingly concerned in the contravention.[55]

Previous cases suggest that the accessory needs to have actual knowledge of the essential matters constituting the contravention. Identifying the essential elements in such cases is not necessarily straightforward.[56] Determining the precise level of knowledge is also complicated. Actual knowledge is said to include ‘wilful blindness’ but does not generally encompass ‘recklessness or negligence’.[57] Although imputed or constructive knowledge is not sufficient in this context,[58] it is also accepted that actual knowledge can be inferred from the relevant surrounding circumstances and that the accessory need not know that the conduct constituted a contravention.[59]

These provisions have most often been used by the FWO, among others, to hold directors and senior managers liable for contraventions committed by the employer corporations for which they are (or were) responsible.[60] There have only been a handful of cases in which the FWO has sought to use s 550 against

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53 Ibid, p 14.
54 FW Act s 550.
55 *Yorke v Lucas* (1985) 158 CLR 661 at 670; 61 ALR 307 at 312; 59 ALJR 776; See also *Fair Work Ombudsman v McGrath* (2010) 195 IR 190; 239 FLR 313; [2010] FMCA 315 at [23].
56 See *Fair Work Ombudsman v Devine Marine Group Pty Ltd* (2015) 234 FCR 122; [2015] FCA 370 at [189]–[192]; *Potter v Fair Work Ombudsman* [2014] FCA 187; cf *Fair Work Ombudsman v Liquid Fuel Pty Ltd* [2015] FCCA 2694 *(Liquid Fuel).*
57 *Keller v LED Technologies Pty Ltd* (2010) 185 FCR 449; 87 IPR 1; [2010] FCAFC 55 at [335].
58 *Giorgianni v R* (1985) 156 CLR 473; 58 ALR 641; 2 MVR 97; *Young Investments Group Pty Ltd v Mann* (2012) 293 ALR 537; 91 ACSR 89; [2012] FCAFC 107 at [11].
59 *Yorke v Lucas* (1985) 158 CLR 661 at 670; 61 ALR 307 at 312; 59 ALJR 776; *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53; 203 ALR 217; [2003] HCA 75 at [48]; *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd (No 2)* (1999) 95 FCR 302; 166 ALR 74; [1999] FCA 1161 at [186].
60 See, eg, *Fair Work Ombudsman v Oz Staff Career Services Pty Ltd* [2016] FCCA 105.

a separate corporation which is said to be 'involved in' a contravention of the direct employer. In terms of lead firm liability, one of the most significant proceedings so far has been the litigation brought by the FWO against Coles Supermarkets Australia Pty Ltd (Coles).[61] In this case, the FWO alleged that at least 10 trolley collectors working at several Coles sites were underpaid approximately $200,000. The affected trolley collectors were engaged through three tiers of contracts.[62]

While there was no direct legal relationship between either Coles and the relevant subcontractors that had employed the workers (that is, the primary wrongdoers) or Coles and the relevant trolley collecting employees (that is, the victims of wrongdoing), the FWO argued that the supermarket chain should be held liable on the basis that it was 'involved in' the contraventions. Ultimately, the substantive issues raised by the Coles case were not fully resolved as the case was cut short after the FWO entered into an enforceable undertaking with the supermarket retailer.[63] Notwithstanding this outcome, the FWO continued to pursue proceedings against the head contractors and their directors in respect of these underpayment contraventions, and significant penalties were recently imposed against the relevant respondents.[64] While this decision remains significant — at least symbolically — it is of somewhat limited value in terms of clarifying the way in which accessorial liability provisions may apply to complex supply chains. In particular, the relationship between the head contractor and the subcontractors was not necessarily typical of a commercial, arms-length, contractual arrangement.[65] Moreover, the case was not fully argued and a default judgment was ultimately entered.[66]

However, a separate Federal Court case — also involving the underpayment of trolley collectors under a string of separate contracts — has provided a more authoritative analysis in this respect.[67] In this particular case, Coles Group Pty Ltd and Woolworths Ltd entered into separate head contracts with Integrated Trolley Management Pty Ltd (ITM) for the provision of trolley

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61 See, eg, *Fair Work Ombudsman v Al-Hilfi* [2012] FCA 1166; *Fair Work Ombudsman v Al-Hilfi (No 2)* [2013] FCA 16.

62 In particular, the trolley collecting workers were employed by third-tier trolley collection service providers, namely Mr Al Hilfi and Mr Al Basry.

63 For further discussion of this undertaking and other relevant outcomes, see Hardy and Howe, above n 47. See also Coles Supermarkets Australia Pty Ltd, *Annual Report Pursuant to the Enforceable Undertaking between the Commonwealth of Australia as Represented by the Office of the Fair Work Ombudsman and Coles Supermarkets Australia Pty Ltd*, 3 November 2015, at <www.fairwork.gov.au/ArticleDocuments/884/coles-report-eu.pdf.aspx> (accessed 18 April 2016).

64 *Fair Work Ombudsman v Al Hilfi* [2016] FCA 193.

65 The relevant subcontractors and putative employers, Mr Al Hilfi and Mr Al Basry, were themselves former employees of the head contractor. These individuals did not speak or read English fluently and relied heavily on the head contractor (and the senior officers) in conducting their business and providing the trolley collection services. These circumstances may have made it easier to satisfy the knowledge requirement under s 550 of the FW Act and may partly explain why pecuniary penalties and compensation orders were not sought against the direct employers, albeit court declarations were made. See *Fair Work Ombudsman v Al Hilfi* [2015] FCA 313.

66 *Fair Work Ombudsman v Al Hilfi* [2015] FCA 313.

67 *Fair Work Ombudsman v South Jin Pty Ltd* [2015] FCA 1456 (*FWO v South Jin*).

collection services at a number of sites. ITM subsequently entered into subcontracts with Coastal Trolley Services Pty Ltd (CTS) for the provision of the relevant services. In turn, CTS subcontracted the work to South Jin Pty Ltd (South Jin) — it was this last company which actually employed the trolley collectors and was the primary wrongdoer in this case.

In order to succeed in this instance, it was necessary for the FWO to establish that there was a 'practical connection'[68] between the so-called CTS Respondents (that is, the interposed contractor and its director, Mr Stroop) and the underpayment contraventions committed by the now defunct employer entity.[69] Rather than attempting to establish that CTS had knowledge of the hours being worked by each particular employee or that each employee was being underpaid by the direct employer, the FWO submitted that the CTS Respondents had the requisite knowledge for the purposes of the accessorial liability provisions:

> because they must have known, and did actually know, that the amounts CTS were paying to South Jin were insufficient to allow it to comply with its statutory and award obligations with respect to wages and other entitlements.[70]

In making this submission, the FWO placed considerable reliance on the so-called 'effective hourly rate' that CTS paid to South Jin in relation to each of the relevant sites, which was calculated by dividing the contract price by the number of hours set out on the 'indicative roster' for each site.[71] The effective hourly rate was nearly always less than the applicable minimum rates of pay. While the relevant calculations were adjusted by the court,[72] the overall approach adopted by the FWO was ultimately accepted. Accordingly, White J concluded that the CTS Respondents were liable as accessories — at least in respect of certain key periods.[73] At these relevant times, it was held that the CTS Respondents had the requisite knowledge and intention in so far that they had 'encouraged and expected South Jin to continue to provide trolley collection services, despite the inadequate payments to it'.[74]

Although this case provides a critical examination of accessorial liability arising under the FW Act, it is not necessarily conclusive in relation to all relevant issues arising in relation to the scope and operation of these statutory

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68 Ibid, at [227]; citing with approval *Qantas Airways Ltd v Transport Workers' Union of Australia* (2011) 211 IR 1; 280 ALR 503; [2011] FCA 470; *Construction, Forestry, Mining and Energy Union v Clarke* (2007) 156 FCR 291; 159 IR 450; [2007] FCAFC 8.

69 The essential elements of the relevant contravention depended on when the underpayment was said to have occurred (that is, before or after the commencement of the *Cleaning Services Award 2010 [MA000022]* (at 1 January 2010)).

70 *FWO v South Jin* [2015] FCA 1456 at [327].

71 Ibid, at [345].

72 The calculations of the 'effective hourly rate' were adjusted by the court on the basis that it was possible for South Jin to perform its contracts with fewer hours than that set out in the indicative roster: ibid, at [355].

73 As a result of the introduction and later variation of the *Cleaning Services Award 2010*, the minimum employment entitlements which applied to the trolley collectors changed a number of times over the period in which it was alleged the workers were underpaid. This meant that there were a number of discrete periods where the FWO was not able to successfully prove that CTS had knowledge of the requisite underpayments based on the adjusted 'effective hourly rate' which applied at the particular time: ibid, at [370]–[373].

74 Ibid, at [375].

provisions. While the FWO was successful in these proceedings, at least in part, this case set a fairly high bar in relation to the knowledge requirement. Accordingly, it remains uncertain as to whether contractors higher in the supply chain, which may be further removed from the relevant employees, will be caught by these provisions. It is quite possible that the greater legal or practical separation between the alleged accessory and the affected workers would make it even more difficult to obtain probative evidence to prove that the accessories had the requisite level of knowledge of particular facts at a point in time.

It also continues to be unclear to what extent the accessorial liability provisions may be successfully applied to other types of fragmented work arrangements, such as labour hire and franchises.[75] While this decision confirmed that the knowledge of an officer of a corporation may be imputed to a corporation,[76] questions remain about the extent to which it is possible to aggregate the knowledge of multiple officers in larger companies — a pivotal issue in relation to the potential accessorial liability of lead firms.[77] Finally, and perhaps most critically, the decision in *FWO v South Jin* did not deal with the circumstances in which a contractor's omission to act may constitute conduct giving rise to accessorial liability, although the Court did confirm that 'not every deliberate failure to make enquiry . . . will support the inference of actual knowledge'.[78]

The FWO has been taking active steps in the past 12 months to resolve some of these uncertainties by instituting a number of test cases under the accessorial liability provisions.[79] It is difficult to overstate the importance of these recent and ongoing proceedings. In particular, it is only with judicial clarification that we will have a firm sense of whether the accessorial liability provisions under the FW Act are sufficiently flexible to tackle some of the most pressing problems identified in Section 2 above. In the event that the courts take a relatively narrow approach to some or all of the issues identified

75 There have been a number of previous, albeit unsuccessful, attempts at applying these principles to labour hire arrangements involving foreign workers, see *Fair Work Ombudsman v Pocomwell Ltd (No 2)* (2013) 218 FCR 94; 239 IR 297; [2013] FCA 1139; *Fair Work Ombudsman v Valuair Ltd (No 2)* (2014) 224 FCR 415; [2014] FCA 759. Further, it appears that, as yet, there have been no cases which have considered whether a head franchisor may be liable under s 550 for franchisee contraventions of civil remedy provisions of the FW Act, particularly in relation to wage-related matters. But see *United Voice v MDBR123 Pty Ltd* [2014] FCA 1344 and *United Voice v MDBR123 Pty Ltd (No 2)* [2015] FCA 76, which considered the extent to which a director of the head franchisor was liable under s 550 for contraventions of the adverse action provisions by one of its franchisees.

76 The court found that, in the circumstances of this case: it was not necessary to distinguish between CTS and its director, Mr Stroop; and Mr Stroop's knowledge could be imputed to CTS: *FWO v South Jin* [2015] FCA 1456 at [235].

77 See I Taylor and L Andelman, 'Accessorial Liability under the Fair Work Act', paper presented at the *Australian Labour Law Association Conference*, Manly, 14–15 November 2014.

78 *FWO v South Jin* [2015] FCA 1456 at [232]. For further analysis of principles relating to 'wilful blindness', at least as applied to individual officeholders, see *Liquid Fuel* [2015] FCCA 2694 at [71]–[90].

79 See Fair Work Ombudsman, *Security Company Fined over $60,000*, Media Release, 20 November 2015; Fair Work Ombudsman, *Probe into MCG Supply Chain Finds Alleged Exploitation of Visa-Holders Working as Cleaners,* Media Release, 7 January 2016.

above, it may be that further statutory reform is required.

However, even if it can be successfully argued that, as an accessory, a lead firm should be held liable for the full extent of the harm suffered by the claimant,[80] it is not clear that the remedies currently available under the FW Act would be sufficient to deliver the necessary deterrence to support a strategic or responsive model of enforcement. First, and in striking contrast to the criminal basis of the work health and safety legislation, there is very limited capacity to seek criminal penalties under the FW Act,[81] even where the contravening behaviour is viewed as egregious.[82] In addition, the maximum pecuniary penalties which are available under the FW Act are much lower than those available under other civil penalty regimes.[83] Another shortcoming is that, unlike the ACCC, there is no capacity for the FWO to seek incapacitation or disqualification orders against the corporate employer or relevant officeholders respectively.[84] This problem is potentially exacerbated by the fact that there is no licensing regime which applies to employers generally or to specific groups of employers, such as labour hire agencies. Incapacitation and disqualification orders, including suspension or refusal of a license, are often viewed as an alternative way in which to address the fact that the deterrence effects of pecuniary penalties are clearly compromised in the face of employer firms that are effectively judgment-proof.[85]

That said, it is quite possible that a number of these limitations, among others,[86] may be addressed in future legislative reforms at the conclusion of various government inquiries, if not before.[87] While these slated amendments may deal with some of the more immediate issues discussed above, they do not necessarily combat the more fundamental question of how to effectively prompt and sustain lead firm commitment to workplace relations compliance.

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80 Historically, the FWO has generally not applied to have compensation orders awarded against third party accessories, as it has taken the view that such orders are only available against the relevant employer entity. However, the FWO has recently changed its position in this respect and is currently seeking to confirm that compensation orders, as well as pecuniary penalties, can be sought against alleged accessories: *Fair Work Ombudsman v Nobrace*, filed on 31 August 2015; *Fair Work Ombudsman v Step Ahead Securities,* filed on 14 September 2015. See also H Anderson and J Howe, 'Making Sense of the Compensation Remedy in Cases of Accessorial Liability under the Fair Work Act' (2012) 36 *MULR* 335.

81 But see FW Act ss 674–678. Compare Work Health and Safety Act 2011 (Cth) s 230.

82 See, eg, *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* [2012] FCA 408.

83 Maximum monetary penalties for most civil remedy provisions under the FW Act are currently set at $54,000 for a corporation and $10,800 for an individual; cf CCA s 76(1A).

84 Compare Corporations Act 2001 (Cth) s 206C.

85 Rogers, above n 7, at 21.

86 The sham contracting provisions (FW Act ss 357–359) may be equally ripe for reform. Various inquiries have recommended that s 357(2) be modified so that the 'recklessness' defence is replaced with a 'reasonableness' defence: see, eg, Productivity Commission Report, above n 25, Recommendation 25.1. See also C Roles and A Stewart, 'The Reach of Labour Regulation: Tackling Sham Contracting' (2012) 25 *AJLL* 258.

87 The introduction of a licensing scheme is being expressly contemplated by various state inquiries, including the Victorian Inquiry, above n 4. See also Fair Work Amendment (Protecting Australian Workers) Bill 2016 (Cth); and 'Labor Bill to Seek to Boost Protections for Visa Workers', *Workplace Express*, 25 February 2016.

V Alternative regulatory approaches from within Australia

The fragmentation of the employment relationship and the compliance and enforcement challenges it presents have elicited a number of distinctive regulatory responses in another area of labour regulation (that is, work health and safety laws) and in relation to specific forms of fissured work (that is, complex supply chains in the textile, clothing and footwear (TCF) industry). These alternative models provide a point of comparison to key aspects of the FW Act discussed above.

(a) Work Health and Safety Regulation

The harmonised Work Health and Safety (WHS) Acts evidence a deliberate and drastic move away from the traditional employment paradigm, which had proved to be increasingly problematic.[88] Instead, under the WHS Acts, 'primary' responsibility is placed on 'a person conducting a business or undertaking' (PCBU) to ensure, so far as is reasonably practicable, the health and safety of 'workers' and 'other persons'.[89] The definition of a PCBU includes not just employers, but also principal contractors, head contractors, franchisors and the Crown.[90] Similarly, the term 'worker' is defined widely as including any person who carries out 'work in any capacity for' a PCBU, including work as: a contractor; a subcontractor; an employee of a labour hire company; an outworker; and a volunteer.[91]

Another important feature of the WHS Acts is that they impose duty-based liability, as compared to strict liability. Further, the relevant duty provisions are designed to deal with what is sometimes referred to as 'counterproductive liability avoidance'[92] — that is, where firms seek to recalibrate their contracting relationships to avoid being defined as an employer or further reduce the extent to which they monitor suppliers' production or franchisees' practices. Rather, the work health and safety legislation is crafted in a way that seeks to encourage firms to respond with the 'right kind of liability avoidance',[93] that is, by taking additional, voluntary measures to minimise the relevant legal risks, including closer monitoring of contractors, increased investment in training and skills or reintegrating the work back into the core organisation.[94] To achieve this objective, the legislation provides that:

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88 See, eg, *Baiada Poultry Pty Ltd v R* (2012) 246 CLR 92; 211 IR 200; [2012] HCA 14. The Model Work Health and Safety Act adopted in 2011 has been enacted in all Australian jurisdictions, except for Victoria and Western Australia: see, eg, Work Health and Safety Act 2011 (Cth). See generally R Johnstone, E Bluff and A Clayton, *Work Health and Safety Law and Policy*, 3rd ed, Thomson Reuters, Sydney, 2012; R Johnstone and M Tooma, *Work Health and Safety Regulation in Australia: The Model Act, Federation Press, Sydney, 2012.*

89 See s 19(1)–(2) of each of the harmonised WHS Acts.

90 WHS Acts s 5; See also Explanatory Memorandum, Work Health and Safety Bill 2011 (Cth), Parliament of Australia, 2011, at para 23.

91 WHS Acts s 7.

92 C Estlund, 'Who Mops the Floor at the Fortune 500? Corporate Self-Regulation and the Low-Wage Workplace' (2008) 12 *Lewis & Clark L Rev* 671 at 692.

93 Ibid.

94 Ibid.

(a) the relevant duties cannot be delegated;[95]
(b) one person can owe a number of duties;[96]
(c) more than one person can hold a duty and each person must comply with the duty even though it might be also owed by others.[97]

A related aspect of the WHS Acts is the way in which they impose a horizontal duty on all PCBUs to consult, cooperate and coordinate with other PCBUs.[98] Again, this provision is specifically designed to address the 'problem of hazards arising from fractured, complex and disorganised work processes'.[99]

The novelty of these provisions, together with the fact that they are still relatively new, means that it is not entirely clear how liability will be ascribed when applied to the various corporate structures and employment arrangements described earlier. In addition, it is important to recognise that there are some significant distinctions between the way in which minimum employment standards and work health and safety standards have been, and continue to be, regulated. This reflects, at least in part, the nature of the harm and the underlying doctrinal principles which have implicitly informed the respective legislative frameworks (that is, contract versus tort). Further, the sanctions available under the WHS Acts are more wide-ranging and more serious. None the less, the duty-based regime established under the harmonised work health and safety legislation provides an important insight into different (and possibly more effective) ways to address some of the problems arising from fissured work arrangements. In particular, it provides an illustrative example of the way in which a statutory regime can effectively channel the relevant regulatory focus towards the business activity in question rather than the formal legal structure, which makes it more difficult for entities to escape liability through complex corporate or contractual structures.[100]

(b) Supply chain regulation in the textile, clothing and footwear industry

The regulatory scheme directed at the TCF industry is similarly designed to shift the court's attention away from formal questions of privity and limited liability so as to enable regulators, including unions, to ensure that workers throughout the supply chain — regardless of their formal employment status, their specific working arrangements or the capitalisation of their direct employer — enjoy basic workplace entitlements, such as minimum rates of pay and penalty rates for overtime work.[101]

In particular, the TCF scheme deems 'outworkers'[102] — which operate along the bottom rung of the TCF supply chain and are often characterised as independent contractors — to be 'employees'. This has the effect of bringing

95 WHS Acts s 14.
96 WHS Acts s 15.
97 WHS Acts s 16.
98 WHS Acts s 46.
99 Johnstone and Stewart, above n 22, at 28.
100 Prassl, above n 14, p 180.
101 FW Act Part 6-4A.
102 FW Act s 789BB.

these workers within the protective scope of the FW Act and relevant modern awards. Moreover, the TCF provisions give outworkers a right to bring a claim for workplace entitlements against virtually any entity in the supply chain. A notable exception is that it is not possible to recover entitlements against a retailer which did not have rights to supervise or otherwise control production prior to the delivery of goods.[103] Another important feature of the TCF scheme is procedural in nature. In particular, where a demand for payment is served against 'an apparent indirectly responsible entity',[104] the onus of proof is reversed and is borne by the entity served with the claim.[105]

These expanded rights of recovery are a critical component for guarding against 'phoenix' behaviour and ensuring that workers are not deprived of key benefits as a result of the direct employer or contractor being wound up or put into liquidation. However, in the event that the direct employer remains solvent, the TCF scheme expressly states that the lead firm may rely on any relevant indemnification for the loss suffered/damages paid as a result of contraventions committed by the direct employer.[106]

While Nosser et al generally support extension of the current regulatory initiatives beyond the TCF industry, they also caution that these models of supply chain regulation are likely to be most suitable to supply chains made up of a vertical series of contracts. In their view, this regime may be less amenable to other business networks or production networks, such as franchises, corporate groups or triangular labour hire arrangements.[107]

However, it is arguable that at least some aspects of the TCF regulatory model outlined above may be applied beyond this discrete sector. In recent times, we have seen a similar, albeit distinct model, used in relation to the road transport industry — a service industry far removed from the production of consumer products.[108] Further, following the 7-Eleven scandal, a rather novel attempt was made to apply the expanded rights of recovery available under the TCF provisions to a distinct organisational form (for example, franchising) rather than another problematic sector.[109]

Indeed, there are compelling arguments for extending key provisions (if not the whole TCF scheme) to the full spectrum of industries and corporate forms. For example, the reversal of the relevant onus of proof is especially appealing — particularly in light of the evidentiary hurdles facing claimants in cases like

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103 FW Act s 789CA(5); I Nosser et al, 'Protective Legal Regulation for Home-Based Workers in Australian Textile, Clothing and Footwear Supply Chains' (2015) 57 *J Ind R* 585.

104 FW Act s 789CA(3).

105 FW Act ss 789CA–789CF. A similar approach is adopted in the United States under the Fair Labor Standards Act. In particular, the Supreme Court decision in *Anderson v Mt Clemens Pottery Co* (1946) 328 US 680 established that in the absence of accurate employment records, the employer will generally bear the burden of proof and must produce evidence to negate any reasonable inferences drawn from the employee's testimony.

106 FW Act s 789CE.

107 Nosser et al, above n 103, at 600.

108 See M Rawling and S Kaine, 'Regulating Supply Chains to Provide a Safe Rate for Road Transport Workers' (2012) 25 *AJLL* 237, discussing the Road Safety Remuneration Act 2012 (Cth). This Act was recently repealed: see Road Safety Remuneration Repeal Act 2016 (Cth).

109 Fair Work Amendment (Recovery of Unpaid Amounts for Franchise Employees) Bill 2015 (Cth) (introduced by Greens Senator Adam Bandt). This Bill lapsed in April 2016.

those involving 7-Eleven and the Baiada Group. There appears to be no obvious reason why this provision alone could not be applied to other sectors. The regulatory merits of the TCF regime more generally — and its potential expansion to other sectors and production networks — is further underlined by the fact that there are a number of similarities between this statutory scheme and important developments in the US and elsewhere.

VI Alternative regulatory approaches from other jurisdictions

The compliance and enforcement problems raised by fragmentation of the traditional employment relationship are issues which have vexed policy-makers and regulatory agencies in a number of developed economies outside of Australia, including the US, Canada and the UK. The summary below identifies a number of regulatory devices which have been used in foreign jurisdictions to address fissured employment arrangements. As with the previous section, the following discussion also provides a preliminary assessment of some of the strengths and weaknesses of these various mechanisms.

(a) Joint employment

The doctrine of 'joint employment' was originally developed in the context of particular employment-related statutes in the US. The precise scope and definition of joint employment differs depending on the relevant statutory provision which is being applied.[110] By way of example, the Fair Labor Standards Act of 1938 (FLSA) broadly defines the term 'employ' to include 'suffer or permit to work'.[111] The more expansive definitions of 'employ' in the FLSA, among other statutes, have allowed the courts to develop the legal device of joint employment as a way of ascribing liability and responsibility to two separate legal entities, where both entities are found to exercise a requisite degree of control over the worker or otherwise share employer-like functions between them.[112] The concept of joint employment is an important underlying principle of Weil's strategic enforcement model in so far that it allows the legal employer, along with the lead firm, to be held jointly and severally liable for compliance with obligations arising under the FLSA, including the requirement to pay minimum wages and overtime.

The standard of joint employment has been the subject of some recent consideration and much debate in the US. In August 2015, the National Labor Relations Board (NLRB) — an independent federal agency — refined the test

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110 For example, the Migrant and Seasonal Agricultural Worker Protection Act of 1983 and the Family and Medical Leave Act of 1993 define 'employ' in exactly the same way as the Fair Labor Standards Act, discussed below.

111 FLSA § 203(g). The FLSA Regulations explicitly state that a single worker may be 'an employee to two or more employers at the same time': FLSA Regulations § 791.2(a).

112 For further discussion of joint employment in the Australian context, see C Dowling, 'The Concept of Joint Employment in Australia and the Need for Statutory Reform', Masters Thesis, University of Melbourne, 2008; P Thai, 'Unfair Dismissal Protection for Labour Hire Workers? Implementing the Doctrine of Joint Employment in Australia' (2012) 25 *AJLL* 152.

for determining joint employer status under the National Labor Relations Act.[113] In particular, the majority judgment in the *Browning-Ferris Industries of California Inc d/b/a BFI Newby Island Recyclery*[114] case held that two entities will be joint employers 'if they share or codetermine those matters governing the essential terms and conditions of employment',[115] even if codetermination of these matters is not done 'directly and immediately, and not in a limited or routine manner'.[116] Rather, it is enough if the control exerted by the host firm 'affects the means or manner of employees' work and terms of employment, either directly or through an intermediary'.[117]

More recently, and perhaps most relevantly in the context of this article, the US WHD has issued administrative guidance which similarly espouses an expansive view of joint employment under the FLSA.[118] In analysing a vertical joint employment arrangement (that is, the employee's employer is an intermediary or otherwise provides labor to another entity), the guidance confirms that one must assess if there is an employment relationship — which involves close consideration of whether, as a matter of economic reality, the employee is economically dependent on the potential joint employer. Relevant factors include, among others: whether the alleged joint employer, directly or indirectly, controls the performance of work, or key employment conditions, such as the rate or method of pay; whether the work is performed on premises owned or controlled by the potential joint employer; and whether the potential joint employer is performing administrative functions for the employee, such as handling payroll, or providing tools and materials required for the work.

The full implications of the *Browning-Ferris* decision, and the latest administrative guidance, are not yet clear. For a start, the NLRB's decision is likely to be subject to a lengthy appeal process, the final outcome of which is difficult to predict. However, some commentators have suggested that these more expansive tests of control potentially widen the circumstances in which lead companies operating in the US, such as head franchisors or client firms, may be deemed to be 'joint employers' (and jointly liable) with the entities that directly engage and pay the workers.[119] Indeed, the outcome in *Browning-Ferris* is particularly relevant to ongoing NLRB proceedings brought against the McDonalds franchisor as an alleged joint employer with its franchisees.[120] Many lead businesses, before and since the decision, have asserted that they should not be found liable for contraventions of workers'

113 In comparison to the FLSA definition, an 'employee' is defined under the National Labor Relations Act of 1935 (NLRA) in a rather circular way as meaning 'any employee': NLRA § 152(3).

114 (2015) 362 NLRB 186 at 1 (*Browning-Ferris*).

115 Citing with approval an earlier decision in *National Labor Relations Board v Browning-Ferris Industries of Pennsylvania Inc* (1982) 691 F2d 1117.

116 *Browning-Ferris* (2015) 362 NLRB 186 at 14.

117 Ibid, at 16.

118 United States Department of Labor, Wages and Hours Division, *Administrator's Interpretation Letter No 2016–1* (Administrator's Interpretation).

119 See, eg, C Fisk, 'N.L.R.B.'s Browning-Ferris Decision Could Reshape Contract and Franchise Labor', *On Labor: Workers, Unions, Politics*, 28 August 2015.

120 See National Labor Relations Board, *NLRB Office of the General Counsel Authorizes Complaints Against McDonald's Franchisees and Determines McDonald's, USA, LLC is a Joint Employer*, Media Release, 29 July 2014. On 14 August 2015, in *McDonald's USA,*

rights, if they only exert control over working conditions in indirect ways. In this respect, the majority of the NLRB noted that it is 'not the goal of joint-employer law to guarantee the freedom of employers to insulate themselves from their legal responsibility to workers, while maintaining control of the workplace'.[121]

These recent developments in the US are of limited relevance here given that the joint employment concept has never been fully embraced by Australian courts and tribunals.[122] One of the barriers to greater acceptance of the joint employment doctrine is that there is no 'statutory hook'[123] in the FW Act which enables the courts to 'transcend the contractual framework'[124] and find that an entity which exercises functional control is a joint employer, notwithstanding the fact that under conventional contractual principles, the entity would not be found as such. It is not impossible for a statutory definition of employment (or joint employment for that matter) to be introduced into the FW Act. Indeed, there are a range of proposals which have been previously floated in the past, but these have generally been restricted to deal with discrete issues in specific contexts.[125]

However, seeking to extend the concept of joint employment beyond these confined circumstances and to the full range of organisational forms may prove to be problematic in the context of the FW Act. For instance, finding that a host employer and a labour hire agency were 'joint employers' would invite a number of practical difficulties — for instance, it may create uncertainty as to which industrial instrument applied to the employment and it may be complicated to determine which entity should be liable for pay, superannuation, workers' compensation etc, and to what extent.[126] That said, the TCF scheme shows that while apportionment of liability between two or more entities may be complicated, it is certainly feasible where an underpayment has occurred.[127]

A more concerning problem with introducing the concept of joint employment into Australian law on a general rather than selective basis is that it may lead to unintended consequences. For example, holding third parties accountable for employment contraventions and absolving the liability of the direct employer 'may create a moral hazard, as primary wrongdoers face decreased incentives to manage risks or comply with the law, knowing that

LLC, a joint employer (2015) 362 NLRB 168, the NLRB rejected McDonald's request to challenge or strike out the expansive definition of 'joint employer' adopted by the NLRB's general counsel.

121 *Browning-Ferris* (2015) 362 NLRB No 186 at 21.

122 *Staff Aid Services v Bianchi* (2004) 133 IR 29; *Fair Work Ombudsman v Eastern Colour Pty Ltd* (2011) 209 IR 263; [2011] FCA 803. Compare *Morgan v Kittochside Nominees Pty Ltd* (2002) 117 IR 152 at [75].

123 Thai, above n 112, at 171.

124 Ibid.

125 For instance, Pauline Thai has proposed amendments to the FW Act which seek to implement joint employment for the narrow, but not insignificant, purpose of allowing labour hire workers to bring unfair dismissal claims against the host entity; ibid.

126 *Costello v Allstaff Industrial Personnel (SA) Pty Ltd* [2004] SAIRComm 13 at [135].

127 FW Act s 789CB; see also G Davidov, 'Joint Employer Status in Triangular Employment Relationships' (2004) 42 *BJIR* 727 at 740–1.

they will not bear the costs'.[128] Strict third party liability may also promote counterproductive practices on the part of the lead firm, given that the third party has fewer incentives to implement detection mechanisms for fear that this evidence may be used against them in future legal actions.[129]

Finally, and as noted earlier, the common law definition of employment is far from clear in Australia. It is possible that introducing a new concept of joint employment may further reduce normative clarity and lead to arbitrary and inconsistent outcomes.[130] Indeed, in the US, the concept of joint employment has been criticised on the basis that it is indeterminate, fact-specific and underinclusive. Further, focusing on questions of formal or functional control and/or the scope of potential enterprise integration does not necessarily address the more pressing question of whether the firm was in a position in which it could effectively deter or prevent wrongdoing in the supply chain or franchise network.[131] As discussed below, a number of other proposals surmount some of the difficulties associated with the concept of joint employment and potentially present more promising alternatives.

(b) Third party liability in specific sectors

In Israel, the Act to Improve Enforcement of Labour Law (Israeli Act)[132] was introduced in 2011 to address compliance issues arising in relation to temporary agency work in key sectors, such as cleaning and security. In essence, this legislation provides that, in prescribed circumstances, a host firm will be liable, as a guarantor, for any underpayments suffered by agency workers.[133] The question of whether the client/host firm ultimately bears these liabilities will depend on three key factors specified in the Act. The first is, whether the client has taken 'reasonable steps' to prevent any infringement of workers' rights by the contractor (that is, labour hire provider), including by establishing a procedure whereby workers can bring complaints about the contractor directly to the client. Second, the client may avoid liability under the Act if they can show that they hired a 'certified wage-checker' to perform periodical checks of pay and made sure that any identified underpayments were promptly rectified. Third, the client will be automatically liable for any relevant underpayments of the agency worker where the client is found to have paid the contractor a contract price which falls below the minimum required by the Act (that is, the client has entered into a 'money-losing' contract).[134]

Davidov argues that while the first factor listed above — the duty to take 'reasonable steps' to ensure workers' rights are respected — is seemingly

128 Rogers, above n 7, at 38, citing R Kraakman, 'Third Party Liability' in Peter Newman (Ed), *The New Palgrave Dictionary of Law and Economics*, Macmillan Reference, London, 1998.

129 J Arlen and R Kraakman, 'Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes' (1997) 72 *NYULR* 687 at 706–17.

130 Glynn, above n 29, at 117.

131 Rogers, above n 7, at 25.

132 Act to Improve the Enforcement of Labor Laws 5772–2011, 2326 SH 62 (2011) (Isr).

133 This model of tiered liability reflects s 34 of the UK National Minimum Wage Act 1998.

134 This contract price is calculated on the basis of the minimum wage, plus the probable costs of all other mandatory employment standards and minimal profit (ie, no losing contracts): Davidov, above n 7, at 11–12.

benign (particularly in comparison to the other two factors which impose direct costs on the client), it is this first element which is perhaps the most powerful. He explains that:

> The Act not only gives clients positive incentives to care about the cleaners/security workers, it also eliminates the negative incentives. If you have direct contact with the workers in order to make sure that their rights are not infringed, there is no reason to suspect that courts will view this as a relevant indicator of employment any longer, because it was required by the Act.[135]

To some extent, the Israeli Act reflects a number of other sector-specific liability schemes in the US. For example, the duty-based element of the Israeli regime is similar to the New York regulation of garment firms, which provides that such firms may be held liable for their subcontractors' minimum wage violations where they 'knew or should have known with the exercise of reasonable care or diligence' of those violations.[136] In comparison, other elements of the Israeli scheme are more in line with the Californian Labor Code, which provides that anyone hiring a labor contractor in construction, farm labor, garment, janitorial or security guard services who 'knows or should know that the contract does not provide funds sufficient to comply with all applicable laws', including wage and hour laws, is liable for back wages and specified damages.[137] It is arguable that all of these schemes are variations on a general theme — that is, they all impose some legal liability on third parties for workplace contraventions, but only in specified sectors.

(c) Innovative sanctions

A more well-known example of duty-based liability — and one that extends beyond prescribed sectors — are the 'hot goods' or 'hot cargo' provisions of the US FLSA. While these provisions are remedial in focus and only apply to the sale and transport of goods, they have proved instrumental in transforming compliance drivers throughout whole supply chains and franchise networks.

Indeed, it was the WHD's innovative use of the hot goods provisions in the US apparel industry which partly inspired Weil's model of strategic enforcement.[138] These particular statutory provisions have enabled the WHD to enjoin or embargo the transportation of sale of 'goods in the production of which any employee was employed in violation' of the FLSA. Under these provisions, injunctive orders have been issued against a whole range of purchasing firms, including distributors, wholesalers and retailers. While these injunctions are not designed to compensate underpaid employees, they generally have this effect as an enjoined party can seek relief by remedying any past FLSA violations.

Another critical component of the hot goods provisions and the way in which they have been effectively used to transform the 'compliance

135 Ibid; see also G Davidov, 'Special Protection for Cleaners: A Case of Justified Selectivity' (2015) 36 *Comp Lab L & Pol'y J* 219.
136 New York Labor Law (2009) § 345-a.
137 Californian Labor Code (2008) § 2810.
138 See D Weil, 'Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage' (2005) 58 *Indus & Lab Rel Rev* 238; C Estlund, 'Rebuilding the Law of the Workplace in an Era of Self-Regulation' (2005) 105 *Col LR* 319.

calculus'[139] of firms throughout the supply chain are the relevant legislative exemptions. In addition to excluding consumers and common carriers from its coverage, the hot goods provision also exempts purchasers of goods (including a retailer, distributor or other intermediary) where they obtained the relevant goods 'in good faith in reliance on written assurances from the producer' that they were produced in compliance with the Act, and 'without notice of any such violation'.[140] The underlying regulations relating to the hot goods provision further explain that in order to rely on this exclusion, each purchaser has an 'affirmative duty' to assure themselves that the goods were produced in compliance with the Act. This generally requires the purchaser to show that they have done all that a 'reasonable, prudent [person], acting with due diligence, would have done in the circumstances'.[141]

The hot goods provisions in the FLSA have proved useful not only in obtaining quick remedial relief for vulnerable employees, they have enabled the regulator to bypass the direct employer and enrol companies higher in the supply chain which have a much stronger incentive to establish private monitoring arrangements in relation to subcontractors. Glynn argues that:

> the hot goods provision is a rare manifestation . . . of the recognition that the broader commercial enterprise may promote underlying violations, that downstream commercial actors therefore may bear some responsibility for such violations, and that deterrence and prevention may require targeting such actors.[142]

But the hot goods provisions are not without their own set of limitations. For a start, and as noted earlier, they only apply to the transport and sale of goods, and not the acquisition of services. Further, while injunctive relief may serve to facilitate compensatory relief, it is not necessarily as direct or as effective as other types of remedial orders. Finally, the hot goods provisions can only be used by the relevant government regulator, and not by employees and their representatives.

The horticulture, food processing and franchise industries in Australia display some of the necessary characteristics that make an embargo-like sanction a particularly powerful one. First, the time between production and sale of the goods is of the essence; and second, there are 'large, highly concentrated business entities that have greater market power than the large set of smaller organisations with which they interact'.[143] However, the FWO faces a major legal hurdle in seeking to adopt a similar enforcement strategy, given that presently there is no equivalent 'hot goods' provision in Australia.[144]

VII Analysis of alternative liability models

As noted in the introduction, the enforcement issues revealed in recent investigations raise a number of important normative and instrumental

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139 Weil, above n 12, p 88.
140 FLSA § 215(a)(1).
141 29 CFR § 278.1 (2010).
142 Glynn, above n 29, at 120.
143 Weil, above n 8, at 142.
144 But see FW Act s 545(2)(a), which arguably provides the court with the potential scope to make orders against an entity other than the primary wrongdoer in order 'to prevent, stop or remedy the effects of a contravention'.

questions about how to enhance compliance with, and enforcement of, employment standards. This section will undertake a preliminary assessment of some of these key issues.

(a) Normative issues raised by extending legal liability beyond the direct employer

In normative terms, the existing literature identifies a number of possible and overlapping justifications for extending full or partial liability for workplace contraventions to third party entities.[145]

The first justification for extending liability to third parties in the employment standards context is that the lead firm has *caused* the direct employer to contravene the relevant workplace laws. Indeed, it could be argued that this causative justification is one of the underlying rationales of the accessorial liability provisions of the FW Act — that is, a third party will be liable as an accessory to a contravention committed by the direct employer where they are found to have had the necessary level of involvement in that contravention, albeit this involvement can, and commonly does, arise through inaction or omission.

A second normative basis for imposing third party liability is that the lead firm possesses the necessary power and position to *prevent* workplace contraventions taking place in the supply chain, corporate group or franchise network, and can subsequently *spread the loss* among many clients and consumers. This justification is supported by a strand of law and economics literature which endorses an approach where liability is imposed on third parties in circumstances where the primary wrongdoer is insolvent and/or where the third party is 'well positioned to deter or prevent wrongdoing'.[146] Indeed, the latest administrative guidance issued by the WHD implicitly recognises this objective in so far that a broad view of joint employment has the capacity to facilitate the model of strategic enforcement and the tactical targeting of lead firms.[147] In particular, the guidance states:

> Where joint employment exists, one employer may . . . be larger and more established, with a greater ability to implement policy or systemic changes to ensure compliance. Thus, WHD may consider joint employment to achieve statutory coverage, financial recovery, and future compliance, and to hold all responsible parties accountable for their legal obligations.[148]

A third reason put forward for third party liability in this context is that the lead firm has *benefitted* — either directly or indirectly — from the relevant workplace contraventions. This element has gained support from a number of scholars in the UK, Canada and elsewhere who have variously argued for a 'relational and functional approach to [identifying the employer to] ensure that those who benefit from employing labor bear the social and economic costs

145 This article focuses on the most common justifications for extending liability beyond the direct employer. However, Davidov has identified a number of additional justifications for extending liability which are less widely accepted in the existing literature and go beyond the confines of this article: Davidov, above n 7, at 29–31.

146 Rogers, above n 7, at 6.

147 Weil, above n 12, ch 9.

148 Administrator's Interpretation, above n 118.

and risks related to that labor'.[149] The FWO has also recently observed that while lead firms may believe they have contracted out the responsibility of compliance with workplace laws, 'the community and the law can hold them to account if it turns out they are benefiting from [employment non-compliance]'.[150]

Fourth and finally, on the basis of general tortious principles, it has been argued that extension of liability to third parties is proper and appropriate where the relevant behaviour increases social costs and invites moral sanction. Indeed, it has been generally observed that the knowledge requirement under the accessorial liability provisions goes to the moral quality of the third party's involvement.[151] It is arguable that moral censure may be an even stronger justification for extending liability in circumstances where the lead firm has made *representations* to the public that is has assumed responsibility for ensuring compliance throughout the relevant production chain or network.[152] Such representations may be implicit or explicit — for example, it may involve the lead firm actively promoting its ethical sourcing policy (in the case of supply chains) or sharing a common brand (in the case of franchises).

A central rebuttal to the proposal to extend liability to third parties is that it will increase the risk of inefficiency. In this respect, a number of law and economics scholars have suggested that whether third-party liability is cost-effective relative to first-party liability is largely a function of two factors. The first key factor is whether the primary wrongdoer/direct employer is insolvent and therefore judgment-proof. In such cases, the imposition of penalties will deliver little deterrence and it may be more efficient to ascribe liability to others. However, it is arguable that where the primary wrongdoer is in a position to pay fines and provide compensation, then the efficiency of imposing third-party liability is weakened, although not necessarily erased.

The second factor relevant to efficiency concerns is whether the third party can induce compliance more cheaply than outsiders. In such a case, 'the savings resulting from third-party liability may outweigh any additional administrative costs'.[153] A number of the reforms canvassed above, including the Israeli reforms and the hot goods provisions in the US, implicitly suggest that 'when a party's sourcing practices help create conditions in which violations are likely, but that party fails to exercise its power to deter violations, it is often both cost-effective and fair to hold it liable'.[154]

The overview of the investigations into the 7-Eleven franchise and the Baiada Group — summarised in Section 2 above — lends weight to many of the normative justifications for extending liability beyond the direct employer.

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149 J Fudge, 'The Legal Boundaries of the Employer, Precarious Workers, and Labour Protection' in G Davidov and B Langille (Eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work*, Hart, Oxford, 2006, p 295 at p 314; Prassl, above n 14, pp 4–5.

150 Fair Work Ombudsman, *$188,100 Penalty for Underpaying Trolley Pushers*, Media Release, 10 March 2016.

151 J Dietrich, 'The Liability of Accessories under Statute, in Equity and in Criminal Law: Some Common Problems and (Perhaps) Common Solutions' (2010) 34 *MULR* 106 at 117.

152 Davidov, above n 7, at 26-9.

153 Rogers, above n 7, at 36.

154 Ibid, at 33–4.

(b) Instrumental issues raised by extending legal liability beyond the direct employer

Assuming that some level of legal liability for workplace contraventions is normatively justified against a wider range of entities, the next fundamental question is which legal mechanism can and should be used to achieve this policy objective. Based on the descriptive account of the various legal mechanisms discussed in Sections 5 and 6 above, a broad distinction can be drawn between those schemes which impose strict liability on third parties, as compared to those where the liability is duty-based.

For instance, it is arguable that the TCF regime and the concept of joint employment could both be described as distinctive forms of strict third party liability. Strict liability regimes are generally seen to offer a number of advantages over duty-based liability regimes. In particular, administering these schemes and apportioning damages is arguably more straightforward — it often removes the need to engage in complex causation enquiries[155] and provides the worker with the ability to pursue whichever entity is the easiest to target on procedural and/or resourcing grounds.[156] Another appealing aspect of a strict liability regime is the fact that low monitoring costs are likely to mitigate any moral hazard issues. In particular, it has been argued that a properly designed strict-liability regime could 'incentivise companies to invest in deterrence and monitoring, and force them to compensate workers for any residual harms'.[157]

A major drawback of strict liability regimes is their failure to fully account for the diversity of contractual relationships and the circumstances in which workplace contraventions take place. While outsourcing, franchising and complex corporate forms may all be described as forms of fissured employment, there are important differences between these arrangements. In addition, as noted in Section 2 above, whether a particular organisational form — such as outsourcing or franchising etc — is likely to lead to workplace contraventions may depend on the terms and circumstances of the particular arrangement and the vulnerability (or otherwise) of the employees. These variations should be taken into account in designing the appropriate legal treatment.[158]

For example, some host firms and labour hire agencies may have long-term, exclusive relationships and both entities may display employer-like characteristics. In comparison, there may be other contractual interactions which are one-off and temporary and the user firm does not display any typical employer characteristics. Some lead firms may be in a powerful position to influence the compliance behaviour of direct employers throughout the supply chain, corporate group or franchise network, while others may not. For example, where a large processor — such as the Baiada Group — sells to a small grocery store, it is quite possible that the processor (rather than the

155 That said, the concept of 'joint employment' pivots on factors such as control and economic integration. To this extent, it is arguable that this form of strict liability continues to involve detailed fact analysis.
156 Prassl, above n 14, p 184.
157 Rogers, above n 7, at 47.
158 Davidov, above n 7, at 33.

company technically at the 'top' of the supply chain) is the firm best positioned to deter workplace contraventions. Conversely, if a major food processor sells to a dominant retailer — such as Woolworths or KFC — then it is arguable that the buyer has even more regulatory power and resources at their disposal than the processor.[159]

This range of circumstances raises real and difficult questions when considering how to design an appropriate strict liability scheme. It seems incongruous to hold local shops and mega-retailers to the same regulatory standard. One way in which to address these concerns is to either create carve outs for specific types of business, certain industries or particular contractual arrangements, or limit the application of the strict liability regime to prescribed sectors, as is the case with the TCF regime.[160]

These types of problems are less pronounced with a duty-based liability scheme, which by its very nature takes into account the particular circumstances of each case. Rogers has argued that while a duty-based regime would be 'more challenging to implement [than a strict liability regime], such complexities could nevertheless enhance its effectiveness by leading more companies to invest in monitoring and deterrence efforts'.[161] That said, duty-based schemes are not without their own set of weaknesses and critics. In particular, Glynn argues that cognitive biases could mean judges are:

> uncomfortable with extending liability for such bad acts to another, less culpable party [and] may find 'cosmetic compliance' measures that are facially consistent with industry practices adequate, even though they are ineffective in preventing underlying violations.[162]

Another difficulty with duty-based liability is that workers may still be denied compensation if the lead firm is found to have complied with the relevant standard of care, but the direct employer is judgment-proof.[163] Whether these issues ultimately pose a problem is likely to turn on the extent to which the statutory scheme is actively enforced and the court's construction of the relevant duty.

(c) Framing possible reform

While these disparate and distinctive experiments offer some promising avenues, they are not in, and of themselves, likely to provide a comprehensive solution to the problems raised by multipolar work situations.[164] There have been a number of attempts at developing such a solution: one of the most ambitious was undertaken by Rogers in the context of the US regulatory regime.[165] Under the duty-based scheme proposed by Rogers — which is principally modelled on the hot goods provisions of the FLSA — a firm would be held liable if:

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159 Rogers, above n 7, at 47–8.
160 Ibid, at 48.
161 Ibid, at 49.
162 Glynn, above n 29, at 125.
163 Ibid, at 126.
164 P Davies and M Freedland, 'The Complexities of the Employing Enterprise' in G Davidov and B Langille (Eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work*, Hart, Oxford, 2006, p 273 at p 290.
165 For other attempts, see generally Glynn, above n 29; Prassl, above n 14.

(a) it has purchased goods or services produced or provided in contravention of the relevant minimum employment standards; and
(b) the firm has failed to take 'reasonable care' to ensure that those goods or services were produced or provided in compliance with relevant employment laws.[166]

Without further qualification or limitation, such a scheme would include a wide range of entities, some of which may only have a tangential connection with the workers. The challenge is how best to confine the potential defendants in order to ensure that any proposed liability scheme not only remains workable in practice, but is best placed to achieve the normative objectives identified in Section 7(a) above. Indeed, the various liability models surveyed earlier illustrate a range of distinct ways in which lead firm liability may be appropriately ascribed and limited.

For example, as a starting point, the court may consider whether the firm had actual or constructive notice or knowledge of the potential contraventions. This may provoke a factual enquiry as to whether the lead firm knew, or ought to have known that: the direct employer was, or was likely to be, rendered judgment-proof;[167] or the monies paid under the relevant contract or franchise agreement were sufficient to enable compliance with workplace laws.[168] Another possible consideration in terms of knowledge may be the extent to which the lead firm was a routine or frequent purchaser of the relevant goods or services and/or the transparency of the relevant procurement arrangements.[169]

To some extent this knowledge requirement reflects the underlying premise of the accessorial liability provisions in Australia. However, an important difference is that it provides that *constructive* knowledge, not just *actual* knowledge, may be sufficient to trigger the duty. This potentially overcomes one of the most challenging aspects of the accessorial liability provisions as they presently apply to fragmented work arrangements.

Another factor which may be taken into account in deciding whether to ascribe liability beyond the direct employer is whether the lead firm has the power to deter contraventions. In measuring a firm's capacity for deterrence, the court may assess the resources, market position and bureaucratic power held by the lead firm and the duration of the relationship between the lead business and the direct employer. To some extent, this enquiry echoes some of the existing tests of 'control' adopted in analysing vertical joint employment arrangements.[170] However, it is arguable that focusing the relevant inquiry on

166 It is arguable that Rogers' proposal also encompasses individuals, however, this goes beyond the scope of this particular article.
167 For example, the direct employer may be effectively rendered 'judgment-proof' to liability for substantive allegations through insolvency or a failure to keep or maintain employment records.
168 In other words, the contract was a 'money-losing' contract (to use the term adopted in the Israeli Act, above n 134).
169 Rogers, above n 7, at 50.
170 The exception applying to retailers under the TCF scheme (above n 103) can be contrasted with the relevant exception which applies under the US hot goods provision discussed in Section 6(c) above. Rather than using the concept of 'control' as the relevant touchstone, the exemption under the hot goods provision turns on whether the purchaser had notice of the contraventions and took steps to assure themselves of compliance.

the firm's power to deter contraventions, rather than the firm's power to control the work activity, is a crucial distinguishing feature. This shift in emphasis means that the court's attention is directed towards the commercial relationship between the lead firm and other entities in the supply chain, corporate group or franchise network, instead of centring on the relationship between the lead firm and the workers.

Assuming that the firm is in a position to deter contraventions, an additional factor which may be considered is the extent to which the lead firm has taken reasonable steps to prevent workplace contraventions by the direct employer. As noted above, imposing reasonable standards of diligence on lead firms is an important feature of the hot goods provisions, the WHS Acts and the Israeli Act. Placing broad, positive duties on multiple entities throughout the supply chain, corporate group or franchise network allows the courts to undertake a fact-sensitive analysis which takes into account the full range of relevant circumstances. Such circumstances may include, among others, whether the lead firm has:

(a) adopted independent, rigorous and accountable monitoring mechanisms, including periodic audits of employment records and unannounced site inspections;
(b) engaged only reliable, well-capitalised and properly insured contractors;
(c) ensured that the monies paid under the relevant contract enable the contractor to comply with the law;
(d) facilitated compliance through tailored financial incentives and commercial sanctions, including bonds, contract 'holdbacks',[171] or indemnification clauses which allow the lead firm to clawback from the direct employer any monies which have been paid by the lead firm to the affected workers.[172]

In order to address some of the uncertainties that may arise from administration of such a scheme, it may be possible to create 'safe harbours' from liability.[173] In essence, the Israeli Act has sought to do just that by allowing firms to avoid residual liability for employment contraventions where they have engaged a 'certified wage checker'. Alternatively, a requirement to implement an independent monitoring scheme may only apply to firms of a certain size or turnover. Obviously, some of these steps may entail increased costs to business, which may be subsequently passed onto consumers. But as Rogers points out, any such 'increased costs would need to

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171 Where a portion of the contract price is withheld until the lead firm is satisfied that all employees have been properly paid.

172 Contractual bonds and indemnification clauses are already being used by lead firms, such as the Baiada Group and 7-Eleven, to enhance compliance commitment among smaller businesses in their supply chain or franchise network. However, it is unclear to what extent lead firms may rely on these types of clauses once the provisions of the Part 2–3 of the Australian Consumer Law relating to unfair contract terms begin to apply to business-to-business contracts: see Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015 (Cth).

173 Rogers, above n 7, at 54.

be weighed against the social value we place upon better ensuring compliance with the law'.[174]

Assuming a consensus can be reached on the relevant legal mechanism which should be used to extend liability to third party entities, there is a question surrounding the level of liability, and other remedies, which would be most appropriate. The statutory schemes reviewed earlier illustrate a range of different outcomes — including joint and several liability, residual liability and liability which is apportioned between two or more entities depending on the extent of their failure to meet the relevant regulatory standard. The reform proposal set out above suggests that more than one firm may be held liable. Again, this reflects the hot goods and WHS Acts to the extent that liability may be imposed on any entity which is found to have failed to meet the relevant standard. The fact that the direct employer or other contracting parties may also be liable in respect of the same contraventions is not immediately relevant. In comparison, under the Israeli Act, residual third party liability is generally only triggered where the direct employer is unable to remedy the relevant underpayment because they are insolvent or deregistered etc. This form of tiered liability may be appropriate to some organisational forms where there are fewer firms involved (such as labour hire or franchising), but not others (such as subcontracting). In order to develop a scheme which can apply across the board, it may be preferable to allow the courts to ascribe liability to more than one entity — albeit this may only be done on a retrospective basis (ie once employment contraventions have been alleged and/or proved) and the level of liability would ultimately depend on the circumstances in which the contraventions arose.

Other questions which arise include whether civil or criminal penalties should be imposed against lead firms (in addition to any compensatory orders), whether injunctive relief or incapacitation orders should be made available against lead firms and/or officers within those businesses and who has standing to bring these types of enforcement proceedings. It is likely that many of these remedial and procedural questions can only be finally resolved once we have a clearer sense of the circumstances in which liability is being imposed in the first place.

VIII Conclusion

The workplace compliance and enforcement problems which have been brought to light in the last year are complex, challenging and profound. This article has traced some of the most pressing problems confronting regulatory agencies and others responsible for ensuring employer compliance with workplace laws. It was observed that the outsourcing of employer functions, combined with a layering of entities, has meant that detection of employment contraventions is increasingly complicated and prohibitively expensive, especially where employment records are absent or inaccurate. Moreover, the fact that these smaller operators are often less visible, thinly capitalised and frequently judgment-proof undermines the deterrence effects of enforcement litigation, compromises the recovery of underpayments on behalf of workers

174 Ibid, at 59.

and does not necessarily address the underlying drivers of poor compliance behaviour. In short, fissured employment has been found to create 'considerable challenges to using the bilateral, personal employment contract as the basis for attributing employment-related responsibilities'.[175]

The accessorial liability provisions of the FW Act are one of the principal mechanisms by which to ascribe third party liability for contraventions of civil remedy provisions. However, it is not yet clear whether these provisions, and the statutory remedies which are currently available, will ultimately support a strategy which pivots on tactically targeting entities beyond the direct employer.

If the existing provisions of the FW Act are ultimately found to be wanting, this will provide a firmer foundation on which to advocate for more far-reaching reform to combat fissured employment practices. For example, it may be that there is even greater public interest in, and political appetite for, an explicit extension of legal liability for workplace contraventions. The various statutory schemes canvassed in this article provide some instructive illustrations of how this could be achieved. By drawing together a number of regulatory experiments undertaken in Australia and elsewhere, this article has undertaken a critical assessment of the conceptual basis and practical issues relating to third-party liability regimes. Ultimately, this article finds that third party liability provisions which are appropriately contextualised and well-crafted may offer the greatest potential for deterring workplace contraventions in a fair and cost-effective way.[176] It is argued that the most promising mechanisms, namely duty-based liability schemes, are more likely to encourage efficient and effective forms of private ordering, including enhanced monitoring, more rigorous procurement practices and greater consideration of agreement terms.[177] This appears to be precisely the type of diligent behaviour that the FWO increasingly seeks to promote and demand when lead firms outsource work to lowest-cost providers.[178]

That said, it is recognised that established contract doctrine and accepted corporate fictions continue to determine the attribution of legal responsibility and may be difficult to displace.[179] In the meantime, a range of more modest regulatory measures may help address some of the other deficiencies in the regulatory framework which militate against effective enforcement of employment standards. For example, the onus of proof could be reversed in underpayment matters where employment records are absent or inaccurate and the remedies available under the FW Act could be significantly strengthened. Another option is to roll out a third party liability regime only in selective industries. A sector-specific approach offers a number of advantages — for example, it represents a tailored regulatory response and recognises the fact that 'if a group of workers is especially vulnerable, it is highly probable that

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175 J Fudge and K Zavitz, 'Vertical Disintegration and Related Employers: Attributing Employment-Related Obligations in Ontario' (2007) 13 *Canadian Labour Law & Policy Journal* 107 at 143.

176 Rogers, above n 7, at 60.

177 Glynn, above n 29, at 133.

178 See, eg, Fair Work Ombudsman, above n 150.

179 Fudge and Zavitz, above n 174, at 146.

universal solutions are not sufficient to address its special vulnerability'.[180] Conversely, selectivity can create some problems — especially where the regulated sectors are defined too narrowly.

Ultimately, it is apparent that no single reform or initiative will fully and finally solve the compliance problems identified in this article. Yet, in an era of increasing firm fragmentation, in an age where government and union resources remain limited, and at a time when mechanisms based on reputation and consumer pressure are not sufficient, it seems that more must be done. The analysis undertaken in this article suggests that to effectively tackle the compliance issues raised by complex and integrated economic organisations, the conception of legal responsibility must be recalibrated to ensure that the freedom to determine the boundaries of the firm does not transform into 'a license to evade legal responsibilities towards others'.[181]

Postscript

This article was completed prior to the release on 9 April 2016 of the FWO's report into the 7-Eleven franchise network.[182] Following its comprehensive inquiry, the FWO concluded that the Australian head office of 7-Eleven (ie, 7-Eleven Stores Pty Ltd) 'had a reasonable basis on which to inquire and to act' and 'could have acted earlier and done more' to curb noncompliance within its franchise network. Notwithstanding these findings, it is somewhat telling that the FWO ultimately determined that it did not have sufficient probative evidence to pursue the 7-Eleven head office under the accessorial liability provisions of the FW Act.

180 Davidov, above n 135, at 235.
181 Fudge and Zavitz, above n 174, at 146.
182 See Fair Work Ombudsman, *Statement on 7–Eleven*, Media Release, 9 April 2016.

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