

# Reconsidering the Notion of ‘Employer’ in the Era of the Fissured Workplace: Traversing the Legislative Landscape in Australia

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## 1. Introduction

The concept of the employer has been receiving renewed attention in Australia following a raft of media and government investigations into the working conditions of temporary foreign workers in the past 12 months.<sup>1</sup> In particular, these recent inquiries have highlighted that certain sectors of the Australian labour market – most notably the horticulture and food processing industries,<sup>2</sup> and the convenience store franchise sector<sup>3</sup> – may be ‘riddled with exploitation’.<sup>4</sup> While it is generally now accepted that employer non-compliance with workplace laws is a pressing problem in Australia, there is far less consensus about what can be done and who should be held responsible. These issues are undeniably complicated by the ‘fissuring’ of work described by David Weil.<sup>5</sup>

Indeed, the labour market in Australia reflects many of the structural shifts which have occurred in the US and elsewhere.<sup>6</sup> Like many advanced economies, Australia has also witnessed a move away from manufacturing towards services, a decline in trade unionism, greater competition in capital and product markets and increased commercialisation of work relationships. Particular management techniques and organisational forms – such as sub-contracting, outsourcing and franchising – have grown

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<sup>1</sup> These investigations have prompted a number of ongoing government inquiries at both federal and state levels. See, e.g., Australian Government, 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* (Final Report, March 2016); Victorian Government, *Inquiry into Labour Hire and Insecure Work* (due to report by 31 July 2016); South Australian Government, Economic and Finance Committee, *Inquiry into Labour Hire Industry* (established on 11 June 2015, submissions closed on 27 July 2015).

<sup>2</sup> Caro Meldrum - Hanna and Ali Russell, ‘Slaving Away’, *Four Corners*, 4 May 2015 (available at <http://www.abc.net.au/4corners/stories/2015/05/04/4227055.htm>; accessed on 14 September 2015).

<sup>3</sup> Adele Ferguson and Klaus Toft, ‘7 - Eleven: The Price of Convenience’, *Four Corners*, 31 August 2015 (available at <http://www.abc.net.au/4corners/stories/2015/08/30/4301164.htm>; accessed on 16 September 2015).

<sup>4</sup> Meldrum-Hanna and Russell, *supra* n. 2.

<sup>5</sup> David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014).

<sup>6</sup> Judy Fudge, ‘Blurring Legal Boundaries: Regulating for Decent Work’ in Judy Fudge, Shae McCrystal and Kamala Sankaran, *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, 2012).

in popularity.<sup>7</sup> Combined, these developments have generally promoted forms of work that are more insecure and precarious.<sup>8</sup>

This paper begins by exploring the available evidence on the extent to which Australian workplaces have become fissured. The paper then provides an overview of the central statutory responses in the respective regulatory spheres of labour, work health and safety and competition and consumer protection. In reviewing this legislative landscape, this paper reveals that while Australian statutes are innovative and inclusive in some respects, critical regulatory gaps remain. This can be linked, at least in part, to the way in which these statutory regimes conceptualise the principal subject and object of the relevant regulation.

First, the *Fair Work Act 2009 (Cth) (FW Act)* continues to reflect the binary notion of employment and the unitary conception of the ‘employer’.<sup>9</sup> While this statute prescribes a comprehensive ‘safety net’ for employees making it less appealing for lead firms to shed direct employment, ultimately it is the employer, as identified at common law, which is positioned as the primary wrongdoer. This underlying premise makes it more difficult for regulators and others to hold lead firms responsible for workplace contraventions taking place in their supply chain or franchise network.

Second, and in stark contrast to the FW Act, the harmonised work health and safety legislation ‘no longer normalises the employment relationship as a starting point of regulation’.<sup>10</sup> Rather, it seeks to protect all workers (regardless of employment status) by placing the primary duty on a ‘person conducting a business or undertaking’.<sup>11</sup> The broader scope of this legislation makes it far more amenable to addressing the problems presented by fragmented work arrangements, albeit the full potential of this regulation may not yet have been realised.

Third, and finally, this paper considers recent reforms under the competition and consumer regulation which are principally designed to safeguard small businesses – including independent contractors and franchisees – from abuses of market power by larger firms. These statutory reforms are relevant to the notion of the employer to the extent that contracting and franchising relationships bridge the traditional boundaries between employment and commercial law.<sup>12</sup>

In the final section, the paper considers the extent to which these statutory schemes either adhere to, or depart from, the dominant employment paradigm and evaluates the implications this may have for affected workers. This analysis is principally conducted by examining two separate, high-profile cases involving the Baiada Group (*Baiada*), the

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<sup>7</sup> Richard Johnstone, Shae McCrystal, Igor Nossar, Michael Quinlan, Michael Rawling and Joellen Riley, *Beyond Employment: The Legal Regulation of Work Relationships* (Federation Press, 2012).

<sup>8</sup> The term ‘insecure work’ has been defined by the Australian Council of Trade Unions as ‘poor quality work that provides workers with little economic security and little control over their working lives’. See Brian Howe et al, ‘Lives on Hold: Unlocking the Potential of Australia’s Workforce’ (The Report of the Independent Inquiry into Insecure Work in Australia, 2012) at 14.

<sup>9</sup> See, generally, Mark Freedland, *The Personal Employment Contract* (Oxford University Press, 2003); Jeremias Prassl, *The Concept of the Employer* (Oxford University Press, 2015).

<sup>10</sup> Johnstone et al, *supra* n. 7, at 5.

<sup>11</sup> See ss. 19(1)-(2) of each of the harmonised Work Health and Safety Acts (*WHS Acts*).

<sup>12</sup> Joellen Riley, ‘A Blurred Boundary between Entrepreneurship and Servitude: Regulating Business Format Franchising in Australia’ in Judy Fudge, Shae McCrystal and Kamala Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, 2012) at 104.

largest poultry processing corporate group in Australia,<sup>13</sup> and the Australian arm of the 7-Eleven convenience store franchise (*7-Eleven*).<sup>14</sup> These cases lie at the heart of the current debate taking place in Australia and illustrate both the challenges and potential of the present regulatory regime.

## 2. To What Extent are Australian Workplaces 'Fissured' and What are the Possible Effects?

### 2.1. Available Data on Fissured Forms of Work

While there is a large degree of variation in working patterns and employment arrangements, there does appear to be some evidence to suggest that fissured work arrangements are an increasing feature of the Australian labour market. In the absence of detailed empirical research, however, it is far more difficult to precisely assess the prevalence of fragmented work forms in Australia and the relevant consequences of such, including the extent to which it perpetuates non-compliance with minimum employment standards and work health and safety obligations. As will be discussed below, even the available data on the incidence and extent of independent contracting, labour hire, franchising and supply chains in the Australian labour market is somewhat uncertain.

For instance, the most recent data on forms of employment suggests that of the 11.6 million persons in paid work in Australia, 8.6 percent (or just over 1 million) were independent contractors.<sup>15</sup> Yet, this same data also suggests that this segment of the workforce displays many of the typical hallmarks of employees. For instance, 63 percent of independent contractors did not have authority over their own work; 43 percent were not able to subcontract their own work; and 87.2 percent had been with their current 'client' for more than 12 months.<sup>16</sup> This data, along with other research, suggests that many workers may be misclassified as independent contractors rather than employees.<sup>17</sup> What this data does not show is the extent to which self-employed franchisees and labour hire workers perceive themselves either as 'independent contractors' (predominantly providing their own labour), or alternatively, as 'other business operators' (operating a business

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<sup>13</sup> The Baiada Group – which includes Baiada Poultry Pty Limited and Bartter Enterprises Pty Limited – supplies many of its chickens to leading supermarkets and fast food chains. 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' (June 2015) (*FWO Baiada Inquiry*).

<sup>14</sup> In Australia, 7-Eleven Stores Pty Ltd – a private, family-owned company – has a license to operate and franchise 7-Eleven stores. The 7-Eleven franchise has been operating for almost 40 years and currently operates over 600 stores within Australia. While the international head office of 7-Eleven is currently located in Dallas, Texas – the brand is currently owned by a Japanese corporation, Seven & I Holdings Co Ltd. Japan now has more 7-Eleven locations than anywhere else in the world.

<sup>15</sup> In this context, the term 'independent contractor' is defined to include people operating their own business and who are contracted to provide 'labor type services' without having the legal status of employee.

<sup>16</sup> Australian Bureau of Statistics, *Characteristics of Employment* (Cat No 6333.0, 2015).

<sup>17</sup> Research undertaken in the construction industry found that around 13 percent of all workers who had self-identified as independent contractors were 'possibly misclassified' and may well be employees at common law. See, eg, Office of the Australian Building and Construction Commission, *Sham Contracting Inquiry Report* (2011); TNS Social Research, *Working Arrangements in the Building and Construction Industry: Further Research Resulting from the 2011 Sham Contracting Inquiry* (2012). See also 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, November 2011).

which generates income not principally derived from providing their own labour).<sup>18</sup> As discussed in section 6.2 below, the distinction between those contractors/franchisees which are self-employed and those contractors/franchisees which are themselves employers can have important implications for the way in which competition and consumer regulation applies to these businesses and the employees that work for them.

The data on labour hire is also somewhat ill-defined. For example, depending on the methodology, data source and time period which is selected, the proportion of labour hire workers in the Australian workforce appears to vary from between 1.8 percent<sup>19</sup> to 5.2 percent.<sup>20</sup> According to official data, labour hire work appears to be most prevalent in the IT and telecommunications, construction and trades, health care and medical sectors.<sup>21</sup> However, it is less clear to what extent marginal labour hire businesses operating in highly competitive sectors, such as cleaning, security, horticulture and food processing, formally identify their business as such. There is certainly anecdotal evidence that labour hire is a prominent way in which to source labour in these sectors.<sup>22</sup>

Similarly, the lack of any official registration requirements on franchisors makes it impossible to accurately identify the population. The data which is available estimates that in Australia there are currently 1160 franchisors, 79,000 franchising units employing around 460,000 people.<sup>23</sup> Indeed, there is evidence to suggest that franchising is more prevalent in Australia than in the United States – the home of the franchise model.<sup>24</sup> While franchising spans an increasingly wide variety of sectors from hotels to hospitality to hairdressers, franchises are especially prominent in service industries, such as retail and food services.<sup>25</sup>

It is even more difficult to pin down the numbers of domestic workers in national and/or transnational supply chains.<sup>26</sup> However, supply chains appear to be a common organisational form in a wide range of industries in Australia, including transport (by road, rail, air or sea), manufacturing (such as textile, clothing and leather goods and food

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<sup>18</sup> ‘Other business operators’ is defined as persons who operate businesses which principally generate income through managing their own workers, or providing goods and services to the public, rather than by providing their own labour services (as is the case of independent contractors). ABS, *supra* n. 16.

<sup>19</sup> Australian Government, *Workplace Relations Framework – Productivity Commission Inquiry Report* (30 November 2015) 5.

<sup>20</sup> *Ibid.*

<sup>21</sup> IBISWorld Industry Report N7212, *Temporary Staff Services in Australia* (July 2015) at 15.

<sup>22</sup> See, e.g., *Fair Work Ombudsman v Eastern Colour Pty Ltd (No 2)* [2014] FCA 55; *Fair Work Ombudsman v Jooine (Investment) Pty Ltd & Anor* [2013] FCCA 2144.

<sup>23</sup> Lorelle Frazer, Scott Weaven and Anthony Grace, *Franchising Australia Survey 2014* (Asia-Pacific Centre for Franchising Excellence, Griffith University, 2014) (*Franchising Survey*).

<sup>24</sup> See Riley (2012), *supra* n. 12. Further, the Australian franchise sector operates over 50 percent more units than in Britain. See British Franchise Association, *NatWest/British Franchise Association Survey* (2011).

<sup>25</sup> In particular, 27 percent of franchisors are in retail trade and 18 percent of franchisors are in accommodation and food services, including fast food. See *Franchising Survey*, *supra* n. 23. For analysis of franchising behaviour in the café sector, see See, e.g., Ashlea Kellner, David Peetz, Keith Townsend and Adrian Wilkinson, ‘“We are Very Focused on the Muffins”: Regulation of and Compliance with Industrial Relations in Franchises’ (2016) 58(1) *Journal of Industrial Relations* 25.

<sup>26</sup> Supply chains are defined broadly in this paper as an interconnected series of contracts or business transactions organised to provide goods or services to organisations at the apex of contractual chains for profit. The organisations at the apex of these chains – so-called ‘lead firms’ – are contractually separated from the workers that produce the goods or provide the services by a series of contracts with and between intermediate parties.

Michael Quinlan, ‘Supply Chains and Networks’ (Safe Work Australia, Canberra, 2011).

processing), construction, hospitality, horticulture, nursing and homecare, cleaning, information technology and waste disposal.<sup>27</sup> While concrete data is sparse, it is now accepted that workers in supply chains in the textile, clothing and footwear and the road transport industries are often vulnerable and in need of additional legislative protection. In the last decade, there have been a number of statutory reforms designed to address worker exploitation arising in these specific types of supply chains. For example, in 2012, the FW Act was amended to include sector-specific regulation of the textile, clothing and footwear industry. These statutory provisions are deliberately designed to provide workers – regardless of their formal employment status or their specific working arrangements – with basic workplace entitlements, such as minimum rates of pay and penalty rates for overtime work.<sup>28</sup> It also expands the workers' rights of recovery by allowing them to bring claims against third party firms higher in the supply chain.<sup>29</sup> While these types of initiatives may be instructive to some extent, they are limited in other respects – not least by the fact that they are restricted to narrowly confined sectors.<sup>30</sup>

## **2.2. Possible Effects of Fissured Work**

The relationship between fissured forms of work (such as subcontracting, labour hire and franchising) and insecure work arrangements (including casual and fixed term work) is not straightforward. For example, casual work<sup>31</sup> is particularly prevalent in Australia making up around 23.5 percent of the paid workforce.<sup>32</sup> While casual work may be characterised as inherently insecure, these arrangements do not necessarily represent a 'fissured' form of employment where the worker continues to be directly employed by the lead firm.<sup>33</sup> That said, there does appear to be some link between fissured forms of work and employment insecurity. For example, when compared to the labour market overall, casual work not only appears to be more concentrated in franchising,<sup>34</sup> its incidence in the franchise sector continues to increase whereas the concentration of casual work has largely plateaued in other parts of the Australian economy.<sup>35</sup> It has been similarly observed that the outsourcing or subcontracting of work in supply chains typically involves the use of

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<sup>27</sup> *Ibid* at 8.

<sup>28</sup> For further discussion, see Igor Nossar, Richard Johnstone, Anna Macklin and Michael Rawling, 'Protective Legal Regulation for Home-Based Workers in Australian Textile, Clothing and Footwear Supply Chains' (2015) 57(4) *Journal of Industrial Relations* 585.

<sup>29</sup> There have been numerous statutory initiatives in the road transport industry, including the enactment of the Heavy Vehicle National Law and the establishment of the Road Safety Remuneration Tribunal. See Igor Nossar and Michael Rawling, 'Regulating Supply Chains to Protect Road Transport Workers: An Early Assessment of the Road Safety Remuneration Tribunal' (2015) 43(3) *Federal Law Review* 397.

<sup>30</sup> For further discussion of alternative regulatory models, including the TCF scheme, see Tess Hardy, 'Who Should Be Held Liable for Workplace Contraventions and On What Basis?' (2016) *Australian Journal of Labour Law* (forthcoming).

<sup>31</sup> While casual employees have no entitlement to regular hours of work or other benefits accruing to permanent employees, such as paid leave, notice of termination or redundancy pay, they are generally entitled to be paid a loading on their base rate of pay by way of compensation.

<sup>32</sup> Australian Bureau of Statistics, *Forms of Employment, Australia* (Cat No 6359.0, 2013).

<sup>33</sup> Richard Johnstone and Andrew Stewart, 'Swimming Against the Tide? Australian Labour Regulation and the Fissured Workplace' (2015) 37 *Comparative Labor Law & Policy Journal* 55, at 59.

<sup>34</sup> The latest estimates suggest that approximately 82 percent of all workers were employed as casuals in company-owned franchised units and around 57 percent were engaged on a casual basis in independent franchised units. Franchising Survey, *supra* n. 23.

<sup>35</sup> It has been argued that self-employed workers are also more common in the franchise sector. See Riley (2012), *supra* n. 12, at 102.

contingent workers, including self-employed subcontractors, home-workers, labour hire and casual employees.<sup>36</sup>

While this data suggests that there are greater levels of insecure work in supply chains and franchises than in other parts of the economy, this does not, of itself, mean that there are necessarily higher rates of employer non-compliance. Indeed, it is difficult to make a firm link between these two trends because there is no conclusive data on the rate of workplace contraventions available in Australia – either by sector, employment arrangement, organisational form or more generally. While there is no definitive data on compliance rates, there is certainly anecdotal evidence that underpayment of employees ‘has become a kind of norm amongst many small businesses in Australia.’<sup>37</sup>

Ultimately, the incidence of workplace contraventions are likely to turn on a range 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 putative employer, the extent to which the employer entity has a viable business that is independent of the lead organisation, the competitiveness of the relevant sector and the vulnerability (or otherwise) of the workers.<sup>38</sup> These various issues are highlighted by the two case studies examined in section 6 below.

### 3. Regulatory Responses in the Labour Sphere

This section examines the central provisions of the FW Act: the statutory cornerstone of the federal workplace relations system.<sup>39</sup> It provides an overview of critical employee rights and protections, before considering the way in which provisions relating to accessorial liability and sham contracting may serve to address some of the issues compliance and enforcement challenges raised by the vertical disintegration of firms and work.

Many of the protections and entitlements under the FW Act apply only to employees<sup>40</sup> as defined at common law.<sup>41</sup> Classifying a work contract as one of employment therefore has significant regulatory consequences. Similar in many ways to the tests adopted in other common law countries, the question of whether a particular

<sup>36</sup> Quinlan, *supra* n. 26, at 8.

<sup>37</sup> Evidence to Senate 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, Melbourne, 5 February 2016, 20 (Michal Smith, 7-Eleven Australia Pty Ltd). This is confirmed by the results of a number of recent industry campaigns carried out by the Fair Work Ombudsman, which found that employer non-compliance was greater than 50 percent (see, e.g., Fair Work Ombudsman, *National Hospitality Industry Campaign: Restaurants, Cafes and Catering – Report* (June 2015)).

<sup>38</sup> Johnstone and Stewart, *supra* n. 33, at 4.

<sup>39</sup> The distinction between employees and independent contractors is also relevant in relation to a range of other legislation regulating matters, such as long service leave, workers’ compensation and superannuation/pension entitlements, amongst others.

<sup>40</sup> This legislative framework generally applies to all employees regardless of visa, residential or citizenship status and are therefore critical in protecting foreign-born workers from workplace exploitation.

<sup>41</sup> There is no statutory definition of employment. For constitutional reasons which are not relevant for present purposes, particular parts of the FW Act – including the provisions dealing with the National Employment Standards, modern awards, enterprise agreements, minimum wages and other terms and conditions of employment – apply only to a ‘national system employer’ and a ‘national system employee’: FW Act, ss. 13, 14. Other parts of the FW Act – including the provisions dealing with parental leave and notice of termination – apply to all employers and employees as ordinarily defined (i.e. as defined at common law): FW Act, s. 11.

individual is an employee or an independent contractor requires the balancing of multiple indicia taking into account the totality of the relationship.<sup>42</sup> While this broad list of indicia usefully captures a wide range of circumstances, the application of this general test is not necessarily settled. Indeed, some recent decisions of the Full Court of the Federal Court place a different emphasis on different factors.<sup>43</sup> In the past, these nuanced distinctions were perhaps less consequential 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.'<sup>44</sup>

The fragmented work structures referred to above – subcontracting, labour hire and franchise arrangements – have generally been accepted by the courts as being both genuine and legitimate. In particular, when assessing the lawfulness (or otherwise) of labour hire and subcontracting arrangements, the courts have typically been reluctant to treat on-hired workers as employees of the 'client' or 'host' business.<sup>45</sup> There has been even less judicial enthusiasm for regarding the labour hire agency and the host business as joint employers.<sup>46</sup> There have, however, been instances where the courts have been willing to dismiss labour hire arrangements as a 'sham', where a business is clearly seeking to avoid its employment obligations by contracting labour through a corporate intermediary, particularly where this occurs as part of a company group.<sup>47</sup>

Similarly, in cases involving employment contraventions in franchises, courts have generally confirmed the validity of franchise arrangements and commonly accepted that an independently owned and operated franchisee company is the relevant employer entity.<sup>48</sup> So far, and with the exception of company-owned franchisees,<sup>49</sup> there have been no cases where the courts have been willing to pierce the corporate veil in order to find that the franchisor is the relevant employer of the affected employees – either on a sole or joint basis.<sup>50</sup>

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<sup>42</sup> These indicia include, amongst other factors, whether the hirer has the right to control the way work is performed, whether the worker is integrated into the hirer's business, whether the worker is exposed to financial risk or potential profits from the running of a business and whether the worker has the power to delegate or subcontract the work to another: *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

<sup>43</sup> In particular, the proper weight to be placed on the terms of the written employment contract, the receipt of paid leave and the deduction of employment-related taxes and other entitlements is somewhat contentious. See *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3)* (2011) 214 FCR 82; *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146; *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37; cf Jessup J in *Tattsbet Ltd v Morrow* [2015] FCAFC 62.

<sup>44</sup> Weil (2014), *supra* n. 5, at 185-6.

<sup>45</sup> See, e.g., *Mason & Cox Pty Ltd v McCann* (1999) 74 ASASR 438; *Wilton v Coal & Allied Operations Pty Ltd* (2007) 161 FCR 300.

<sup>46</sup> See, e.g., *FP Group Pty Ltd v Tooheys Pty Ltd* (2013) 238 IR 239.

<sup>47</sup> See, e.g., *Fair Work Ombudsman v Eastern Colour Pty Ltd (No 2)* [2014] FCA 55; *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* [2011] FCA 1176.

<sup>48</sup> See, e.g., *Fair Work Ombudsman v Zillion Zenith International Pty Ltd* [2014] FCCA 433 and *Fair Work Ombudsman v Haider Pty Ltd & Anor* [2015] FCCA 2113. In both these cases, an independently owned franchisee was found to have underpaid its workers and was subsequently fined under the FW Act.

<sup>49</sup> See, e.g., *Fair Work Ombudsman v Ultra Tune Australia Pty Ltd* [2012] FMCA 560 and *Brobbel v Darrell Lea Chocolate Shops Pty Ltd* [2008] FMCA 714. In both these cases, the franchisee store or outlet was owned and operated by the franchisor – accordingly, it was the franchisor company which was penalised as a result of employment contraventions which took place.

<sup>50</sup> There has been at least one case where the director of the franchisor was found to be 'involved in' contraventions of one of its franchisees and held liable as an 'accessory' under s. 550 of the FW Act: see

Many of the issues arising under common law – such as the contention surrounding the legal classification of workers and the judicial reluctance to lift the corporate veil – reflects some of the key trends in other jurisdictions. However, there are a number of features of the Australian workplace relations framework which distinguish it from systems elsewhere. These regulatory distinctions may mean that lead firms have fewer incentives to use fissured work arrangements in that they have less to gain from sourcing labour from smaller, separate businesses. While subcontracting or outsourcing may not allow a lead firm to source labour more cheaply, it may deliver a number of other benefits, including greater access to a flexible workforce, an avenue for minimising union influence and a way in which to limit the lead firm’s risk and responsibilities towards those that work in their organisation, supply chain or franchise network.<sup>51</sup>

### 3.1. Minimum Employment Standards as Prescribed by Statute and Modern Awards

While many of the key protections in the FW Act – such as the National Employment Standards<sup>52</sup> and modern awards<sup>53</sup> – only apply to employees and do not typically extend to independent contractors,<sup>54</sup> these ‘safety net’ provisions generally apply across the spectrum of employment arrangements and business settings.<sup>55</sup> This means, for example, that a labour hire employee will commonly be covered by the modern award which applies on the basis of the type of work they are undertaking.<sup>56</sup> The employer entity which has engaged the worker or the union which is entitled to represent them is not determinative in this respect.<sup>57</sup>

In addition, and in more confined ways, the FW Act provides some level of protection for independent contractors. In particular, employees *and* independent contractors may be able to make a claim under provisions dealing with workplace bullying,<sup>58</sup> as well as an array of prohibitions – known as ‘general protections’ – which are broadly designed to protect workers from a range of discriminatory or wrongful

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*United Voice v MDBR123 Pty Ltd* [2014] FCA 1344 and *United Voice v MDBR123 Pty Ltd (No 2)* [2015] FCA 1344. The accessorial liability provisions are discussed in more detail in section 3.4 below.

<sup>51</sup> Johnstone et al, *supra* n. 7, at 101.

<sup>52</sup> The National Employment Standards statutorily prescribes 10 minimum employment conditions, including working hours, various leave entitlements, notice of termination, redundancy pay and other matters. While all these standards apply to ongoing employees (including full-time and part-time employees), only a select number apply to casual employees.

<sup>53</sup> Modern awards are instruments which operate with the force of legislation and are designed to supplement the National Employment Standards. Modern awards generally prescribe industry or occupational wage rates across different work classifications, loadings, penalty rates and allowances. Awards also generally regulate scheduling of working hours, consultation over change initiatives and dispute resolution procedures. The coverage of awards does not normally extend to managerial, supervisory or professional workers.

<sup>54</sup> Outworkers in the textile, clothing and footwear industries are a notable exception. See section 2.1 for further discussion of this sector-specific regulation.

<sup>55</sup> This is also true of superannuation/pension entitlements which are regulated by legislation administered by the Australian Tax Office. Under this legislative scheme, all employers are required to contribute a percentage of each employee’s earnings (presently set at 9.5 percent) to a pension fund.

<sup>56</sup> The modern award may be displaced, however, if the labour hire employee is covered by an enterprise agreement.

<sup>57</sup> For example, a cleaner employed by a labour hire agency and supplied to clean offices of the host business will generally be covered by the Cleaning Services Award 2010 (Modern Award).

<sup>58</sup> FW Act, Pt. 6-4B.



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### 3.2. Enterprise Agreements

Enterprise agreements are instruments which are negotiated between employers and their employees (often, but not always, with the involvement of a union). These agreements generally deal with wages and other employment conditions as they apply to a specific enterprise – albeit 'enterprise' is defined broadly in this context to mean any kind of business, activity, project or undertaking.<sup>60</sup> Indeed, there are a number of ways in which enterprise agreements may apply to workers beyond the boundaries of a single firm.

First, a registered enterprise agreement covers any employers and employees which come within its scope.<sup>61</sup> This not only includes employees who are engaged by the relevant employer entity after the agreement was made and registered, it may also encompass labour hire employees engaged by a separate entity altogether. Although enterprise agreements cannot prohibit firms from using labour hire employees, it can include terms which effectively extend their coverage to any employees of a labour hire company performing work with the host organisation. In some instances, enterprise agreements may contain so-called 'site rates' provisions which require that any externally engaged workers receive pay and conditions at least as favourable as the host organisation's direct employees.<sup>62</sup> That said, there is no requirement to include such a term and it is quite possible for a labour hire employee and a direct employee to work alongside one another at a host organisation and be covered by entirely different industrial instruments prescribing distinctive terms and conditions of employment.<sup>63</sup>

Second, the FW Act contains provisions designed to protect employees in a transfer of business. The definition of 'transfer of business' generally captures situations where an employee has transferred from one employer to another and the work they are performing with the new employer is substantially the same as that which they did for the old employer.<sup>64</sup> A transfer of business will not only arise in circumstances where there has been a commercial transfer of ownership or use of assets from the old employer to the new employer or where the new and old employers are associated entities,<sup>65</sup> it also includes situations where the work has been outsourced from the old employer to the new employer.<sup>66</sup> If a transfer of business has occurred, and in the absence of any tribunal order to the contrary,<sup>67</sup> any enterprise agreement that previously covered an employee at the old

<sup>59</sup> FW Act, Pt. 3-1. In addition, independent contractors may avail themselves of protections under various anti-discrimination statutes that apply at both federal and state levels in Australia.

<sup>60</sup> FW Act, s. 12.

<sup>61</sup> FW Act, s. 53.

<sup>62</sup> The Productivity Commission has recently recommended that these types of matters (extensions to, and restrictions on, use of labour hire) should be prohibited from inclusion in enterprise agreements. See Australian Government, *Workplace Relations Framework – Productivity Commission Inquiry Report* (30 November 2015) at 686.

<sup>63</sup> See Johnstone et al, *supra* n. 7, at 101.

<sup>64</sup> See Breen Creighton and Elizabeth Shi, 'The Transfer of Business Provisions of the Fair Work Act in National and International Context' (2009) 23 *Australian Journal of Labour Law* 39.

<sup>65</sup> *Corporations Act 2001* (Cth), s. 50AAA.

<sup>66</sup> The fourth way in which a transfer of business may occur for the purposes of the FW Act is where work which has previously been outsourced from the new employer to the old employer, is being transferred back (sometimes referred to as 'insourced').

<sup>67</sup> Such orders will generally only be made where the Fair Work Commission is satisfied that the transferring employees will not be disadvantaged by varying the terms of the transferring agreement or exempting the

employer will transmit to cover that employee at the new employer (to the exclusion of any award or enterprise agreement that may otherwise apply to the transferring employee).<sup>68</sup> These provisions are principally designed to prevent employers who have made enterprise agreements from simply avoiding the obligations set out in these agreements by shifting the employees to a separate entity.

Combined, these two sets of provisions – the wide coverage of enterprise agreements and the obligations that come with transferring employees – may serve to inhibit a lead firm from outsourcing various functions to a labour hire firm or sub-contracting if it is doing so solely on cost grounds.

Finally, under the FW Act, there are a number of different types of agreements available, including single- and multi-enterprise agreements, which may be especially relevant in relation to franchises. While a single-enterprise agreement can be made by a single employer,<sup>69</sup> it can also be made with two or more employers where they are related corporations, or conduct a joint venture or common enterprise, or have obtained a ‘single interest employer authorisation’ from the federal tribunal.<sup>70</sup> The wide definition of what constitutes a ‘single enterprise’ means that a group of franchisees operating separate businesses under the same brand can apply for a single interest authorisation and make an agreement which applies to workers throughout the franchise. In comparison, a multi-enterprise agreement is an agreement made by two or more employers that cannot meet the ‘single interest’ requirement noted above. There is no need to obtain prior authorisation before making a multi-enterprise agreement, no capacity for protected industrial action to be taken in support of such an agreement and no enforceable obligation to bargain in good faith in relation to a multi-enterprise agreement. The major drawback of a multi-enterprise agreement (as compared to a single-enterprise agreement) relates to the procedures for employee approval.<sup>71</sup>

In some respects, the potential flexibility and breadth of these enterprise agreements represent important developments in light of the fact that it has been ‘very difficult for employees in small franchise outlets to organise and bargain effectively for wages and working conditions’.<sup>72</sup> So far, however, there have been very few agreements made of this nature.<sup>73</sup> Indeed, as will be discussed in section 6 below, removing legal hurdles to bargaining across a franchise does not necessarily address the many practical obstacles

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new employer from any obligation to comply with the enterprise agreement with the old employer. *Communication, Electric, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v CSIRO* [2010] FWA 1171.

<sup>68</sup> FW Act, s. 313.

<sup>69</sup> There may also be more than one single-enterprise agreements within a single employer. This is particularly common where there are multiple unions representing workers within the employer’s business or where the employer has multiple sites at different locations.

<sup>70</sup> FW Act, s. 172(2), (5).

<sup>71</sup> A multi-enterprise agreement will only be valid if there is majority approval in at least one enterprise. Where such approval is not given by employees at any given enterprise, that enterprise will not be bound by the multi-enterprise agreement. In comparison, a single-enterprise agreement must be approved by a majority of employees across the relevant enterprise casting a valid vote: FW Act, s. 182. Another potential disadvantage of multi-enterprise agreements is that at any time an employer who is covered by such an agreement may choose to enter into a single-enterprise agreement of its own. If this occurs, the single-enterprise agreement effectively overrides the multi-enterprise agreement. FW Act, s. 58(3).

<sup>72</sup> Riley (2012), *supra* n. 12, at 107.

<sup>73</sup> But see *McDonald’s Australia Pty Ltd* [2010] FWAFC 4602 (21 July 2010).

facing workers and their unions in this sector, not least of which is ensuring sustainable compliance with minimum employment standards.<sup>74</sup>

### **3.3. Sham Contracting**

As eluded to earlier, another common way in which employers have sought to avoid the application of protective employment legislation, such as the FW Act,<sup>75</sup> is through the misclassification of workers as 'independent contractors'. Under the sham contracting provisions of the FW Act, employers are prohibited from misrepresenting an actual or proposed employment relationship as an independent contracting arrangement.<sup>76</sup> If the sham contracting provisions are enlivened, the 'real' or 'actual' employer may be liable not only for employment-related entitlements, but may also be exposed to a range of civil remedies, including pecuniary penalties.

While the sham contracting provisions are designed to deter misclassification of workers either directly or via triangular labour hire agency arrangements,<sup>77</sup> they have not been used extensively. One of the obstacles to their wider application is that, as noted earlier, the distinction between employees and independent contractors is not clear cut under the common law in Australia. This inherent uncertainty has meant that employers have routinely been able to rely on the relatively generous defence available under these provisions.<sup>78</sup> In particular, a number of defendants have successfully pleaded that they should not be held liable because at the time they made the representation they did not know, and were not reckless to, the true nature of the working relationship.<sup>79</sup> Further, the sham contracting provisions themselves have proved 'very complex'<sup>80</sup> – which has meant that some actions have been unsuccessful partly because of the way in which they have been pleaded.<sup>81</sup>

Another important conceptual limitation is that, unlike the accessorial liability provisions outlined below, the sham contracting provisions do not have the effect of extending liability to third parties that display only some (if any) employer characteristics.<sup>82</sup> Rather, the sham contracting provisions reflect and uphold key concepts

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<sup>74</sup> Riley (2012), *supra* n. 12, at 107.

<sup>75</sup> In addition to the FW Act, a whole raft of other regulation ordinarily applies to employment relationships, including workers' compensation, superannuation and payroll tax.

<sup>76</sup> See FW Act, s. 357. Sections 358 and 359 of the FW Act respectively prohibit a person: from dismissing or threatening to dismiss an employee in order to engage them to perform substantially the same work as an independent contractor; and from making what they know to be false statements to induce a current or former employee to agree to such an engagement. See generally FW Act, Pt. 3-1, Div. 6.

<sup>77</sup> *Fair Work Ombudsman v Quest South Perth* [2015] HCA 45.

<sup>78</sup> An employer who engages a worker purportedly under an independent contractor arrangement, which the court subsequently finds should be more properly classified as an employment contract, may avoid liability under s 357 on the basis of the 'recklessness' defence available under s. 357(2) of the FW Act. For further discussion, see Andrew Stewart and Cameron Roles, 'The Reach of Labour Regulation: Tackling Sham Contracting' (2012) 25 *Australian Journal of Labour Law* 258. Various inquiries have recommended that s. 357(2) be modified so that the 'recklessness' defence is replaced with a 'reasonableness' defence. See, e.g., Australian Government, *Workplace Relations Framework – Productivity Commission Inquiry Report* (30 November 2015), Recommendation 25.1.

<sup>79</sup> See, e.g., *Construction, Forestry, Mining and Energy Union v Nubrick Pty Ltd* (2009) 190 IR 175.

<sup>80</sup> Johnstone and Stewart, *supra* n. 33.

<sup>81</sup> See, e.g., *Wells v Fair Work Ombudsman* [2013] FCAFC 47.

<sup>82</sup> Guy Davidov, 'Indirect Employment: Should Lead Companies be Liable?' (2015) 37 *Comparative Labor Law & Policy Journal* 5.

underpinning the binary employment relationship, albeit a greater emphasis is placed on the economic realities of the relevant arrangements, rather than technical corporate forms. While there are some obvious limitations, the sham contracting provisions have proved useful where companies have sought to convert employees into independent contractors or transfer them into labour hire companies in order to avoid statutory workplace relations protections.<sup>83</sup>

### 3.4. Accessorial Liability

If a person contravenes a civil remedy provision of the FW Act, including a failure to comply with the National Employment Standards, a term of a modern award or enterprise agreement or the sham contracting provisions, the person may be liable for a range of civil remedies, including a pecuniary penalty and compensation orders.<sup>84</sup>

To a large extent, the civil remedy regime established under the FW Act reflects traditional presumptions about employment arrangements – that is, primary responsibility and liability for contraventions of employment standards regulation is ordinarily ascribed to the relevant employer at common law. However, under the accessorial liability provisions, there is some capacity for liability to extend beyond the legal employer to other persons found to be ‘involved in’ a contravention of the Act.<sup>85</sup>

Broadly-speaking, a person will be taken to be ‘involved in’ a contravention under s 550 of the FW Act if they have:

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

These provisions have proven particularly valuable where the direct employer is insolvent or no longer in existence and the FWO has routinely used the accessorial liability provisions to bring enforcement proceedings against the individual directors of failed companies.<sup>86</sup> On occasion, the FWO has brought enforcement proceedings against advisors, such as HR managers, who may have the necessary knowledge of the essential matters making up the contravention.<sup>87</sup> There have only been a handful of cases in which the FWO has sought to use s 550 against a separate corporation which is said to be ‘involved in’ a contravention of the direct employer. One of the most significant and novel examples of

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<sup>83</sup> See, e.g., *Enforceable Undertaking between the Office of the Fair Work Ombudsman and Telco Services Pty Ltd* (24 December 2013).

<sup>84</sup> Under s. 545 of the FW Act, the courts have a broad power to ‘make any order the court considers appropriate’ where it is satisfied that a person has contravened a civil remedy provision. The maximum civil penalty which is currently available under the FW Act is A\$54,000 for a corporation and A\$10,800 for a natural person.

<sup>85</sup> FW Act, s. 550.

<sup>86</sup> This is essentially what occurred in the case *Fair Work Ombudsman v Haider Pty Ltd & Anor* [2015] FCCA 2113, discussed in section 6.1 below.

<sup>87</sup> *Fair Work Ombudsman v Centennial Financial Services & Ors* [2011] FMCA 459. For further discussion of the liability of advisors and other ‘gatekeepers’, see Tess Hardy and John Howe ‘Gatekeepers in Labour Law’ (Paper presented at the Australian Labour Law Association National Conference, Sydney, Australia, 14-15 November 2014); and Helen Anderson and Linda Haller, ‘Phoenix Activity and the Liability of the Advisor’ (2014) 36 *Sydney Law Review* 471.

the accessorial liability provisions involves the Australian supermarket retailer, Coles Supermarkets Australia Pty Ltd (*Coles*).<sup>88</sup>

In this particular 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 a series of separate contracts with individual businesses. None of the underpaid workers were actually employed by Coles. Further, there was no direct contract between Coles and the relevant employers. Notwithstanding the legal obstacles presented by these disaggregated arrangements, the FWO alleged that the supermarket chain should be held liable as an accessory under the FW Act on the basis that it was 'involved in' the contraventions. Although the case against Coles was settled prior to being heard,<sup>89</sup> it remains significant – both in symbolic and practical terms.<sup>90</sup> This proceeding is of less value, however, when it comes to clarifying the way in which accessorial liability provisions may apply to complex supply chains, as well as labour hire and franchise arrangements. Indeed, while there have been a number of proceedings since the Coles case which have reached final determination,<sup>91</sup> there are a number of critical issues which are yet to be authoritatively determined. For example, in respect of corporate accessories, it is not entirely clear whether it is possible to aggregate the knowledge of various employees and thereby prove that the corporation itself had requisite knowledge of the contravention.<sup>92</sup>

These previous and pending test cases are critical in clarifying whether the accessorial liability provisions have the capacity to successfully cut through contracting chains and trespass traditional legal boundaries so as to ensure that lead firms are not able 'to have it both ways'.<sup>93</sup> The experience so far underlines the value of targeting principal contractors, supply chain heads and franchisors. First, these third party corporations are often better resourced than the direct employer and are less likely to wind up the relevant corporate entity in order to avoid the consequences of any relevant court orders. This not only means that affected workers are fully compensated, but that the imposition of penalties is more than a token exercise.<sup>94</sup> Second, and perhaps most critically, the threat of legal liability (and the possibility of significant brand damage) may be enough to prompt voluntary and far-reaching measures amongst lead firms – a trend which will be further explored in section 6.2 below.

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<sup>88</sup> See, e.g., *Fair Work Ombudsman v Al-Hilfi & Ors* [2012] FCA 1166 (26 October 2012); and *Fair Work Ombudsman v Al-Hilfi & Ors (No 2)* [2013] FCA 16 (17 January 2013).

<sup>89</sup> *Fair Work Ombudsman v Al Hilfi* [2016] FCA 193.

<sup>90</sup> For further discussion of this case and the relevant outcomes, see Tess Hardy and John Howe, 'Chain Reaction: A Strategic Approach to Addressing Employment Non-Compliance in Complex Supply Chains' (2015) 57(4) *Journal of Industrial Relations* 563; See also Coles Supermarkets Australia Pty Ltd, *Annual Report Pursuant to the Enforceable Undertaking between the FWO and Coles* (3 November 2015).

<sup>91</sup> See, e.g., *Fair Work Ombudsman v Al Hilfi* [2016] FCA 193; and *Fair Work Ombudsman v South Jin Pty Ltd* [2015] FCA 1456.

<sup>92</sup> See Ingmar Taylor and Larissa Andelman, 'Accessory Liability under the *Fair Work Act*' (Paper presented at the Australian Labour Law Association, Manly, 14-15 November 2014).

<sup>93</sup> Weil (2014), *supra* n. 5, at 14.

<sup>94</sup> In the Coles case, key subcontractors, such as Starlink Operations, had gone into liquidation in the course of the proceeding. However, under the enforceable undertaking between the FWO and Coles, the supermarket retailer agreed to rectify any relevant underpayments.

## 4. Regulatory Responses in the Work Health and Safety Sphere

The harmonised Work Health and Safety Acts (*WHS Acts*) evidence a deliberate and drastic move away from the traditional employment paradigm.<sup>95</sup> Under the WHS Acts, ‘primary’ responsibility is placed on ‘a person conducting a business or undertaking’ to ensure, so far as is reasonably practicable, the health and safety of ‘workers’ and ‘other persons’.<sup>96</sup> The definition of a ‘person conducting a business or undertaking’ – colloquially referred to as a PCBU – includes not just employers, but also principal contractors, head contractors, franchisors and the Crown.<sup>97</sup> Similarly, the term ‘worker’ is exceptionally wide (especially in comparison to the definition of ‘employee’ under the FW Act). In particular, this term is defined under the work health and safety legislation as including any person who carries out ‘work in any capacity for’ a PCBU, including work as: a contractor; a sub-contractor; an employee of a labour hire company; an outworker; and as a volunteer.<sup>98</sup>

Importantly, the WHS Acts contain provisions which are designed to address what is sometimes referred to as ‘counterproductive liability avoidance’<sup>99</sup> – 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 franchisee’s 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’,<sup>100</sup> 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.<sup>101</sup> To achieve this objective, the legislation provides that:

- a) the relevant duties cannot be delegated;<sup>102</sup>
- b) that one person can owe a number of duties;<sup>103</sup>
- c) that more than one person can hold a duty and that each person must comply with the duty even though it might be also owed by others.<sup>104</sup>

A related aspect of the WHS Acts is the way in which it imposes a horizontal duty on all PCBUs to consult, cooperate and coordinate with other PCBUs.<sup>105</sup> Again, this provision

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<sup>95</sup> See, e.g., *Baiada Poultry Pty Ltd v The Queen* [2012] HCA 14. For detailed discussion of these Acts, see Richard Johnstone, Elizabeth Bluff and Alan Clayton, *Work Health and Safety Law and Policy* (3<sup>rd</sup> ed, 2012). The Model Work Health and Safety Act adopted in 2011 has been enacted in all Australian jurisdictions, except for Victoria and Western Australia.

<sup>96</sup> WHS Acts, s. 19(1)-(2).

<sup>97</sup> WHS Acts, s. 5 of WHS Acts See also Explanatory Memorandum, Work Health and Safety Bill 2011 (Cth), [23].

<sup>98</sup> WHS Acts, s. 7.

<sup>99</sup> Cynthia Estlund, ‘Who Mops the Floor at the Fortune 500? Corporate Self-Regulation and the Low Wage Workplace’ (2008) 12(3) *Lewis & Clark Law Review* 671, at 692.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> WHS Acts, s. 14.

<sup>103</sup> WHS Acts, s. 15.

<sup>104</sup> WHS Acts, s. 16.

<sup>105</sup> WHS Acts, s. 46. PCBUs are also under a vertical duty to consult all of the ‘workers’ who carry out work in any capacity for the PCBU and who are ‘likely to be directed affected by a matter relating to’ health and safety. WHS Acts, ss. 47-49.

is specifically designed to address the 'problem of hazards arising from fractured, complex and disorganised work processes.'<sup>106</sup> Finally, the WHS Acts place a 'positive and proactive duty'<sup>107</sup> on all officers of a PCBU 'to exercise due diligence' to ensure that the PCBU complies with all relevant duties and obligations arising under the Act. An officer can be prosecuted for a failure to exercise proper due diligence,<sup>108</sup> even if the PCBU itself is not breaching its own duties.<sup>109</sup>

The novelty of these provisions, together with the fact that they are still relatively new, means that it is not entirely clear how these provisions will play out, and how liability will be ascribed, when applied to the various corporate structures and employment arrangements described earlier.<sup>110</sup>

## **5. Regulatory Responses in the Competition and Consumer Sphere**

As noted in the introduction, there are a number of statutes which potentially influence the notion of the firms and their relevant responsibilities to workers, but which lie somewhat beyond the world of workplace relations – at least as far as this regulatory sphere is conventionally conceived. While the regulation of commercial exchange was once the domain of contract law and equitable doctrines, these common law rules have been increasingly supplemented by statutes, such as the *Independent Contractors Act 2006* (Cth) (*IC Act*) and the *Competition and Consumer Act 2010* (Cth) (*CC Act*). The IC Act represented an important development at the time of its enactment in that it enabled, for the first time at a federal level, a party to a 'services contract' to challenge the 'fairness' of the contract before a court.<sup>111</sup> However, it is likely that this legislation may be soon superseded by some of the more far-reaching reforms of the federal competition and consumer regulation summarised below.

The first way in which the CC Act affects work contracts is by way of the unfair contract terms provisions of the Australian Consumer Law.<sup>112</sup> While these protections are

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<sup>106</sup> Johnstone and Stewart, *supra* n. 32, 28.

<sup>107</sup> *Ibid.*

<sup>108</sup> Section 27(5) of each of the WHS Acts defines 'due diligence' to include taking 'reasonable steps' to do the following, amongst other things: to acquire and keep up-to-date knowledge of work health and safety matters; to gain an understanding of the nature of the PCBU's operations and generally of the hazards and risks associated with these operations; and to ensure that the PCBU has, and implements, processes for complying with any duty or obligation under the Act.

<sup>109</sup> WHS Acts, s. 27(4).

<sup>110</sup> While key provisions have changed under the WHS Acts, some of the prosecutions brought under predecessor legislation are likely to provide the courts with some guidance on how to appropriately ascribe liability in respect of certain organisational forms, such as franchising. For example, in *WorkCover Authority of New South Wales v McDonald's Australia Ltd* (2000) 95 IR 383, both the franchisor and the franchisee were convicted on the basis that they had, as was required under the previous legislation, 'to any extent, control of' the premises. For further discussion of these issues, see Andrew Terry and Joseph Huan, 'Franchisor Liability for Franchisee Conduct' (2012) 39(2) *Monash University Law Review* 388.

<sup>111</sup> IC Act, ss 7(2), 11(1)(a). However, very few successful cases brought under these statutory provisions in the decade since it came into operation: But see *Keldote Pty Ltd v Riteway Transport Pty Ltd* (2008) 176 IR 316.

<sup>112</sup> The Australian Consumer Law is set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

currently confined to consumer contracts, from November 2016, the provisions will be extended to small business contracts.<sup>113</sup>

Under these statutory provisions, a party to a small business contract can seek a declaration that unfair contract terms be declared void, amongst other remedies.<sup>114</sup> In determining whether a term is unfair, the court must consider whether the term:

- a) causes a significant imbalance in the parties' rights and obligations;
- b) is reasonably necessary to protect the legitimate interests of the benefited party; and
- c) causes detriment (financial or otherwise) to the other party.<sup>115</sup>

The types of terms which are likely to be subject to the most scrutiny are terms that enable one party (but not the other): to vary the contract; to terminate the contract; to impose penalties for breaching the contract; or to limit liability.

The extension of unfair contract term protections to small business contracts may place critical restrictions on the principal contractor and/or the franchisor. For example, in a franchising context, it is likely that a provision in a franchise agreement which allows the franchisor to terminate the agreement at any time without cause and without providing any compensation to the franchisee is likely to be characterised as 'unfair' and therefore void. Further, if the franchise agreement expressly incorporates the franchisor's operations manual, then it is possible that the provisions of the manual may be also be subject to the unfair contract terms law. Another important limitation is on the variation rights of the franchisor. This is critical given that franchising relationship is often one where 'franchisors assume an entitlement to dictate rather than negotiate with franchisees.'<sup>116</sup>

The second, significant way in which the CC Act potentially shapes work relationships is via industry-specific codes of regulation,<sup>117</sup> including the Franchising Code of Conduct<sup>118</sup> and the Food and Grocery Code of Conduct.<sup>119</sup> The Franchising Code – a mandatory code which applies to all franchising relationships in Australia – was introduced on the basis of a growing awareness of the way in which the 'asymmetric power dynamic within franchise agreements [had the] potential to lead to abuse of power.'<sup>120</sup>

In summary, the Franchising Code requires the franchisor to disclose critical and comprehensive information to existing and prospective franchisees before entering into a

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<sup>113</sup> 'Small business contracts' are defined to include contracts where: at least one party is a business that employs less than 20 people; the upfront price payable under the contract is \$300,000 or less (or \$1,000,000 or less if the contract is for more than 12 months); and the contract is a standard form contract.

<sup>114</sup> Proceedings may also be brought by the relevant regulator, the Australian Competition and Consumer Commission under these provisions.

<sup>115</sup> In determining this matter, the court may take into account the contract as a whole and the extent to which the term is transparent.

<sup>116</sup> Riley (2012), *supra* n. 12, at 115.

<sup>117</sup> Section 51AD of the federal *Competition and Consumer Act 2010* (Cth) requires corporations to comply with industry codes and enables access to the remedial provisions of the Act, including rights to seek declarations, compensatory damages, injunctions and pecuniary penalties.

<sup>118</sup> The Franchising Code is set out in Schedule 1 to the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014* (Cth).

<sup>119</sup> The Food and Grocery Code of Conduct – which operates on a voluntary basis and came into effect from 2015 – governs certain conduct by grocery retailers and wholesalers in their dealings with suppliers, including with respect to disclosure, termination of agreements and dispute resolution. This Code is especially relevant to the Baiada case referred to below.

<sup>120</sup> See Parliamentary Joint Committee on Corporations and Financial Services, *Opportunity Not Opportunism: Improving Conduct in Australian Franchising* (Commonwealth of Australia, December 2008) at 6.



franchise agreement, and on an annual basis thereafter.<sup>121</sup> In addition, the Franchising Code restricts the termination rights of the franchisor in a number of different ways. Summary termination of a franchise agreement is only permitted in very confined circumstances.<sup>122</sup> Even where there is a breach by the franchisee, a franchisor is only permitted to terminate a franchise agreement, where it has given notice of the breach to the franchisee and the franchisee has failed to remedy the breach within the specified timeframe.<sup>123</sup> If the franchisee successfully rectifies the breach, the franchisor may not terminate the agreement for that breach. Further, the Code also now expressly requires franchisors to deal with franchisees in good faith.<sup>124</sup> While the obligation to act in good faith does not prevent parties acting on the basis of their legitimate commercial interests, it may serve to prevent the capricious and opportunistic exercise of contractual rights – particularly those that afford the franchisor a high level of discretion. In many ways, the good faith obligation may supplement the unfair contract terms law, especially in relation to rights of variation. It also potentially complements the statutory prohibition on unconscionable conduct generally available under the Australian Consumer Law.<sup>125</sup>

The third and final way in which the CC Act affects the rights, power and position of workplace actors is via its regulation of collective action. Although independent contractors and franchisees have a right to freely associate,<sup>126</sup> they have no access to the statutory collective bargaining framework under the FW Act or otherwise. It is therefore unclear what actions (if any) contractors and franchisees may legitimately take in pursuit of their freedom of association.<sup>127</sup> In addition to a number of common law obstacles, the CC Act further restricts the rights of independent contractors and franchisees to take collective action as such conduct is generally perceived as contravening the anti-competitive provisions.<sup>128</sup> While it is possible to seek an exemption from these provisions by application to the ACCC, such an exemption has been sought and granted only sparingly.<sup>129</sup>

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<sup>121</sup> Franchising Code, Pt. 2.

<sup>122</sup> The franchisor may only terminate the franchise agreement without notice where the franchisee: no longer holds the necessary licence to carry on the franchised business; becomes bankrupt, insolvent or the company is deregistered; abandons the franchise; is convicted of a serious offence; operates the franchised business in a way that endangers public health or safety; or acts fraudulently. Franchising Code, cl. 29.

<sup>123</sup> Franchising Code, cl. 27-28.

<sup>124</sup> Franchising Code, cl. 6.

<sup>125</sup> Australian Consumer Law, s. 22. This prohibition generally applies to situations where one person has supplied or acquired goods or services to or from another, albeit there are some exclusions in relation to listed public companies.

<sup>126</sup> The federal *Fair Work (Registered Organisations) Act 2009* (Cth) allows the registration of employee associations that have independent contractors as members, but there is a level of uncertainty as to whether an association can be registered under this Act where its members consist solely of independent contractors. In comparison, cl. 33 of the Franchising Code of Conduct expressly protects the right of franchisees (or prospective franchisees) to form an association. See Johnstone et al, *supra* n. 7, at 134-5.

<sup>127</sup> Riley (2012), *supra* n. 12, at 113.

<sup>128</sup> In particular, the CC Act prohibits: contracts, arrangements or understandings that have the purpose, or would likely have the effect, of substantially lessening competition; collective refusals to deal with other parties; and cartel behaviour by way of price fixing. See CC Act, ss. 44ZRD, 44ZRF, 45(2). For further discussion, see Shae McCrystal, 'Collective Bargaining by Independent Contractors: Challenges from Labour Law' (2007) 20 *Australian Journal of Labour Law* 1.

<sup>129</sup> The ACCC is authorized to grant an exemption where the proposed collective bargaining conduct produces sufficient 'public benefit' (so as to outweigh any public detriment). Johnstone et al, *supra* n. 7, at 145.

## 6. Evaluation and Future Prospects

As noted in the introduction, the capacity of these separate regulatory schemes will be assessed by reference to the recent controversies surrounding the workplace rights and responsibilities of various actors in the Baiada supply chain and the 7-Eleven franchise network. Before engaging in this evaluative discussion, however, it is necessary to briefly provide some background on each of these cases.

### 6.1. Background

In the Baiada case, it has been found that plant workers – many of whom were on working holiday visas and sourced through a complex chain of contractors – were being routinely underpaid, forced to work long and arduous hours in poultry processing factories and compelled to pay inflated rent amounts for substandard accommodation. There was also evidence of discrimination and misclassification of employees as independent contractors.

A comprehensive inquiry undertaken by the FWO in 2015 revealed that Baiada principally sourced labour through six contractors and paid these contractors on the basis of the kilogram of poultry processed rather than hours worked. These contractors then sub-contracted to second- and third-tier entities, involving up to 34 entities in total. There were no written agreements between any of the entities. The FWO Inquiry also found 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.'<sup>130</sup> Since the conclusion of the FWO's Inquiry, Baiada has taken a range of measures designed to address these issues. The relevant outcomes will be discussed in further detail shortly.

In addition, and more recently, the 7-Eleven franchise in Australia has been grappling with allegations of widespread underpayment of international student workers by franchisee employers.<sup>131</sup> In particular, there is evidence to suggest that franchisee employers across the convenience store chain have deliberately sought to evade the law by adopting a number of illegitimate strategies, including the so-called 'half-pay scam'<sup>132</sup> and the 'cash-back scam'.<sup>133</sup> The main outcome of both these arrangements was that 7-Eleven employees were frequently receiving only half of what they were actually entitled to under

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<sup>130</sup> Ryan Lin, *Poultry Processing in Australia*, IBISWorld Pty Ltd, February 2014, cited in the FWO Baiada Inquiry, *supra* n. 13.

<sup>131</sup> Documents which were reviewed as part of the Fairfax/*Four Corners* investigation revealed that 69 percent of stores had payroll compliance issues. See Adele Ferguson, Sarah Danckert and Klaus Toft, '7-Eleven: A Sweatshop on Every Corner', *The Age*, 29 August 2015.

<sup>132</sup> Under the half-pay scam, employment records were deliberately manipulated in a way that disguised the real number of hours worked. In general, half the number of actual hours worked were formally recorded, but in some instances, only a third of the actual hours worked were recorded in the payroll system. Evidence to Senate 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, Melbourne, 5 February 2016, 28 (Professor Allan Fels, Fels Wage Fairness Panel).

<sup>133</sup> Under the cash-back scam, the employees were paid the full amounts owing to them under workplace laws, and the correct amounts were reflected on formal employment records and payslips. However, the employees were then forced or coerced to repay to their employer half of that amount in cash. *Ibid* at 29.

the relevant workplace laws and industrial instruments.<sup>134</sup> While investigations continue, it is estimated that thousands of employees have been underpaid and the total backpay claim across the franchise may ultimately exceed A\$30 million.<sup>135</sup> It has been argued that this poor compliance behaviour may have been driven, at least in part, by the relevant business model. Indeed, there is growing evidence to suggest that while the Australian head office of the 7-Eleven franchise continued to reap significant profits, many independent franchisees were struggling to survive.<sup>136</sup> Professor Allan Fels – the former head of the ACCC – has noted that, in his view, the 7-Eleven 'business model will only work for the franchisee if they underpay or overwork employees.'<sup>137</sup>

Despite the fact that both cases revealed serious and systemic non-compliance with workplace laws, there has been overwhelming evidence showing that the affected employees – who were predominantly temporary migrant workers – were unlikely to complain to government authorities out of fear, ignorance or both.<sup>138</sup> Further, in both cases, more proactive methods of detection were foiled by the fact that employment records were either completely absent or deliberately falsified.<sup>139</sup> Enforcement activities were not only compromised by problems of proof, but were further undermined by illegal 'phoenix' behaviour.<sup>140</sup> For instance, last year, the former operator of a 7-Eleven store in Queensland was fined \$6,970 after it was found that a temporary foreign worker – an international student from Nepal – 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

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<sup>134</sup> The more recent allegations reflect previous evidence of serious underpayments and deliberate falsification of employment records in the 7-Eleven franchise: see, e.g., *Fair Work Ombudsman v Bosen Pty Ltd & Anor* [2011] VMC 81; Enforceable Undertaking between the Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman) and PSP International Trading Pty Ltd and Kumar Sundarakumar (13 March 2015). See also Fair Work Ombudsman, 'More 7-Eleven Store Operators to Face Court for Allegedly Short-Changing Employees', Media Release, 14 January 2016.

<sup>135</sup> Sarah Danckert, '7-Eleven Workers who Helped Expose Wage Fraud Get Paid', *Sydney Morning Herald*, 14 February 2016.

<sup>136</sup> In an internal document uncovered as part of the Fairfax/*Four Corners* investigation, it was revealed that 228 stores, which represents approximately one third of all stores in the network, delivered a total income to the franchisee of \$350,000 or less for the year to June 2015. More specifically, it shows that one store earned less than \$150,000, 38 stores generated an income of less than \$200,000 and 84 stores had an income ranging between \$200,000 and \$250,000. Labour costs for one casual employee amounted to around \$230,000 and generally represented the most expensive item for franchisees given that they are required to be open 24 hours per day, 7 days per week. See Adele Ferguson, Sarah Danckert and Klaus Toft, '7-Eleven Stores in Strife', *The Age*, 31 August 2015.

<sup>137</sup> Adele Ferguson, Sarah Danckert and Klaus Toft, '7-Eleven: Allan Fels says Model Dooms Franchisees and Workers', *The Age*, 31 August 2015.

<sup>138</sup> Professor Allan Fels recently gave evidence that some 7-Eleven franchise workers were reluctant to make a claim to the independent panel for fear that the immigration authorities would take action against them for breaching working conditions. Others may be subject to threats from franchisees if they put in a claim. Fels observed that 'there is a strong, powerful and quite widespread campaign of deception, fearmongering, intimidation and even more physical actions of intimidation by franchisees.' Evidence to Senate 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, Melbourne, 5 February 2016, 30 (Professor Allan Fels, Fels Wage Fairness Panel).

<sup>139</sup> See, e.g., FWO Baiada Inquiry, *supra* n. 13.

<sup>140</sup> Illegal phoenix activity has been described as occurring where there is a deliberate liquidation of a company with unpaid debts and the assets of the original company are transferred to a newly created company for undervalue. The outcome of this transfer is to deprive employees and unsecured creditors of any remedy against the original company. See Helen Anderson, 'Phoenix Activity and the Recovery of Unpaid Employee Entitlements - 10 Years On' (2011) 24 *Australian Journal of Labour Law* 141.

action against it was stayed.<sup>141</sup> As a result, the former owner was liable for a much reduced penalty amount and the former employee was left substantially out of pocket.<sup>142</sup> Similarly, during the course of the FWO's Inquiry into Baiada, a large number of entities identified in the supply chain ceased trading.<sup>143</sup> The effect of this systematic company collapse was to make the relevant employer entities immune to the imposition of compensatory orders and pecuniary penalties.<sup>144</sup>

Another issue at play in these cases – and that underlined in Weil's work – is that punishment of the putative employer (i.e. the contractor or the franchisee) may do little to address the underlying drivers of poor compliance behaviour, namely the attitude and activities of the lead firm. For example, in the Baiada case, the FWO found that Baiada's principal operating model was to 'transfer costs and risks associated with the engagement of labour to an extensive supply chain of contractors responsible for sourcing and providing labour.'<sup>145</sup> Further, Baiada's competitive procurement processes and poor governance arrangements were also viewed as creating an environment ripe for worker exploitation. However, as Baiada was not the direct employer of the affected employees, there was some hesitation about how to prompt Baiada – one of the lead firms in this case – to make a firm commitment to improve workplace relations compliance throughout its contracting chain. There was even less certainty on what could be done to encourage supermarkets and fast food chains to revise their contracting practices.

Similar challenges have confronted the FWO with respect to the 7-Eleven franchise network. While the regulator had been very active in bringing litigation against 7-Eleven franchisees over a span of some years, the franchisor has generally sought to distance itself from the unlawful behaviour of so-called 'rogue' franchisee employers. It was not until the high profile media investigation late last year, the revelation of the breadth and gravity of the non-compliance and the incurrence of significant brand damage, that the franchisor was ultimately prepared to accept a level of responsibility for the underpayments,<sup>146</sup> revise the relevant monitoring practices and make sweeping changes to the existing business model.<sup>147</sup>

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<sup>141</sup> See *Fair Work Ombudsman v Haider Pty Ltd & Anor* [2015] FCCA 2113 (30 July 2015).

<sup>142</sup> Under the FW Act, natural persons are liable for a maximum penalty which is one-fifth of the penalty set for corporations.

<sup>143</sup> In particular, four of the six key contractors and 17 of the other sub-contractors ceased trading. FWO Baiada Inquiry, *supra* n. 13.

<sup>144</sup> However, eligible employees may be able to recover their outstanding wages and other entitlements through a federal government scheme, where the employee has lost their employment due to the liquidation or bankruptcy of their employer. See *Fair Entitlements Guarantee Act 2012* (Cth); Helen Anderson, *The Protection of Employee Entitlements in Insolvency: An Australian Perspective* (University of Melbourne Press, 2012).

<sup>145</sup> FWO Baiada Inquiry, *supra* n. 13, at 2.

<sup>146</sup> In particular, the head office has established an independent panel – chaired by Professor Allan Fels – to receive, process and determine any claims from employees of its franchisees. See Adele Ferguson and Sarah Danckert, '7-Eleven: Allan Fels to Lead Wage Scandal Inquiry', *Sydney Morning Herald*, 4 September 2015.

<sup>147</sup> While it has continued to dispute the assertion that the franchise system is not financially viable, the Australian franchisor of 7-Eleven has agreed that it will, for any existing franchisee who wishes to exit the franchise system, refund the franchise fee that has been paid and help sell any store where a goodwill payment has been made. Subsequently, in December 2015, the Australian franchisor of 7-Eleven entered into a variation agreement with over 97 percent all franchisees whereby it was agreed that the existing financial arrangements between the franchisor and franchisees would be adjusted in favour of franchisees. Under this variation agreement, franchisees are projected to earn an additional \$150 million over three years. Evidence to Senate Inquiry into the Impact of Australia's Temporary Work Visa Programs on the Australian Labour

## 6.2. Strengths and Weaknesses of Current Statutory Responses

Most of the underpaid workers in the Baiada and 7-Eleven cases – many of whom were foreign nationals – were legally classified as employees. This meant that they were covered by many of the statutory safeguards available under the FW Act, including the National Employment Standards, modern awards and enterprise agreements. However, these two cases reveal that these formal protections were somewhat futile in the face of systemic non-compliance occurring in complex contracting chains and franchise networks. As noted above, one of the main drawbacks of the FW Act is the way in which it adheres to, and upholds, traditional notions of employment. While the affected employees had rights to bring claims against their employer – these rights were thwarted by the fact that the putative employer was often evasive and frequently no longer in existence. Although the accessorial liability provisions of the FW Act provide a possible avenue for redress, and a legal mechanism to pursue the relevant lead firms, their application to third party corporations remains somewhat experimental.

The limitations of the current legal framework, combined with a growing appreciation of Weil's strategic model of enforcement, have prompted the FWO to experiment with a whole raft of voluntary initiatives.<sup>148</sup> While these interventions are distinct in substance, they are linked by a common appreciation of the fact that the FWO's compliance and enforcement activities should serve to

create awareness among large organisations that it is not acceptable to be indifferent regarding the treatment of people that work for, and within, their organisations just because it does not directly employ them.<sup>149</sup>

The FWO inquiries present one of the most recent manifestations of this principle. These formal, long-term inquiries generally involve the federal regulatory agency undertaking a detailed examination – though site visits, interviews and payroll audits – of the drivers of compliance behaviour in an industry, region, supply chain or labour market. Particular focus is placed on the role of lead firms. At the conclusion of an inquiry, a written report is made publicly available which sets out the findings, the regulator's recommendations and the actions taken. Ten comprehensive inquiries were active during 2014–15, including the Baiada Inquiry referred to above, as well as an ongoing inquiry into the workplace practices of 7-Eleven franchise stores.<sup>150</sup>

The Baiada Inquiry – which was concluded in June 2015 – demonstrates the power of informal sanctions, such as disapproval and adverse publicity. In the past, Baiada has

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Market and on the Temporary Work Visa Holders, Parliament of Australia, Melbourne, 5 February 2016, 18 (Robert Baily, Chief Executive Officer, 7-Eleven Stores Pty Ltd).

<sup>148</sup> For further discussion of these various initiatives, see Hardy and Howe, *supra* n. 90; Tess Hardy and John Howe, 'Too Soft or Too Severe? Enforceable Undertakings and the Regulatory Dilemma Facing the Fair Work Ombudsman' (2013) 41 *Federal Law Review* 1; and Tess 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).

<sup>149</sup> Fair Work Ombudsman, 'Push to End Exploitation of Trolley Collectors', Media Release, 29 August 2014.

<sup>150</sup> Fair Work Ombudsman, *Annual Report 2014-15*, at 31. The Australian franchisor of 7-Eleven has indicated that they intend to enter into a 'compliance partnership' with the FWO. Evidence to Senate 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, Melbourne, 5 February 2016, 6 (Michael Smith, Chairman, 7-Eleven Australia Pty Ltd).

fiercely resisted taking responsibility for workplace contraventions which have occurred at its sites.<sup>151</sup> However, as a result of the FWO Inquiry, the threat of accessorial liability and the public airing of some of its practices, Baiada has now entered into a 'proactive compliance deed' with the regulator.<sup>152</sup> Under this voluntary, common law agreement, the Baiada Group expressly acknowledged that:

it has a moral and ethical responsibility to require standards of conduct from all entities and individuals involved in its enterprise that...meet Australian community and social expectations to provide equal, fair and safe work opportunities for all workers at all of its sites.<sup>153</sup>

In addition, the Baiada Group agreed to a number of practical measures designed to stamp out worker exploitation at its factories, such as improving the transparency and documentation of contractor arrangements, arranging for a third party professional to conduct periodic audits of all contractors and subcontractors supplying labour to its sites, introducing electronic timekeeping and ensuring that all workers are informed of the relevant employing entity and their employment rights.<sup>154</sup> Subsequently, and outside of the formal terms of the deed, it appears that Baiada has also simplified its contracting arrangements so that it now engages labour through a much 'flatter' structure.<sup>155</sup>

While the Baiada proactive compliance deed may be seen as a positive outcome in many respects, especially for the workers immediately affected, the broader implications of this approach are not as clear-cut. Indeed, while these 'light-touch' regulatory techniques may mitigate some of the underlying problems that plague conventional compliance and enforcement tools, there are some potential obstacles to this approach. For a start, the legal status of proactive compliance deeds is not entirely clear given that it is made under the general law rather than statute.<sup>156</sup> Further, it is not certain to what extent (if at all) firms would be willing to adopt voluntary compliance mechanisms in the absence of consumer pressure, regulatory scrutiny and/or the credible threat of liability. These issues are particularly pertinent in relation to the 'other' lead firms involved in the food processing industry, namely supermarket retailers and fast food chains, which have predominantly adopted and relied on self-regulatory measures, such as ethical sourcing policies. There is evidence to suggest that supermarkets have limited oversight as to whether firms actually comply with such policies. Further, it appears that they have little inclination to change their monitoring practices in the absence of sufficient positive or negative incentives to do so: that is, where there is no real prospect of legal liability.<sup>157</sup> While policy measures are valuable, the importance of an adaptable legislative scheme cannot be overstated.

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<sup>151</sup> See, e.g., *Baiada Poultry Pty Ltd v The Queen* [2012] HCA 14.

<sup>152</sup> For further discussion of proactive compliance deeds, see Hardy and Howe (2015), *supra* n. 90.

<sup>153</sup> Proactive Compliance Deed between the Office of the Fair Work Ombudsman and Baiada Poultry Pty Ltd and Bartter Enterprises Pty Ltd dated 23 October 2015.

<sup>154</sup> *Ibid.*

<sup>155</sup> Evidence to Senate 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, Melbourne, 5 February 2016, at 45 (Michael Campbell, Deputy Fair Work Ombudsman, Operations, Fair Work Ombudsman).

<sup>156</sup> In comparison, enforceable undertakings made under the FW Act have statutory force and can be enforced in a court. See Hardy and Howe (2013), *supra* n. 90.

<sup>157</sup> Evidence to Senate 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, Melbourne, 18 May 2015, at 4 (Armineh Mardirossian, Group Manager, Corporate Responsibility, Community and Sustainability, Woolworths Limited).

In comparison to the FW Act, the WHS Acts present a broad and flexible regulatory regime which reflects many of the core principles of the strategic enforcement model – that is, it allows regulators to traverse traditional legal boundaries in order to better address work health and safety issues arising in complex supply chains, labour hire arrangements, company groups and franchise networks. It is explicitly designed to deter actors from interposing corporate entities in a bid to avoid liability – rather it encourages direct employers, as well as third party firms situated above them, to take proactive steps to ensure their respective compliance with work health and safety obligations. The horizontal duties imposed under this statutory scheme are especially helpful where there may be more than one ‘lead firm’ – one of the issues identified in the Baiada case. In particular, the fact that all PCBUs along a supply chain have a separate and concurrent duty to consult, cooperate and coordinate with other PCBUs – would mean that the Baiada Group, as well as the major buyers of processed poultry, would be obliged to take steps to reduce risks to health and safety.<sup>158</sup> Further, in comparison to the uncertainty associated with the scope of the accessorial liability provisions and their application to franchise arrangements, there is little doubt that the franchisor and the franchisee in the 7-Eleven case are both responsible for minimising health and safety risks amongst franchise workers.

While the work health and safety legislation holds much potential in terms of addressing some of the adverse consequences arising from fragmented work arrangements, it is not yet clear how rigorously the regulatory agencies and judiciary will enforce these novel provisions. Indeed, in contrast to the FWO which has been very active and innovative in crafting policy mechanisms that effectively harness market power and reputational concerns, the work health and safety inspectorates have generally taken a more conventional approach to achieving sustainable compliance – at least historically.

Finally, it is necessary to examine the regulatory constraints and capabilities of the competition and consumer regulation to counter some of the problems identified in the Baiada and 7-Eleven cases. While some of these reforms may address a number of issues raised by fissured work in ancillary ways, they do not directly confront the difficult situation that arose in these cases – that is, where small businesses operated not only as autonomous employer businesses, but were simultaneously vulnerable contracting parties. It is arguable that the failure to fully address this apparent tension appears to have led, in some cases, to adverse consequences for workers labouring at the foundations of these supply chains and franchise networks.

While there are clearly some limitations under the CC Act, there are also some notable benefits. The unfair contract terms law and the good faith obligations of the prescribed industry codes may provide small businesses with greater capacity to challenge the commercial decisions and bureaucratic power of lead firms. For instance, the duty of good faith may require franchisors and major buyers, such as supermarkets and fast food heads, to engage in negotiations in a more measured way. Further, the unfair contract terms protections allow contractors and franchisees the opportunity to have one-sided contractual clauses struck out.<sup>159</sup> That said, it is somewhat doubtful as to whether contractors or

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<sup>158</sup> WHS Acts, s. 46. PCBUs are also under a vertical duty to consult all of the ‘workers’ who carry out work in any capacity for the PCBU and who are ‘likely to be directed affected by a matter relating to’ health and safety. WHS Acts, ss. 47-49.

<sup>159</sup> In relation to Baiada, it is important to note that the unfair contract terms law is unlikely to offer much assistance to the employer entities in this case given that the arrangements between the second and third-tier contractors and the Baiada Group were not formalised in writing.

franchisees may be able to use these statutory provisions (i.e. the unfair contract terms law and the good faith obligations) to effectively challenge the amounts paid or payable under their contractual arrangements with larger firms.<sup>160</sup> This is a significant limitation given that there appears to be a link between the unsustainable business practices adopted by the lead firm and the poor compliance behaviour of independent contractors or franchisees further down the supply chain.

Further, the fact that the CC Act restricts the taking of any collective action by contractors and franchisees means that there are limited points of leverage by which to compel lead firms to revise the relevant contract price, discounting strategy or business model. Indeed, in the absence of overwhelming public pressure, it is highly questionable whether the franchisor of 7-Eleven would have acceded to the demands of its franchisees to vary the relevant profit-sharing arrangements.

One of the most troubling consequences of the CC Act is the way in which the protection of small businesses interests may come at the expense of workers in commercial contracting or franchising relationships. For example, the relevant lead firms in the Baiada and 7-Eleven cases have suggested that the restrictions imposed under the relevant industry codes prevent them from using critical commercial sanctions, such as termination of the relevant supply contract or franchise agreement, even in the face of egregious breaches of workplace laws by their suppliers and/or franchisees.<sup>161</sup> These termination restrictions potentially obstruct effective implementation of Weil's strategic enforcement model which is premised on the idea that harnessing the regulatory resources of lead firms is often far more powerful than legal penalties in terms of driving long-term behavioural change among potentially wayward franchisees or contractors. Circumscribing the rights of lead firms in this way, potentially allows contractors and franchisees repeated opportunities to correct their concerning compliance behaviour which may ultimately lead to the continuation, rather than the curbing, of exploitative employer behaviour.

## 7. Conclusion

Outsourcing, subcontracting and franchising have grown in popularity in Australia, and all have been accepted as common and lawful business strategies. Yet, there is mounting evidence and increasing appreciation of the way in which these arrangements can create difficulties for both regulators and unions seeking to uphold minimum employment standards. This paper has canvassed some of the core regulatory responses in labour, work health and safety and competition and consumer regulation and assessed the extent which they are able to effectively tackle the problems raised by fissured work arrangements. While there is a growing consensus that harnessing the power, position and resources of lead firms is critical, and although there have been some important legislative and policy developments in this direction, analysis of the Baiada and 7-Eleven cases has revealed a gap between law and practice. The question remains whether the current

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<sup>160</sup> In particular, the good faith obligations do not prevent the larger firm acting in their own legitimate commercial interests. Further, the unfair contract terms law does not apply to terms which set the 'upfront price payable'. This term refers to any payments (including any contingent payments) to be provided for the supply, sale or grant under the contract where such payments are disclosed at or before the time the commencement date of the relevant contract.

<sup>161</sup> See, e.g., Evidence to Senate 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, Melbourne, 5 February 2016, at 12 (Robert Baily, Chief Executive Officer, 7-Eleven Stores Pty Ltd).



regulatory frameworks are capable of bridging this divide. While the work health and safety legislation holds much promise, the FW Act is potentially limited by its implicit adherence to the dominant employment paradigm. It is arguable that focusing on the commercial regulation of fragmented work may be more fruitful. To this extent, it is crucial that greater attention is paid to the complex interplay between workplace and competition and consumer regulation so as to better ensure that all firms are clear as to their relevant legal responsibilities and all workers enjoy the benefit of the relevant statutory protections.