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GUEST EDITORS' INTRODUCTION

Emerging Business Models and the Evolving Regulatory Response: Perspectives from Australia and Beyond

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This Special Issue contains a selection of papers presented at a workshop, 'Emerging Business Models and the Evolving Regulatory Response: Perspectives from Australia and Beyond'. This workshop brought together a group of scholars, policy-makers and graduate students actively working, or otherwise interested, in the broad themes of labour and employment regulation and enforcement. The workshop was held in July 2018, with the generous support of the Centre for Employment and Labour Relations Law at the University of Melbourne.

1 The Aims of this Special Issue

In most Commonwealth countries, many core labour law obligations – including wage, leave and termination entitlements – have traditionally rested on the employer party to a common law contract of employment. However, since the late 1980s changes in the way that work is performed and organised have presented a fundamental challenge to the predominance of direct forms of employment. Globalisation, competition, consumer demands and technological advances, have prompted businesses to reconfigure the production of goods and services and to source labour through a growing variety of business models, including labour hire or agency arrangements, franchise networks and/or sub-contracting. These structures may be implemented via traditional, as well as emerging, mediums, such as digital platforms.

The regulatory challenges presented by the vertical disintegration of firms was perhaps first recognised in the early 1990s by Hugh Collins.¹ More recently, Professor David Weil has revealed how the 'fissuring' of work, combined with the rise of financialisation and the uptake in technology, has entrenched these earlier patterns and introduced a range of pressing regulatory problems.² Indeed, while multilateral business arrangements may all be legitimate in certain contexts, many of them have been at the centre of public scandals involving widespread or severe exploitation of

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¹ H Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 *OJLS* 353; H Collins, 'Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration' (1990) 53 *M.L.R.* 731.

² D Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*, Harvard University Press, Cambridge, 2014.

vulnerable workers. There is growing recognition that we need to understand how, to what extent, and in what ways these business models – either separately or together – drive non-compliance with key labour law rights and standards and what can be done to curb these impulses and outcomes.

In some respects, the demand for greater regulatory intervention, and the search for more satisfactory solutions, has already commenced in Australia. This Special Issue has been published, in the midst of widespread disillusionment with existing legal frameworks and at a time of immense regulatory change. In the last few years, we have seen the enactment – after a tortured passage through the federal Parliament – of the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth); the introduction (and partial repeal) of labour hire licensing schemes in a number of states;³ an election commitment by the Andrews Labor Government to introduce criminal sanctions for certain underpayment offences in Victoria;⁴ and a number of state-based inquiries into ‘insecure work’⁵ and ‘wage theft’, which may prompt further statutory reforms.⁶ In this same period, there have been a swathe of federal government inquiries into related issues, including corporate avoidance of the Fair Work Act,⁷ non-payment of superannuation,⁸ exploitation in contract cleaning chains⁹ and a broad examination of the problems facing migrant workers in this country.¹⁰

These recent activities and efforts, while positive in many ways, also have the potential to fall into the trap identified by Collins: that is, the scope and structure of reforms may present a statutory fix for discrete issues raised in the public consciousness, rather than being aimed at regulating the foreseeable (and unforeseen) problems that may arise in business networks.¹¹ Christopher Carrigan

³ See, eg, *Labour Hire Licensing Act 2017* (SA) (commenced on 1 March 2018, however, repeal legislation has since been introduced into the SA Parliament following a change in government in mid-2018); *Labour Hire Licensing Act 2017* (Qld) (commenced on 16 April 2018); and *Labour Hire Licensing Act 2018* (Vic) (while the Act is now in operation, the licensing obligations are yet to take effect).

⁴ Victorian Labor Government, ‘Dodgy Employers to Face Jail for Wage Theft’ (26 May 2018) <<https://www.premier.vic.gov.au/dodgy-employers-to-face-jail-for-wage-theft/>>.

⁵ Anthony Forsyth, *Victorian Inquiry into Labour Hire and Insecure Work – Final Report* (2016).

⁶ See, eg, Queensland Parliament, Education, Employment and Small Business Committee, *A Fair Day’s Pay for a Fair Day’s Work: Exposing the True Cost of Wage Theft in Queensland* (Report No 9, November 2018); Hon Bill Johnston, Minister for Mines and Petroleum, Energy and Industrial Relations, ‘Inquiry into Wage Theft in Western Australia’ (Media Release, 23 January 2019); Parliament of Victoria, ‘Inquiry into the Victorian On-Demand Workforce’ (ongoing).

⁷ Senate Education and Employment References Committee, Parliament of Australia, *Corporate Avoidance of the Fair Work Act* (2017). See also Senate Select Committee, Parliament of Australia, *Hope is Not a Strategy: Our Shared Responsibility for the Future of Work and Workers* (2018).

⁸ Senate Economics References Committee, Parliament of Australia, *Superbad – Wage Theft and Non-Compliance with the Superannuation Guarantee* (2017).

⁹ Senate Education and Employment References Committee, Parliament of Australia, *Wage Theft? What Wage Theft?! The Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies* (2018).

¹⁰ A Fels and D Cousins, Parliament of Australia, *Report of the Migrant Workers’ Taskforce*, Australian Government (March 2019); Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (2016).

¹¹ H Collins, ‘Introduction’ in Gunter Teubner, *Networks as Connected Contracts* (Hart, 2011).

and Cary Coglianese similarly observe that calamities, such as the current regulation and enforcement crisis,

bring with them strong tendencies for faulty assessments of both underlying causes and necessary reforms. ... [This] means that solutions can end up being adopted that are either unrelated to the true cause of disasters or that actually work at cross-purposes to improving conditions.¹²

With a federal election now looming in Australia, and the potential for more far-reaching reform, these cautionary comments hold great resonance. The principal aim of this Special Issue is to pursue academic research and advance policy debate in order to ‘counteract and inform tendencies to leap to hasty conclusions’.¹³ Contributions to this Special Issue examine a range of business models, including labour hire,¹⁴ supply chains,¹⁵ franchising¹⁶ and sub-contracting via the gig economy.¹⁷ Another common theme is that many contributors go beyond the traditional boundaries of employment law so as to identify cross-cutting themes and constructive developments emerging from other regulatory spheres¹⁸ and alternative jurisdictional domains.¹⁹ While each article is distinct in its focus and format, together they help illuminate the underlying drivers for adoption of certain business models, the challenges these models pose for existing regulation and enforcement and critical issues to consider in crafting a more effective regulatory response by state and non-state actors alike.

¹² C Carrigan and C Coglianese, ‘Oversight in Hindsight: Assessing the US Regulatory System in the Wake of Calamity’ in C Coglianese (ed.), *Regulatory Breakdown: The Crisis of Confidence in US Regulation* (University of Pennsylvania Press, 2012) pp. 1-20, p. 5.

¹³ *Ibid.*

¹⁴ J Howe et al, ‘A Critical Examination of the Relationship between Labour Hire Intermediaries and Growers in the Australian Horticulture Industry’ (2019) 32 *AJLL* 83.

¹⁵ C Arup, ‘Enforcing Labour Standards in the Supermarket Food Supply Chain’ (2019) 32 *AJLL* 103.

¹⁶ T Hardy, ‘Shifting Risk and Shirking Responsibility? The Challenge of Upholding Employment Standards Regulation within Franchise Networks’ (2019) 32 *AJLL* 62.

¹⁷ A Stewart and S McCrystal, ‘Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?’ (2019) 32 *AJLL* 4.

¹⁸ More specifically, a number of contributions consider the influence of: competition and consumer Law (see Arup, above n 15); corporations law (see H Anderson, ‘A New Approach to Corporate Structures Involved in Labour Law Breaches’ (2019) 32 *AJLL* 23); and work health and safety regulation (see R Johnstone, ‘Regulating Work Health and Safety in Multilateral Business Arrangements’ (2019) 32 *AJLL* 41).

¹⁹ M Dias-Abey, ‘Using Law to Support Social-Movement-Led Collective Bargaining Structures in Supply Chains’ (2019) 32 *AJLL* 123.