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Senate Inquiry

The impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders

Submission

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1. Introduction

While the scope of this Inquiry is broad-ranging, this submission focuses on one particular aspect identified in the Terms of Reference – that is, the adequacy of the monitoring and enforcement of the wages, conditions and entitlements of temporary work visa holders, particularly low-paid workers. As noted in previous submissions and wider commentary, ensuring that employers comply with key employment standards[1] is critical to the overall integrity of the temporary work visa programs and the workplace relations framework more generally. Recent investigations into the horticulture and food processing industries,[2] and more recently the 7-Eleven franchise,[3] have revealed that certain sectors of the Australian labour market may be 'riddled with exploitation'.[4] While it is increasingly clear that employer non-compliance with minimum employment standards is a significant and persistent issue in Australia,[5] there is less certainty about what can be done and who should be held responsible.

2. Drivers of Employer Non-Compliance with Minimum Employment Standards

In order to develop a platform for regulatory reform in this area, it is necessary to first have 'an understanding of why employers make the choices they do, and what is required to alter those decisions.'[6] Historically, many regulators, policy-makers and commentators in Australia had assumed that:

> the vast majority of employers are law abiding and fair except for an aberrant few…Such law breaking is likely to be explained as a moral evil rather than as a consequence of structural factors. There is therefore no need to target enforcement at particular industries since it can be reasonably assumed that aberrant law breakers are scattered throughout industries.[7]

However, it is increasingly difficult to sustain such assumptions in the face of growing evidence which suggests that the compliance behaviour of employers, and the increasing fragmentation of the traditional employment relationship, is often shaped by industry dynamics. In this respect, Professor David Weil, a US economist who currently leads the Wages and Hours Division (***WHD***) of the US Department of Labor, has noted that the 'breakdown of traditional employment

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[1] For the purposes of this submission, the term 'employment standards' is generally used to denote the minimum entitlements, rights and protections – including minimum rates of pay, hours of work, and leave and termination entitlements – as set by the *Fair Work Act 2009* (Cth), its regulations, awards and agreements. While there are a range of other important workplace laws which apply to temporary foreign workers, including legislation regulating anti-discrimination, superannuation and workers' compensation, amongst others, they are largely beyond the scope of this submission.

[2] 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).

[3] 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).

[4] Meldrum-Hanna and Russell, above n 3.

[5] Conclusive data on levels of employer non-compliance is not available in Australia, but in a number of recent industry campaigns carried out by the Fair Work Ombudsman (***FWO***), employer non-compliance has been found to be greater than 50% (see, eg, Fair Work Ombudsman, *National Hospitality Industry Campaign: Restaurants, Cafes and Catering – Report* (June 2015)). Moreover, there is some evidence to suggest that employer non-compliance is not only widespread, but it is sustained. For instance, in a follow-up campaign undertaken in the cleaning industry in 2012-13, the FWO found that almost 40% of employers had not met their workplace relations obligations – notwithstanding the fact that this industry had been the subject of previous campaigns and other initiatives (see Fair Work Ombudsman, *National Cleaning Industry Follow Up Campaign 2012-13 – Report* (February 2015)).

[6] David Weil, 'Crafting a Progressive Workplace Regulatory Policy: Why Enforcement Matters' (2007) 28 *Comparative Labour Law and Policy Journal* 125, 138.

[7] Laura Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law* (1994) 151.

relationships…did not occur in a vacuum, but in the context of specific markets and sectors.'[8] In light of this, and as part of his model of strategic enforcement, Weil argues that regulatory activities should be aimed at changing the behaviour of employers at the market level, rather than at the level of the individual workplace.[9]

Indeed, it is unlikely to be a matter of mere coincidence that the industries which have been the subject of recent and intense public scrutiny – horticulture, food processing and convenience stores – all display a set of common features. Despite their obvious differences, each of these sectors appears to be characterised by intense price pressures, a concentration of market power in a limited number of lead firms (either at the top of the supply chain or at the apex of the franchise network) and small and geographically dispersed employers, including labour hire providers and franchisees. Indeed, the strength of market power in the horticulture, food and grocery and franchise sectors is such that these three industries are subject to a specific code of conduct administered by the Australian Competition and Consumer Commission (***ACCC***).[10] These sectors are also characterised by a large proportion of vulnerable workers, including many temporary foreign workers, and relatively low levels of unionisation.[11] Further, in all these sectors, key conditions of employment – such as recruitment, training, pay, working hours, supervision, performance monitoring and termination – may be determined and/or implemented by multiple organisations as a result of subcontracting, outsourcing, labour hire or franchising. These 'fissured' forms of employment are not confined to the sectors identified above. While the problems identified in recent investigations are somewhat extreme, they are not necessarily exceptional. Rather, fragmented work structures appear to have become relatively common throughout the Australian labour market and can be seen in a diverse range of sectors from construction, cleaning, security, trolley-collecting and hospitality, amongst many others.[12]

However, as Johnstone and Stewart point out not all forms of insecure work in Australia are associated with fissuring. For example, casual work and/or work performed under a fixed-term contract have the typical hallmarks of precarious employment, and yet it is arguable that these arrangements do not necessarily represent a 'fissured' form of employment to the extent that the worker continues to be directly employed by the lead firm.[13]

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[8] See also Glenda Maconachie and Miles Goodwin, 'Transforming the Inspection Blitz: Targeted Campaigns, Enforcement and the Ombudsman' (2010) 21(1) *Labour and Industry* 369; and David Weil, 'Rethinking the Regulation of Vulnerable Work in USA: A Sector-Based Approach' (2009) 51(3) *Journal of Industrial Relations* 411.

[9] David Weil, 'Improving Workplace Conditions Through Strategic Enforcement, A Report to the Wage and Hour Division' (Report, US Department of Labour, May 2010), 75.

[10] In particular, the Horticulture Code of Conduct and the Franchising Code of Conduct are both mandatory codes administered by the ACCC. The ACCC is also responsible for overseeing and enforcing the Food and Grocery Code of Conduct – a voluntary code of conduct which came into operation earlier this year.

[11] For example, union membership has historically been weak in the horticulture sector and the agriculture, forestry and fishing industry continues to have the lowest proportion of trade union membership in Australia at around 3.5%. The ABS does not currently collect data on union membership in the horticulture sector alone. Australian Bureau of Statistics, *Employee Earnings, Benefits and Trade Union Membership* (Cat No 6310.0, May 2013).

[12] See 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)); and the Sham Contracting Inquiry and subsequent research carried out by and on behalf of the Australian Building and Construction Commission (and later Fair Work Building & Construction) (see (Fair Work Building and Construction, 'Working Arrangements in the Building and Construction Industry' (Research Report, 21 December 2012)). See also 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) and Fair Work Ombudsman, 'Statement in Response to 4-Corners Report' (Media Release, 7 May 2015). But note that comprehensive data on the extent of 'fissured' employment in Australia is not available.

[13] Richard Johnstone and Andrew Stewart, 'Swimming Against the Tide? Australian Labour Regulation and the Fissured Workplace' (Paper presented at the Labour Law Research Network Conference, Amsterdam, 25-27 June 2015), 4.

Further, while many of the 'fissured' forms of employment are present in Australia, whether they also result in work that is insecure and/or lead to contraventions of the *Fair Work Act 2009* (Cth) (***FW Act***), may depend on a raft of other factors, such as: the nature and terms of the contract between the lead organisation and the employing company, the size and assets of the direct employer (i.e. the subsidiary, the labour hire firm company, the subcontractor or the franchisee) and/or the extent to which the company otherwise has a viable business that is independent of the lead organisation.[14]

Nonetheless, there seems to be some evidence that 'fissuring' is now a feature of the Australian labour market and these working arrangements may be perpetuating some of the issues of employer non-compliance and magnifying some of the challenges of enforcement discussed in section 3 below.[15] While there are a range of factors driving insecure work and employer non-compliance,[16] Weil posits that the phenomenon of workplace fissuring is a result of three, interconnected elements. Firstly, a desire, on the part of lead firms, to increase revenue through focusing on core competencies. Secondly, and at the same time, lead firms have actively sought to reduce costs through shedding their role as the direct employer of workers. The final and fundamental element, which is described as the 'glue' holding these elements together, is that the lead firm continues to perform an important and somewhat intrusive role in terms of creating and enforcing rigorous quality standards and detailed work practice requirements in relation to the provider companies.[17] Combined, these three elements can have positive effects for companies, investors and consumers. For instance, concentrating on building the brand through a focus on core competencies, and utilising flexible corporate forms to achieve that aim, can boost firm profits and lead to the development of new products, or the improvement in the provision of services, all at a lower cost to consumers. But these benefits can also have real and adverse social effects.[18]

From a regulatory perspective, there are at least two important consequences of these broader labour market trends. First, there is some (albeit inconclusive) evidence to suggest that in those industries where the 'fissuring' of employment is most advanced, worker exploitation is also more likely.[19] Weil contends that:

> Although the fissured workplace plays out in different ways across industries, its consequences for workplace conditions are similar. By shifting the provision of service or parts of production to other employers, lead businesses create markets for services that are usually very competitive, thereby

[14] Johnstone and Stewart, above n 13, 4.

[15] For example, there have been a number of cases where *Odco*-style arrangements (where workers are engaged by a labour hire company as independent contractors and then on-supplied to a third party 'host' business) have been used in respect of unskilled workers, such as cleaners (*Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37) and teenage shop assistants (*Fair Work Ombudsman v Contracting Solutions Australia Pty Ltd* [2013] FCA 7. See also 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).

[16] The existing and extensive socio-legal literature on compliance motivations (which is summarised elsewhere) suggests that business compliance and evasion may be driven, influenced and potentially undermined by a whole host of factors. See John Howe, Tess Hardy and Sean Cooney, *The Transformation of Enforcement of Minimum Employment Standards in Australia: A Review of the FWO's Activities from 2006-2012* (Centre for Employment and Labour Relations Law, Melbourne Law School, 2014); and Tess Hardy, 'Enrolling Non-State Actors to Improve Compliance with Minimum Employment Standards' (2011) 22(3) *Economic and Labour Relations Review* 117, 121-4.

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

[18] Ibid 8.

[19] As noted earlier, there is currently no way to definitively measure levels of employer non-compliance in Australia, but there is certainly some indication that insecure work and the fragmentation of the employment relationship may perpetuate contraventions of minimum employment standards. See Howe, above n 11. For a broad analysis of some of these issues in an Australian context, see Richard Johnstone, Shae McCrystal, Igor Nossar, Michael Quinlan, Michael Rawling and Joellen Riley, *Beyond Employment: The Legal Regulation of Work Relationships* (Federation Press, 2012). For a summary of the situation in the US and Canada, see respectively: Annette Bernhardt et al, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* (National Employment Law Project, 2009).

> creating downward pressure on the marginal price for them. This means that the employers competing for that work face significant pressures on the wages and conditions they can offer their workforce, particularly in industries where there is an elastic supply of labor, skill requirements are relatively low, and labor costs represent a significant part of overall costs.[20]

Second, as a result of the dissolution of the traditional binary relationship between employer and employee, responsibility for workplace conditions has become 'blurred'.[21] Indeed, while subcontracting, outsourcing and franchising are all legitimate and distinct business strategies, the fragmentation of corporate structures and working arrangements into loosely connected networks and highly complex supply chains underlines the limits of the existing legal framework,[22] and poses significant challenges for ensuring compliance with minimum employment standards.[23]

It also raises a number of crucial normative questions. First, in what circumstances is it justified to place responsibility for workplace contraventions on an entity other than the direct employer? For example, should a distinction be drawn between situations which involve deliberate misuse of legal structures for corporate gain versus situations in which the deterioration in workers' rights is an indirect effect of an otherwise legitimate business arrangement? Second, what level of responsibility is justified – full (i.e. the third party entity is held to be the employer) or residual (i.e. the third party entity acts as a guarantor in respect of any underpayments)? And finally, assuming some level of responsibility is justified in the circumstances of the particular case, what legal provisions and/or techniques can (and should) be used to achieve this outcome.[24]

3. An Overview of Key Compliance and Enforcement Challenges

The shifts in the structures of work organisation summarised above create difficulties for both regulators and unions seeking to uphold minimum employment standards. In an era of limited resources, the detection of employer non-compliance is difficult and burdensome. Vulnerable employees, particularly those in low-wage industries and engaged under precarious or unlawful arrangements, may be reluctant to raise a complaint about their working conditions or pursue their rights when they are contravened.[25] Indeed, the forensic nature of the investigations into 7-Eleven[26] – where employment records were manipulated in a way that disguised the real number of hours worked – underlines the difficulties that inspectors (and unions) face in seeking to piece together an accurate and comprehensive picture of the relevant working reality.[27] Workplace investigations undertaken in the horticulture and food processing industries are often foiled by the fact that

[20] Weil (2014), above n 17, 15.
[21] Ibid 7.
[22] These limits are discussed in more detail in section 4 below.
[23] Richard Johnstone, 'Regulating Occupational Health and Safety in a Changing Labour Market' in Christopher Arup et al , *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press, 2006).
[24] Guy Davidov, 'Indirect Employment: Should Lead Companies be Liable?' (Paper presented at the Labour Law Research Network Conference, Amsterdam, 25-27 June 2015) 9.
[25] See Stephen Clibborn, 'Why Undocumented Workers Should Have Workplace Rights' (2015) 26(3) *Economic and Labour Relations Review* 1.
[26] Fair Work Inspectors have undertaken unannounced inspections throughout the course of the night in order to enable them to interview staff, take photographs, collect records and issue notices to produce. See Fair Work Ombudsman, '7-Eleven Franchisee Admits Doctoring Records and Underpaying Workers to Cut Operating Costs' (Media Release, 1 September 2015).
[27] See Adele Ferguson and Sarah Danckert, '7-Eleven: Wage Fraud Cover-Up From Head Office', *The Age*, 31 August 2015. It appears that another way in which employers have sought to evade the law and regulatory scrutiny is by engaging in a so-called 'cash pay' scam where employees were paid the full amounts owed to them under workplace laws, the correct amounts were reflected on formal employment records and payslips. However, the employees were then forced to pay back half their entitlements in cash to their employer. See Adele Ferguson, '7-Eleven: Workers Caught in Cashback Scam', *The Age*, 8 September 2015.

information which is provided to temporary foreign workers by labour hire agencies or 'facilitators' is often restricted and may be misleading.[28] Further, employment records may not be created or maintained, particularly where piece rate work is involved.[29] Inspector access to workers and records may also be resisted by the employers and/or the owners of worksites.[30] Workers may be beaten or threatened with violence, or being reported to the immigration authorities if they complain.[31] The difficulties associated with detection and investigation means that an amnesty on pursuing workers for visa contraventions may hold much regulatory value. This approach is likely to encourage temporary foreign workers (within the 7-Eleven franchise network and beyond) to come forward and provide critical information to the regulator and other interested third parties, such as unions and plaintiff lawyers.[32]

However, even where employer non-compliance is identified and the employing entity is sanctioned, the deterrence effects of this intervention may be undermined by the doctrine of limited liability, clever corporate structuring and/or deliberate asset-shifting. In particular, enforcement litigation – the traditional way of achieving compliance, deterrence and compensation – can be derailed through problems of proof, particularly where witnesses are reluctant to provide oral testimony, as well as 'phoenix' behaviour.[33] The string of investigations into, and cases brought against, a raft of separate 7-Eleven franchisees illustrates this point.[34] For instance, earlier this 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 action against it was stayed.[35] As a result, the former owner was liable for a much reduced penalty amount and the former employee was left substantially out of pocket.[36]

Moreover, it is no longer apparent that punishment of the putative employer will be effective in addressing some of the key drivers of compliance behaviour, which may be determined by more powerful firms positioned higher in the supply chain or at the apex of the franchise network.[37] There is some evidence which supports the view that non-compliance with workplace laws was systemic and sustained within the 7-Eleven franchise network.[38] There is also evidence to suggest that while the Australian head office of the 7-Eleven franchise continued to reap significant profits, many

[28] Stephen Howells, 'The Report of the 2010 Review of the *Migration Amendment (Employer Sanctions) Act* 2007' (Report prepared for the Minister for Immigration and Citizenship, 2010) 54 ('*Howells Report*').
[29] Fair Work Ombudsman, 'Horticulture Industry Shared Compliance Program Final Report 2010' (November 2010), 12.
[30] See 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).
[31] Howells Report, above n 28, 56.
[32] See Stephen Clibborn, '7-Eleven: amnesty must apply to all exploited workers', *The Age*, 9 September 2015.
[33] Helen Anderson, 'Phoenix Activity and the Recovery of Unpaid Employee Entitlements - 10 Years On' (2011) 24 *Australian Journal of Labour Law* 141. See also PricewaterhouseCoopers, 'Phoenix Activity: Sizing the Problem and Matching Solutions' (Report prepared for the Fair Work Ombudsman, June 2012).
[34] For a summary of the various activities undertaken by the FWO in relation to the 7-Eleven franchise network, see Fair Work Ombudsman, '7-Eleven Franchisee Admits Doctoring Records and Underpaying Workers to Cut Operating Costs' (Media Release, 1 September 2015).
[35] See *Fair Work Ombudsman v Haider Pty Ltd & Anor* [2015] FCCA 2113 (30 July 2015).
[36] Under the FW Act, natural persons are liable for a maximum penalty which is one-fifth of the penalty set for corporations.
[37] Richard Johnstone and Michael Quinlan, 'The OHS Regulatory Challenges Posed by Agency Workers: Evidence from Australia' (2006) 28(3) *Employee Relations* 273.
[38] Documents which were reviewed as part of the Fairfax/*Four Corners* investigation revealed that 69 per cent 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. The FWO has also brought multiple proceedings against 7-Eleven franchisees in the past few years – the most recent proceeding was issued last month. See Fair Work Ombudsman, '7-Eleven Franchisee Admits Doctoring Records and Underpaying Workers to Cut Operating Costs' (Media Release, 1 September 2015).

independent franchisees were struggling to survive.[39] 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.'[40]

While it has continued to dispute the assertion that the franchise system is not financially viable, 7-Eleven Stores Pty Ltd has announced 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. Moreover, the head office has committed to setting up an independent panel to receive and process any claim of underpayment and review the terms of the standard franchise agreement.[41] The positive steps which have been taken by the 7-Eleven head office in the wake of the investigation demonstrates the power of informal sanctions, such as disapproval, adverse publicity and ostracisation. Indeed, in previous research undertaken by Christine Parker and Vibeke Nielsen, reputational-based sanctions have been found to prompt significant changes in compliance behavior not only in relation to the original firm, but throughout the supply chain or franchise network, particularly where companies had experienced a 'regulatory crisis'.[42]

On the basis of the strategic enforcement model and with a growing awareness of the power of reputational concerns, the Office of the Fair Work Ombudsman (***FWO***) has experimented with a whole raft of initiatives which are designed to harness the position, power and resources of lead firms. For instance, in a speech last year, the Ombudsman observed that while outsourcing is a legitimate business strategy, it raises real and difficult questions about where the responsibilities to the employees 'begin and end'.[43] On an increasing basis, the FWO has been working with head franchisors, corporate parents, and other lead firms, to voluntarily commit to taking steps to ensure that employer businesses throughout the franchisor network, corporate group or supply chain comply with their workplace obligations. These voluntary measures have taken a variety of different forms, including enforceable undertakings and proactive compliance deeds (now known as 'compliance partnerships'), as well as the National Franchise Program, amongst other initiatives.[44]

While these new techniques may mitigate some of the underlying problems that plague conventional compliance and enforcement techniques, which centre on the direct employer of workers, there are some potential obstacles to this approach. In particular, the existing regulatory enforcement literature suggests that to induce or compel lead firms and franchisors to commit to these types of voluntary initiatives, particularly in the longer term, it is necessary to have sufficient

[39] 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.

[40] Adele Ferguson, Sarah Danckert and Klaus Toft, '7-Eleven: Allan Fels says model dooms franchisees and workers', *The Age*, 31 August 2015.

[41] See also Adele Ferguson and Sarah Dankert, '7-Eleven to "substantially change" model in wake of wages scandal', *The Age*, 10 September 2015.

[42] See Christine Parker and Vibeke Lehmann Nielsen, 'How Much Does it Hurt? How Australian Businesses Think About the Costs and Gains of Compliance and Noncompliance with the Trade Practices Act' (2008) 32 *Melbourne University Law Review* 555.

[43] Natalie James, 'Risk, Reputation and Responsibility' (Speech to the Australian Labour and Employment Relations Association National Conference, Gold Coast, 29 August 2014).

[44] For further discussion of these various initiatives, 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; 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).

positive and/or negative incentives.[45] In particular, the influential model of responsive regulation is premised on the regulator having a suite of enforcement tools, including sufficiently strong deterrents, at their disposal. Such deterrents are seen as critical on the basis that agencies

> will be more able to speak softly when they carry big sticks (and crucially, a hierarchy of lesser sanctions). Paradoxically, the bigger and more various are the sticks, the more regulators will achieve success by speaking softly.[46]

Without the relevant 'fear factor', however, it is not clear how the regulator (or unions for that matter) can effectively encourage (or compel) lead firms and others to commit to 'softer', voluntary measures.[47]

4. Potential Limitations of the *Fair Work Act 2009* (Cth)

Many of the protections and entitlements under the FW Act apply only to 'employees' as defined at common law. A general premise of the regulatory framework is that a binary and direct employment relationship is in existence. As noted above, the statutory foundation of the FW Act is potentially compromised by the fact that it is not now uncommon for the employment relationship to be fragmented and for multiple organisations to be involved in shaping key working conditions. Further, the common law test for distinguishing between employees and independent contractors is somewhat uncertain in light of some recent, and not necessarily consistent, decisions of the Full Court of the Federal Court.[48] In the past, these nuanced differences and distinctions were perhaps less consequential for the economy given that the boundaries of the firm were more concrete. However, as Weil points out, the 'more the workplace has fissured, the more the subtleties raised by definitions of employment matter.'[49]

In addition, it is arguable that laws which were originally intended to protect workers from exploitation are now being used to perpetuate such problems 'by focusing regulatory attention on the wrong parties.'[50] Indeed, the civil remedy regime established under the FW Act, and the way in which responsibility and liability is broadly ascribed, generally reflects traditional presumptions about employment arrangements. This compliance and enforcement model does not necessarily account for the profound transformations to Australian workplaces outlined in section 2 above. In this respect, Weil argues that:

> The failure of public policy makers to fully appreciate the implications of how major sectors of the society organize the production and delivery of services and products means that lead businesses are allowed to have it both ways. Companies can embrace and institute standards and exert enormous control over the activities of subsidiary bodies. But they can also eschew any responsibility for the consequences of that control.[51]

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[45] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992); Cameron Holley, Neil Gunningham and Clifford Shearing, *The New Environmental Governance* (Routledge, 2011) 174.

[46] John Braithwaite, 'Convergence in Models of Regulatory Strategy' (1990) 2 *Current Issues in Criminal Justice* 59, 59.

[47] See discussion in section 6(b) below regarding strategic use of the 'hot cargo' provision which provided the impetus for establishing comprehensive private monitoring in the apparel chain. See also Chris Wright and William Brown, 'The Effectiveness of Socially Sustainable Sourcing Mechanisms: Assessing the Prospects of a New Form of Joint Regulation' (2013) *Industrial Relations Journal* 603.

[48] 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.

[49] Weil (2014), above n 17, 185-6.

[50] Ibid 4.

[51] Weil (2014), above n 17, 14. A similar finding was made in the ACTU Inquiry into Insecure Work, see Howe et al, above n 11.

While there is some uncertainty about whether the civil remedy regime of the FW Act may extend to fissured employment structures,[52] there does appear to be some significant obstacles and/or shortcomings. The following discussion addresses some of the potential limitations in relation to:

- the accessorial liability provisions;
- the sham contracting provisions; and
- the civil remedy regime more generally.

a) Accessorial Liability

Under the accessorial liability provisions of the FW Act, persons found to be 'involved in' a contravention of the Act may be found liable under a civil remedy provision, even where they are not the direct employer of the worker whose rights have been breached. Broadly-speaking, s 550 of the FW Act provides that a person will be taken to be 'involved in' a contravention if the person has:

- aided or abetted the contravention;
- has procured or induced the contravention (whether by threats or promises or otherwise); or
- has been in any way, by act or omission, directly or indirectly, 'knowingly concerned' in the contravention.

These provisions have most often been used by the FWO, amongst others, to hold directors and senior managers liable for contraventions committed by the employer corporations for which they are (or were) responsible.[53] 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. Arguably, the most significant proceedings so far has been the enforcement litigation brought by the FWO against Coles Supermarkets Australia Pty Ltd (***Coles***) in 2011. The FWO relied on s 550 to allege that Coles was liable under the accessorial liability provisions of the FW Act in relation to contraventions committed by trolley-collecting labour hire companies, which were engaged by the supermarket chain to provide workers to collect trolleys in the various car parks. Many of those who were underpaid were Indian workers who spoke limited English. While Coles' application to dismiss the FWO's action by way of summary judgment was rejected by the Federal Court of Australia,[54] the proceedings were discontinued before the final hearing as a result of the FWO entering into an enforceable undertaking with Coles.[55]

While the interlocutory proceedings are therefore of limited precedential value, the judgment highlighted some important issues in relation to the operation and application of the accessorial liability provisions in relation to supply chains, labour hire agencies and possibly franchise networks.[56] In particular, the following issues are yet to be authoritatively determined:

[52] For example, it appears that, as yet, there have been no cases which have considered whether a head franchisor may be liable under s 550 for franchisee contraventions of civil remedy provisions of the FW Act, particularly in relation to wage matters. But see *United Voice v MDBR123 Pty Ltd* [2014] FCA 1344 and *United Voice v MDBR123 Pty Ltd (No 2)* [2015] FCA 1344, which considered the extent to which a director of the head franchisor was liable under s 550 for contraventions of the adverse action provisions by one of its franchisees.

[53] See, eg, *Fair Work Ombudsman v Tsurc Pty Ltd & Anor (No 2)* [2015] FCCA 2148. Helen Anderson and John Howe, 'Making Sense of the Compensation Remedy in Cases of Accessorial Liability Under the Fair Work Act' (2012) 36 *Melbourne University Law Review* 335.

[54] See, eg, *Fair Work Ombudsman v Al-Hilfi & Ors* [2012] FCA 1166 (26 October 2012).

[55] For further discussion of this undertaking and other relevant outcomes, see Hardy and Howe (2015), above n 44.

[56] These issues may be especially relevant in relation to another test case brought by the FWO earlier this year against a national security company for its alleged involvement in underpaying a guard employed by one of the company's contractors. The regulator has alleged that the security company must have known that the hourly rate it was paying to the contractor was not sufficient to allow the contractor to meet its legal obligations arising under the FW Act and modern

- the requisite level of knowledge the accessory needs to have about the essential matters constituting the contravention;
- whether 'wilful blindness' is sufficient to meet this knowledge requirement; and
- whether, in respect of corporate accessories, it is possible to aggregate the knowledge of various employees and thereby prove that the corporation itself had requisite knowledge of the contravention.[57]

While these issues have not been definitively resolved in the context of the FW Act, court decisions which have dealt with similar accessorial liability provisions arising under other statutes[58] suggest that the courts may well take a fairly restrictive approach to these questions.[59]

b) Sham Contracting

Another common way in which employers have sought to avoid the application of protective employment legislation, such as the FW Act, 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.[60] However, it seems that the sham contracting provisions are somewhat problematic in at least the following respects:

- The inherent difficulties associated with distinguishing between employees and independent contractors, which were noted above, makes enforcement of the sham contracting provisions more complicated and difficult. Further, the sham contracting provisions themselves have proved 'very complex'[61] – which has meant that some actions have been unsuccessful partly because of the way in which they have been pleaded.[62]

- As has been previously pointed out by Stewart and Roles,[63] 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). Employers have successfully relied on this defence by pleading that at the time they made the representation they did not know, and were not reckless to, the true nature of the working relationship.[64] This defence has been described as relatively generous and

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award. See Fair Work Ombudsman, *Security Companies to Face Court After Employee Allegedly Underpaid over $11,000* (Media Release, 29 May 2015).

[57] See Ingmar Taylor and Larissa Andelman, 'Accessorial Liability under the *Fair Work Act*' (Paper presented at the Australian Labour Law Association, Manly, 14-15 November 2014).

[58] For example, the *Competition and Consumer Act 2010* (Cth) (and the predecessor legislation, the *Trade Practices Act 1974* (Cth)) contains a similar provision to s 550 of the FW Act.

[59] See *Yorke v Lucas* (1985) 158 CLR 661; *Medical Benefits Fund of Australia Limited v Cassidy* (2003) 135 FCR 1; cf *Rural Press Ltd v ACCC*. See also Brent Michael, 'Must an Accessory Be a Know-it-All?' (2010) 18 *Trade Practices Law Journal* 2345; and Taylor and Andelman, above n 57.

[60] 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.

[61] Johnstone and Stewart, above n 13.

[62] *Wells v Fair Work Ombudsman* [2013] FCAFC 47; and *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37.

[63] Andrew Stewart and Cameron Roles, 'The Reach of Labour Regulation: Tackling Sham Contracting' (2012) 25 *Australian Journal of Labour Law* 258. See also Andrew Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15 *Australian Journal of Labour Law* 235.

[64] See, eg, *Construction, Forestry, Mining and Energy Union v Nubrick Pty Ltd* (2009) 190 IR 175.

somewhat ambiguous.[65] Various inquiries have recommended that s 357(2) be modified so that the 'recklessness' defence is replaced with a 'reasonableness' defence.[66] The previously proposed amendments would mean that the defence to a sham contracting action under s 357(1) would only be available where the employer is able to prove that at the time the representation was made, the employer believed that the contract was a contract for services rather than a contract of employment, and 'could not reasonably have been expected to know otherwise'.[67]

- The Full Court of the Federal Court has recently adopted a narrow interpretation of the sham contracting provisions and their application to particular forms of triangular working arrangements.[68] This case, which is currently on appeal to the High Court,[69] reveals a potential loophole in the application of s 357 to these particular types of work relationships.[70] Unless this aspect of the decision is reversed on appeal, it may mean that the sham contracting provisions can be readily circumvented through certain types of third party contracting arrangements.

c) Weaknesses of the Current Civil Penalty Regime under the FW Act

Even if it can be successfully argued that a lead firm (such as a corporate parent, a principal contractor or master franchisor) should be held liable for contraventions of the FW Act that have taken place in the corporate group, supply chain or franchise network, it is not clear that the remedies available under the FW Act would be sufficient to deliver the necessary deterrence to support a strategic model of enforcement.

First, under the FW Act, there is very limited capacity to seek criminal penalties,[71] even where the contravening behaviour is viewed as egregious.[72] In this respect, the FW Act stands in striking contrast to work health and safety regulation which is largely premised on a criminal model.[73] Other spheres of corporate regulation also provide a point of comparison. In particular, the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission are able to pursue criminal, as well as civil sanctions in relation to various provisions.

[65] Stewart and Roles, above n 63.
[66] See ABCC Report, above n 14; and Ron McCallum, Michael Moore and John Edwards, 'Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation' (Final Report of Review of the Fair Work Act 2009, 2 August 2012) ('Fair Work Review').
[67] Fair Work Review, above n 65. This recommendation has also been viewed favourably by the Productivity Commission in its current inquiry into the workplace relations framework. See Productivity Commission, 'Workplace Relations Framework – Draft Report' (August 2015).
[68] Depending on the relevant contractual arrangements, the worker may be engaged either as an employee or an independent contractor of the labour hire agency – in this particular instance, it was the latter. See *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37.
[69] *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd & Ors (No. P16 of 2015).* See also 'High Court to hear FWO challenge to sham contracting ruling', *Workplace Express*, 14 August 2015.
[70] The plurality of the Full Federal Court found that to be actionable under s 357, the relevant representation: a) needed to mischaracterise the contract as a contract for services made between the employee and the employer; and b) must be directed at the contract made between the employer and employee and not simply relating to the status of the employee. See *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37.
[71] Some breaches of the FW Act are designated as criminal offences, such as where a person breaches an order of Fair Work Commission: FW Act ss 674–8.
[72] See, eg, *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2)* [2012] FCA 408 (20 April 2012). In imposing a penalty nearing the maximum set by Parliament (i.e. the total penalty of $115,200 represented 97% of the possible maximum of $118,800), the Court noted that this case 'involved a deliberate, calculated and systematic refusal to comply with the requirements of the WR Act and to take advantage of the vulnerability of the complainant employees.'
[73] Richard Johnstone, Elizabeth Bluff and Alan Clayton, *Work Health and Safety Law and Policy* (3rd ed, 2012).

In addition, the maximum pecuniary penalties which are available under the FW Act are much lower than those available under other regimes. In particular, the maximum monetary penalties for most civil remedy provisions under the FW Act are:

- A$54,000 (300 penalty units) for a corporation;
- A$10,800 (60 penalty units) for an individual.[74]

In comparison, certain consumer protection breaches under the *Competition and Consumer Act 2010* (Cth) can attract maximum fines of A$1.1 million for a corporation and A$220,000 for an individual. Maximum penalties in relation to trade practices contraventions are significantly higher than these amounts.[75] Even with an increase in the maximum penalties, determining the appropriate level of penalty in any given case will ultimately be a question determined by the courts taking into account the totality of the circumstances.[76] However, by elevating the penalty ceiling it is clear that more meaningful penalties can be imposed against firms which may be in a position to otherwise absorb the costs or pass them onto customers or consumers.

A third shortcoming of the civil remedy regime established under the FW Act is that there is no capacity for the regulator (or other interested party, such as a union) to seek an incapacitation order either against the corporate employer or key individuals within the organisation. For example, in other spheres of corporate and workplace regulation, such as work health and safety, incapacitation sits at the peak of the enforcement pyramid[77] — a sanction which can be achieved by way of an injunction, suspension of trading, asset seizure or imposing a state-authorised management team. Further, unlike ASIC and the ACCC, the FWO does not currently have any capacity to seek an order disqualifying directors or officeholders from managing corporations for a relevant period in relation to their involvement in particular contraventions.[78] This problem is potentially exacerbated in relation to the FW Act by the fact that there is no licensing regime which applies to employers generally or to specific groups of employers, such as labour hire agencies. This last issue is particularly relevant in the context of this Inquiry and is explored further in section 6(c) below.

5. Alternative Regulatory Approaches from within Australia

The fragmentation of the employment relationship and the compliance and enforcement challenges it presents have elicited a number of distinctive regulatory responses in other areas of labour law (i.e. work health and safety regulation) and in relation to specific forms of 'fissured' employment (i.e. complex supply chains in the textile, clothing and footwear (***TCF***) industry and the road transport sector). These alternative models provide a point of contrast to many of the principal provisions of the FW Act and potentially overcome some of the shortcomings identified in section 4 above.

a) Work Health and Safety Regulation

The harmonised Work Health and Safety Acts (***WHS Acts***) evidence a deliberate and drastic move away from the traditional employment paradigm, which had proved to be increasingly

[74] The monetary value of a penalty unit was increased to A$180 from 31 July 2015: Crimes Legislation Amendment (Penalty Unit) Act 2015 (Cth).

[75] For example, the maximum penalties applicable to corporations for each act or omission found to be in contravention of the provisions relating to restrictive trade practices is the greater of: a) A$10 million; b) if a court can determine the total value of the 'reasonably attributable' benefit obtained by the act or omission, 3 times that total value; or c) if a court cannot determine benefit, 10% of annual turnover in preceding 12 months. See *Competition and Consumer Act 2010* (Cth) s 76(1A).

[76] See *Australian Ophthalmic Supplies* (2008) 165 FCR 560; and *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383.

[77] Ayres and Braithwaite, above n 45.

[78] Compare *Corporations Act 2001* (Cth) s 206C.

problematic.[79] Instead, 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'.[80]

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.[81] 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.[82]

Importantly, the WHS Acts contain provisions which are designed to address what is sometimes referred to as 'counterproductive liability avoidance'[83] – 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',[84] 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.[85] To achieve this objective, the legislation provides that:

- the relevant duties cannot be delegated;[86]
- that one person can owe a number of duties;[87]
- 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.[88]

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.[89] Again, this provision is specifically designed to address the 'problem of hazards arising from fractured, complex and disorganised work processes.'[90] Finally, in comparison to the accessorial liability provisions which have routinely been used by the FWO against officers of the corporate employer, the WHS Acts place a 'positive and

[79] See, eg, *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* (3rd 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.
[80] See ss 19(1)-(2) of each of the harmonised Work Health and Safety Acts ('WHS Acts').
[81] See s 5 of WHS Acts See also Explanatory Memorandum, Work Health and Safety Bill 2011 (Cth), [23].
[82] See s 7 of WHS Acts.
[83] 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, 692.
[84] Ibid.
[85] Ibid.
[86] See s 14 of WHS Acts.
[87] See s 15 of WHS Acts.
[88] See s 16 of WHS Acts.
[89] See s 46 of each of the WHS Acts. 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. See s 47-49 of each of the WHS Acts.
[90] Johnstone and Stewart, above n 57, 28.

proactive duty'[91] 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,[92] even if the PCBU itself is not breaching its own duties.[93]

Johnstone and Stewart argue that the combined effects of these provisions are that:

> Each PCBU in a contractual chain, including the lead business, owes the primary duty to all workers carrying out work below them in the chain. Thus, a worker at the bottom of a chain of contractual arrangements will be owed the primary duty by all parties above them – the retailer at the head of the chain…and all head contractors, contractors and sub-contractors further down the chain, each of which clearly engages, influences or directs the worker. Leased workers who are employed by a labour hire agency but work at a client firm will be owed a primary duty by both the client, and the agency.[94]

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.[95] In addition, it is important to recognise that there are some significant differences between the way in which minimum employment standards and work health and safety standards have been, and continue to be regulated.[96] Indeed, it may be difficult to directly transpose the broad definition of 'worker' as set out in the WHS legislation to the FW Act without potentially destabilising fundamental concepts which underpin the Fair Work system. Nonetheless, the harmonised work health and safety legislation may provide some important regulatory insights into different (and possibly more effective) ways to address some of the problems raised in this Inquiry.

b) Supply Chain Regulation

A number of other promising regulatory alternatives – which have been trialled in the Australian context – include the supply chain initiatives that have been implemented in the textile, clothing and footwear (***TCF***) and road transport industries respectively.[97]

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[91] Ibid.

[92] 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.

[93] See s 27(4) of WHS Acts.

[94] Johnstone and Stewart, above n 13, 27.

[95] 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.

[96] For example, a contravention of work health and safety laws generally falls within the criminal jurisdiction and is principally overseen and enforced by state regulatory agencies, whereas contraventions of the FW Act (and related regulations and instruments) generally falls within the civil jurisdiction and are now largely overseen by federal regulatory agencies, such as the FWO. Unions continue to play a compliance and enforcement role under both regulatory frameworks.

[97] Another important initiative – which goes beyond the scope of this Inquiry and its focus on temporary foreign workers – are the relevant principles which apply to public procurement. But see John Howe, 'Government as Industrial Relations Model: The Promotion of Collective Bargaining and Workplace Cooperation by Non-Legislative Mechanisms' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012); Michael Rawling and John Howe, 'The Regulation of Supply Chains: An Australian Contribution to Cross-National Learning' in Katherine Stone and Harry Arthurs (eds), *Rethinking Workplace Regulation:*

In many respects, these separate schemes reflect some of the key tenets of the strategic enforcement model referred to earlier. For example, the regulatory scheme directed at the TCF industry is deliberately designed to target those lead firms positioned at the top of the supply chain in a way that ensures workers throughout the supply chain – regardless of their formal employment status or their specific working arrangements – enjoy basic workplace entitlements, such as minimum rates of pay and penalty rates for overtime work.

In particular, the TCF scheme:

- Deems 'outworkers'[98] – which operate along the bottom rung of the TCF supply chain and are often characterised as independent contractors – to be 'employees'. This has the effect of bringing these workers within the protective scope of the FW Act and relevant modern awards.
- Gives outworkers a right to bring a claim for workplace entitlements against any entity in the supply chain[99] and a reversal of the onus of proof onto the party served with the claim for recovery. These expanded rights of recovery are a critical component for guarding against 'phoenix' behaviour and ensuring that workers are not deprived of key benefits as a result of the direct employer or contractor being wound up, put into liquidation, becoming externally administered or being deregistered.[100]
- Inserts mandatory and universal provisions into all contracts between contractors and subcontractors which requires companies operating in the 'middle' of the supply chain to record and disseminate crucial information about where goods are manufactured, and under what conditions, to those firms at the top (i.e. the retailers and fashion hours).[101] This transparency mechanism not only allows lead firms greater insight into the operation of the supply chain, but increases regulatory pressure on such firms to take responsibility for ensuring workplace relations compliance throughout the contracting chain.

As Nosser et al point out, it is feasible that key elements of the TCF regulatory model outlined above may be applied to other product markets or industries and other supply chain forms. In recent times, we have seen a similar, but distinct model, used in relation to the road transport industry.[102] Indeed, the extension of supply chain regulation to the transport industry, a service industry removed from the production of consumer products, suggests that a far broader range of supply chains might be appropriate for the application of this type of regulatory strategy in whole or in part. Indeed, it is quite possible that this regulatory approach could be especially valuable in relation to the agri-food supply chain. While Nosser et al generally support extension of the current regulatory initiatives, they also caution that these models of supply chain regulation are likely to be most suitable to supply chains made up of a vertical series of contracts. They may be less amenable to other business networks or production networks, such as franchises, corporate groups or triangular labour hire arrangements.[103]

Beyond the Standard Employment Contract (Russell Sage Foundation, 2013); and Katherine Ravenswood and Sarah Kaine, 'The Role of Government in Influencing Labour Conditions Through the Procurement of Services: Some Political Challenges' (2015) 57(4) *Journal of Industrial Relations* 544.

[98] Generally this term is used to describe those workers they work from residential premises rather than in a traditional commercial work site.

[99] However, there are some limits to these rights of recovery under the FW Act. In particular, it is not possible, to recover entitlements against a retailer which did not have rights to supervise or otherwise control production prior to the delivery of goods. See Igor Nosser, 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.

[100] Anderson, above n 33, 141.

[101] See Johnstone and Stewart, above n 13.

[102] See Richard Johnstone, Igor Nosser and Michael Rawling, 'Regulating Supply Chains to Protect Road Transport Workers: An Early Assessment of the Road Safety Remuneration Tribunal' (2015) 43 *Federal Law Review* (forthcoming).

[103] Nosser et al, above n 99, 600.

That said, it would seem that certain elements of the TCF regime summarised above may be applied more generally. In particular, the expanded rights of recovery which allow workers to bring claims for workplace entitlements against third party entities and reverse the relevant onus of proof are especially appealing. Indeed, these same elements underpin some recent legislation reforms in Israel which were aimed at addressing some of the enforcement problems associated with agency work in the cleaning and security sectors, amongst others.[104] This particular initiative is discussed in more detail in section 6(a) below.

6. Alternative Regulatory Approaches from Elsewhere

Given the global reach of many organisational forms described earlier, the compliance and enforcement problems raised by fragmentation of the traditional employment relationship, and the vulnerability of temporary foreign workers, are issues which have vexed policy-makers and regulatory agencies in a range of developed economies, including the US, Canada and the UK.[105] The summary below identifies a number of regulatory devices or initiatives which may be worthy of further exploration in the Australian context.

In addition to those which are specifically identified below, there are a range of other regulatory mechanisms which have been adopted by state and non-state actors to address workplace contraventions taking place in global supply chains. Many of these mechanisms – such as third party auditing and targeted information disclosure – are also likely to be of some value in relation to domestic supply chains in key sectors.[106]

a) Joint Employment or Third Party Liability for Employment Contraventions

The concept of 'joint employment' was originally developed in the context of US employment-based regulation. In general terms, the doctrine of joint employment is a legal device which allows the court to ascribe liability and responsibility to two separate legal entities where both entities are found to exercise a requisite degree of control over the worker or otherwise share employer-like functions between them.[107]

The concept of 'joint employment' has been the subject of some recent consideration, and heated public debate, in the US. In particular, in a long-awaited decision, the National Labor Relations Board (***NLRB***) – an independent federal agency – recently refined its standard for determining joint

[104] In addition to cleaning and security, other relevant sectors include catering – which has not yet attracted much attention. However, it is possible for the Minister of Economy to expand the sectors which are subject to these additional legislative measures. See Guy Davidov, 'Indirect Employment: Should Lead Companies by Liable?' (Paper presented at the Labour Law Research Network, Amsterdam, 25-27 June 2015).

[105] Some of the regulatory limitations of the Fair Work framework also appear to afflict certain Canadian provinces, such as Ontario. See Judy Fudge and Kate Zavitz, 'Vertical Disintegration and Related Employers: Attributing Employment-Related Obligations in Ontario' (2007) 13 *Canadian Labour Law & Policy Journal* 107; and Eric Tucker, 'Shareholder and Director Liability for Unpaid Workers' Wages in Canada: From Condition of Granting Limited Liability to Exceptional Remedy' (2008) 28(1) *Law and History Review* 57.

[106] See, eg, Michael Toffel and Jodi Short, 'Coming Clean and Cleaning Up: Does Voluntary Self-Reporting Indicate Effective Self-Policing' (2011) 54(3) *Journal of Law and Economics* 609; Archon Fung, Mary Graham and David Weil, *Full Disclosure: Perils and Promise of Transparency* (Cambridge University Press, 2007); and Cynthia Estlund, 'Just the Facts: The Case for Workplace Transparency' (2011) 63 *Stanford Law Review* 351, 369.

[107] The scope and definition of 'joint employment' differs depending on the relevant statutory entitlement which is at issue, see Weil (2014), above n 16, Chapter 9. For further discussion of joint employment in the Australian context, see Craig Dowling, 'The Concept of Joint Employment in Australia and the Need for Statutory Reform' (Masters Thesis, University of Melbourne, 2008); Pauline Thai, 'Unfair Dismissal Protection for Labour Hire Workers? Implementing the Doctrine of Joint Employment in Australia' (2012) 25 *Australian Journal of Labour Law* 152; and Rohen Cullen, 'A Servant and Two Masters? The Doctrine of Joint Employment in Australia' (2003) 16 *Australian Journal of Labour Law* 359.

employer status in the *Browning-Ferris* case in a bid 'to better effectuate the purposes of the Act, in the current economic landscape.'[108]

Many lead companies, before and since the decision, have asserted that they should not be found liable for contraventions of workers' rights, if they only exert control over working conditions in indirect ways. In this respect, the majority of the NLRB noted that it is 'not the goal of joint-employer law to guarantee the freedom of employers to insulate themselves from their legal responsibility to workers, while maintaining control of the workplace.'[109] The full implications of this decision are not yet clear. In particular, it is not certain to what extent the Board's findings – which were directed at the question of whether a host firm and labour hire agency were joint employers – will affect ongoing legal proceedings against McDonald's franchisees, as well as their franchisor, McDonald's USA LLC. These proceedings were brought by the NLRB against the franchisor and franchisees as 'joint employers' for unfair labour practices and other workplace contraventions which are alleged to have taken place within their franchise network.[110] Some commentators have suggested that the more expansive test of control set by the *Browning-Ferris* case potentially widens the circumstances in which lead companies, such as head franchisors or client firms, may be deemed to be 'joint employers' (and jointly liable) with the franchisee companies or labour hire agencies that directly employ the workers,[111] but the final position is difficult to predict.[112]

These recent developments in the US are of limited relevance here given that the 'joint employment' concept has not yet been definitively accepted by Australian courts and tribunals.[113] One of the barriers to greater acceptance of the 'joint employment' doctrine is that there is no 'statutory hook'[114] in the FW Act which enables the courts to 'transcend the contractual framework'[115] and find that an entity which exercises functional control is a joint employer, notwithstanding the fact that under conventional contractual principles, the entity would not be found as such.[116]

It is not impossible for a statutory definition of employment (or joint employment for that matter) to be introduced into the FW Act. Indeed, there are a range of proposals which have been previously floated in the past, but these have generally been confined to deal with discrete issues in specific contexts. For example, Thai has proposed amendments to the FW Act which seeks to implement joint employment for the narrow, but not insignificant, purpose of allowing labour hire workers to bring unfair dismissal claims against the host entity.[117] In addition, in one of the few decisions which has considered the concept of joint employment in some detail, Hampton DP (as he then was) observed that the 'concept of joint employment where related corporations are conducting a

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[108] *National Labor Relations Board v Browning-Ferris Industries of California, Inc* (Case 32–RC–109684) (August 27, 2015), at 1.

[109] Ibid at 21.

[110] National Labor Relations Board, 'NLRB Office of the General Counsel Authorizes Complaints Against McDonald's Franchisees and Determines McDonald's, USA, LLC is a Joint Employer' (Media Release, 29 July 2014).

[111] See, eg, Catherine Fisk, 'NLRB's Browning Ferris Decision Could Reshape Contract and Franchise Labor', *On Labor: Workers, Unions, Politics*, 28 August 2015; Noam Scheiber and Stephanie Strom, 'Labor Board Ruling Eases Way for Fast-Food Unions Efforts', *New York Times*, 27 August 2015.

[112] It is quite possible that the Board's decision will be appealed – if this occurs, it may be years before a final decision is reached on this point.

[113] See *Morgan v Kittochside Nominees Pty Ltd* (2002) 117 IR 152; *Staff Aid Services v Bianchi* (2004) 133 IR 29; and *Fair Work Ombudsman v Eastern Colour Pty Ltd* [2011] FCA 803. In this last case, the Court held, in an interlocutory proceeding, that there is 'scope in Australian law for a claim that multiple entities can jointly employ a person.' However, this aspect of the claim was not at issue in the final proceedings and the earlier statement is therefore of limited precedential value: *Fair Work Ombudsman v Eastern Colour Pty Ltd (No 2)* [2014] FCA 55.

[114] Thai, above n 107, 171.

[115] Ibid.

[116] In comparison, the Fair Labor Standards Act of 1938 broadly defines the term 'employ' to include 'suffer or permit to work'. See also *Rutherford Food Corporation v McComb* 331 US 722 (1947).

[117] Thai, above n 107.

common enterprise and operating as a group with ill-defined boundaries would appear to be well within the compass of existing authorities.'[118]

However, seeking to extend the concept of 'joint employment' beyond these confined circumstances and to the full range of organisational forms may prove to be problematic, and to some extent unnecessary, in the context of the FW Act. For instance, finding that a host employer and a labour hire agency were 'joint employers' would invite a number of practical difficulties – for instance, it may create uncertainty as to which industrial instrument applied to the employment and it is likely to be inherently complex to apportion liabilities relative to each of them (i.e. it may be complicated to determine which entity should be liable for pay, superannuation, workers' compensation etc and to what extent).[119]

It is also possible that introducing the concept of 'joint employment' into Australian law may lead to unintended consequences and counterproductive effects. For example, Underhill has argued that freeing agency employers from their employer obligations and liabilities would be 'a curious reward for persistent non-compliance with statutory obligations.'[120] Instead, in the Australian setting and in the first instance, it may be simpler and more straightforward to address key compliance and enforcement issues through expansion of some of the existing mechanisms under the FW Act. For example, some of the most concerning aspects of fissured employment may be effectively addressed:

- by amending the statutory provisions relating to accessorial liability and sham contracting (to the extent that they found to be insufficient in their current form);
- by strengthening the remedies available under the FW Act;
- by adapting some of the key concepts emerging from the WHS Acts; and/or
- by allowing enhanced rights to recovery beyond the TCF industry.

Indeed, a combination of some of these measures is reflected in the 2011 Israeli reforms noted earlier in section 5. In particular, the Act to Improve Enforcement of Labour Law, places direct responsibility for cases of non-compliance with minimum employment standards in key sectors, such as cleaning and security, on the client (i.e. the host firm) – not as employers, but rather as guarantors. Whether the client ultimately bears these responsibilities will depend on the following three factors specified in the Act:

- First, whether the client has taken 'reasonable steps' to prevent any infringement of workers' rights by the contractor (i.e. labour hire provider), including by establishing a procedure whereby workers can bring complaints about the contractor directly to the client.
- Second, the client may avoid liability under the Act if they can show that they hired a 'certified wage-checker' to perform periodical checks of pay and made sure that any identified underpayments were promptly rectified.
- Third, the client will be automatically liable for any relevant underpayments of the agency worker where the client is found to have paid the contractor a contract price which falls below the minimum required by the Act.[121]

Davidov argues that while the first factor listed above – the duty to take 'reasonable steps' to ensure workers' rights are respected – is seemingly benign (particularly in comparison to the other two

[118] *Costello v Allstaff Industrial Personnel (SA) Pty Ltd* [2004] SAIRComm 13 at [125]. See also *Matthews v Cool or Cosy Pty Ltd* [2003] WAIRC 10399; *McConnell-Imbriotis v Eurobanks Pty Ltd* [2004] NSWIRComm 1035.
[119] *Costello v Allstaff Industrial Personnel (SA) Pty Ltd* [2004] SAIRComm 13.
[120] Elsa Underhill, 'Should Host Employers Have Greater Responsibility for Temporary Agency Workers' Employment Rights' (2010) 48(3) *Asia Pacific Journal of Human Resources* 338.
[121] This contract price is calculated on the basis of the minimum wage, plus the probable costs of all other mandatory employment standards and minimal profit (i.e. no 'losing contracts'). The Act provides that it is a criminal offence for the client (and separately for the client's managers) to offer a 'losing contract' to a contractor. Davidov, above n 24, 7.

factors which impose direct costs on the client), it is this first element which is perhaps the most powerful. He explains that:

> In the past, clients/users have been very hesitant about showing interest in the rights of workers employed indirectly, out of fear that any direct contact will be used as an indicator of direct employment relations. The Act not only gives clients positive incentives to care about the cleaners/security workers, it also eliminates the negative incentives. If you have direct contact with the workers in order to make sure that their rights are not infringed, there is no reason to suspect that courts will view this as a relevant indicator of employment any longer, because it was required by the Act.[122]

b) More Effective Sanctions

As noted earlier in this submission, Weil's model of strategic enforcement is specifically designed to address some of the compliance and enforcement issues facing regulatory agencies and unions. This idealised model of enforcement partly shapes the current approach adopted by the FWO.[123] This strategic approach was developed, at least to some extent, on the basis of Weil's earlier research into the deployment of the 'hot goods' or 'hot cargo' provision by the WHD in the domestic apparel industry. In short, this provision allowed the regulator to deploy an embargo-like sanction which froze any assets produced in contravention of minimum employment standards. This freeze on assets meant that shipments to retailers were delayed, resulting in manufacturers incurring additional costs and losing supply contracts.[124] As a result, manufacturers were effectively required to give up financial gains from supplying those products to retailers. This sanction was not only useful in obtaining quick remedial relief, it also enabled the regulator to enrol companies higher in the supply chain given that they had a strong incentive, courtesy of enforcement threats from the state, to establish private monitoring arrangements in relation to subcontractors.

In many respects, proactive compliance deeds which have been made between the FWO and various lead firms are somewhat similar to the voluntary monitoring agreements that were concluded as part of the 'No Sweat' campaign in the US garment industry. However, a major difference between the US monitoring agreements and the Australian deeds is that the latter lacks a credible enforcement mechanism. This is a significant weakness. First, without the 'teeth' of government sanctions, there is less incentive to establish and support ongoing monitoring regimes. Second, while the monitoring systems set up in the US garment industry had a significant influence on compliance behaviour over the period in which WHD was actively enforcing the 'hot goods' provision, when the enforcement pressure receded so too did the effects of earlier interventions.[125] In other words, a level of enforcement capability is not only important for prompting regulatory enrolment, but in ensuring that the commitments of lead firms and franchisors are sustained.

While the horticulture, food processing and franchise industries display some of the necessary characteristics that make an embargo-like sanction a particularly powerful one,[126] the FWO faces a major legal hurdle in seeking to adopt a similar enforcement strategy given that there is no equivalent 'hot goods' provision in Australia. Further, in direct comparison to the powers available to the Gangmasters' Licensing Authority (***GLA***) – a specialist UK regulatory agency – there is no equivalent licensing regime which applies to labour hire firms in Australia and therefore, as

[122] Davidov, above n 24, 7.
[123] See Hardy and Howe, above n 44.
[124] Weil (2010), above n 9.
[125] Ibid 87.
[126] The first key characteristic is that the time between production and sale of the goods is of the essence; the second important industry feature is that there are 'large, highly concentrated business entities that have greater market power than the large set of smaller organisations with which they interact'. Both these elements are potentially satisfied in the sectors currently under examination. Weil (2007), above n 6, 142.

mentioned above, no straightforward way for the FWO to incapacitate firms – either at the workplace level or beyond – which have a history of repeated, wilful or serious contraventions of employment standards regulation.

c) Licensing Schemes

The GLA was created as a result of several extreme cases of temporary foreign worker exploitation by labour hire agencies operating in various sectors.[127] Since 2006, labour hire providers (commonly known as 'gangmasters') operating in the agricultural, horticultural, dairy farming, forestry, shellfish gathering, food processing and packaging industries are required to obtain a license from the GLA.[128] Gangmasters must demonstrate compliance with workplace laws[129] in order both to receive and maintain their licenses.[130] The GLA keeps a public register of all licensed gangmasters, which provides useful information for growers who are obliged to use only licensed labour providers,[131] as well as trade unions who may be seeking to locate a particular gangmaster or determine whether a particular gangmaster is licensed and operating lawfully.[132] All workers engaged by gangmasters are covered by the scheme, regardless of whether they are considered employees or independent contractors.[133]

Regarding the content of the licensing requirements, gangmasters must demonstrate that they provide adequate accommodation to workers and comply with employment, tax and national insurance requirements.[134] Gangmasters are required to maintain status as a 'fit and proper' provider, which takes into account whether the gangmaster has tried to obstruct the GLA in the exercise of its functions, any relevant criminal convictions against the gangmaster and any connection with any person or entity deemed to not be fit and proper in the previous two years. Gangmasters must not only pay the relevant minimum wage, they must keep adequate records to demonstrate payment of such wages.[135]

The regulatory regime is supported by a range of substantial sanctions. For example, the GLA has the power to refuse or revoke a license or grant a license only on specific conditions. In addition, some offences carry custodial penalties up to 10 years imprisonment.[136] These formal sanctions, combined with consumer pressure and reputational concerns, have also led to the GLA building a relationship, over several years, with leading supermarket chains and other key non-state actors. This collaboration has led to the development of a Good Practice Guide for Labour Users and Suppliers supported by major food retailers and supplier representatives, as well as a Supermarkets and Suppliers' Protocol setting out how the GLA, supermarkets, unions and suppliers, including growers,

[127] Trades Union Conference, *'Enforcing Basic Workplace Rights: A Guide for Unions and their Members to the Statutory Enforcement Agencies*' (2011), 51.
[128] Ibid 51-52.
[129] Ibid 52.
[130] Ibid 53.
[131] It is a criminal offence for growers (i.e. the host/client organisation) to use an unlicensed labour provider if the workers are in the registered sectors.
[132] See TUC, above n 127.
[133] Ibid, 53-54.
[134] Ibid 55.
[135] In particular, gangmasters must also demonstrate proper workplace management documents and processes are in place, including: worker contracts, itemised pay slips that list deductions, tenancy agreements with worker notice periods not in excess of 10 days, an example of a worker's file, compliance with gas and electricity safety standards and an understanding of occupational health and safety laws.
[136] For further discussion of the regulation of employment agencies in the UK see: Michael Wynn, 'Regulating rogues? Employment Agency Enforcement and Sections 15-18 of the Employment Act 2008' (2009) 38(1) *Industrial Law Journal* 64.

can work together to ensure the relevant licensing standards are applied throughout the food produce supply chain.[137]

The licensing model under the *Gangmasters (Licensing) Act 2004* (UK) represents a somewhat promising experiment in an industry which was plagued by problems of worker exploitation. It also provides a useful example of how a licensing regime, coupled with an increased focus on enforcement,[138] has the potential to improve compliance amongst labour hire providers in sectors with high numbers of temporary foreign workers. For instance, in June 2009, there were 1230 gangmasters and over 180,000 workers registered by the GLA.[139] Initially, over 70% of gangmasters applying for a license were reported to have raised standards in one way or another.[140] Various worker support agencies have noted a significant reduction in reported cases in exploitation.[141] While noting various limitations to the GLA's effectiveness, Oxfam has advocated for the extension of this largely successful model to labour hire companies in other sectors with a prevalence of vulnerable workers, including construction, hospitality and social care.[142]

The GLA's licensing scheme for labour hire agencies is one way in which the FWO (and others) may be able to sufficiently strengthen the deterrence effects of regulatory interventions and curb workplace contraventions either in key industries or across the Australian labour market more generally. Indeed, it was observed by the ACTU Inquiry into Insecure Work that introducing a licensing system for labour hire agencies would not be a 'unique or radical move'[143] with similar schemes having already been adopted throughout various OECD countries. They further note that 'employment agencies and labour hire operators who don't exploit existing failures of regulation would have nothing to fear, and may benefit from undercutting behaviour being stamped out.'[144]

7. Conclusion

The compliance and enforcement problems which have been identified as part of this Inquiry are complex, challenging and profound. The existing regulatory enforcement literature, particularly the work of David Weil, suggests that in order to effectively address these problems, policy-makers and regulatory agencies must seek to devise a regulatory response which is based on a 'deep understanding of how industries and sectors operate and how those dynamics affect workplace outcomes generally and employment vulnerability in particular.'[145] It was observed that many of the

[137] These two publications - the Good Practice Guide for Labour Users and the Supplier/Retailer Protocol – are both available on the GLA website: http://www.gla.gov.uk/Publications/Labour-User-Guidance/ accessed on 16 September 2015.
[138] In April 2014, the GLA was moved from the Department for Business Innovation & Skills to the Home Office. This change appeared to shift GLA's focus from enforcing labour standards to tackling irregular migration and combatting organised crime. This change in institutional location also led to a significant drop in investigations and prosecutions. See Alan Travis, 'Gangmaster prosecutions decline to four-year low, reports Home Office', *The Guardian*, 14 November 2014. Indeed, this trend underlines one of the drawbacks of the 'Modern Slavery Strategy' of the Cameron government in the UK. In particular, the focus of Modern Slavery Act 2015 (UK), and the recently appointed Anti-Slavery Commissioner, is principally, although not exclusively, on preventing human trafficking across borders. Fudge argues that: 'The problem with this strategy is that it reinforces, rather than challenges, an approach that emphasises the criminal law and border controls at the expense of labour standards and business regulation.' See Judy Fudge, 'The Dangerous Appeal of the Modern Slavery Paradigm', *Open Democracy*, 25 March 2015.
[139] Oxfam Briefing Paper, *'Turning the Tide: How to best protect workers employed by gangmasters, five years after Morecambe Bay*' (31 July 2009) 9.
[140] Ibid 11.
[141] Ibid.
[142] Ibid 1.
[143] These countries were stated to include: Canada, Korea, Japan, Germany, Austria, Spain, Luxembourg, the Netherlands, Sweden, Belgium, France, Italy and Portugal. See Howe, above n 11, 34.
[144] Ibid.
[145] Weil (2009), above n 9, 426.

industries which have been the subject of recent scrutiny display 'fissured' characteristics – to the extent that many workers, including many temporary foreign workers, are engaged as contractors, or as low paid employees of small sub-contractors or franchisees, instead of as the direct employees of vertically organized large firms. These same labour market trends have also meant that lead firms and head franchisors often possess strong market power, hold key regulatory resources and wield considerable influence and bureaucratic control over the compliance behaviour of smaller firms in the relevant sector.

While the FWO has experimented with a number of strategic initiatives which are broadly designed to leverage the position, power and resources of lead firms in a way that improves compliance throughout the relevant corporate group, supply chain or franchise network, it is also clear that the current regulatory framework may be inadequate in a number of respects. For example, it is quite possible that the accessorial liability provisions and/or sham contracting provisions may not be sufficiently flexible to sustain the FWO's strategy in relation to complex business structures, as much as this strategy may be justified from a regulatory perspective. That said, it may be that just bringing these test cases, or threatening to do so, is enough to change the 'compliance calculus'[146] of larger, brand sensitive firms, even if these cases settle before any final determination.

However, if and when a test case is ultimately pursued to the final hearing, then the courts will be provided with a critical opportunity to contemplate and clarify the boundaries of employment in sectors, which are characterised by and various organisational forms, including franchising, subcontracting and outsourcing through labour hire agencies. If the current provisions of the FW Act are ultimately found to be wanting, this arguably provides a firmer foundation on which to advocate for further and more far-reaching reform to combat fissured employment practices. For example, it may be that there is even greater public interest in, and political appetite for:

- introducing a concept of 'joint employment' in respect of certain contraventions or certain organisational structures;
- departing from the conventional 'employment' paradigm – as has been done under the model work health and safety legislation;
- extending existing models of supply chain regulation beyond the relevant sectors in which they currently operate.

In the interim, a range of more modest regulatory measures may help address some of the other deficiencies in the regulatory framework which were identified earlier in this submission. In particular, it is recommended that:

- the 'recklessness' defence in the sham contracting provisions be replaced with a 'reasonableness' defence;
- the statutory provisions relating to accessorial liability and sham contracting be amended (to the extent that they are ultimately found to be insufficient in their current form);
    - For example, it may be justifiable and appropriate to provide workers with enhanced rights to recovery against third party entities (including lead firms) in certain circumstances.[147]
- the civil remedy regime is strengthened in various ways, including:
    - by significantly increasing the maximum penalties available under the FW Act;
    - by introducing disqualification orders for officers; and
    - by possibly adopting a mechanism which is similar to the 'hot cargo' provision used by the US WHD to great effect;
- a licensing regime for labour hire providers should be introduced either in specific sectors or more generally.

[146] Weil (2010), above n 9, 88.
[147] The Israeli reforms summarised in section 6(a) provide a possible model in this respect.