SUBMISSION TO THE VICTORIAN INQUIRY

INTO THE LABOUR HIRE INDUSTRY AND INSECURE WORK

Centre for Employment & Labour Relations Law

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1 Introduction

This submission is made to the Victorian Inquiry into the Labour Hire Industry and Insecure Work on behalf of the Centre for Employment and Labour Relations Law (***CELRL***) at the University of Melbourne. The CELRL is a specialist unit within Melbourne Law School devoted to teaching and research in labour and employment law. Further information about the CELRL is available at: http://www.law.unimelb.edu.au/centre-for-employment-and-labour-relations-law.

The submission addresses a number of discrete questions raised by the Background Paper issued by the Inquiry in October 2015. We confine our commentary and analysis to matters that draw most directly on the current research projects of Centre members who have prepared this submission.

While we have worked together to produce this submission, certain Centre members have been more heavily involved in various sections. In particular, we note that:

- Sections 3.1, 3.2.1, 3.2.2, 6.1 and 7.3 on labour hire arrangements in Australia and Italy have been largely prepared by Ms Maria Azzurra Tranfaglia;
- Sections 3.2.3, 4 and 7.2 on compliance and enforcement issues, franchising and the Gangmasters Licensing Authority respectively have been predominately prepared Dr Tess Hardy;
- Sections 5 and 6.2.4 have been prepared by Professor Helen Anderson; and
- Section 7.1 has been prepared by Professor John Howe.

In Section 8, we set out a number of preliminary recommendations. We note that some of these may be of limited application at the state level to the extent that they are directed at federal statutes, such as the *Fair Work Act 2009* (Cth) (***FW Act***) and the *Corporations Act 2001* (Cth) (***Corporations Act***). However, we also consider some other initiatives, based on approaches adopted in the UK and Italy, which illustrate different ways in which to better regulate the labour hire industry. In particular, we suggest that greater regulation of labour hire agencies and possible licensing and registration of labour hire providers are regulatory mechanisms which can be adopted at the state level. It should also be feasible for the state to better regulate labour hire employment through its own procurement practices.

2 Background

In our submission, we focus on a number of different business structures and practices which may be contributing to the avoidance of minimum employment standards, exploitation of vulnerable workers and creation of insecure work.

The three industries which have been the subject of recent and intense public scrutiny in relation to exploitation of labour in Australia – horticulture, food

processing and convenience stores – all display a set of common features.[1] 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***). These sectors are also characterised by a large proportion of vulnerable workers, including many temporary foreign workers, and relatively low levels of unionisation.[2]

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,[3] cleaning,[4] postal services,[5] security,[6] trolley-collecting,[7] car-wash services[8] and hospitality,[9] amongst many others.[10] More detail on the prevalence

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[1] 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) and 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).

[2] 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).

[3] 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)).

[4] Pat McGarth, 'Myer cleaners accuse retailer of underpayment, denying entitlements with 'sham contracting' practice', 22 October 2015 (available at http://www.abc.net.au/news/2015-10-22/myer-accused-of-underpaying-cleaners-through-sham-contracting/6876760; Maria Azzurra Tranfaglia 'Law allows Myer to outsource responsibility for labour hire workers', *The Conversation*, 28 October 2015 (available at https://theconversation.com/law-allows-myer-to-outsource-responsibility-for-labour-hire-workers-496500); *Fair Work Ombudsman v Quest South Perth* [2015] HCA 45.

[5] Madeleine Morris, 'Australia Post major contractor arrested and accused of running immigration racket', 7:30, 5 August 2015 (available at http://www.abc.net.au/7.30/content/2015/s4287814.htm).

[6] Fair Work Ombudsman, 'Security Company Fined over $60,000', *Media Release*, 20 November 2015.

[7] *Fair Work Ombudsman v Al-Hilfi & Ors* [2012] FCA 1166 (26 October 2012); *Fair Work Ombudsman v Al Hilfi (No 2)* [2013] FCA 16.

[8] *Fair Work Ombudsman v Crystal Carwash Cafe Pty Ltd (No 2)* [2014] FCA 827.

of labour hire and franchising in particular sectors is set out in Sections 3.1 and 4.1 respectively.

However, 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 insecure work, 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.[11]

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.[12]

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[13] and magnifying some of the challenges of enforcement. The first part of this submission will focus on three key issues raised by the fragmentation of the traditional, bipartite employment relationship:

a) the prevalence of labour hire in Australia and Victoria and the regulatory challenges raised by trilateral working arrangements;
b) the prevalence of franchising in Australia and Victoria and some of the unique regulatory issues that can arise in these commercial arrangements; and
c) the prevalence of phoenix activity and the relevance of corporate law.

In light of the above, this submission will address the characteristics of labour hire, franchising and phoenix activity in Australia and in Victoria. It will look at the critical regulatory issues arising from the use of such arrangements. Finally, it will offer some recommendations for reform drawing on historical and/or comparative regulatory experiences.

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[9] *Fair Work Ombudsman v Contracting Solutions Australia Pty Ltd* [2013] FCA 7.
[10] 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 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).
[11] Richard Johnstone and Andrew Stewart, 'Swimming Against the Tide? Australian Labour Regulation and the Fissured Workplace' (2015) 37 *Comparative Labor Law & Policy Journal* 55.
[12] Johnstone and Stewart, above n 11, 4.
[13] 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)).

3 Labour Hire Arrangements

The study of agency work, better known in Australia as 'labour hire' has attracted considerable interest from a regulatory perspective both at national and at international level in the last three decades.[14] Agency work has generated widespread interest for a range of reasons. On the one hand, it is viewed as an important tool to match the supply and the demand of labour and stimulate job creation.[15] For this reason, it is also been identified as a preferable form of non-standard work.[16] However, on the other hand, its use is often associated with the avoidance of responsibilities connected to a direct employment relationship.[17]

Indeed, the growing attention directed towards labour hire is part of the broader debate around the proliferation of 'insecure' or 'non-standard forms of employment'.[18] These terms are generally used to describe working arrangements that are defined by their difference from the 'standard employment relationship'[19], which is often understood as a bipartite relationship with a worker engaged in a subordinate capacity to work at the employer's premises on a full-time and permanent basis.[20] However, the increasing use of agency work arrangements to source labour mean that it is become less atypical and more standard. The growing normalisation of agency work arrangements, warrants particular consideration, especially in light of a trend of unscrupulous practices that have emerged in a number of sectors noted above.

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[14] See John Burgess and Julia Connell, 'International Aspects of Temporary Agency Employment' in John Burgess and Julia Connell (eds) *International Perspectives on Temporary Agency Work* (Routledge 2004); Andrew Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15 *Australian Journal of Labour Law* 1, 42; Steve O'Neill, 'Labour Hire: Issues and Responses' (Research Paper No 9, 2003-04, Parliament of Australia, Economics, Commercial and Industrial Relations Group, 8 March 2004); Elsa Underhill, 'Report – Labour Hire Employment and Independent Contracting in Australia: Two Enquiries, How Much Change?' (2006) 19 *Australian Journal of Labour Law*, 306-314; Pauline Thai, 'Unfair Dismissal Protection for Labour Hire Workers? Implementing the Doctrine of Joint Employment in Australia' (2012) 25 *Australian Journal of Labour Law* 158; Howe et al, above n 10; Michael Wynn, 'Power, Politics and Precariousness: The Regulation of Temporary Agency Work in the European Union' in Judy Fudge and Kendra Strauss (eds) *Temporary Work, Agencies and Unfree Labour – Insecurity in the New World of Work* (Routledge, 2013) 48;

[15] Andrea Ichino, 'Temporary Agency Work in Italy: A Springboard Toward Permanent Employment? (2005) 64(1) *Giornale degli Economisti e Annali di Economia* 1; Burgess and Connell, above n 14. See also M Neugart and D Storrie, 'The Emergence of Temporary Work Agencies' (2006) 58 *Oxford Economic Papers* 137; and Lars Mitlacher and John Burgess, 'Temporary Agency Work in Germany and Australia: Contrasting Regulatory Regimes and Policy Challenges' (2007) *The International Journal of Comparative Labour Law and Industrial Relations* 401.

[16] See Silvia Spattini, 'Agency Work: A Comparative Analysis' (2012) 1(3-4) *E-Journal of International and Comparative Labour Studies* 169, 172.

[17] Judy Fudge, above n. 10.

[18] See Judy Fudge 'Blurring Legal Boundaries: Regulating for Work' in Judy Fudge, Shae McCrystal and Kamala Sankaran (eds) *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, 2012) 1-26; and Giuseppe Casale and Adalberto Perulli, *Towards the Single Employment Contract – Comparative Reflections* (ILO, 2013).

[19] Deidre McCann, *Regulating Flexible Work* (Oxford University Press, 2008) 4.

[20] Judy Fudge and Rosemary Owens, 'Precarious Work, Women and the New Economy: The Challenge to Legal Norms' in Judy Fudge and Rosmary Owens (eds) *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (Oxford Hart, 2006), 3–27.

Experience suggests that these arrangements have been used, at least by some, to circumvent the protections associated with permanent employment (such as unfair dismissal laws, occupational health and safety, collective rights and other working conditions like minimum wage, paid leave entitlements, etc.). Further, temporary working arrangements could foster inequality by creating a two-tier labour market. In this situation, employers only provide permanent status to core employees, while maintaining a pool of more dispensable workers that may not enjoy the same working conditions as those employees performing the same job who are hired directly by the user company.[21]

3.1 Available Evidence on the Prevalence of Labour Hire

Pure labour hire broadly consists in a working arrangement where an entity (agency) supplies workers to a third company (user company), in exchange for a fee and maintaining an ongoing relationship with both the workers and the user company for a certain period of time (assignment period).[22] In other words, the agency does not simply perform the recruitment and placement function, nor does it usually retain the control on the working activity of the workers it employs/engages and then supplies. Generally speaking in Australia, labour hire agencies range from the large well-known multinational firms, such as Adecco and Manpower and some substantial local firms, such as Skilled Engineering, to many small operators.[23]

In Australia, as well as in many other countries, temporary agency work has often been used to either replace absent workers or to supply specialist labour to meet occasional needs.[24] However, the practice is now associated with ongoing labour needs.[25]

As the Inquiry's Background Paper notes, although there have been a number of recent attempts to estimate the prevalence of labour hire arrangements, results vary according to methodology, data sources and time periods.[26] Nevertheless, it is reasonable for the Inquiry to conclude that labour hire 'has stabilized as a significant feature of working arrangements in Australia', and that 'Victoria has a relatively high concentration of labour hire workers' given the limitations of available studies.[27] For example, it is important to consider that the accuracy of estimates of the prevalence of labour hire work may be jeopardised by the existence of arrangements which might not necessarily be captured. For example, firms that are functioning in the 'black' market may not publicly identify as operating as a labour hire agency.

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[21] ACTRAV, 'From Precarious Work to Decent Work: Outcome Document to the Workers' Symposium on Policies and Regulations to Combat Precarious Employment' (International Labour Office, Bureau for Workers' Activities, Geneva, 2012), 30.
[22] Iain Campbell, Ian Watson and John Buchanan, 'Temporary Agency Work in Australia' in John Burgess and Julia Connell (eds) *International Perspectives on Temporary Work and Workers* (Routledge, 2004) 1.
[23] Burgess and Connell, above n 14.
[24] Campbell, Watson and Buchanan above, n 22, 3.
[25] Stewart, above n 14.
[26] Background Paper, 9. See generally, Anthony O'Donnell 'Non-standard Workers in Australia: Counts and Controversies' (2004) 17 *Australian Journal of Labour Law* 89.
[27] Ibid.

Another possible limitation of the data on the prevalence of labour hire is that it tends to refer to the ANZSIC codes (Australian and New Zealand Standard Industrial Classifications) used by the Australian Bureau of Statistics. These codes are organised into various tiers – commencing with 'divisions' such as 'accommodation and food services' and 'construction'. Divisions are not very useful in identifying problems in particular kinds of workplaces, because they tend to aggregate very disparate industries.[28] For example, the division 'administrative and support services' covers both travels agents and cleaners.

The ABS divides these broad categories into two digit 'sub-divisions', three digit 'groups' and four digit 'classes'. This allows for much more finely grained analyses, although even at the group level, some substantively dissimilar forms of employment are brought together (such as the classes of police and security guards; or cleaning, pest control and gardening). It is really only at the level of 'class' - the four digit level – that a clear picture of relative levels of non-compliance across all discrete occupational types would emerge.

Therefore, more specific studies should be conducted to measure and scrutinise the practices and the extent of the phenomenon in some particular sectors in light of the issues recently identified in the media and relevant case law.

3.2 Some Regulatory Challenges Arising from Labour Hire

Some of the principal regulatory challenges raised by labour hire arrangements include the following:

a) The proper characterisation of the relationship between the worker and the agency firm (i.e. whether the working relationship is, or should be, characterised as one of employment or instead as an independent contracting arrangement);
b) The appropriate allocation of employment responsibilities between the agency and the user company; and
c) Compliance and enforcement issues arising in relation to labour hire arrangements.

The basic premise of the practice of labour hire, as we have noted above, involves a triangular arrangement where an agency engages and pays a worker which it then supplies to a 'host' organisation under a separate contract with the host.

The lack of any specific regulation of labour hire in Australia (discussed further in Section 6.1 below) has given rise to certain regulatory challenges, including the proper allocation of employment responsibilities between the agency and the

[28] For further discussion of the limitations of the ANZSIC codes, see John Howe, Tess Hardy and Sean Cooney, 'Complaints, Campaigns and Compliance: The Fair Work Ombudsman and Detection of Fair Work Law Violations', paper presented to the Australian Labour Law Association National Conference, 2012.

user company. As the agency supplies the user firm with employees[29] to work under the instructions of the user firm:

> whether – and to what extent – these workers are employees and, if so, how the employer's obligations under the law should be allocated between agency and user are subjects that virtually all labour law systems have engaged.[30]

In addition, the lack of employment protections and job security for workers engaged as independent contractors or hired on a casual basis have fuelled the call for specific statutory intervention and greater oversight of agency work. However, despite a series of previous State and Federal inquiries which have suggested that regulatory measures are needed to provide better protection for labour hire workers, this area of the law still remains largely ungoverned by specific legal provisions.[31]

3.2.1 Employment Status of Labour Hire Workers

In many cases, agencies engage workers using the so-called 'Odco' system, named for the company behind the Troubleshooters agency which won a test case on this question back in the early 1990s.[32] Under this system, the agency purports to engage workers as independent contractors before on-hiring them to host organisations. The validity of this model has been approved in many cases, often on the basis of the contractual documentation prepared by the agency, as distinct from the substance of the arrangement between the agency and the worker.[33]

Roles and Stewart have argued that labour hire is 'a legitimate business arrangement that should not be associated with sham contracting – except where it involves artificial arrangements that are designed to allow workers to be engaged to perform work without the protection of labour laws'.[34] In their view, the Odco system often involves artificial arrangements. In such cases, there is a need for state intervention to deem that the workers involved are the employees of labour hire agencies.[35]

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[29] As noted in Section 3.2.1 below, not all workers are engaged as employees of the agency firm. Rather, some can be engaged as independent contractors. In this latter instance, the worker is not generally entitled to any employment-related benefits.
[30] Paul Benjamin, 'The Persistence of Unfree Labour: The Rise of Temporary Employment Agencies in South Africa and Namibia' in Judy Fudge and Kendra Strauss, *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work* (Routledge, 2014).
[31] Underhill, above n 14; Thai, above n 14; Howe et al, above n 10.
[32] Colin Fenwick, 'Shooting for Trouble? Contract Labour-Hire in the Victorian Building Industry' (1992) 5 *Australian Journal of Labour Law* 237; *Re Odco Pty Ltd v Building Workers' Industrial Union of Australia* [1989] FCA 336; and *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104..
[33] Cameron Roles and Andrew Stewart, 'The Reach of Labour Regulation: Tackling Sham Contracting' (2012) 25 *Australian Journal of Labour Law* 258, 281.
[34] Ibid 280.
[35] Ibid.

3.2.2 Identification of the 'Real' Employer

In some cases, questions arise as to whether engagement of labour by a host organisation through a third party intermediary represents genuine labour hire arrangements. That is, labour hire arrangements are said to be legitimate as long as the labour hire company is truly conducting a business and it is not a mere screen between the host organisation and the workers the agency supplies to the host organisation. In such circumstances, the courts have held that there is no reason to infer an employment relationship between the host organisation and the worker. [36]

In some cases it has been argued that it is the host organisation which is effectively the 'real' employer of labour. In these cases, it is often argued that the host organisation should be held to be the 'joint employer' of labour with the labour hire agency. In a recent decision of the Fair Work Commission, the Full Bench concluded that the doctrine of joint employment was not recognised in Australia, because 'the law has generally strived to find one or the other of the two putative employers to be the "real" employer' rather than apportioning liabilities.[37]

Although joint employment was rejected in this context, some recent cases brought by the Fair Work Ombudsman have revealed different ways in which the host firm has been found to be the 'real' employer.[38] For example, in one case the Federal Court deemed as sham contracting an arrangement between a horticultural grower and two labour-hire agencies which was merely orchestrated to avoid paying overtime to the workers being supplied. As a result, the host company (i.e. the grower) was deemed to be the "true" employer, with all the associated responsibilities, including payment of penalties for contravening applicable federal employment instruments and legislation.

3.2.3 Compliance and Enforcement Issues

Labour hire arrangements have given rise to a number of different compliance and enforcement issues. Many of these issues can be illustrated by reference to the recent inquiry by the Fair Work Ombudsman (***FWO***) into the Baiada Group, the largest poultry processing corporate group in Australia with a market share of more than 20 per cent.[39] This Inquiry found that plant workers – many of whom were on working holiday visas and sourced through this complex chain of labour hire agents – were being routinely underpaid and forced to work long and arduous hours. The problems faced by these precarious workers are arguably exacerbated by the difficulties of detecting and addressing employer non-

[36] *FP Group Pty Ltd v Tooheys Pty Ltd* [2013] FWCFB 9605.
[37] Ibid.
[38] See *Fair Work Ombudsman v Eastern Colour Pty Ltd (No 2)* [2014] FCA 55 (11 February 2014).
[39] The Baiada Group – which includes Baiada Poultry Pty Limited and Bartter Enterprises Pty Limited – supplies many of its chickens to leading brands, including Coles, Woolworths, McDonald's and KFC. Fair Work Ombudsman, 'A Report on the Fair Work Ombudsman's Inquiry into the Labour Procurement Arrangements of the Baiada Group in New South Wales' (June 2015) ('FWO Baiada Inquiry').

compliance arising in these arrangements, particularly in regional and remote areas and especially in the face of chronic phoenix activity.

For instance, in terms of detection, the Baiada Inquiry revealed that inspector access to workers and records was actively resisted by the employers and/or the owner of the relevant worksites.[40] Even where access was granted, employment records were often not created or maintained. In other instances, records were deliberately falsified or fabricated, sometimes with the assistance of accounting and legal professionals. In the Baiada Inquiry, the absence of full and accurate records meant that the FWO was ultimately 'unable to account for hundreds of thousands of dollars as money moved down the supply chain.'[41]

Another barrier to effective detection is the fact that many employees are reluctant to complain to authorities for a variety of reasons, including ignorance and fear. For instance, many workers in the horticulture and food processing industries rely on information which is provided by labour hire agencies or 'facilitators', which is often restricted and may be misleading.[42] Further, workers – particularly temporary foreign workers – may be threatened with violence, or being reported to the immigration authorities if they complain.[43]

While the FWO acknowledged that contracting out labour can be a convenient and legitimate business strategy, the regulator also recognised that the competitive procurement processes and poor governance arrangements which characterised the Baiada arrangements can (and did) combine to create an environment ripe for worker exploitation. More specifically, Baiada's principal operating model was found to effectively 'transfer costs and risks associated with the engagement of labour to an extensive supply chain of contractors responsible for sourcing and providing labour.'[44] This is especially problematic in light of the fact that, during the course of the Inquiry, a large number of entities identified in the supply chain ceased trading. The effect of this systematic company collapse was to make the relevant entities immune to enforcement proceedings and the imposition of compensatory orders and pecuniary penalties.

Since the conclusion of the Inquiry, the Baiada Group has adopted a range of measures designed to stamp out worker abuse at its factories, such as improving the transparency and documentation of contractor arrangements, introducing electronic timekeeping and ensuring that all workers are informed of the relevant employing entity and their employment rights.[45] Many of these measures could be adopted by principal contractors/host firms in order to better ensure workplace relations compliance throughout the production network,

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[40] For instance, the FWO reports that Fair Work Inspectors were denied access to three NSW sites. Ibid 2.
[41] FWO Baiada Inquiry, above n 39, 3.
[42] 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*').
[43] Ibid 56.
[44] FWO Baiada Inquiry, above n 39, 2.
[45] Proactive Compliance Deed between the Office of the Fair Work Ombudsman and Baiada Poultry Pty Ltd and Bartter Enterprises Pty Ltd dated 23 October 2015.

particularly in sectors which are notorious for non-compliance, such as cleaning and security. However, it is not clear to what extent firms would be willing to take these steps in the absence of consumer pressure, regulatory scrutiny and/or the credible threat of liability. This gap underlines the importance of measures, such as government procurement and licensing, discussed in Section 7 below.

Another question which is raised, but not necessarily resolved, by this case is whether Baiada is the only 'lead firm' which can and should be targeted. In particular, the FWO Inquiry acknowledged that over half of Baiada's products were purchased by supermarkets. Further, it also referred to reports which had found that: '[i]ntensive discounting undertaken by the major supermarkets [may] have placed downward pressure on profit margins in the industry which has led to diminished profits at the processing level.'[46] While the FWO actively canvassed the possibility of applying the accessorial liability provisions against entities other than the direct employer, such as Baiada, the regulator seemed far less inclined to hold the retailers legally liable.

Rather, the FWO stated that they intended to rely solely on voluntary and self-regulatory measures to 'raise awareness of the importance of compliant and ethical supply chains'[47] with major buyers of processed chicken products, including leading supermarkets and fast food chains. The difficulty with this approach is that to induce or compel lead firms to commit to these types of voluntary initiatives, particularly in the longer term, it is generally necessary to have sufficient positive and/or negative incentives, including consumer backlash and legal liability.[48] Again, the way in which the UK regulatory agency has worked with supermarkets is somewhat instructive in this respect.[49]

[46] Ryan Lin, *Poultry Processing in Australia,* IBISWorld Pty Ltd, February 2014, cited in the FWO Baiada Inquiry, above n 39.
[47] FWO Baiada Inquiry, above n 39, 31.
[48] 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. See also Tess Hardy, *Submission to Senate Inquiry on the Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders*, www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Submissions.
[49] See further discussion at Section 7.2 below.

4 Franchising Arrangements

4.1 Available Evidence regarding the Prevalence of Franchising in Australia

The lack of any official registration requirements on franchisors makes it impossible to accurately identify the population. However, the most recent data collected as part of the *Franchising Australia 2014* survey provides the following snapshot of the national franchising sector.[50]

Measure	Australian Estimates
No of Franchisors	1160
No of Operating Units	79,000
No of People Employed	460,000
Sales Turnover of Franchising Sector	$144 billion

Source: Franchising Australia Survey 2014

Casual work appears to be more concentrated in franchising than in other commercial arrangements. Casual work is particularly high in company-owned franchised units (over 82% of all workers were engaged as casuals) and independent franchised units (57% of all workers were employed as casual).[51]

To some extent, the higher levels of casualisation may partly reflect the sectors in which franchising is most concentrated, namely retail trade (27% of franchisors involved in this sector) and accommodation and food services, including fast food (18% of franchisors identified as being part of this sector).

However, one feature which is unique to franchises, as compared to the labour market overall, is that casualisation rates are growing amongst independent and company-owned franchisees,[52] whereas the concentration of casual work has largely plateaued in other parts of the Australian economy.[53]

This data suggests that there are greater levels of insecure work in the franchise sector than in other parts of the economy, although this does not, of itself, mean

[50] Franchising activities in motor vehicle and fuel retailing were not generally captured in the survey: Lorelle Frazer, Scott Weaven and Anthony Grace, Franchising Australia Survey 2014 (Asia-Pacific Centre for Franchising Excellence, Griffith University, 2014) ('Franchising Survey'). This is a significant omission given that fuel franchising appears to be a sector which has been plagued by problems of employer non-compliance and worker exploitation in recent years. See, eg, *Fair Work Ombudsman v Liquid Fuel Pty Ltd & Ors* [2015] FCCA 2694 (8 October 2015).
[51] Franchising Survey, above n 50.
[52] Ibid 41.
[53] See Australian Bureau of Statistics, *Characteristics of Employment*, Cat. No. 6359.0 (2015).

that there are necessarily higher rates of employer non-compliance. As noted in Section 2 above, these questions are likely to turn on the relevant circumstances of each franchise, including the business model which is adopted by the franchisor.

4.2 Regulatory Challenges Raised by Franchising

4.2.1 Diversity of Franchising Models

One of the challenges of regulating franchises is the fact that there are a whole range of franchising models – each of which raises distinct questions under employment and competition regulation.[54] For instance, franchisees may be independent, small businesses who employ only those employees working in their store. This is the most common type of franchise structure and arguably the type which is most susceptible to employment non-compliance.

Alternatively, franchisees may own multiple stores and operate as fairly large employers in their own right. Conversely, franchisees may have no employees, but rather be self-employed. One of the issues which typically arise in respect of this latter type of franchise relationship is whether the franchisee should be more properly classified as an employee (rather than an independent contractor).[55]

Franchises also span an increasingly wide variety of sectors from hotels to hospitality to hairdressers. This makes it more difficult to take a purely sectoral approach, albeit industry characteristics are still highly relevant. Obviously, the relevant industry in which the franchise is operating will affect the industrial instruments, including modern awards, which apply. It is also the case that different compliance issues are likely to arise in distinct sectors. For instance, accountants and real estate agents commonly operate through franchise arrangements, but these franchises are likely to raise separate issues to those that operate in the fast food and convenience store sectors.

4.2.2 Compliance and Enforcement Issues

Again, we have taken one of the most high profile cases – that relating to the 7-Eleven chain of convenience stores – to highlight some of the key problems facing regulators, such as the FWO and unions, seeking to curb employer non-compliance in franchises. As has been well-documented, an investigation into the 7-Eleven franchise revealed that many temporary foreign workers had been seriously underpaid across the franchise network. Similar to the Baiada Inquiry discussed in Section 3.2.3 above, this case has also revealed the challenges of effective detection and enforcement of minimum employment standards in 'fissured' workplace arrangements.

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[54] See further discussion in Section 4.2.2 below.

[55] See Joellen Riley, 'A Blurred Boundary between Entrepreneurship and Servitude: Regulating Business Format Franchising in Australia' in Judy Fudge, Shae McCrystal and Kamala Sankaran, *Challenging the Legal Boundaries of Work Regulation* (Hart Publishing, 2012).

In terms of detection, this case again underlines the limitations of relying on worker complaints to identify employer non-compliance in sectors which have a high proportion of vulnerable workers, such as international students. These workers are often unaware of their employment rights, fearful of exercising them or both. This case also reveals some of the problems of relying on desk-based audits. Indeed, the forensic nature of the investigations into 7-Eleven[56] underlines the difficulties that inspectors (and unions) face in seeking to piece together an accurate and comprehensive picture of the relevant working reality where employment records are missing or manipulated.

Second, even where employer non-compliance had clearly been identified and the employing entity is sanctioned, the deterrence effects of this intervention may be undermined by the doctrine of limited liability and phoenix activity – discussed further in Section 5 below. This case shows that punishment of the putative employer (i.e. the franchisee) will not necessarily be effective in addressing some of the key drivers of compliance behaviour, which may be determined by the franchisor. Notwithstanding the fact that the FWO had brought a series of enforcement proceedings against individual franchisees over the past five years,[57] non-compliance with workplace laws appeared to remain both systemic and sustained within the 7-Eleven franchise network. It has been argued that this poor compliance behaviour may have been driven, at least in part, by the relevant business model.[58] In particular, 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.'[59]

If it is assumed that the franchisor's business model is partly to blame for the workplace contraventions taking place, the question then arises as to what can be done either by the FWO or the ACCC: the two federal regulators currently overseeing franchisor behaviour. For example, there are a number of current and pending proceedings which are geared towards pursuing the franchisor under the accessorial liability of the FW Act or the unconscionable conduct provisions of the *Competition and Consumer Act 2010* (Cth). Many of these investigations are ongoing[60] and a final decision in the relevant legal proceedings is pending.[61] In

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[56] 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).
[57] For a summary of the activities of the FWO against various 7-Eleven franchisees, see ibid.
[58] 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.
[59] Adele Ferguson, Sarah Danckert and Klaus Toft, '7-Eleven: Allan Fels says model dooms franchisees and workers', *The Age*, 31 August 2015.
[60] The FWO is currently conducting an inquiry into 7-Eleven. See Fair Work Ombudsman, *Annual Report 2014-15*, 31. The ACCC has also indicated that it is conducting a review of 7-Eleven's conduct. See Adele Ferguson and Sarah Danckert, '7-Eleven: ACCC eye convenience store chain for potential law breaches', *The Age,* 26 September 2015.
[61] For instance, there is a current class action brought by a number of Pizza Hut franchisees against Yum! Restaurants Australia Pty Ltd, the Australian owner of the Pizza Hut brand. See Andrea Mayes, 'Pizza Hut Franchisees Launch Class Action Over Pizza Price War', *ABC News*, 27

light of the current level of federal regulation of franchises and the possible tension which already exists between workplace and competition and consumer legislation, it may be problematic, and potentially unnecessary, for the state government to further intervene in this space.[62]

5 Phoenix Activity

5.1 Available Evidence regarding the Use of Phoenix Activity

The nature of phoenix activity is such that it is impossible to quantify the extent of this activity. We refer the Inquiry to some of our latest research on this subject.[63] While we understand from anecdotal evidence that that phoenix activity is a significant problem for employees in Victoria, no reliable statistics are maintained by ASIC or the ATO. Any quantification that relies upon the counting of external factors – the closure of one company, the creation of another controlled by the same people running the same business – risks capturing legal, desirable business rescues that are potentially beneficial for employees.

5.2 Corporate Law's Relevance to Labour Hire and Insecure Work

It is important that the Inquiry recognises the significant impact of corporate law upon all aspects of labour hire and insecure work. This enables the Inquiry to understand how it happens, why it is difficult to legislate, and how it might be overcome. As corporate law in Australia is governed by federal laws, principally through the *Corporations Act 2001* (Cth), and is policed by the Australian Securities and Investments Commission, there is limited scope for the Victorian government intervention. However, it can advocate for federal reform.

Corporations with separate legal personality are the foundations upon which modern enterprise is built. The company is liable without limit for the debts incurred in running the business. The company's shareholder enjoys limited liability up to the amount unpaid on his or her shares, if any.[64] Directors and managers of the company face personal liability via a range of mechanisms under the *Corporations Act* but generally speaking, these relate to some aspect of their own improper conduct.[65] They are not de facto ways to make controllers liable for corporate debts. Protecting the separate legal entity of a company and

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July 2015. More recently, the Pizza Hut chain has been plagued by allegations of sham contracting and employee underpayment raising the possibility of proceedings being brought under the FW Act. See Adele Ferguson and Sarah Danckert, 'Wage fraud: Pizza Hut franchisees using 'sham' contracts to underpay drivers', *The Age*, 23 November 2015.

[62] For further discussion of this tension, see Tess Hardy, 'Franchises: All Care and No Responsibility', *The Conversation*, 29 October 2015.

[63] Helen Anderson et al, *Quantifying Phoenix Activity: Incidence, Cost, Enforcement* ((Research Report, Centre for Corporate Law and Securities Regulation, 2015); Helen Anderson et al, *Defining and Profiling Phoenix Activity* (Research Report, Centre for Corporate Law and Securities Regulation, December 2014). For further information on this research project, see Centre for Corporate Law and Securities Regulation, 'Regulating Fraudulent Phoenix Activity' http://law.unimelb.edu.au/centres/cclsr/research/major-research-projects/regulating-fraudulent-phoenix-activity.

[64] *Corporations Act 2001* (Cth) s 516.

[65] These include directors' duties under the *Corporations Act 2001* (Cth) ss 180-183.

the limited liability of its shareholders is important to ensure that those with capital and an entrepreneurial spirit are willing to invest in companies, which are, in essence, risk-taking vehicles.

Workers are major beneficiaries of corporations, both as a personal source of employment and as a generator of general economic prosperity. Nonetheless, workers can suffer as a result of their dealings with companies. In the current context, employment with a labour hire entity without assets or which engages in phoenix activity can deprive employees of their entitlements. This is because a company can legally be established in Australia without any mandatory capital beyond $1. It is also legal for a company to enter liquidation and sell its business to a newly established entity run by the company's controllers.

Simplistically, it might seem that the way to overcome these problems would be to mandate labour hire companies to hold a minimum amount of capital and to prohibit failed companies selling their businesses to companies established by related parties. However, neither of these solutions are workable. Even if a company were required to be established with, say, $100,000 of capital, the company may well lose this money through unsuccessful trading or through avoidance measures. For example, in the labour hire context, the hirer company could pay more in wages than the hiree company was paying it, thus transferring the capital to the hiree company. Detecting this sort of improper behaviour is resource intensive and extremely complex. If the labour hire company were required to hold a set amount in a separate trust account for the benefit of its employees, this ties up valuable working capital, which is politically anathema. The international trend is to move away from mandatory minimum capitalisation.

Equally, it is difficult to legislate against phoenix activity without unduly restricting the proper resurrection of a failed business. It is better to term legal phoenix activity as 'business rescue'. Typically, a company 'Oldco' is in financial trouble and is placed in liquidation or voluntary administration. Then, the same controllers or their associates transfer the assets of Oldco to a newly incorporated or existing entity, 'Newco', through which they carry on Oldco's business. The company's controllers have no intention of defrauding creditors, including employees. Considering all options, saving the business but not the debt-laden company is the preferable course of action for them to take. Often, the outcome for the company's creditors and/or employees is better than it would have been had the business not been resurrected. Business rescue might result in the employees finding work with Newco, and is also beneficial to society at large because it encourages entrepreneurism.

Before considering ways of tackling labour hire abuses and phoenix activity, some statistics relating to Victoria are useful. External administrator reports show the following causes of company insolvency for companies in external administration during 2014-2015:[66]

[66] ASIC, *Report 456 Insolvency statistics: External administrators' reports* (July 2014 to June 2015) November 2015, Table 12.

Under-capitalisation	441
Poor financial control, including lack of records	605
Poor management of accounts receivable	233
Poor strategic management of business	883
Inadequate cash flow or high cash use	1,000
Poor economic conditions	406
Other …	…
TOTAL	5,201

The external administrator reports also show suspected breaches of various civil penalty and criminal provisions of the *Corporations Act*, broken down by state.[67] These include suspected breaches of directors' duties, insolvent trading and breaches of s 596AB, discussed further below.

5.3 Tackling labour hire abuses and phoenix activity

What the Inquiry is examining, inter alia, are the *abuses* of labour hire companies and phoenix activity, rather than those issues on their own. In terms of dealing with abuses of the corporate form, there is already much being done. Some general observations can be made. There is no over-arching principle to pierce the corporate veil where the corporate status of the employer threatens to interfere with the ability of employees to claim their entitlements. The 'solutions' are a mix of common law, statute and government-funded assistance.

There is no specific offence prohibiting phoenix activity. While many inquiries have sought to develop one,[68] this has proved elusive, mainly because tests focusing on outward behaviours may capture legitimate business rescues.[69] A proscriptive provision also provides a roadmap for fraudulent operators to sidestep liability. As a result, any enforcement relating to phoenix activity involves the use of some other provision. This could be a disqualification of a director for being involved in two or more failed companies where an adverse liquidator report had been lodged with ASIC,[70] or a breach of the director's duty

[67] Ibid.
[68] See Helen Anderson et al, *Defining and Profiling Phoenix Activity*, Research Report, Centre for Corporate Law and Securities Regulation, December 2014, Part 1.3.
[69] See for example, the proposed similar names legislation that was not introduced into Parliament following public criticism during its exposure draft period: the Corporations Amendment (Similar Names) Bill 2012.
[70] *Corporations Act 2001* (Cth) s 206F.

to not misuse their position to make a gain for themselves or someone else or cause a loss to the company.[71]

For the reasons discussed above, prohibiting phoenix activity is likely to inhibit legitimate business rescues. One approach adopted in the UK and New Zealand is to impose liability on directors where the 'phoenixed' company has a similar name to the previous one.[72] In our opinion, this is a flawed method. Legitimate business rescues, where full value has been paid for the failed companies assets, are likely to be caught if the new company's controllers try to capitalise upon remaining goodwill by using a similar name. On the other hand, directors who fraudulent transfer assets from the failed company to a new one escape liability simply by choosing a different name.[73]

A better way to deal with 'serial entrepreneurs' is to impose further requirements as each subsequent company is incorporated. For example, Ireland requires directors against whom adverse liquidators' reports have been lodged to prove in court why they should be allowed to manage another company, or else pay a security bond.[74] This reverse onus relieves the detection and compliance burden on the regulator. Another option is imposing frequent audit obligations on the company. Financial options include requiring the pre-payment or more regular payment of PAYG(W) taxes or superannuation amounts by the company.

Since 2005, the safety-net schemes, GEERS and FEG, have only provided advances to the employees where their corporate employers were in liquidation.[75] As a result, there could be many employees of insolvent employers who do not have access to the scheme because their employer has simply ceased to trade without a liquidator being appointed. This was recognised by the federal government with the passing of the *Corporations Amendment (Phoenixing and Other Measures) Act 2012* (Cth). Section 489EA allows ASIC to wind up dormant companies so that their employees can access the federal safety net scheme.[76] It should be noted here that despite the name of the 2012 Act, there is no need to prove that phoenix activity has taken place.

However a simpler way of overcoming the issue of the employees of dormant companies being ineligible for FEG is to loosen the rules governing FEG. It seems

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[71] *Corporations Act 2001* (Cth) s 182. See for example, *ASIC v Somerville & Ors* (2009) 77 NSWLR 110.

[72] *Insolvency Act 1986* (UK) s 216; *Companies Act 1993* (NZ) s 386A.

[73] See further Helen Anderson, 'The Proposed Deterrence of Phoenix Activity: An Opportunity Lost?' (2012) 34 *Sydney Law Review* 411, 427.

[74] *Companies Act 2014* (Ireland) s 683 and s 819.

[75] GEERS Operational Arrangements: 1 November 2005 – 31 October 2006, cls 8(g)(vii), 16(f)(i). The same restriction applies in later versions of the OAs, although the paragraph numbers differ: GEERS OA: 1 November 2006, cl. 16(g)(i); GEERS OA: 15 December 2008, cl. 16(g)(i); and GEERS OA: 1 January 2011, cl. 16(f)(i). For the reasons behind this change, see further, Helen Anderson, *The Protection of Employee Entitlements in Insolvency: An Australian Perspective* (Melbourne University Press, 2014) 73.

[76] Australian Securities and Investments Commission, *Regulatory Guide 242*, RG242.5. See further Helen Anderson, 'Comment On Consultation Paper 180: ASIC's Power To Wind Up Abandoned Companies', (2012) 30(8) *Company and Securities Law Journal* 528, 528-9.

inefficient to have a government-funded agency like ASIC spend time and money placing a dormant company into liquidation for the purpose of meeting the eligibility rules of the government-funded Department of Employment. It is understandable that FEG, like GEERS, is not available for employees of companies that are undergoing restructure through the voluntary administration process because this could involve taxpayer money underwriting the resurrected business. But where the company has ceased to trade, no administrator has been appointed and the employees remain unpaid, it makes sense to allow them access to FEG. A small legislative change could be inserted into the *Corporations Act* to allow FEG to recover the sums advanced in the unlikely event that the company starts up again.[77]

In 2000, the federal parliament passed the *Corporations Law Amendment (Employee Entitlements) Act 2000* (Cth), with the Coalition conceding that it would 'amend the Corporations Law to introduce a new offence to stop directors from entering into arrangements or transactions to avoid payment of employee entitlements.'[78] The new offence introduced by the Act was s 596AB. It has proved totally ineffective with not a single successful prosecution having been brought. This is likely to be attributable to the requirement for the prosecution to prove on a subjective level beyond reasonable doubt that the directors intended the transaction to avoid payment of employee entitlements.

Section 596AB has clearly been a failure. One can say reliably that there were potential instances in which the section could have been used because ASIC's comments in relation to director disqualifications have identified deliberate actions by directors to avoid payment of employee entitlements.[79] The collated statistics of reports from external administrators, published by ASIC, have also shown the numbers of instances in which liquidators have said that they suspect a breach of s 596AB and of those, when they hold documentary evidence to support their suspicions.[80] In terms of reform, it would not be difficult to improve upon the section. One simple way to do so would be to recast it as a civil penalty provision, which would remove the criminal offence hurdle of proof beyond reasonable doubt of a subjectively held intention.

In the group context, a lateral solution would be to pierce the corporate veil to remove the benefit from holding and related companies of the insolvency of the labour hire company. Where a subsidiary company's operations are funded by secured debt from the holding company, subordinating that debt behind the claims of other unsecured creditors would take away the advantage of

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[77] Section 560 of the Corporations Act would need to be extended so that advances made to employees of dormant companies can be recovered by the government. At present, it only covers advances to employees who are creditors with rights under the chapter, namely employees of companies in liquidation whose rights are set out under s 556(1)(e) – (h).

[78] The Hon Peter Reith, Ministerial Discussion Paper, 'The Protection of Employee Entitlements in the Event of Employer Insolvency', [12].

[79] See further the comments of ASIC Commissioner Greg Tanzer at http://www.abc.net.au/pm/content/2015/s4254172.htm

[80] See for example, ASIC, *Report 412: Insolvency statistics: External administrators' reports (July 2013 to June 2014)* September 2014, Table 22; ASIC, *Report 456 Insolvency statistics: External administrators' reports* (July 2014 to June 2015) November 2015, Table 31.

undercapitalising the subsidiary. In general terms, this is one of the mechanisms available in both Germany and the United States.[81] Ireland and New Zealand both allow courts to order that solvent members of corporate groups contribute towards payment of the debts of insolvent companies in the group where certain conditions are satisfied. That is a useful way of removing the benefit from the separation of labour into another entity so that payment of entitlements is not defeated by that company's liquidation.[82]

6 Overview of Existing Statutory Regulation and Potential Shortcomings

6.1 *Lack of Specific Regulation of Labour Hire*

The use of labour hire in Australia has never been prohibited nor strictly regulated. Australia has not ratified the ILO's Private Employment Agencies Convention,[83] which requires adequate procedures to be put into place for the investigation of complaints, abuses and fraudulent practices concerning the activities of private employment agencies (Art. 10).

An overview of the Australian regulatory approach to agency work reveals a general lack of protective statutory regulation for workers, resulting in a porous and opaque regulatory system.[84] An OECD study conducted in the mid-1990s placed Australia at the liberal end of the spectrum, 'whereby private agencies have operated alongside a public employment service with the former requiring neither a particular license nor being subject to government regulation.'[85]

The statutory regulation of employment agents at the state level generally applies to recruitment and placement agencies rather than to those performing a pure labour hire function.[86] The only restrictions at the national level limiting the activity of labour hire agencies are the general rules governing commercial enterprises.[87] More generally, there are no specific reporting or financial obligations on labour hire firms, and no limitations on which industries can access agency work.[88]

Currently, there is no legal obligation for host companies to inquire about the work practices of labour hire suppliers, save for the requirement under work health and safety legislation that both host firms and labour hire agencies have a duty to ensure the health and safety of labour hire workers so far as is reasonably practicable.

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[81] See further Anderson (2012), above n 73, 433.
[82] *Companies Act 1993* (NZ), s 271(1); *Companies Act 2014* (Ireland) s 599(1).
[83] Convention concerning Private Employment Agencies Adoption, signed 19 Jun 1997, 85th ILC session (Entered into force 10 May 2000).
[84] Iain Campbell, Ian Watson and John Buchanan, 'Temporary Agency Work in Australia: A Basic Profile and a Few Questions', in John Burgess and Julia Connell (eds) *International Perspectives on Temporary Work and Workers* (Routledge, 2004).
[85] Anthony O'Donnell and Richard Mitchell, 'The Regulation of Public and Private Employment Agencies in Australia: An Historical Perspective' (2001) 23 *Comparative Labor Law and Policy Journal* 7.
[86] Ibid 10.
[87] Mitlacher and Burgess, above n 15, 419.
[88] Ibid.

There have been a number of proposals to reform agency work regulation with particular reference to the introduction of a licensing system to regulate the industry, but none have been successfully implemented.[89] For example, during the previous Victorian Inquiry into labour hire employment in 2004, the Victorian Trades Hall Council proposed the introduction of a licensing system for work agencies.[90] However, at the time, the proposal did not receive any support from agencies' representatives, who claimed that such a system would not eradicate fly-by-night operators.[91]

In the Federal Government Senate Inquiry into Independent Contractors and Labour Hire undertaken in 2005, one agency argued for the introduction of more detailed national regulation in order to improve the reputation of the industry, as well as workers' conditions.[92] However, at the time, the key industry group, Recruiting and Consulting Services Association of Australia and New Zealand (***RCSA***), claimed that self-regulation would be the best option, suggesting that a higher level of regulation would reduce the number of jobs.[93]

In the past decade, the RCSA has generally continued to promote self-regulation as its preferred alternative to government regulation of the labour hire industry. However, in the past 12 months, the RCSA has proposed that an Employment Services Industry Code of Conduct[103] should be adopted at the federal level. It is proposed that this Code would apply to all Australian employment services and on-hire providers, as well as to the users of their services. As noted in this Inquiry's Background Paper, the Code would impose a wide range of obligations on providers, including requirements relating to 'fair work practices.' However, it is not yet clear whether the Code will be adopted. Moreover, it is inherently uncertain as to whether the ACCC would be willing to devote the necessary resources to ensure its adequate implementation, especially in the sectors which have proved to be most problematic from a compliance and enforcement perspective.

[89] Different licensing models are discussed in Sections 7.2 and 7.3 below.
[90] Underhill, above n 14, 307.
[91] Ibid.
[92] Skilled, Submission to the Senate Inquiry into Independent Contractors and Labour Hire. Parliament House, 2005, Canberra, cited by Mitlacher and Burgess, above n 15, 427.
[93] Recruitment and Consulting Services Association, Submission to the Senate Inquiry into Independent Contractors and Labour Hire. Parliament House, 2005, Canberra, cited by Mitlacher and Burgess, above n 15, 427.

6.2 The Current Capacity of the Fair Work Act to Address Regulatory Issues Raised by Labour Hire, Franchising and Phoenix Activity

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.

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.'[94] 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 section briefly looks at the scope of the FW Act to deal with some of the regulatory challenges identified earlier, including the system of modern awards and enterprise agreements, unfair dismissal, accessorial liability provisions, sham contracting provisions and the civil remedy regime.

6.2.1 Modern Awards and Enterprise Agreements

Notwithstanding the application of anti-discrimination and occupational health and safety legislation that generally cover all labour hire workers, in Australia there is no general provision dealing with the equal treatment of labour hire workers compared to workers directly hired by host companies.[95] Nevertheless, clauses ensuring equal treatment of agency workers are present in Modern Awards.[96] Furthermore, some enterprise agreements include clauses limiting the duration and the proportion of labour hire employment, to prevent employers covered by those agreements from introducing labour hire to obtain cheaper and non-unionised labour.[97] Such clauses are valid under the FW Act as long as they meet the 'permitted matters' requirements under s 172 of that Act.[98]

It can be concluded that, despite a generally liberal approach to the use of labour hire, there has been a gradual attempt to introduce some limitations under collective instruments, such as enterprise agreements and modern awards.

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[94] Ibid 4.

[95] Richard Mitchell, Peter Gahan, Andrew Stewart, Sean Cooney and Shelley Marshall, 'The Evolution of Labour Law in Australia: Measuring the Change' (2010) 23 (1) *Australian Journal of Labour Law* 61-93.

[96] See, eg, cl 4.5 of the Restaurant Award 2010: 'This award covers any employer which supplies labour on an on-hire basis in the industry set out in clause 4.1 in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry…'

[97] Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 2010) 210.

[98] Ibid 211. For an overview on what constitutes 'permitted matters', see, eg, *National Union of Workers v Philip Leong Stores Pty Ltd* [2014] FWC 6459.

However, this has not prevented the use of labour hire arrangements to avoid minimum working conditions.

6.2.2 Unfair Dismissal

As a consequence of the high proportion of casual labour hire employees, the law also seems to fail 'to provide labour-hire employees with effective redress where they have lost access to their livelihood in circumstances that are substantially or procedurally unfair'.[99] As noted by Thai[100], a labour hire worker who wants to bring an unfair dismissal claim faces a series of challenges, including the following: (i) providing evidence of the dismissal if he/she remains on the books of the agency as a casual employee; and (ii) demonstrating the unfairness of the dismissal served by the agency in circumstances where the agency has received instructions from the user-company to no longer supply the worker.[101]

6.2.3 Accessorial Liability

The accessorial liability provisions of the Act allow civil remedies to be pursued not just against the direct employer responsible for the relevant contravention, but any person said to be 'involved in' the contravention.[102] So far, there have only been a handful of cases in which s 550 has been used against a separate corporation which is said to be 'involved in' a contravention of the direct employer. As a result, there remains a level of uncertainty about the scope and operation of these provisions, particularly in respect of certain organisational forms, such as franchise arrangements.

In practice, it may not be straightforward proving that the lead firm (i.e. the supply chain head, host firm or the franchisor) has the requisite knowledge of the essential matters constituting the contravention (particularly where you are seeking to attribute knowledge to a corporation, such as 7-Eleven Stores Pty Ltd, by aggregating the knowledge of various employees within head office).[103] That said, a recent case brought by the FWO in relation to a security contractor shows that it is not impossible for s 550 to be used against a principal contractor in respect of workers which have been employed by a third party entity.[104]

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[99] Trina Malone, 'Vulnerability in the Fair-Work Place: Why Unfair Dismissal Laws Fail to Adequately Protect Labour Hire Employees in Australia' (Student Working Paper No 6, Centre for Employment and Labour Relations Law, May 2011) 24.
[100] Pauline Thai, above n 14.
[101] Ibid.
[102] FW Act s 550.
[103] See, eg, *Fair Work Ombudsman v Al-Hilfi & Ors* [2012] FCA 1166 (26 October 2012); *Fair Work Ombudsman v Al Hilfi (No 2)* [2013] FCA 16. For further discussion of this litigation and the ultimate outcome, 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.
[104] See Fair Work Ombudsman, 'Security Company Fined over $60,000', *Media Release*, 20 November 2015.

6.2.4 Phoenix Activity

While phoenix arrangements have been mentioned in cases dealing with *Fair Work Act* breaches,[105] there are no special prohibitions against this behaviour under the Act. The penalties that are applied to company controllers as accessories to the company's failure to pay entitlements reflect no additional punishment because of the phoenix context. Nor do the FWO or FWBC always consider seeking a penalty against errant directors in these circumstances. In a recent case brought by the FWBC, the Federal Circuit Court noted its failure to prosecute the director of a phoenixed bricklaying company that failed to pay workers' entitlements, despite clear evidence of the person's involvement.[106]

Strictly-speaking, the *Fair Work Act* allows the court to order compensation to be payable by accessories to civil remedy breaches of the Act.[107] However, the FWO does not seek this remedy against directors and other corporate officers in an apparent acknowledgement of the statement in the Act's Explanatory Memorandum that this was not intended.[108] Nonetheless, a number of courts have made these orders,[109] and there has been express acknowledgment by Gray J in the *Forgecast* decision[110] that the unions bringing the claims on behalf of the workers have 'standing to seek orders that Mr Beynon and Ideal [the new company of which he was the controller] compensate the employees in respect of whom the proceeding is brought and pay interest on the amount of the compensation'.

One of the ways to ensure that the liquidation of the corporate employer is not used to avoid the consequences of breach of the *Fair Work Act* is to remove the benefits of liquidation. Imposing a compensation order on the directors personally would go a long way towards achieving this.

6.2.5 Sham Contracting

Under the sham contracting provisions of the FW Act, employers are prohibited from misrepresenting an actual or proposed employment relationship as an

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[105] See for example, *Roberts v A1 Scaffold Group Pty Ltd & Ors* [2015] FCCA 422, [56]; *Roberts v A1 Scaffold Group Pty Ltd & Ors (No 2)* [2015] FCCA 2249, [21]; *Fair Work Ombudsman v Francis* [2011] FMCA 1005.

[106] *Director of the Fair Work Building Industry Inspectorate v Vic Metro Brick and Blocklaying Pty Ltd & Ors* [2015] FCCA 2266, [232].

[107] FW Act s 545(2)(b).

[108] Explanatory Memorandum, *Fair Work Bill 2009* (Cth), [2177].

[109] *Workplace Ombudsman v Dracook International Pty Ltd & Anor* [2009] FMCA 1318, where the Workplace Ombudsman amended the statement of claim to include a compensation order on the suggestion of the magistrate; in *Fair Work Ombudsman v Aussie Junk Pty Ltd (in liq)* [2011] FMCA 391, Neville FM observed that s 807(1) authorized the court to make an order for payment of compensation by a defendant to another person in addition to any penalty awarded against the defendant, at [10]; see also *Fair Work Ombudsman v Blacklight Investments Pty Ltd* [2011] FMCA 506: a later hearing of this case, at [2012] FMCA 130, was concerned with the setting of penalties and the awarding of costs. Reference was made to the earlier compensation order but there was no discussion of its basis.

[110] *Automotive Food Metals Engineering Printing and Kindred Industries Union v Beynon* [2013] FCA 390, [21].

independent contracting arrangement.[111] However, it seems that the sham contracting provisions remain somewhat problematic, notwithstanding the recent decision of the High Court in *Fair Work Ombudsman v Quest South Perth*.[112]

For instance, the sham contracting provisions have proven to be complex (a number of proceedings have fallen down because of pleading problems). Further, the defences available under the sham contracting provisions are potentially too broad – allowing employers to effectively evade liability.[113]

6.2.6 Civil Penalty Regime

Even if these limitations can be overcome, and a Court finds that a lead firm is liable for contraventions of the FW Act under the accessorial liability or sham contracting provisions, it is not clear that the remedies are sufficient to deliver the necessary deterrence.

The civil remedy regime established under the FW Act is fairly weak – especially when compared to the sanctions available under comparable statutes, such as the *Competition and Consumer Act 2010* (Cth).[114]

Further, there is no capacity for the FWO (or unions) to seek an incapacitation order either against the corporate employer or the relevant officers under the FW Act. In particular:

- Unlike ASIC and the ACCC, the FWO does not have the power to seek an order disqualifying directors or officeholders from managing corporations for a relevant period; and
- Further, there is no licensing regime which applies to employers generally (or labour hire agencies more specifically).

This last issue is particularly relevant in the context of this Inquiry and is explored further in Sections 7.2 and 7.3 below.

7 Alternative Models of Regulation

In discussing some possible alternative models of regulation that the Victorian State Government could explore, we focus on regulation of labour hire agencies as we believe this is where there is the most scope for Victoria to respond to some of the concerns about the impact of different business arrangements on

[111] 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.
[112] [2015] HCA 45.
[113] Roles and Stewart, above n 33.
[114] The maximum penalty for contravention of a civil remedy provision of the FW Act is $54,000 for a corporation. In comparison, breaches of certain consumer protection provisions under the *Competition and Consumer Act 2010* (Cth) can attract maximum fines of A$1.1 million for a corporation. They are significantly higher in relation to trade practices contraventions.

insecure work. We look at the potential for a public procurement accreditation model, before considering two examples of more broad based licensing regimes from the UK and Italy.

7.1 Procurement

A relatively straightforward option for the Victorian State Government to be a 'model employer' in relation to the labour hire issues raised in this submission is by regulating labour hire practices through its own procurement policies.

Governments have long used their market power as a substantial purchaser of goods and services from the private sector to pursue social policy objectives secondary to the immediate goal of cost-effective government procurement.[115] Indeed, there is an ILO convention and recommendation on the subject of labour-specific criteria in procurement contracts dating from the post-Second World War era: Labour Clauses (Public Contracts) Convention 1949 (No, 94) and Recommendation (No. 84). The Convention and Recommendation provides that public authorities entering into contracts which require the employment of workers must include clauses requiring that minimum employment standards are observed, thus preventing competition among bidders for government contracts on the basis of labour costs. In addition, the convention requires that public contracts provide for employment at prevailing wages and conditions, that is, 'hours of work and other conditions that are not less favourable than those established for work of the same character … in the district where the work is carried on' whether by collective agreement, award or legislation.[116]

The growth in public procurement has only increased the pressure on government to ensure that government contractors are subject to social performance criteria such as the observance of minimum labour standards and progressive employment practices. Where governments purchase goods and services from the private sector using taxpayer funds, it is argued that government should use its purchasing power to ensure that its suppliers follow decent employment practices.[117] The relevance of this to the Victorian Government was recently affirmed by the FWO after an inquiry into the Victorian Department of State Development and Business Innovation's labour hire and independent contractor arrangements.[118]

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[115] For discussion of the history of the use of procurement to regulate labour standards, see Breen Creighton, 'Government Procurement as a Vehicle for Workplace Relations Reform: The Case of the National Code of Practice for the Construction Industry' (2012) 40(3) *Federal Law Review* 349-384.

[116] ILO Convention No. 94, Art. 2, Cl. 1. For a more detailed discussion of the ILO Convention, see ibid.

[117] John Howe, 'Government as Industrial Relations Role 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* (2012). Breen Creighton and Andrew Stewart, *Labour Law* (4th ed, 2005) 30.

[118] *Fair Work Ombudsman Inquiry Findings: The Fair Work Ombudsman's Inquiry into the Victorian Victorian Department of State Development and Business Innovation's Labour Hire and Independent Contractor Arrangements*, Fair Work Ombudsman, February 2015.

Australian governments at both federal and state level have been active in using public purchasing power to promote social objectives such as local employment creation, achievement of affirmative action targets, and compliance with labour and employment laws, although in a somewhat ad hoc manner. [119] The Victorian Government has been an innovater in this area, through the Victorian Government Schools Contract Cleaning Program (currently known as the Schools Contract Cleaning Panel). The key innovation of the program, which commenced in 2005, was to establish a system of accreditation for cleaning contractors in Victorian Government schools. From 1 July 2006, all cleaning contractors who wished to be considered for Victorian Government schools cleaning contracts were required to be members of a Panel of approved cleaning contractors: that is, to gain 'Panel Status'. A study of the Contract Cleaning Panel conducted by the Centre in 2007[120] found that cleaning contractors who wish to apply for Panel Status must provide documentary evidence that they meet the key assessment criteria, which included minimum employment standards equivalent to the relevant award standards.

There are three stages in the procurement process at which governments can impose minimum standards: qualification, or eligibility to tender for a government contract; the tender assessment process; and the contractual requirements imposed on the successful tenderer. Under the Victorian Contract Cleaning Program at the time we conducted our study, contractors were required to comply with minimum standards through the tender assessment process, but also once they were awarded Panel Status, through contractual requirements set by the Victorian Government with panel cleaners. Panel status was determined by a tripartite committee consisting of representatives from government and schools, unions, and contractor associations.

It would be relatively straightforward for the Victorian Government to set up an accreditation program for labour hire agencies similar to the Schools Contract Cleaning Panel, and drawing on elements of the licensing schemes discussed below. The government could require that all government departments, agencies and other government entities engaged only accredited labour hire agencies, and further to require that all other government contractors only use accredited labour hire agencies in the provision of goods and services to the government. We envisage that to be accredited, labour hire agencies would have to demonstrate to a tripartite government committee or panel that they were 'fit and proper' agencies, and provide evidence of compliance with relevant employment standards in relation to the workers engaged by the agency. The government should ensure that the fit for purpose requirement included consideration of agencies' employment arrangements, including an assessment of whether there was any risk of mischaracterisation of employees as independent contractors, increasing the likelihood of breaches of minimum

[119] See John Howe, '"Money and Favours": Government Deployment of Wealth as an Instrument of Labour Regulation', in Chris Arup et al (eds) *Labour Law and Labour Market Regulation* (2006); Creighton and Stewart, above n 117, 30.

[120] John Howe and Ingrid Landau, 'Using Public Procurement to Promote Better Labour Standards in Australia: A Case Study of Responsive Regulatory Design' (2009) 51(4) *Journal of Industrial Relations* 575.

employment standards.[121] These fit for purpose requirements and employment standards would need to be built into the contracts between government and their contractors, whether labour hire agencies or otherwise, to ensure ongoing compliance with the requirements, and to allow for sanctions to be imposed in cases of non-compliance. The Government would need to determine whether these requirements apply to all contractors, or only to larger contracts, and/or contracts in particular industries or types of procurement. There would need to be thought given to implementation of the program, to ensure ongoing monitoring of compliance with the program requirements.

7.2 Licensing Regime I: The UK Approach to Regulating Agency Work

The following two bodies regulate agency work in the UK:

- the Employment Agency Standards Inspectorate (***EAS***); and
- the Gangmasters' Licensing Authority (***GLA***).

7.2.1 Employment Agency Standards Inspectorate

The ESA enforces the *Employment Agencies Act 1973* (UK) and the *Conduct of Employment Agencies and Employment Businesses Regulations 2003* (UK). Currently, this agency is principally focused on addressing:

- complaints from temporary agency workers about non-payment of relevant entitlements;
- cases where workers are charged a fee for work-finding services;
- situations which involve particularly poor compliance practices (e.g. nurses being placed in employment in the absence of adequate criminal checks).

The ESA tends to resolve the bulk of complaints on an informal and voluntary basis. However, it does have the power to prosecute agencies and can prohibit individuals from operating an employment agency for up to ten years. These sanctions are imposed sparingly.[122] The limited use of deterrence mechanisms may partly reflect the difficulty of securing criminal convictions and the agency's low level of resources.[123]

7.2.2 Gangmasters' Licensing Authority

The GLA – a statutory enforcement agency – was set up in 2006 to protect temporary foreign workers against exploitation by labour hire agencies.[124] In

[121] See Fair Work Ombudsman, above n 118.
[122] For example, in the period between 31 March 2013 and 1 April 2015, EAS brought nine prosecutions against individuals and companies. It successfully secured convictions in seven of these cases. Department of Business Innovation and Skills and Home Office, *Tackling Exploitation in the Labour Market* (Consultation, October 2015) 15 ('Tackling Exploitation').
[123] Even after a recent increase in funding, the total number of EAS inspectors is nine: ibid. 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.
[124] Trades Union Conference, *'Enforcing Basic Workplace Rights: A Guide for Unions and their Members to the Statutory Enforcement Agencies'* (2011) 51.

particular, under the *Gangmasters (Licensing) Act 2004* (UK), labour hire providers (commonly known as 'gangmasters') operating in the agriculture, horticulture, shellfish gathering and associated food processing and packaging sectors are required to obtain a license from the GLA.[125] All workers engaged by gangmasters are covered by the scheme, regardless of whether they are considered employees or independent contractors.[126]

To receive and maintain their licenses, gangmasters must demonstrate compliance with various workplace laws, including the National Minimum Wage and work health and safety standards.[127] Gangmasters must also keep adequate records to demonstrate their compliance with these standards (e.g. records of payment of such wages).[128]

In addition to complying with all relevant licensing conditions, gangmasters are also required to maintain their 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. The TUC has previously observed that this last requirement is

> an important licensing standard as the GLA has uncovered gangmasters who have had their licences revoked but have continued to run employment agencies by using other individuals as a front for their agency.[129]

Further, a gangmaster who uses other gangmasters or subcontractors to supply workers is also obliged to ensure that these subcontractors hold a GLA licence. This legislative mechanism is important in addressing the tiers of contractors which perpetuated some of the problems of compliance and enforcement in the Baiada case.

More generally, the licensing regime and record-keeping requirements addresses some of the transparency problems and governance issues discussed in Section 3.2.3 above. Further, the 'fit and proper' person test would provide a powerful incentive for labour hire agencies to cooperate with authorities, rather than obstruct their investigations as was the case with the Baiada Group. Combined, these measures not only enhance detection of employer non-compliance, but work to improve the success of any subsequent enforcement proceedings.

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[125] Ibid 51-52.
[126] Ibid 53-54.
[127] In addition, licensees must demonstrate compliance with relevant laws and regulations dealing with tax, national insurance, forced labour and the employment of migrant workers. The full suite of current licensing conditions is set out in the *Gangmasters (Licensing Conditions) Rules 2009* (UK).
[128] 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.
[129] TUC, above n 124, 55.

Another unique feature of the GLA regime is its extraterritorial reach. Even where gangmasters are located outside of the UK, they must obtain a GLA licence in order to supply workers into the UK.[130] Again, this is critical in light of the way in which temporary foreign workers are frequently recruited in the horticulture and food processing sectors in Australia.

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 and supply chain heads who may be seeking to determine whether a particular gangmaster is licensed and operating lawfully.[132] This type of register would potentially serve to strengthen the accountability and rigour of the ethical sourcing audits that are currently being carried out by supermarket retailers in Australia.

The GLA 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.[133] This obviously addresses some of the weaknesses identified earlier associated with the existing civil remedy regime of the FW Act and deals with some of the problems relating to phoenix activity.

Further, 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, can work together to ensure the relevant licensing standards are applied throughout the food produce supply chain.[134] Again, the way in which the GLA has openly collaborated with supermarkets, employer associations and unions is instructive for Victoria.

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, has the potential to improve compliance amongst labour hire providers in sectors with high numbers of temporary foreign workers. Initially, over 70% of gangmasters applying for a license were reported to have raised standards in one way or

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[130] Ibid 54.

[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] TUC, above n 124.

[133] In particular, the maximum penalty for operating as a gangmaster without a valid licence is 10 years in prison and a fine of up to £5,000. In comparison, the maximum penalty for using an unlicensed gangmaster is six months in prison and a fine of up to £5,000.

[134] 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.

another.[135] Various worker support agencies have noted a significant reduction in reported cases of exploitation.[136]

The success of the GLA model is underlined by the fact that the UK government is currently considering a significant expansion of its powers and remit. Rather than focusing only on licensing in the fresh food supply chain, it is proposed that the GLA is transformed into an organisation that works to prevent serious exploitation across the labour market. While this proposal has not yet been adopted, it does suggest that the licensing model is not only viewed as valuable, but can be usefully extended beyond the fresh food supply chain to other sectors which are notorious for serious and systemic employer non-compliance.[137]

7.3 Licensing Regime II: The Italian Approach to Regulating Agency Work

Italy is another jurisdiction which maintains a specific regulatory regime for agency work which is essentially based on a licensing model. Before the 1990s, agency work was completely banned under Italian labour law. [138] Up until 1997, there was a public monopoly of work placement services [139] that forced employers to go through the public placement office every time they needed to hire an employee. However, due to the influence of the European Union's Employment Strategy, [140] over the last two decades the use of agency work has been encouraged as a preferable form of non-standard work within strict regulatory parameters. Among other reforms, since 1997 private employment agencies are permitted to play the role of intermediaries in the supply of temporary work, while other changes sought to reduce the proportion of irregular work by introducing 'regulated flexibility' for atypical employment contracts.[141]

Unlike in Australia, where agency workers can be engaged as independent contractors, in Italy, agency workers are identified by the law as employees of the agency. They can be hired either on a fixed term or on an open-ended basis and during the assignment period perform their work activity in the interest and under the direction of the host company.[142] Moreover, during each assignment,

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[135] Oxfam Briefing Paper, *'Turning the Tide: How to best protect workers employed by gangmasters, five years after Morecambe Bay*' (31 July 2009) 11.
[136] Ibid.
[137] Tackling Exploitation, above n 122, 40-42.
[138] CIETT, International Confederation of Private Employment Agencies, *Economic Report* (2014) <http://www.ciett.org/fileadmin/templates/ciett/docs/Stats/Economic_report_2014/CIETT_ER2013.pdf>. For further analysis of the penetration rate of agency work in Europe, see also Spattini, above n 16, 169-70.
[139] Ibid.
[140] The Strategy stimulated a labour market flexibility debate in Europe based primarily on the orthodox economic theory that high European unemployment is due to labour market rigidities, which must be abolished in order to improve job growth and fight unemployment. For a further analysis of the labour market flexibility debate and regulatory approaches to flexible work in Europe see McCann, above n 19 and Diamond Ashiagbor, *The European Employment Strategy* (Oxford University Press, 2005).
[141] Marco Biagi and Tiziano Treu, 'Italy's New Law on Promotion of Employment: An Explanation and Summary' (1997-1998) 19 *Comparative Labor Law and Policy Journal*, 97.
[142] Eg. Italy, art. 20, D. Lgs. N. 276/2003. See also Iain Campbell, Ian Watson and John Buchanan, above n 22.

agency workers are entitled to basic working conditions that should not be lower than those applicable to workers of the same level that are directly hired by user companies assessed on an overall basis.[143] Their employment relationship is regulated according to the general rules applying to employment contracts. The work agency, being the employer, retains the disciplinary power, which is however exercised on the basis of the circumstances referred by the user-company.[144]

Although legislative reforms have made it easier for host firms to source agency labour in Italy, the operation of labour market intermediaries is still strictly controlled by way of a stringent licensing system.

Under the current legislation in, in order to perform their services as intermediaries, work agencies have to enrol in a specific register held by the Ministry of Labour and Welfare. They are also required to meet certain legal and financial requirements.[145] Among the legal requirements, work agencies must give evidence of an adequate level of professional competence and expertise in industrial relations and human resource management. On the financial side, they must ensure a minimum capital of €600,000, and provide further financial guarantees equal to at least €350,000 for the purpose of ensuring salary and social security contributions payments to workers.

To summarise, outsourcing in Italy is now allowed either in the form of genuine service contracts – where the service provider is a viable business that exercises direction and control over its employees – or in the form of mere labour supply through state accredited intermediaries (work agencies) which are identified as 'employers' by the law and are subject to strict legal requirements imposed by the relevant licensing system.[146]

In addition to the licensing requirements detailed above, Italian labour law also stipulates that agency work contracts between the agency and the host company must be in writing and must contain prescribed information, such as:

- a reference to the employment agency's authorisation;
- the number of employees that will be supplied, the tasks they will perform as well as the place and the time of work and their working conditions;
- the reasons justifying the use of agency work (according to Article 20, par 3 and 4);
- the duration of assignments;
- the employment agency's obligation to perform all salary and social security contributions payments;
- the user-company's obligation to disclose and communicate to the agency the salary levels guaranteed to insider workers that perform equivalent

[143] Art. 23, par 1, D. Lgs. n. 276/2003.
[144] Art. 23, par. 7, D. Lgs. n. 276/2003.
[145] Art. 5, D. Lgs. N. 276/2003.
[146] Luisa Corazza and Orsola Razzolini, *Who is the Employer* (WP CSDLE "Massimo D'Antona Working Paper International, No 110/2014).

tasks, to reimburse the payments borne by the agency and to pay agency workers directly in case the agency results in breach of its payments obligation.

Agency workers may be entitled to a permanent employment contract with the host firm[147] and claim damages from the host firm (which is now capped between 2.5 and 12 months' salary[148]) if:

- the host firm has engaged an employment agency that is not duly authorised or does not meet all the relevant requirements;
- the contract between the host firm and the agency does not comply with all the prescribed formal requirements; and/or
- the host firm has breached any of the relevant restrictions on the use of agency work (e.g. [use of agency work for the replacement of workers on strike or use of agency work without any underlying justifying reason beyond the first 36 months]).

In addition to the remedies described above, the host and agency firms may be subject to a range of criminal and administrative sanctions for breaches of the licensing regime and other regulatory requirements and limitations.

Italian law also recognises a form of joint employment in the allocating responsibilities between the user company and the agency. For example, the user company is considered jointly liable for salary and social security compensation payments together with the work agency, as well as for occupational health and safety requirements.[149] Further, sanctions and remedies can be imposed on both entities in the event of breach of the conditions established for the use of agency work.

In summary, this discussion of the Italian treatment of agency work provides another example of a regulatory regime balancing the interests of agencies and workers by utilising a licensing system supported by requirements concerning the content of contracts between agencies, host firms, and workers.

8 Recommendations

There has been a shift away from direct employment in Australia as a result of changes in business structures and practices leading to increasingly 'fissured' or fragmented work arrangements. There is evidence that these changes - including subcontracting, outsourcing, use of labour hire agencies, franchising and corporate reorganisation and phoenixing – are frequently related to the avoidance of minimum employment standards, exploitation of vulnerable workers and creation of insecure work.

While there are labour regulation mechanisms in place to address these problems, our submission has identified some gaps in the regulatory framework as well as challenges for the effective enforcement of existing regulation. We

[147] Art. 27, D. Lgs. n. 276/2003.
[148] Art. 32 L. 183/2010.
[149] Article 23, par 3, D. Lgs. n. 276/2003; Article 23, par 5, D. Lgs. n. 276/2003.

acknowledge that Victoria does not have the jurisdictional capacity to address all of these challenges. However, we recommend that Victoria take steps to address the unregulated nature of the labour hire industry, through a combination of a procurement program requiring the accreditation of labour hire agencies engaged under government contracts, and a wider licensing scheme for all labour hire agencies in Victoria. Accreditation for government contracting could be evidenced by possession of a licence under the wider scheme. Such a scheme should not only require the compliance with minimum working conditions for labour hire workers, but could potentially require the establishment of minimum financial requirements for labour hire operators, as well as a joint-liability mechanism between the host and the supplier for the effective enforcement of labour hire workers' rights.

The GLA's licensing scheme for labour hire agencies is one model which may serve to sufficiently strengthen the deterrence effects of regulatory interventions and curb workplace contraventions either in key industries or across the Victorian labour market more generally. In making this recommendation we endorse the observation by the ACTU Independent Inquiry into Insecure Work that introducing a licensing system for labour hire agencies would not be a 'unique or radical move'[150] with similar schemes having already been adopted throughout various OECD countries. The Inquiry also noted 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.'[151]

[150] These countries were stated to include: Canada, Korea, Japan, Germany, Austria, Spain, Luxembourg, the Netherlands, Sweden, Belgium, France, Italy and Portugal. See Howe et al, above n 10, 34.
[151] Ibid.