

# Regulatory responses to the blurring boundary between employment and self-employment: a view from the Antipodes.

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## Abstract

Protective labour standards developed over the 20<sup>th</sup> century are under challenge in the 21<sup>st</sup> century from business strategies directed towards engaging labour indirectly through intermediaries, and as contractors, rather than employees. Much labour law scholarship has been directed towards analyzing the kinds of working relationships that deserve the protection of employment laws, and expanding the legal definition of employment to capture those relationships. An alternative approach is to think even more expansively about the scope of labour law, and to devise regulatory strategies which pursue its vocation (of supporting decent incomes and working conditions for working citizens), without reliance on an elusive legal definition. This paper considers a number of such regulatory strategies, with a focus on statutory initiatives in Australia.

## I. The blurred boundary between employment and self-employment

The boundary problem in contemporary labour law is a well-researched and documented one.<sup>1</sup> The legal distinction between those workers who, as ‘employees’, are protected by national labour laws, and those entrepreneurial workers whose engagement contracts are subject to ordinary commercial laws, has been thoroughly analysed by eminent labour law scholars, and has been subject to many important judicial decisions in the common law world.<sup>2</sup> The notion that there is in fact a single boundary between this ‘binary divide’ has been challenged, particularly in the body of scholarship developed by Professor Mark Freedland and his colleague, Nicola

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<sup>1</sup> See for example Guy Davidov – Brian Langille: *Boundaries and Frontiers of Labour Law*, Hart Publishing, Oxford, 2006; Mark Freedland: ‘Application of Labour and Employment Law Beyond the Contract of Employment’ (2007) 146 *International Labour Review* 3; Guy Davidov – Brian Langille (eds.), *The Idea of Labour Law*, Oxford University Press, Oxford, 2011; Judy Fudge, Shae McCrystal – Kamala Sankaran (eds.): *Challenging the Legal Boundaries of Work Regulation*, Hart Publishing, Oxford, 2012.

<sup>2</sup> In the United Kingdom, the leading decision is *Autoclenz Ltd v Belcher* [2011] UKSC 41. The most recent Australian High Court decision (deciding that a bicycle courier was an employee notwithstanding a written contract and established commercial practice) is *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; [2001] HCA 44.

Kountouris, who have made an extensive study of the range of personal work relationships typical in European jurisdictions, and how they are regulated.<sup>3</sup>

At the heart of much of this scholarship is recognition of a kind of crisis (if that is not too strong a word) in labour law. The great advances made over the course of the 20<sup>th</sup> century in many western industrial democracies to establish protective labour standards for employees are at risk of erosion as a result of several phenomena, including evolution over time of the patterns and structuring of economic enterprise, the globalization of labour markets, and also a ‘moral hazard’ problem.

### *1.1. Structural changes in the organization of production*

The first of these phenomena – structural changes in the organization of economic enterprise – are evolutionary, or possibly cyclical, if we regard the observations made in the Supiot Report.<sup>4</sup> Many of the large monolithic corporations that emerged in the 20<sup>th</sup> century and relied on the engagement of armies of direct employees, have since ‘disintegrated’<sup>5</sup> into smaller, more specialized enterprises engaged in interdependent business networks. The underpinning assumptions in the concept of employment and the legal incidents of that relationship included an expectation of long term engagement and the worker’s potential progression through a career ladder within the one large enterprise. This large and paternalistic enterprise could reasonably be expected to undertake management of certain risks on behalf of its workers (such as the risks of illness and injury, by the provision of workers’ compensation insurance and sick leave entitlements).<sup>6</sup> Collective enterprise bargaining also assumes the existence of relatively large organizations engaging a critical mass of workers in the same or similar occupations. The emergence of many smaller units of production engaging in more short term contracting for services challenges these assumptions.

### *1.2. Globalisation of the market for services*

The globalization of labour markets has developed rapidly with the advent of digital technology that allows a wider range of occupational work to be ‘offshored’ to jurisdictions with lower labour costs. Just as shipping containerization facilitated

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<sup>3</sup> Mark Freedland – Nicola Kountouris: *The Legal Construction of Personal Work Relations*, Oxford University Press, Oxford, 2011. This work makes the culmination of scholarship in a number of books and articles, including Mark Freedland, *The Personal Employment Contract*, Oxford University Press, Oxford, 2003; Mark Freedland: ‘From the Contract of Employment to the Personal Work Nexus’ (2006) 35 *Industrial Law Journal* 1. Other scholars have also interrogated the basis upon which those workers who are to be protected by labour laws should be recognized. See for example, Orsola Razzolini: ‘The Need to go Beyond the Contract: ‘Economic’ and ‘Bureaucratic’ Dependence in Personal Work Relations’ (2010) 31 *Comparative Labour Law and Policy Journal* 267. See also the collection of essays in Giuseppe Casale (ed.): *The Employment Relationship: A Comparative Overview*, Hart Publishing, International Labour Organisation, Geneva, 2011.

<sup>4</sup> Alain Supiot: *Beyond Employment: Changes in Work and Future of Labour Law in Europe, A Report Prepared for the European Commission*, Oxford University Press, Oxford, 2000

<sup>5</sup> Hugh Collins: ‘Independent Contractors and the Challenge of Vertical Disintegration’ (1990) 10 *Oxford Journal of Legal Studies* 353.

<sup>6</sup> Katherine Van Wezel Stone: *From Widgets to Digits: Employment Regulation of the Changing Workplace*, Cambridge University Press, Cambridge, 2004.

decisions by goods manufacturers to locate their production facilities in remote locations, internet communication technology has created opportunities for enterprises such as banks and telecommunications companies to engage clerical services located offshore.<sup>7</sup> Global competition has inevitably generated pressure on domestic labour markets.

### *1.3. Moral hazard: regulatory avoidance*

The moral hazard problem is related to economic restructuring and global competition, but is more insidious. Increasingly protective labour standards (particularly the introduction of laws protecting workers' job security) increase the costs of engaging workers as employees. The desire to minimize the costs of production – particularly in a highly competitive global environment – creates incentives for business controllers to seek out ways to engage labour without incurring the regulatory costs associated with employment. And so they exploit any uncertainties in the legal definition of employment in an attempt to characterize as contractors as many of their labour force as possible. Many organizations which are in fact huge, integrated economic entities will recreate themselves into a group structure which fragments the business into a number of separate (but nevertheless wholly owned and controlled) subsidiaries, in order to manage labour costs, and obligations under labour laws. (An example of this is outlined below in Section VI.2.)

There are in fact two ways for a business enterprise to avoid the regulatory burdens of employment: make sure that the worker is not classified as an employee but as an independent contractor; or make sure that the employee who will be serving the enterprise is in fact someone else's employee. Business restructuring is a way of achieving the second method. The emergence of an industry of labour hire (or 'temporary agency') organisations, who engage workers to on-hire to host enterprises, has created particular challenges for traditional labour law. Many of the cases in which the worker's status (as an employee or contractor) is in dispute, involve arrangements whereby a host enterprise has relied upon labour hire workers to provide long term services.<sup>8</sup>

### *1.4. Tackling the problem*

So this is the problem: the strategies of business enterprises operating in globally competitive markets have created considerable pressure on regulators seeking to maintain protective labour standards in their own jurisdictions. One approach to this problem by scholars has been to interrogate the legal definitions of employment (and particularly the 'employment contract') to find more expansive definitions so as to

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<sup>7</sup> See Carolyn Penfold: 'Trade Union Responses to White Collar Off-shoring' (2007) 18 *Economic and Labour Relations Review* 53 for a general discussion of the challenge of off-shoring.

<sup>8</sup> See for example *Brook Street Bureau (UK) Ltd v Dacas* [2004] EWCA Civ 217; *Staff Aid Services v Bianchi* (2004) 133 IR 29; *Costello v Allstaff Industrial Personnel (SA) Pty Ltd and Bridgestone TG Australia Pty Ltd* [2004] SAIRComm 13; *Country Metropolitan Agency Contracting Services Pty Ltd v Slater* (2003) 124 IR 293; *Drake Personnel Ltd v Commissioner of State Revenue* [2002] VR 635.

capture a wider range of workers within the definition.<sup>9</sup> The object of this exercise is to defend the most vulnerable workers from loss of important labour protections when employers deliberately structure their engagements as precarious contracts rather than permanent employment. This mission, while worthy, is proving to be a game of catch-up – at least in the Australian environment. Business enterprises are increasingly creative in finding ways to circumvent the policies of protective labour laws, and to find new forms of engagement which relieve them of the obligations of direct employment. Rather than reiterate the arguments of others about where the boundary line should be drawn, this paper proposes that we take a different approach to the problem. The question for those who would devise laws to regulate the labour market should not be ‘what kind of contract is this?’ but ‘what interests are at risk in this kind of working relationship, and how should those interests be protected?’<sup>10</sup> This paper, therefore, considers the problem from the perspective of alternative ways to regulate labour relationships.

First, the paper considers regulatory approaches that deal with direct contracting relationships between workers and those who engage them. Section II begins this analysis by considering those regulatory approaches which are designed to recapture contracting arrangements as employment relationships: prohibitions on ‘sham contracting’, and ‘deeming’ provisions in legislation designed to extend the reach of certain statutory protections. The first – controlling ‘sham contracting’ – still depends on judges to draw the boundary between employment and contracting, but it imposes a greater cost on employers for misclassifying workers, and so encourages greater self-regulation. The second – deeming provisions – enable legislatures to pre-empt judicial decisions about where the boundary should be drawn, by stipulating their own inclusions in worker protections.

Section III considers specialist regulatory regimes which recognise that certain classes of workers are not employees, and ought not to be regulated as such, but nevertheless require their own, suitably tailored forms of protection. As an example of this kind of specialist regime, the paper considers the principal features of systems for governing the working arrangements of owner-driver transport workers in Australia. Section IV considers a more general approach to regulating all ‘contracts under which work is performed’ by permitting judicial review of contract terms, in the interest of fairness, in much the same way as many contemporary legal systems permit judicial revision of ‘unfair contract terms’ in consumer or retail lending contracts.<sup>11</sup>

Then, the paper considers regulatory approaches designed to deal with the problems created when host enterprises, or ‘client’ enterprises, engage labour indirectly, through intermediaries. Section V briefly considers the experiments with supply chain regulation, particularly in the textile, clothing and footwear industry in Australia. Section V also notes the regulatory approach now adopted in work, health

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<sup>9</sup> See Freedland: above n 3; Andrew Stewart: ‘Redefining Employment? Meeting the Challenge of Contract and Agency Labour’ (2002) 15 *Australian Journal of Labour Law* 145.

<sup>10</sup> Richard Johnstone – Shae McCrystal – Michael Quinlan, et al: *Beyond Employment: The Legal Regulation of Work Relationships*, The Federation Press, Sydney, 2012, p 195.

<sup>11</sup> See for example the *Unfair Terms in Consumer Contracts Regulations 1999* (UK) implementing the European Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, [1993] OJ L 95/29.

and safety regulation in Australia, which imposes obligations to monitor safety on ‘persons in control of business undertakings’ in respect of a wide range of workers who come within their sphere of influence, whether or not those workers are directly engaged employees or contractors.

These statutory techniques do not stop all of the gaps in the regulatory safety net for workers, principally because legal measures are constrained by some inescapable jurisdictional boundaries. In this respect, the particular challenge of ‘offshore’ worker engagement is acknowledged in Section VI.

Section VII concludes that a multi-faceted approach to regulating labour market relationships makes more sense in the contemporary world than continuing to rely on the problematic legal boundary between employment and self-employed entrepreneurship to determine matters of such great importance as decent wages, working conditions and income security for working citizens.

## **II. Capturing more work contracts within ‘employment’ protection**

### *II.1. Controls on ‘sham’ contracting*

In common law jurisdictions – and certainly in Australia – it has been common until recently to rely on a judicial assessment of the nature of a working relationship to determine whether a worker has the benefit of a particular statutory protection. For example, the various iterations of federal and state industrial relations legislation have typically conferred benefits on ‘employees’, cast obligations on ‘employers’, and left it to judges to determine whether a particular worker was an employee after a dispute arose.<sup>12</sup> The only legal risk facing an employer who misclassifies a worker is the risk that it may ultimately be required to shoulder an obligation it thought it had escaped. Except perhaps in matters involving revenue authorities, a rational if unethical employer may consider it worth classifying a worker as a contractor, because the employer might make immediate savings and face only a remote risk that the employee would ultimately find reason to bring a grievance. If the worst punishment is to be required to afford the worker the benefits that the worker would have had if properly classified as an employee in the first place, this is a risk worth taking. It is no wonder, then, that the practice of engaging workers as contractors has increased.<sup>13</sup>

Of course, in Australia, as in the United Kingdom, the choice of classification is not governed by the parties themselves, and cannot be determined only by the wording in a contract document. As Gray J said in *Application by DJ Porter for an Inquiry into an Election in the Transport Workers Union of Australia*: ‘The contracting parties cannot create something with all the features of a rooster and call

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<sup>12</sup> See for example the *Fair Work Act 2009* (Cth), s 25 which adopts the ordinary meaning of ‘employee’ and ‘employer’.

<sup>13</sup> According to the Australian Bureau of Statistics Report 6359.0 - Forms of Employment, Australia, November 2011 (available on line at <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/6359>) only 62% of Australia’s 11.4 million strong workforce were employees with full entitlements. 2.2 million were employees without paid leave entitlements (casuals), one million were individual independent contractors; and a further one million were small business business operators.

it a duck.’<sup>14</sup> Nevertheless, one factor in the ‘multiple indicia’ test commonly used in Australia to determine whether a worker is an employee or not is whether the worker contracts to provide work through a corporate vehicle.<sup>15</sup> Relying on the assumption that a corporation cannot be an employee, some employers have begun to require workers to incorporate a company for the purposes of accepting an engagement.

This assumption was proved incorrect in the United Kingdom in *Catamaran Cruisers Ltd v Williams*,<sup>16</sup> where the Employment Appeals Tribunal found that a man who had agreed to form a company for the purpose of accepting a work engagement could still bring unfair dismissal proceedings. Mr Williams met all the other tests for showing that he was in an employment relationship, including a prohibition on delegating his work to others. His purposefully incorporated company, Unicorn Enterprises Ltd, had no other clients but Catamaran Cruisers Ltd, so the court was prepared to apply the principle stated by Lord Denning MR in *Massey v. Crown Life Insurance*: ‘[I]f the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label on it.’<sup>17</sup> Nevertheless, the assumption remains strong in some employers’ and advisors’ minds that an incorporated person cannot be an employee.

Since 1998, Australian corporate law has permitted the incorporation of single shareholder, sole director companies, so an individual worker can clone him or herself, for the price of a shelf company, and acquire an Australian Company Number (ACN) for the purposes of entering into work contracts. When goods-and-services tax (GST) legislation was introduced requiring all service contractors to provide an Australian Business Number (ABN), some employers assumed that workers who presented an ABN could automatically be treated as independent contractors, notwithstanding the reality of the relationship under which they provided work, even when the worker had not incorporated. So stories began to circulate of 17 year old unskilled labourers being required to obtain an ABN so that the employer could engage them as independent contractors, and pay no regard to otherwise applicable industrial awards or agreements determining employment conditions.<sup>18</sup>

The risk for any employer who adopts this strategy now is that it will attract the attention of an industry watchdog as a ‘sham contracting’ arrangement.<sup>19</sup> Australian legislatures have decided not to rely only on common law sanctions, but to enact statutory prohibitions on sham contracting arrangements. The first such provisions were introduced into Australian federal industrial relations law with the *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006*.<sup>20</sup> They have

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<sup>14</sup> (1989) 34 IR 179 at 184.

<sup>15</sup> See *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 13, 36 and 46 for an explanation of the multiple indicia test.

<sup>16</sup> [1994] IRLR 386.

<sup>17</sup> [1978] ICR 590 at 594.

<sup>18</sup> See for example the findings of the Office of the Australian Building and Construction Commissioner, *ABCC Sham Contracting Inquiry Report*, November 2011, at p 114. This report is available on line from the Commission’s website: [www.abcc.gov.au](http://www.abcc.gov.au).

<sup>19</sup> ‘Sham’ transactions have also been recognized as a problem in the United Kingdom. See A C L Davie: ‘Sensible Thinking about Sham Transactions: *Protectacoat Firthglow Ltd v Szilagyi* [2009] EWCA Civ 98; [2009] IRLR 365’, (2009) 38(3) *Industrial Law Journal* 318-328.

<sup>20</sup> See former *Workplace Relations Act 1996* (Cth) ss 901-4.

been maintained in the *Fair Work Act 2009* (Cth) ss 357-359. The consequences of a finding that an employer has breached the statutory provisions against sham contracting is that the employer is exposed to civil penalties under the Act, which can be as much as \$A33,000 for each infringement for a corporate employer. The Fair Work Ombudsman (FWO) has standing to bring a prosecution for breach of these provisions, even in the absence of an individual complaint. These new enforcement mechanisms increase the prospect that sham contracting arrangements will be detected and addressed.<sup>21</sup> A number of prosecutions have already occurred.<sup>22</sup>

This form of regulation continues to rely on judicial determinations of the boundary between employment and contracting, but it increases the risks for employers who exploit uncertainties in that boundary. Publicity surrounding FWO prosecutions encourages greater self-regulation by employers.

## *II.2. Deeming provisions*

Some kinds of work arrangements clearly fall outside of the common law definition of employment. For instance, the bread carters and milk vendors who own their own vehicles and operate their businesses from their own premises, and can delegate work to assistants will generally fall outside of the common law definition of employment, because there are sufficient indicia in the working arrangement to identify them as small business people, bringing more than their own labour to the relationship. Nevertheless, these workers will often be ‘price-takers’ in a market controlled by a monopolistic producer or cartel of producers who dictate contract terms. These kinds of workers can also find themselves facing the kinds of industrial problems that employees face: a need for review of their contract terms to ensure minimum incomes; a desire to bargain collectively with the producers to ensure fair market terms; and protection from capricious termination of their contracts. ‘Deeming’ these workers to be employees for the purpose of certain statutory protections was the means adopted by the *Industrial Relations Act 1996* (NSW) to recognise that certain kinds of workers had the same need of access to a specialist industrial relations tribunal for resolving these kinds of disputes.<sup>23</sup>

This regulatory strategy can be appropriate when a particular statute wishes to confer particular rights on ‘workers’ with particular problems, and does not wish to restrict access to those rights only to those who would meet the judicially determined definition of ‘employment’. A conservative federal government sought to defeat these state initiatives when it introduced national legislation to govern independent contracting, which sterilized the effect of such measures.<sup>24</sup> This coincided with a

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<sup>21</sup>The former Australian Building and Construction Commission completed an inquiry into sham contracting in the construction industry. See Office of the Australian Building and Construction Commissioner, *ABCC Sham Contracting Inquiry Report*, November 2011, available on line at [www.abcc.gov.au](http://www.abcc.gov.au).

<sup>22</sup> See for example *Darlaston v Risetop Construction Pty Ltd* [2011] FMCA 220; *Australian Building and Construction Commissioner v Rapid Formwork Constructions Pty Ltd* [2011] FMCA 649.

<sup>23</sup> See *Industrial Relations Act 1996* (NSW) s 5(3) and Schedule 1. See also *Industrial Relations Act 1999* (Qld) s 275, which empowered a tribunal member to deem a particular worker to be an employee for the purposes of the Act.

<sup>24</sup> *Independent Contractors Act 2006* (Cth) s 7.

general federal takeover of industrial laws in Australia.<sup>25</sup> A change to a Labor government in 2007 did not reverse these laws. Nevertheless, although this regulatory technique is no longer used much in Australia, it is a technique whereby a legislature can determine that a wider class of work relationships will be covered by certain protective provisions, without disturbing or expanding the judicial definition of employment.

### III. Special regimes

#### III.1. Australian owner truck drivers

Many years ago, the Australian High Court determined that a truck driver who owned his own truck, and had been driving it full-time for the same employer for many years, was not an employee, because the employer could not practically control how he drove his truck.<sup>26</sup> This finding was a tragedy for the driver's widow, because it meant that she could not receive a benefit from workers' compensation insurance when her husband was killed in a road accident while driving his truck. Her tragedy, however, was possibly one of many influences in the development of special legislation permitting industrial tribunals to supervise remuneration rates and other conditions of work for owner drivers in some Australian states.

In both New South Wales and Victoria, self-employed transport workers have been able to seek the intervention of specialist tribunals to deal with disputes over the terms of their work contracts.<sup>27</sup> The *Industrial Relations Act 1996* (NSW) Chapter 6, regulates transport industry workers whose engagements fall within the definition of a 'contract of carriage' as defined in s 309 of the Act. These drivers are able to make applications to the Industrial Relations Commission of NSW for a review of the remuneration or other terms in their contracts with principal contractors. The Commission's powers extend to making determinations concerning minimum rates of pay and allowances, and it also has power to order reinstatement of terminated contracts.<sup>28</sup> Through this jurisdiction, transport workers in NSW have had the benefit of similar protections to those enjoyed by employees: support for decent wages and conditions of work, and a degree of protection from capricious termination of their work contracts. Specialist legislation has dispensed with the need to run any arguments about whether the driver was an employee or a contractor before allowing the driver these protections.

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<sup>25</sup> For an explanation of the federal and state arrangements for industrial regulation in Australia, see Rosemary Owens: 'Unfinished Constitutional Business: Building a National System to Regulate Work' (2010) 22 *Australian Journal of Labour Law* 258 and Andrew Lynch: 'The Fair Work Act and the Referrals Power – Keeping the States in the Game' (2011) 24 *Australian Journal of Labour Law* 1.

<sup>26</sup> See *Humberstone v Northern Timber Mills* (1949) 79 CLR 389.

<sup>27</sup> For a more detailed account of owner driver regulation in Australia, see Brendan Johnson, 'Developing Legislative Protection for Owner Drivers in Australia: The Long Road to Regulatory Best Practice' in Judy Fudge, Shae McCrystal – Kamala Sankaran (eds.): *Challenging the Legal Boundaries of Work Regulation*, Hart Publishing, Oxford, 2012, pp 121-138.

<sup>28</sup> See *Industrial Relations Act 1996* (NSW) ss 313-314.

The *Owner Drivers and Forestry Contractors Act 2005* (Vic) is also a specialist regulatory scheme for owner drivers, haulage and harvesting contractors.<sup>29</sup> This more recently enacted statute does not empower a tribunal to make contract determinations, however it does permit a Tribunal to review the terms of a contract on the basis that the contract is ‘unjust’.<sup>30</sup> These state enactments escaped the emasculation of state industrial laws by the federal government when it introduced the *Independent Contractors Act 2006* (Cth), possibly because the state provisions provided well-established mechanisms for regulating important industries (and hence were too important to be disturbed), and were well-supported by the Transport Workers Union, which has long been an influential trade union in Australia.

### *III.2. Road safety regulation*

In recent times, however, these state regimes have not provided sufficient protection from a form of ‘sweating’ in the transport industry. Ferocious competition for work in an industry typified by very few principal contractors and powerful clients on the one hand, and thousands of owner-drivers on the other, has given rise to frightening safety problems in the industry. Tragic road accidents involving long haul drivers who had fallen asleep at the wheel after long hours without rest because of the imperative of meeting the onerous terms of their contracts drew attention to systemic problems in the industry. In 2008, the National Transport Commission (NTC) conducted an enquiry with a view to recommending national level regulation of the transport industry to address the safety problems in the industry.<sup>31</sup> The Review Report recommended the introduction of a national scheme for mandating ‘safe rates’ of pay for both employed and owner-drivers, as the only viable means of ensuring that drivers would not succumb to competitive pressures to create unsafe conditions on national highways.

The outcome of the review has been the *Road Safety Remuneration Act 2011* (Cth), passed into law in March 2012 with effect from 1 July 2012. This legislation created a new Road Safety Remuneration Tribunal with powers to make ‘road safety remuneration orders’, either on the Tribunal’s own initiative, or upon an application by a road transport driver, employer, registered employee association, or a client or supplier participating in transport contracts.<sup>32</sup> A road safety remuneration order may deal with the minimum rates of remuneration for drivers; the conditions in contracts relating to waiting times, working hours, load limits and payment methods; and ‘ways of reducing or removing remuneration-related incentives, pressures and practices that contribute to unsafe work practices’.<sup>33</sup> The Tribunal also has powers to resolve disputes about these issues between owner-drivers and hirers, and can make

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<sup>29</sup> See *Owner Drivers and Forestry Contractors Act 2005* (Vic) ss 4-6 for definitions of the types of contracts covered by the legislation.

<sup>30</sup> *Owner Drivers and Forestry Contractors Act 2005* (Vic) s 44.

<sup>31</sup> See Michael Quinlan – Lance Wright: *Remuneration and Safety in the Australian Heavy Vehicle Industry: A Review Undertaken for the National Transport Commission (NTC)*, National Transport Commission, Melbourne, 2008.

<sup>32</sup> *Road Safety Remuneration Act 2011* (Cth), s 19(3).

<sup>33</sup> *Ibid*, s 27.

an arbitration order to impose a resolution of the dispute on the parties.<sup>34</sup> Breach of a remuneration or arbitration order attracts civil penalties.<sup>35</sup>

At the time of writing, the Tribunal was newly constituted. Time will tell how effective this body will be in meeting the objectives of the legislation, which are principally directed to ensuring that road transport drivers (whether they are employed or engaged as contractors) enjoy decent wages and working conditions, enabling them sufficient rest breaks, to avoid the terrible costs imposed on society more generally from allowing a completely ‘free’ (and unequal) market to operate in the road transport industry.<sup>36</sup>

The notable feature of this legislation, from the perspective of the theme of this paper, is that the Tribunal is empowered to intervene where it perceives a risk of unsafe contracting practices, whether the drivers are employees of small business sub-contractors, or owner-drivers. The risks are the same, whether the drivers are employees or self-employed. The legislation focuses on the interests at stake – ‘safe rates’ to enable workers to earn a livelihood without putting themselves and other road users at risk – and not on the legal classification of the contract between the parties.

### *III.3. Other special regimes: franchise regulation*

Regulatory regimes governing franchise relationships might also be included in a study of forms of labour market regulation that address the challenges of ‘vertical disintegration’<sup>37</sup> of business enterprises. It is perhaps a radical suggestion that commercial franchise relationships should be considered to be within the purview of labour market regulation. The Freedland thesis would not (it is submitted) consider that this kind of relationship should be included within any of the overlapping circles mapping the range of ‘personal work relations’ warranting the imposition of any protective labour standards.<sup>38</sup> Nevertheless, if we are willing to think outside those circles, we may recognise that many franchising relationships involve the same kinds of problems as are inherent in the subordinate employment relationship.<sup>39</sup>

The typical franchise is a contractual relationship whereby one party (the franchisor) agrees with another (the franchisee) that the franchisee will operate a separately constituted branch or ‘clone’ of the franchisor’s business concept. While the well-known fast food networks (such as the ubiquitous McDonalds™ and

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<sup>34</sup> Ibid, s 44.

<sup>35</sup> Ibid, s 46.

<sup>36</sup> Ibid, s 3.

<sup>37</sup> See Hugh Collins: ‘Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws’ (1990) 10 *Oxford Journal of Legal Studies* 352.

<sup>38</sup> See Mark Freedland: ‘Application of labour and employment law beyond the contract of employment’, (2007) 146 *International Labour Review* 3, 15 (Figure 1).

<sup>39</sup> These arguments have been elaborated in Joellen Riley ‘Regulating unequal work relationships for fairness and efficiency: A study of Business Format Franchising’ in Christopher Arup – Peter Gahan – John Howe, et al (eds.): *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships*, Federation Press, Sydney, 2006, pp 561-578; Joellen Riley: ‘A Blurred Boundary between Entrepreneurship and Servitude: Regulating Business Format Franchising in Australia’ in Judy Fudge, Shae McCrystal – Kamala Sankaran above n 1, pp 101-120.

Kentucky Fried Chicken <sup>TM</sup> chains) have been the face of franchising, this particular business model has also been adopted in many service industries, such as cleaning, school tutoring, and coffee vending, in order to engage individual workers to work in the ultimate service of the franchisor who invented the business concept.<sup>40</sup>

Typically, the franchisor provides a license to use trademarks and other intellectual property; is possibly the sole source of supply of any materials needed; distributes and maintains an operating manual which the franchisee is contractually bound to obey; and guarantees exclusivity over a certain territory.<sup>41</sup> The franchisee pays a fee (often a one-off start-up fee, plus ongoing fees determined as a proportion of profits), and works the territory. The franchisee bears many of the business risks, such as the costs of financing and maintaining premises and any equipment, and the liabilities associated with employing any assistant staff.

By virtue of the constraints imposed by the franchisor's operating manual, the franchisee often works under tight controls determined by the franchisor. There is very little scope in a franchise to exercise any real independence in how to run the business. Also, any goodwill developed in the business is generally captured by the franchisor who owns all the trade indicia of the business. The franchisor can influence the profitability of the franchisee's cloned business by determining the price of supplied materials (often the franchise agreement dictates the source of supply), the price of services, and the extent of the territory available to the franchisee.

When the franchisee is an individual worker who is bringing little more than her own labour to the business, a franchise arrangement can raise many of the same regulatory problems as the engagement of subjugated employees. Franchising can be a way for a business owner to outsource business risk, while retaining control of a reliable portion of profit and all the goodwill generated in the business. Franchisees can be just as vulnerable as employees to the sudden loss of their 'job' by capricious termination of a franchise agreement.

This is not to say that franchising should be regulated by employment laws. The peculiarities of the franchising relationship warrant specialist regulation, which recognizes the particular vulnerabilities of the franchisee, but without impinging on the essentially entrepreneurial character of her chosen work relationship. Industry specific regulation is a more appropriate way to deal with this kind of working relationship.<sup>42</sup> This kind of regulation exists in Australia in the form of the

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<sup>40</sup> See Lorelle Frazer – Scott Weaven – Owen Wright, *Franchising Australia 2008 Survey*, Asia Pacific Centre for Franchising Excellence, Griffiths University Brisbane, 2008, p 2 for statistic information on the size of the franchising sector in Australia. According to this survey there were an estimated 1100 business format franchises in Australia in 2008, and approximately 63,500 franchisees.

<sup>41</sup> For a description of the typical franchise arrangement in Australia see the Parliamentary Joint Committee on Corporations and Financial Services Report, *Opportunity not Opportunism: Improving Conduct in Australian Franchising*, December 2008. For a view of franchising in the United States, see Thomas M Pitegoff – W Michael Garner, 'Franchise Relationship Laws' in Rupert M Barkoff – Andrew C Selden, *Fundamentals of Franchising*, 3<sup>rd</sup> ed American Bar Association, 2008, and for a critical perspective of the field, see Paul Steinberg and Gerald Lescatre, 'Beguiling Heresy: Regulating the Franchise Relationship' (2004) 109 *Penn State Law Review* 105.

<sup>42</sup> See a full account of this argument in Johnstone, McCrystal – Quinlan, et al above n 10, pp 70-73. See also Joellen Riley: 'A Blurred Boundary between Entrepreneurship and Servitude: Regulating Business Format Franchising in Australia' in Fudge, McCrystal – Sankaran, above n 1, pp 101-119.

Franchising Code of Conduct, made under the *Trade Practices (Fair Trading) Act* 1998 (Cth) and the *Trade Practices Regulations*. The Code prescribes a range of obligations for franchisors, generally with a view to ensuring that franchisees have adequate information and seek commercial advice before embarking on the venture. Two entitlements in the Code are particularly important: the right to join in associations with other franchisees, without interference from franchisors,<sup>43</sup> and a right against capricious and arbitrary termination of their franchise contracts.<sup>44</sup> These protections recognise that franchisees are workers who, like employees, have an interest in collective representation of their industrial interests, and should be afforded a measure of ‘job’ security to shield them from sudden loss of income through termination of their work contract. The specially-designed regime in the Franchising Code of Conduct is able to address the particular interests of the parties to the working relationship in appropriate ways, without the necessity of defining the worker as an ‘employee’.

#### **IV. Unfair contracts review for contractors**

One argument against the approach described in Section III is that too many specialist regimes may create unnecessary legislative complexity. Each different regime creates its own needs for definitions, and its own problems in determining inclusions and exclusions from coverage. One regulatory approach with the potential to escape those criticisms is the institution of a broad right to apply for judicial review of any contract under which work is performed in industry. Legislation empowering the Industrial Relations Commission of NSW to review work contracts for ‘unfairness’ was enacted in NSW in 1959, and it provided a vibrant jurisdiction until the federal takeover of state industrial laws in 2006.<sup>45</sup> This jurisdiction permitted an industrial judge a discretion to vary any contract or arrangement under which work was performed in industry, if that contract or arrangement was relevantly ‘unfair’. The first iteration of this statutory provision (in s 88F of the *Industrial Arbitration Act* 1940) was enacted to defeat the stratagems of employers who sought to avoid their obligations under industrial awards by classifying their workers as contractors rather than as employees.<sup>46</sup>

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<sup>43</sup> It is however questionable whether this freedom of association extends to robust collective bargaining and withdrawal of cooperation: see Shae McCrystal: ‘Organising Independent Contractors: the Impact of Competition Law’ in Fudge, McCrystal – Sankaran, above n 1, p 139.

<sup>44</sup> See *Franchising Code of Conduct* clauses 21-22.

<sup>45</sup> See the *Industrial Relations Act* 1996 (NSW) s 106. For an early history of this jurisdiction, see Gregory David Woods – Paul L Stein: *Harsh and Unconscionable Contracts of Work in New South Wales: Section 88F of the Industrial Arbitration Act (New South Wales) – ‘A Radical Law’*, Law Book Co, Sydney, 1972. For a more recent account see Jeffrey Phillips – Michael Tooma: *Law of Unfair Contracts in NSW*, Thomson LBC, Sydney, 2004 This jurisdiction is now available only to public sector workers. For an explanation of the federal and state arrangements for industrial regulation in Australia, see Rosemary Owens: ‘Unfinished Constitutional Business: Building a National System to Regulate Work’ (2010) 22 *Australian Journal of Labour Law* 258 and Andrew Lynch ‘The Fair Work Act and the Referrals Power – Keeping the States in the Game’ (2011) 24 *Australian Journal of Labour Law* 1.

<sup>46</sup> See also Joellen Riley: ‘Regulating for Fair Dealing in Work Contracts: A New South Wales Approach’ (2007) 36 (1) *Industrial Law Journal* p. 19-34.

At a time when most industries were covered by industrial awards fixing wages and conditions for employees, the temptation to save money or enjoy more flexible working conditions by engaging workers on independent contracts was no doubt as strong as it clearly is today. One of the grounds upon which an independent contractor could establish that a contract was unfair was that the remuneration received under the contract was less than the contractor would have received if he or she had been engaged to do the work as an employee. Nevertheless, as the early case law demonstrated, this statutory provision was not simply an antidote to the schemes of those allergic to paying award wages. A contract could also be found to be ‘unfair’, or ‘harsh or unconscionable’ and these terms were given an expansive meaning.<sup>47</sup> This jurisdiction was engaged to resolve disputes involving small business enterprises, such as franchises and distributorships, as well as employment and individual contracting contracts.<sup>48</sup>

One of the most important aspects of this jurisdiction was that it permitted review of any contract ‘or arrangement’ under which work was performed in industry. All that was necessary to attract the jurisdiction of the tribunal was some arrangement for the performance of work in NSW. It was not necessary that there be a direct contractual relationship between the parties. For example, in *Arrogante v AOS Group Australia Pty Ltd (in liq)*<sup>49</sup> it was held that a parent company should be held liable for the accrued wages, leave and severance payments owed to workers by an insolvent subsidiary company, on the basis that the parent company had enjoyed the benefit of the workers’ labour (via labour hire contracts between the entities) and had been able to distribute profits to shareholders on the strength of revenue generated from that work. Marks J found that the undercapitalized labour hire entity should be treated as if it were acting as the parent company’s agent. He was able to create that legal relationship, despite there being no express arrangement to that effect between the parent and subsidiary, by finding that there was an arrangement under which work was performed, and which produced an unfair result.

Although this New South Welsh jurisdiction is no longer available to private sector employees,<sup>50</sup> the federal *Independent Contracts Act 2006* (Cth) provides for similar (if more narrow) opportunities for contracts or arrangements under which work is performed by independent contractors to be reviewed and varied on the basis that they are unfair.<sup>51</sup> One of the earliest disputes to be litigated under these federal provisions involved truck drivers who contested the termination of their haulage

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<sup>47</sup> See *Stevenson v Barham* (1977) 136 CLR 190 per Barwick CJ at 192.

<sup>48</sup> See for example *Gough & Gilmour Holdings Pty Ltd v Caterpillar of Australia Ltd (No 15)* [2003] NSWIRComm 173.

<sup>49</sup> [2003] NSWIRComm 283, upheld by a full bench in *AOS Group Australia Pty Ltd (in liq) v Arrogante* [2004] NSWIRComm 80.

<sup>50</sup> It is still alive for public sector employees: see *Public Service Association and Professional Officers’ Association Amalgamated Union of New South Wales v Director of Public Employment* [2011] NSWIRComm 152.

<sup>51</sup> See *Independent Contractors Act 2006* (Cth) s 12. For commentary, see Johnstone, McCrystal – Quinlan, et al above n 10, 108-112; Andrew Stewart, *Understanding Independent Contractors*, CCH, Sydney, 2007; Joellen Riley, *Independent Work Contracts*, Thomson LBC, Sydney, 2007.

contracts, with inadequate compensation, when they refused to upgrade their vehicles without an appropriate renegotiation of their remuneration rate.<sup>52</sup>

## V. Indirect relationships

### V.1. Triangular, labour hire arrangements.

The forms of regulation discussed in Sections II-IV focus on direct relationships between workers and the enterprises engaging them. One of the more insidious ways in which an enterprise can seek to escape the application of protective labour standards is to avoid any direct engagement of workers at all. All labour is hired through intermediaries, with a view to outsourcing the costs of employment regulation to the labour hire (temporary agency) entity. In Australia, a body of jurisprudence has generally established that the labour hire entity and not the host employer, is the true employer in such an arrangement.<sup>53</sup> So the worker will have to look to the labour hire entity to meet the employee's rights to minimum wages, working conditions and employment security.

Typically, labour hire workers in Australia are engaged as casual employees.<sup>54</sup> This means that they have very limited rights to any paid leave in the event of illness, and weak protection from unfair dismissal, because their rights are enforceable only against the labour hire employer, and not against the host.<sup>55</sup> Suggestions that Australian law should develop a doctrine of 'joint employment' to deal with the potential inequities arising from these triangular working arrangements have so far fallen on deaf parliamentary ears.<sup>56</sup>

### V.2. Supply chain regulation

Australian legislators have been more inventive, however, in dealing with problems in the textile, clothing and footwear industry, created by the existence of long supply chains.<sup>57</sup> Supply chains describe business networks in which a lead firm at the apex of the network contracts with other organizations, lower in the hierarchy, to provide services. The work is successively sub-contracted through a series of entities, and is often ultimately completed by precariously engaged outworkers. Under conventional

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<sup>52</sup> See *Keldote Pty Ltd v Riteway Transport Pty Ltd* (2008) 176 IR 316; (2009) 185 IR 155; [2010] FMCA 394.

<sup>53</sup> See the Australian case law noted above at n 8.

<sup>54</sup> Some are also effectively engaged as contractors: see *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104; 37 IR 380.

<sup>55</sup> See *Costello v Allstaff Industrial Personnel (SA) Pty Ltd and Bridgestone TG Australia Pty Ltd* [2004] SAIRComm 13.

<sup>56</sup> See Pauline Thai: 'Unfair dismissal protection for labour hire workers? Implementing the doctrine of joint employment in Australia' (2012) 25 *Australian Journal of Labour Law* 152.

<sup>57</sup> See generally, Michael Rawling, 'A Generic Model of Regulating Supply Chain Outsourcing' in Christopher Arup – Peter Gahan – John Howe – Richard Johnstone – Richard Mitchell – Anthony O'Donnell (eds.): *Labour Law and Labour Market Regulation*, Federation press, Sydney, 2006, p 520; 'The Impact of Federal Legislation upon the Scope of State Jurisdictions to Regulate Outwork' (2009) 22 *Australian Journal of Labour Law* 147. See also Johnstone, McCrystal – Quinlan et al, above n 10, pp 66-69.

legal principles, the outworker has recourse only against the entity which directly engages her for payment of wages and benefits. If the small business contracting for her labour avoids its legal responsibilities, conventional common law principles would hold no-one else responsible for meeting these obligations. Supply chain regulation, however, can provide that organizations higher in the chain may acquire a liability to meet those responsibilities, where they benefit from the labour, and exercise some control or influence over the conditions under which the work is performed.

This kind of regulation tears through corporate veils, and makes the organizations who have benefitted from the provision of labour responsible for meeting obligations to workers if the immediate employer defaults. Presently, Australian law provides for supply chain regulation in the textile, clothing and footwear industry to protect the most vulnerable workers, who are often migrant women, working in garages and homes.<sup>58</sup> There is scope, however, for this kind of regulation to be extended to other occupational groups and areas in which supply chains exist and create significant risks that employment standards will be avoided, for example in construction work.

The supply chain approach to requiring the ultimate beneficiary of labour to take some responsibility for ensuring that workers receive their entitlements, notwithstanding the absence of any direct contractual relationship between the enterprise and the worker may remove some of the incentive for enterprises to artificially distance their workers, and so go some way to addressing the ‘moral hazard’ problem identified in Section I.3.

### *V.3. Work, health and safety regulation and the ‘person controlling a business undertaking’*

Just as safety on Australian highways was a key concern motivating the development of the *Road Safety Remuneration Act*, so concerns about the vitally important field of work health and safety generally has driven the development of a new approach to defining responsibilities for promoting health and safety in Australian workplaces. Australia is presently working towards harmonizing state work health and safety legislation by encouraging states to adopt a Model Work Health and Safety Bill. This legislation escapes reliance on concepts of employment, and even concepts of ‘occupation’ of business premises, in imposing a primary duty of care on any ‘person in control of a business undertaking’ (PCBU) in respect of any ‘worker’, broadly defined, who comes within the ambit of that control. ‘Worker’ includes contractors, sub-contractors, outworkers, employees of labour hire contractors; and the PCBU owes a duty in respect of any worker ‘whose activities in carrying out the work are influenced or directed’ by the PCBU.<sup>59</sup> When the interest at stake is so important as worker safety, a regulatory strategy which imposes obligations on anyone who influences safety conditions makes more sense than one limited to the direct employer’s duty of care.

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<sup>58</sup> See Johnstone, McCrystal, – Quinlan et al, above n 10, pp 103-104.

<sup>59</sup> Sections 7 and 19.

## VI. An intractable problem: the jurisdictional limits of the law

The survey of regulatory techniques in the sections above represents some advances in addressing the problems noted in Section 1. Just because business enterprises restructure and engage labour indirectly through intermediaries, does not mean that the enterprise will escape all responsibilities for complying with decent working standards. An important limitation on the effectiveness of these techniques, however, is the fact that most law-making is constrained by jurisdictional boundaries. One recent Australian industrial dispute is sufficient to illustrate this problem.

### VI.1. *The Qantas story*

Over the past couple of years, Australia's national carrier, Qantas Airways Ltd, has been in dispute with several of the trade unions representing its staff, because of the airline's strategy for engaging labour hire staff from neighbouring New Zealand. Qantas established a wholly-owned and controlled subsidiary, Jetconnect, in New Zealand in 2001, in order to employ pilots and cabin crew resident in New Zealand. To understand why Qantas would do this, we need to traverse a little of Qantas' industrial relations history.

Qantas was once a government-owned airline which benefitted from legislated restrictions on the operation of competitive airlines in Australia. As a consequence, its directly employed staff are reputed to enjoy what are commonly described as 'legacy' pay and conditions, considerably above the entitlements paid to the employees of competitor airlines, such as Virgin Airlines.<sup>60</sup> Qantas was privatized in the 1990s,<sup>61</sup> and since then, the privately-owned company has operated in a more competitive domestic air travel market.

In the international market, Qantas has also faced competition from lower cost carriers, so has engaged in strategies to lower its own labour costs by outsourcing some of its operations to lower cost providers.<sup>62</sup> The Qantas outsourcing story is a complex one: here we focus only on the arrangement with Jetconnect, which employs cabin crew and pilots in New Zealand (under terms and conditions determined by New Zealand's labour laws), and hires them to fly trans Tasman routes under the Qantas brand.<sup>63</sup> These arrangements are colloquially described as a 'wet lease', that is, a lease of equipment (aeroplanes) together with the personnel required to operate the equipment. Qantas owned the aeroplanes, but leased them to Jetconnect. Jetconnect then hired the planes back to Qantas complete with crew, including pilots and flight attendants. The Jetconnect strategy, and the Australian

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<sup>60</sup> See Sarah Oxenbridge– Joseph Wallace – Lorraine White – Siobhan Tiernan – Russell Lansbury, 'A Comparative Analysis of Restructuring Employment Relationships in Qantas and Aer Lingus: different routes similar destinations' (2010) 21(2) *International Journal of Human Resource Management* 180 at 182.

<sup>61</sup> See the *Qantas Sale Act 1992* (Cth).

<sup>62</sup> Oxenbridge et al above n 60 at 186.

<sup>63</sup> See *Australian and International Pilots Association v Qantas Airways Limited and Jetconnect Limited* [2011] FWAFB 3706 at [9] to [15].

trade union's vigorous opposition to it,<sup>64</sup> is illustrated in the application brought before Fair Work Australia by the Australian and International Pilots Association (AIPA) against both Qantas and Jetconnect.<sup>65</sup>

This application sought to vary the Qantas Shorthaul Pilots' Award, 2000 [Transitional] which governed Qantas pilots' pay and conditions, so that Qantas and Jetconnect would be required to extend those conditions to the Jetconnect pilots employed to operate Qantas aircraft on Qantas routes across the Tasman. Among the union's arguments was an assertion that the arrangements between Qantas and Jetconnect warranted lifting the corporate veil between the parent and its subsidiary, either on the basis that Jetconnect was merely an agent for Qantas, or that the arrangement between them was a sham to avoid Australian industrial laws.<sup>66</sup> The AIPA argued that, as the principal, Qantas should be required to pay Australian rates to all pilots flying under the Qantas brand.

The application failed, largely because a majority of the FWA full bench held that the legislation under which the award had been made did not reach extraterritorially beyond Australia.<sup>67</sup> As Jetconnect was incorporated in New Zealand, the majority held it must be subject to New Zealand's labour laws. Its pilots were New Zealand residents, and were eligible to join the New Zealand Air Line Pilots Association Industrial Union of Workers (NZALPA). The New Zealand pilots were already covered by a collective enterprise agreement with the NZALPA, or by individual employment agreements made under New Zealand's employment laws.<sup>68</sup>

This case was grim news not only for the Qantas unions who compete for work with offshore providers (and this would include the licensed aircraft maintenance engineers, whose work can be done in any port in which a Qantas plane touches down during a journey) but for employees in other enterprises operating globally.

There may however be some limits to the airline's ability to use these strategies to buy in cheaper offshore labour. The Fair Work Ombudsman (FWO), which is the institution charged with enforcement of Fair Work standards, has recently commenced proceedings against Jetstar (the Qantas budget brand operating in the domestic market), alleging underpayment of employees hired from partly-owned subsidiaries incorporated in Thailand and Singapore to fly internal Jetstar routes. According to the information filed in the Federal Court in May 2012, Jetstar had entered into a services agreement with Tour East (TET) Ltd, incorporated in Thailand, and Valuair Limited, incorporated in Singapore, to engage a number of cabin crew to work for Jetstar on its domestic and international flights.<sup>69</sup>

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<sup>64</sup> See Penfold, above n 7.

<sup>65</sup> *Australian and International Pilots Association v Qantas Airways Limited and Jetconnect Limited* [2011] FWAFB 3706. The application was brought under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (Transitional Act) Sch 3, Items 10 and 12.

<sup>66</sup> *Ibid* at [36] and [38].

<sup>67</sup> *Workplace Relations Act 1996* (Cth) (preserved by the *Transitional Act*).

<sup>68</sup> There were also reasons based on the statutory requirements to be met before a transitional award could be varied: see *Ibid* at [106] to [113].

<sup>69</sup> See Workplace Express 'Fair Work Ombudsman accuses Jetstar of underpaying foreign cabin crew' 28 May 2012. *This news report cites the following information statements filed in court, and due for hearing in August 2012: Fair Work Ombudsman & Valuair Limited (200302952W) & Tour East (T.E.T) Ltd (31629391) & Jetstar Airways Pty Ltd ACN 069 720 243, NSD719/2012.*

The FWO has alleged that Tour East and Valuair have breached the minimum pay provisions in the Aircraft Cabin Crew Award 2010 applying to all employees working in Australia, and it is seeking backpay on behalf of the workers, and also penalties from Jetstar for aiding and abetting the breaches of the award. Accessory liability provisions in the *Fair Work Act* may prove to be the regulatory tool to impose responsibility for off shore labour hire subsidiaries to parent companies.<sup>70</sup>

The back pay claims, if successful, will be substantial. Thai cabin crew are paid a monthly salary of 8,500 baht (\$A273.50), while directly employed Australian crew are paid \$A2915.90 a month. This claim may also be the thin end of an extensive wedge that the FWO is planning to use to leverage compliance with Australian labour standards for foreign-hired agency workers in the airline industry. It has been suggested that more than 300 other airline workers are in the FWO's sights.<sup>71</sup>

It is yet to be seen whether the FWO prosecutions will be successful. Nevertheless, the full bench *Jetconnect* decision suggests that there are serious limits to the reach of domestic labour laws. While ever there are incentives, and capacity, to use offshore labour, this is the new challenge for regulators.

## **VII. Conclusions: Regulating work, not employment**

This survey of Australian regulatory developments has sought to illustrate that there are more ways of meeting the challenge of the blurring boundary in labour law than seeking to extend or redefine the central notion of 'employment'. Rather than continue to wrestle with an elusive definition of what it is that makes one worker worthy of labour law's protections, but others beyond its reach, the approaches described above tackle the regulatory problems more directly, by focusing on the interests at risk, and selecting appropriate means to protect those interests. Perhaps it is time for scholars, too, to look beyond employment, and possibly even further than Professor Freedland's 'personal work relationship', to investigate more useful regulatory means to address the challenge of ensuring decent conditions for working citizens, in the face of all the pressures of global competition in labour markets.

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<sup>70</sup> See Fair Work Act 2009 (Cth) s 550.

<sup>71</sup> Ibid.