

# Australian Journal of Labour Law (AJLL)

## Volume 32 Part 1

*(guest editors' introduction and articles included in this part are linked to the LexisNexis platform)*

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### Guest Editors' Introduction

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

— *Tess Hardy, Richard Johnstone and John Howe*

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

### Articles

#### Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?

— *Andrew Stewart and Shae McCrystal*

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Most forms of labour regulation operate on the assumption that rights and protections should be accorded to employees, but not the self-employed. The need to question that binary divide is heightened by modern forms of business organisation that seek to separate the performance of work necessary to the business from the business itself. We re-examine the case for either universalism or selectivity in the coverage of labour standards by reference to one of these models, involving the engagement of 'gig' workers through digital labour platforms. After reviewing the common law principles used to determine employment status, we consider how platform workers might be categorised under existing laws. We go on to make three arguments as to the coverage of labour standards. The first is that many (though not all) labour protections can and should apply regardless of work status. The second is that in framing rights or processes analogous but not identical to those enjoyed by employees, it may be appropriate to cover all self-employed workers, not just 'dependent contractors'. The extension of collective bargaining rights to non-employees offers an example of that approach. The third is that the practice of sham contracting is best addressed by an expanded definition of employment that presumes workers to be employees unless they can be shown to be running their own business. This is preferable to creating an intermediate category of 'independent worker', which, as we illustrate by reference to overseas examples, risks a loss of rights and protections for workers who should be treated as employees.

## A New Approach to Corporate Structures Involved in Labour Law Breaches

— *Helen Anderson*

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Employers may sometimes deliberately choose to structure their business operations in a way that puts their assets beyond the reach of employee claims. The legally liable company may use liquidation to frustrate recovery action by the Fair Work Ombudsman. This article urges those engaged in law reform to look beyond the form of these arrangements and instead to focus on their substance.

## Regulating Work Health and Safety in Multilateral Business Arrangements

— *Richard Johnstone*

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This article examines the regulation of work health and safety (WHS) in multilateral business arrangements in Australia. The focus is on the regulatory standards set out in the current WHS Acts and on approaches to the monitoring and enforcement of these standards. The article shows that the policy underpinning these Acts is to protect all workers in all kinds of work arrangements arising from new and changing business models, and from all kinds of existing and emerging hazards. It argues that the primary duty of care in s 19 of the Acts clearly covers workers carrying out work in most multilateral work arrangements, but that there is uncertainty about whether the drafting of s 19 is clear enough to achieve this policy objective in all circumstances. The article also examines the positive and proactive due diligence duty on officers, and the extensive inspection and enforcement powers given to WHS inspectorates to ensure compliance with these extensive duties.

## Shifting Risk and Shirking Responsibility? The Challenge of Upholding Employment Standards Regulation within Franchise Networks

— *Tess Hardy*

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The challenge of upholding employment standards regulation within franchise networks was laid bare by the investigation into 7-Eleven. However, as the Migrant Workers' Taskforce recently observed '7-Eleven is unlikely to be alone in being associated with significant wage exploitation of its franchisee employers.' This article seeks to unpack the apparent link between business format franchising and underpayment contraventions in the Australian context. It combines an examination of relevant case law from the past decade, with a review of other critical inquiries, investigations and research relating to specific brands and the franchising sector more generally. The final part of this article considers how, and to what extent, key provisions in the recent Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 (Cth) may influence the ascription of risk and responsibility within the franchising relationship.

## A Critical Examination of the Relationship between Labour Hire Intermediaries and Growers in the Australian Horticulture Industry

— *Joanna Howe, Alexander Reilly, Chris F Wright, Diane van den Broek and Stephen Clibborn*

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Labour hire intermediaries are an established feature of the Australian horticulture industry. A number of reports have found that the presence of these intermediaries have contributed to noncompliance

with labour standards of harvest workers. In this context, this article seeks to develop a more nuanced analysis of the interdependencies between labour hire and growers and what that means for farm labour. It also develops a deeper empirical picture from which to build a critical assessment of the relationship between growers and labour hire intermediaries in the horticulture industry. By focusing on the dependencies between growers and labour hire intermediaries, this article highlights both the legitimate functions performed by labour hire intermediaries, but also the challenges these dependencies create for labour standards enforcement and how they construct and entrench segmented labour markets.

### Enforcing Labour Standards in the Supermarket Food Supply Chain

— *Chris Arup*

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How can labour standards be enforced in supermarket food supply chains? The article first asks where power lies in these chains, either to degrade or elevate labour standards. Liberal labour law supports business models in which such power is exercised without responsibility. The article evaluates regulatory responses seeking to harness the power of the major supermarkets to prevent exploitation along the chains. A possible point of attachment for such responsibility is liability as an accessory under the Fair Work Act 2009 (Cth). More thorough going reforms to the law are also mooted.

### Using Law to Support Social Movement-Led Collective Bargaining Structures in Supply Chains

— *Manoj Dias-Abey*

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This article critically examines two specific examples of collective bargaining structures created by social movement actors to regulate working conditions across supply chains — the Fair Food Program and the Bangladesh Accord on Fire and Building Safety. These programs can be characterised as nascent forms of supply chain collective bargaining, which involves representatives of workers negotiating with entities further upstream that have the power to influence labour conditions through their commercial practices. The key distinguishing feature of the Fair Food Program and the Bangladesh Accord, especially in comparison with previous private regulatory efforts, is that the agreements are legally enforceable against the lead firms. The available evidence suggests that they have resulted in significant improvements in the industries they regulate. Given the potential of supply chain collective bargaining structures to improve the working conditions of supply chain workers, this article considers how state law might extend and encourage these initiatives at both the national and transnational levels.