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**Uses and abuses of the corporate form in managing employers'
regulatory obligations**

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Abstract:

Corporate law is increasingly coming into conflict with labour regulation. Old precedents holding that a corporation can never be an employee have encouraged some engagers of labour to stipulate that workers should incorporate as single shareholder/sole director companies to accept work contracts. Employers are incorporating wholly-owned and controlled subsidiaries to engage a workforce contracted back to the parent, in some cases to take advantage of the lower labour standards in an off-shore jurisdiction. This paper will consider the ramifications of these strategies for the coverage of labour laws, and will reflect on some regulatory responses.

The modern corporation

In a utopian world, the wonderful creation of the legal imagination known as the Corporation, would be a great boon to working people. The capacity to create a single, artificial legal 'person' to own and control assets on behalf of a collective enables wealth-generating collaboration between people who contribute a variety of resources: not only those resources traditionally described as 'capital' (such as land and money), but also the 'human capital' of labour (including knowledge, skill and capability). Legal doctrine enables this beneficial collaboration – the separate legal personality of the corporation (separate from its incorporators) creates a stable and efficient means for a collective to marshal, exploit and develop resources for mutual benefit. Unfortunately, the same legal doctrine can also be used to avoid the claims of workers for a share in the wealth created by their labour.

This paper examines recent examples (principally from Australian law and industrial relations practice) of the ways in which the doctrine of separate legal personality has been exploited by some enterprises in order to avoid potential obligations to workers under protective labour laws. The paper also considers some regulatory strategies for defending the interests of working people against these stratagems.

I do not propose to engage at length in the broader theoretical debates about the nature of the modern corporation and whom corporate regulation ought to serve (the usual options being shareholders alone, stakeholders more broadly, and the community at large).¹ It is sufficient here

¹ See Jennifer Hill 'Public Beginnings, Private Ends – Should Corporate law Privilege the Interests of Shareholders?' (1998) 9 *Australian Journal of Corporate Law* 21.

to observe that there are respectable arguments that the working people who contribute much of the wealth of corporate enterprise are stakeholders with a legitimate claim to share in the wealth created from their collective endeavours.² The predominant philosophy of Anglo-American corporate law is that directors of corporations are bound to serve the interests of shareholders who effectively ‘own’ the company,³ so workers’ claims to share in corporate wealth must be satisfied by bargaining for wages and working conditions.⁴ In modern times, workers’ claims to adequate recompense for their contribution to enterprise have been addressed not only through individual bargaining, but through a variety of forms of regulation in different jurisdictions. In Australia, for example, legislation at State and federal level has ensured a range of basic conditions of work for permanent employees, including (inexhaustively):

- minimum wages for various occupational groups,
- controls on working hours to guard against ‘sweating’,
- mandatory paid leave entitlements to cover illness and injury,
- paid annual recreation leave to ensure some respite from work;
- rights to return to a job after parental leave and recreation;
- mandatory workers’ compensation insurance;
- protection from capricious dismissal (subject to eligibility requirements);
- Minimum notice periods for termination of employment;
- Severance pay upon dismissal for reasons of redundancy.

Depending upon an employee’s occupation, he or she may also be entitled to the benefit of an industrial award providing additional benefits such as penalty rates for working unsociable hours, rights to rest breaks and other occupation-specific conditions and benefits. Most importantly, employees are also entitled to join unions and to bargain collectively for wages and conditions above the statutory and award minima. Typically, union-negotiated enterprise agreements will contain some measures addressing job security, such as consultation rights on proposed changes to work arrangements,⁵ and enhanced entitlements to severance pay.

Access to all of these entitlements, however, depends upon the worker being classified as an employee. Much of the mischief of the corporate stratagems discussed in this paper is due to a persistent reliance on the direct employment relationship as the basis for determining which workers should be the recipients of protective labour standards. The *Fair Work Act 2009* (Cth) continues to rely on the common law definition of employment (the ‘contract of service’) to determine which workers are entitled to the benefits of most labour rights enshrined in that

² See generally the collection of essays in Margaret M Blair and Mark J Roe (eds) *Employees & Corporate Governance*, Brookings Institution Press, Washington DC, 1999.

³ See Richard Mitchell, Anthony O'Donnell, and Ian Ramsay, 'Shareholder Value and Employee Interests: Intersections Between Corporate Governance, Corporate Law and Labour Law' (2005) 23 *Wisconsin International Law Journal* 417 at 439.

⁴ See Jennifer Hill, 'At the Frontiers of Labour law and Corporate Law: Enterprise Bargaining, Corporations and Employees' (1995) 23 *Federal Law Review* 204.

⁵ See Ronald C McCallum 'Crafting a New Collective Labour law for Australia' (1997) 39 *Journal of Industrial Relations* 405 at 421 for the proposition that 'adult industrial citizens of a modern democratic state have the right to participate in workplace governance by sharing in the rule-making and rule interpretative processes of the enterprise'.

legislation.⁶ Australian case law has consistently found that temporary agency workers can call only upon their direct employer (the labour hire firm) and not the host employer to afford those rights to the worker.⁷ Enterprises with reasons (or merely desires) to avoid the costs and risks associated with affording those entitlements to workers have an incentive to seek alternate ways of engaging labour. One strategy is to make sure the worker is not an employee but an ‘independent contractor’. Another is to make sure that even if the worker must be an employee, he or she is someone else’s employee. This is achieved by engaging the worker through a labour hire (or temporary agency) arrangement.

The doctrine of separate legal personality of the individual subsidiaries within a corporate group can enable an employer corporation to shed some of the liabilities of employing staff directly without necessarily contracting on a commercial, arms’ length basis with a specialist labour hire firm. The group may simply incorporate its own, wholly-owned and controlled labour hire subsidiary. The most effective way to avoid the costs of domestic labour laws, is to ensure that this labour hire entity operates in another, preferably low-cost jurisdiction. These strategies are not illegal. Managed carefully they can be effective ways of preserving the wealth of the corporation for a core of shareholders, managers and a privileged class of directly engaged employees. These strategies do, however, create challenges for legislatures committed to extending labour standards and protections broadly to workers, including those workers who are pushed to the periphery of enterprises by these very kinds of engagement strategies.

The following discussion of these strategies serves to illustrate contemporary practices, and some of the regulatory strategies that have attempted (sometimes, but not always, successfully) to combat their worst effects.

The incorporated worker

The tactic of engaging workers as independent contractors instead of employees is a common one for avoiding obligations to pay wages set by industrial awards or enterprise bargains, workers’ compensation insurance premiums, some taxation obligations, and the risk of facing unfair dismissal applications. Nevertheless, employers who seek these advantages can confront difficulties if a worker is in fact subservient to and economically dependent upon the employer. Common law tests for distinguishing the contract of service from the contract for services do not pay regard to the parties’ own choice – nor to any wording in a contract document – if that choice clearly misclassifies the worker. As Gray J said in *Application by DJ Porter for an*

⁶ See *Hollis v Vabu Pty Limited* (2001) 181 ALR 263 for the common law tests applied in Australia. For a discussion of the persistent reliance of Australian law on the common law tests, see Andrew Stewart, ‘Redefining Employment? Meeting the Challenge of Contract and Agency Labour’ (2002) 15 *Australian Journal of Labour Law* 235-276; ‘WorkChoices and Independent Contractors: The Revolution that Never Happened’ (2008) 18 *Economic and Labour Relations Review* 53.

⁷ See for example *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; *Drake Personnel Ltd & Ors v Commissioner of State Revenue* (2000) 2 VR 365. Australian case law has not taken up the implication in *Brook Street Bureau (UK) Ltd v Dacas* [2004] EWCA 217, that there may be an implied employment contract between the host employer and the agency worker.

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 it a duck.’⁸

One factor taken into account in determining the reality of the relationship is whether the worker contracts to provide work through a corporate vehicle. 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*,⁹ 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.’¹⁰

The court in *Catamaran Cruisers* said:

In our view, it is a question of fact in every case whether or not the contract in question is one of service or a contract for services. We accept that the formation of a company may be strong evidence of a change of status but that the fact has to be evaluated in the context of all the other facts as found.

Nevertheless, the assumption remains strong in some employers’ and advisors’ minds. 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 the 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 we began to hear 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.¹¹

⁸ (1989) 34 IR 179 at 184.

⁹ [1994] IRLR 386

¹⁰ [1978] ICR 590 at 594.

¹¹ 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.

The risk of this particular strategy now is that it will be recognized as a ‘sham contracting’ arrangement. ‘Sham’ transactions have been recognized as a problem in the United Kingdom.¹² 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*.¹³ They have been maintained in the *Fair Work Act 2009* (Cth) ss 357-359.

Under the common law, the consequences of finding that a person engaged as a contractor is really an employee is that the person will be treated as an employee and can claim the benefit of any entitlements they ought to have received. The additional 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. Also, the Fair Work Ombudsman 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 of sham contracting arrangements being detected and addressed.

The Australian Building and Construction Commission has recently completed an inquiry into sham contracting in the construction industry.¹⁴ The publicity surrounding the report of this inquiry, and a number of prosecutions of sham contracting arrangements,¹⁵ have raised awareness of the problem, and will hopefully dissuade enterprises from engaging in sham contracting activities. One thing that has become clear from this enquiry is that it is not sufficient that an employee purport to contract through an ACN or ABN for the employer enterprise to avoid employment obligations.

Labour Hire

Labour hire arrangements are common in Australia (as they are in many other industrialized economies) and are legally ‘unremarkable’.¹⁶ Australian law has accepted the legitimacy of arrangements whereby one enterprise – the labour hire entity – engages workers (either as employees or independent contractors), and hires them to host employers. Under Australian law, this triangular arrangement involves two separate contracts: a contract of service or contract for services between the labour hire entity and the worker; and a commercial contract for the provision of labour between the labour hire entity and the host employer. There is no direct contract between the worker and the host employer. The host employer generally contracts with

¹² See A C L Davies ‘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.

¹³ See former *Workplace Relations Act 1996* (Cth) ss 901-4.

¹⁴ See Office of the Australian Building and Construction Commissioner, *ABCC Sham Contracting Inquiry Report*, November 2011, available on line at www.abcc.gov.au.

¹⁵ 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.

¹⁶ *Fair Work Ombudsman v Ramsay Food Processing Pty Ltd* [2011] FCA 1176 at [60].

the labour hire entity on the basis that the labour hire entity undertakes to meet any labour law obligations to the workers.¹⁷

Labour hire entities provide a useful service in many industries where demands for labour fluctuate. A host employer can engage staff for the limited period of a project, or to ‘top up’ labour provided by their regularly employed staff at times of unusual demand. Workers engaged by labour hire entities may benefit by being kept in regular employment in their chosen occupation, notwithstanding movement between different host employers. Nevertheless, labour hire arrangements can challenge the ability of trade unions to secure and maintain improvements to working conditions.¹⁸

In a system of enterprise bargaining focused on establishing single business enterprise agreements, labour hire arrangements permit employers to avoid the obligation to pay all of the workers supporting their operations the same rates of pay, and afford them the same conditions, as they provide to their direct employees. (Unions have developed some strategies to attempt to control the risk that labour hire workers will undermine union enterprise bargains. These are discussed below.) Wages are not the only concern. In *Costello v Allstaff Industrial Personnel (SA) Pty Ltd and Bridgestone TG Australia Pty Ltd*,¹⁹ Mr Costello worked at Bridgestone, but under a labour hire arrangement. When he had to take an extended period of time off work due to an injury, he was dismissed from his post at Bridgestone. Allstaff offered to find him a different posting, but in a different location, on lower pay, and away from his regular friends. If Mr Costello had been a direct employee of Bridgestone, he would have enjoyed protection from dismissal for temporary absence from work for illness or injury, and would have been entitled to apply for reinstatement to his job.²⁰ As a labour hire worker, however, he had no rights against the host employer. So labour hire arrangements also relieve host employers of their usual obligations under provisions purporting to respect the worker’s right to job security.

The wholly-owned labour hire subsidiary

Labour hire arrangements become more dubious when the labour hire entity is a wholly-owned subsidiary of the host employer corporation, and the principal reason for setting up the structure is to quarantine the employer company from labour law obligations to its workers. For example, in the notorious Waterfront dispute of 1998, the Patricks group of stevedoring companies deliberately restructured to separate asset-owning entities in the group from the subsidiaries that engaged labour.²¹ A clear purpose in this strategy was to further a plan to deunionise the

¹⁷ See Richard Johnstone et al, *Beyond Employment: The Legal Regulation of Work Relationships*, Federation Press, Sydney 2012, at p 61 for a diagram of the arrangement.

¹⁸ It is not only Australian trade unions who are concerned to protect domestic jobs. See Catherine Barnard “British Jobs for British Workers”: The Lindsay Oil Refinery Dispute and the Future of Local Labour Clauses in an Integrated EU Market” (2009) 38(3) *Industrial Law Journal* 245-277.

¹⁹ [2004] SAIRComm 13.

²⁰ This right is currently protected by the *Fair Work Act* 2009 (Cth) s 352. The case was brought under an earlier version of this right, under South Australian law.

²¹ See *Maritime Union of Australia v Patrick Stevedores No 1 Pty Ltd* (1998) 27 ACSR 497; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 153 ALR 643. For an anatomy of this case see David Noakes ‘Dogs on the Wharves: Corporate Groups and the Waterfront Dispute’ (1999) 11 *Australian Journal of*

workforce.²² In other notable examples of corporate manipulation, employer corporations have sought to avoid payment of employee entitlements to workers by segregating the enterprises' activities into a number of subsidiaries, with an undercapitalized subsidiary invariably chosen to be the employing entity.

Where such a strategy has been sloppily administered, a court may nevertheless lift the corporate veil on the group and hold the parent company liable for entitlements owed to workers in the supposed subsidiary. This occurred in *Fair Work Ombudsman v Ramsay Food Processing Pty Ltd*,²³ where it was held that the labour hire entity (Tempus) which purported to be the employer of the staff was merely an agent for the host employer (Ramsay). Although it was legally incorporated, Tempus did not have any independent business of its own. It earned no income. Any money coming into its accounts was immediately siphoned off to Ramsay. Ramsay provided Tempus with funds to meet obligations to employees and revenue authorities only as and when those payments were required. The whole arrangement whereby Tempus purported to employ staff and hire them to Ramsay was 'a sham'.²⁴

An employee successfully argued that a labour hire entity was an agent, providing nothing more than payroll management services for the real employer, in *Damevski v Giudice*.²⁵ This case concerned the worker's entitlement to bring an application for unfair dismissal against the host employer. Agency arguments were also successful in *Arrogante v AOS Group Australia Pty Ltd (in liq)*.²⁶

Arrogante concerned the all too frequent problem created when one company in a corporate group fails, leaving employee entitlements (to accrued wages, leave and severance payments) unpaid, while a related entity which has enjoyed the benefit of the workers' labour (via labour hire contracts between the entities) survives to distribute profits to shareholders.²⁷ In this case, however, Marks J found that the undercapitalized labour hire entity should be treated as if it were acting as the parent company's agent. The judge in this case was able to create that legal relationship, because the case was brought under the unfair contracts review jurisdiction of the New South Wales Industrial Relations Commission – a jurisdiction available in New South

Corporate Law 27. See also Graeme Orr, 'Conspiracy on the Waterfront' (1998) 11 *Australian Journal of Labour Law* 159.

²² For another example of an elaborate corporate structure designed to defeat workers' rights to freedom of association, see *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 IR 165.

²³ [2011] FCA 1176.

²⁴ At [121]. See also *Barhoum v All Districts Coating Pty Ltd & Ors* [2008] FMCA 172.

²⁵ (2003) FCR 438.

²⁶ [2003] NSWIRComm 283, upheld by a full bench in *AOS Group Australia Pty Ltd (in liq) v Arrogante* [2004] NSWIRComm 80.

²⁷ For more detailed accounts of this kind of problem in Australian industrial relations practice, see Joellen Riley, 'Protection for employment entitlements: a legal perspective' (2003) 29 (1) *Australian Bulletin of Labour* 31; J, 'Bargaining for Security: Lessons for Employees from the World of Corporate Finance' (2002) 44 *Journal of Industrial Relations* 491-507; 'Lessons from Ansett: Locating Labour's Voice in Corporate Enterprise' (2002) 27(3) *Alternative Law Journal* 112-115, 141.

Wales from 1958 until the federal takeover of state industrial laws in 2006.²⁸ 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’.

Unfair contracts review under this somewhat unique statutory provision was able to achieve what has tended to be highly unorthodox in Australian corporate law – lifting the corporate veil between companies within a corporate group, when each company has been properly incorporated and maintains its own independent management and financial records.²⁹

Although this New South Welsh jurisdiction is no longer available to private sector employees, 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. No case has yet tested whether these provisions are apt to assist the employees of a labour hire entity to access their entitlements from a parent company.³⁰

The wholly-owned offshore labour hire subsidiary

The strategy of using a wholly owned labour hire entity can assist an employer corporation in avoiding some liabilities to employees. It can, for example, permit the employer to pay the labour hire workers according to a separate enterprise agreement with lower wage rates than are paid to directly employed staff. It cannot, however, avoid the obligation to pay basic Australian employment entitlements to employees of the labour hire subsidiary. While the subsidiary remains solvent, it will be obliged to meet the requirements of the National Employment Standards and any applicable modern award, as minimum standards. The only way of avoiding these obligations is to take the subsidiary offshore, to a jurisdiction with lower labour standards. Australia’s iconic national airline, Qantas Airways Limited, effectively did this by establishing a wholly owned subsidiary, Jetconnect, in New Zealand in 2001.

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, to

²⁸ See the *Industrial Relations Act 1996* (NSW) s 106. 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.

²⁹ For a more complete explanation of this jurisdiction see Joellen Riley, ‘Regulating for Fair Dealing in Work Contracts: A New South Wales Approach’ (2007) 36 (1) *Industrial Law Journal* 19-34.

³⁰ For commentary on the unfair contracts provisions, see Johnstone et al above n at 108-112. See also Andrew Stewart, *Understanding Independent Contractors*, CCH, Sydney, 2007; Joellen Riley, *Independent Work Contracts*, Thomson LBC, Sydney, 2007.

such as Virgin Airlines.³¹ Qantas was privatized in the 1990s,³² and since then, the privately-owned company has operated in a more competitive domestic air travel market. It has managed this competition by preserving the Qantas brand for a premium service (generally on business routes between major capitals in Australia), and by establishing a separate company called Jetstar to compete at the budget end of the market for tourist travel.

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.³³ The Qantas outsourcing story is a complex one, encompassing for example labour hire engagement of baggage-handlers and outsourcing of catering services. This paper will focus on one arrangement, with its wholly-owned subsidiary in New Zealand.

Jetconnect 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.³⁴ The arrangements between Qantas and Jetconnect are colloquially described as a 'wet lease', that is, a lease of equipment (in this case 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 trade union's vigorous opposition to it,³⁵ is illustrated in the application brought before Fair Work Australia by the Australian and International Pilots Association (AIPA) against both Qantas and Jetconnect.³⁶

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 pilots employed in New Zealand by Jetconnect to operate Qantas aircraft on Qantas short haul 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.³⁷ The AIPA argued that, as the principal, Qantas should be required to pay Australian rates to all pilots flying under the Qantas brand, so FWA should extend coverage of the relevant award to Jetconnect employees.

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.³⁸ As

³¹ See S Oxenbridge, J Wallace, L White, S Tiernan and R 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.

³² See the *Qantas Sale Act 1992* (Cth).

³³ Oxenbridge et al above n 31 at 186.

³⁴ See *Australian and International Pilots Association v Qantas Airways Limited and Jetconnect Limited* [2011] FWAFB 3706 at [9] to [15] for an explanation of the labour hire arrangement between Qantas and Jetconnect.

³⁵ See C 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.

³⁶ *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.

³⁷ *Ibid* at [36] and [38].

³⁸ *Workplace Relations Act 1996* (Cth) (preserved by the *Transitional Act*).

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.³⁹

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 (the institution charged with enforcement of Fair Work standards) has recently commenced proceedings against Jetstar (the Qantas budget brand), 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 this year, 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.⁴⁰

The Fair Work Ombudsman has alleged that the labour hire entities, 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 sheet home responsibility for labour hire subsidiaries.

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 Fair Work Ombudsman 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.⁴¹

This action follows an earlier threat that the FWO would pursue Jetstar for alleged breaches of workplace laws in respect of cadet pilots recruited in New Zealand to perform work exclusively within Australia. The FWA alleged that these apprentices were covered by a domestic Australian award, and were being underpaid.⁴²

³⁹ 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].

⁴⁰ 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*.

⁴¹ *Ibid*.

⁴² Workplace Express, 'FWO Prosecutes Jetstar over Kiwi trainees, warns multinationals', 3 April 2012.

Regulatory strategies to combat abuse of corporate separate personality

The above discussion notes a number of regulatory strategies that attempt to defeat corporate stratagems designed to avoid Fair Work labour standards. Sham contracting provisions, and lifting the corporate veil on agency arrangements (whether by engaging common law principles, or a statutory unfair contracts provision) seek to ensure that these arrangements do not exclude indirectly hired workers from employment protection laws.

There are, however, other regulatory tools that may be engaged to ensure that decent labour standards are enjoyed by workers outside the category of direct employment. Supply chain regulation is one example.⁴³ 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 often ultimately completed by precariously engaged outworkers. Under conventional 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 which respect the privity of contract doctrine 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.⁴⁴ Recent legislation in Australia has extended a form of supply chain regulation to owner truck drivers.⁴⁵ 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.

Specialist regulation in particular industry sectors, or for particular business models, is another regulatory strategy for capturing exploitative working relationships, notwithstanding that the worker has been engaged indirectly, or as a contractor rather than as an employee. The explosion of franchising in recent times, for example, represents the extension of a 'vertically

⁴³ See generally, Michael Rawling, 'A Generic Model of Regulating Supply Chain Outsourcing' in Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell (eds) *Labour Law and Labour Market Regulation*, Federation press, Sydney, 2006 at 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 Richard Johnstone et al, *Beyond Employment: the Regulation of Work Relationships*, Federation Press, Sydney 2012, pp 66-69.

⁴⁴ See Johnstone et al, above n 17 at pp 103-104.

⁴⁵ See *Road Safety Remuneration Act* 2012 (Cth).

disintegrated',⁴⁶ business model which enables a core enterprise to shed many of the risks and responsibilities of engaging labour to an army of supposedly entrepreneurial worker/franchisees. When the franchisee is an individual worker (or perhaps a family unit), a franchise arrangement can raise many of the same regulatory problems as the engagement of subjugated employees. The franchisee may be subject to highly restrictive conditions for running her fragment of the enterprise. 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.⁴⁷ Should franchising be regulated according to employment laws? This is not necessary while there is industry-specific regulation mandating certain ethical standards of engagement between franchisors and franchisees.⁴⁸ This kind of regulation exists in Australia in the form of the Franchising Code of Conduct, made under the *Trade Practices (Fair Trading) Act 1998* (Cth). This code is a schedule to 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 exercise a freedom of association with other franchisees, without interference from franchisors; and a right against capricious and arbitrary termination of their franchise contracts. 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.

Self-help regulation?

The forms of regulation described (briefly) in the section above assume that government policy makers are interested in extending labour standards to workers at the periphery of enterprises. This may be an optimistic assumption. Direct legislation is not the only way to secure worker rights. In an enterprise bargaining based system, collective agreement making is also an option,

⁴⁶ See Hugh Collins 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 *Oxford Journal of Legal Studies* 352.

⁴⁷ 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, above n. **Error! Bookmark not defined.** For a view of franchising in the United States, see Pitegoff, T and Garner, WM, "Franchise Relationship Laws" in RM Barkoff and AC Selden, *Fundamentals of Franchising*, 3rd ed (American Bar Association, 2008), and for a critical perspective of the field, see Steinberg, P and Lescatre, G, 'Beguiling Heresy: Regulating the Franchise Relationship' (2004) 109 *Penn State Law Review* 105.

⁴⁸ See a full account of this argument in Johnstone et al above n 17 at pp 70-73. See also Joellen Riley, 'A Blurred Boundary between Entrepreneurship and Servitude: Regulating Business Format Franchising in Australia' in J Fudge, S McCrystal and K Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation*, Hart Publishing, (2012 – forthcoming), pp 101-119.

so long as the worker groups enjoy a right to organize,⁴⁹ and can flex sufficient industrial muscle to do so effectively.

The trade union movement in Australia (or at least, some well-organized, robust trade unions) have sought to take some steps to prevent the widespread avoidance of domestic labour standards through these corporate stratagems by seeking enterprise agreements directly with labour hire outfits. These agreements can include clauses whereby the labour hire entity agrees to pay the same wages and conditions as the host employer pays to their direct employees. An example of such a clause can be found in the *Skilled Transport Workers' Union Fair Work Agreement*, approved in August 2011, clause 3, on 'relativity at client sites'.⁵⁰ Unfortunately, however, union density rates are low in Australia, and the workers in many industries – particularly the most vulnerable workers in the kinds of occupations most often outsourced, such as cleaning – are not well organized.

Conclusions

This paper has provided a brief overview of a problem and some regulatory solutions. The problem, if not actually created by law, has certainly been supported by law. The doctrine of separate legal personality of corporations has been used (and I would argue, abused) for the purpose of segregating those people who will benefit from the fruits of corporate enterprise, from those who will contribute labour, but remain outside the gates, in a poorly regulated wilderness. Astute policy makers have discovered forms of regulation which penetrate corporate veils. Labour law in the 21st century is likely to be just as much about these forms of regulation, as about the more traditional interests of employment law. Concentration only on employment law in a world where corporations are regulated without regard to the interests of workers is bound to see increased avoidance of labour standards. Advocates for workers' rights to claim a fair share of the fruits of collective endeavour, need to think outside of the traditional boundaries drawn by employment law.

⁴⁹ On this issue for non-employed workers in Australia, see Shae McCrystal 'Organising Independent Contractors: the Impact of Competition Law' in Judy Fudge, Shae McCrystal and Kamala Sankaran, *Challenging the Legal Boundaries of Work Regulation*, Hart Publishing, Oxford, 2012.

⁵⁰ See [2011] FWAA 5830.