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Labour Law and Productive Decentralisation: Australian Report

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Labour Law and Productive Decentralisation: Australian Report

Abstract

The decentralisation of production by various means has been a major feature of Australian labour law and relations since the 1980s. Since the recession of the early 1980s, many businesses have pursued financial savings through outsourcing of labour. Many companies did so firstly as a means of focusing on their core business activities and shifting to program-based accounting systems. More recently it has been part of the process of continuous cost-cutting and downsizing, associated with the preoccupation with shareholder value. Decentralisation is usually accompanied by reduction of the internal workforce and intensification of work remaining within the business. These trends are not surprising given the high degree of foreign ownership and control of large business in Australia, and the exposure of the Australian economy to diversification, deregulation and global competition in the last two decades. Decentralisation was in fact championed by conservative governments which began outsourcing (“contracting out”) or privatising government businesses and services from the late 1980s. This paper examines recent Australian Law concerning productive decentralisation. The paper was prepared as a national report for the XVIII World Congress of Labour and Social Security Law, Paris, 5-8 September 2006, on behalf of the Australian Labour Law Association, with contributions by Mr Toby Borgeest.

Keywords

productive decentralisation, contracting out, franchising, agency labour, labour hire, corporate restructuring, transmission of business, transfer of undertaking

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Australian Labour Law Association

XVIII WORLD CONGRESS OF LABOUR AND SOCIAL SECURITY LAW

PARIS, SEPTEMBER 5-8, 2006

TOPIC 2:

**LABOUR LAW (IN ITS INDIVIDUAL AND COLLECTIVE DIMENSIONS) AND
PRODUCTIVE DECENTRALIZATION (OUTSOURCING OF WORK AND
CONTRACTING OF LABOUR)**

Australian Report

Labour Law and Productive Decentralisation: Australian Report*

1 - INTRODUCTION

The decentralisation of production by various means has been a major feature of Australian labour law and relations since the 1980s. Since the recession of the early 1980s, many businesses have pursued financial savings through outsourcing of labour. Many companies did so firstly as a means of focusing on their core business activities and shifting to program-based accounting systems. More recently it has been part of the process of continuous cost-cutting and downsizing, associated with the preoccupation with shareholder value. Decentralisation is usually accompanied by reduction of the internal workforce and intensification of work remaining within the business. These trends are not surprising given the high degree of foreign ownership and control of large business in Australia, and the exposure of the Australian economy to diversification, deregulation and global competition in the last two decades. Decentralisation was in fact championed by conservative governments which began outsourcing (“contracting out”) or privatising government businesses and services from the late 1980s.

The development has been aided by changes in technology and organisation; often the influence of these two forces are closely intermingled. For example, developments in telephony and computing have allowed the shift in customer service and marketing to call centres, often contracted out of the core business, but sometimes spun off to a subsidiary. Banks and telephone companies now routinely use external call centres to replace functions previously provided in-house.

In Australia the main means of decentralisation have been:

- sub-contracting: replacement of in-house functions with services provided by contractors, often “independent contractors” who are self-employed. Because they are not classed as employees, they are not covered by most aspects of labour law.

* Prepared by Dr Andrew Frazer, Faculty of Law, University of Wollongong, and Mr Toby Borgeest, Partner, Slater & Gordon Solicitors, Perth. The law stated is that obtaining at September 2005.

- ❑ labour hire: outsourcing of functions to labour hire agencies which provide workers (who may be either employees of the agency or independent contractors), often on a long-term basis. This sector has grown substantially in the last decade.
- ❑ corporate restructuring and outsourcing, including the creation of subsidiary corporations and “spin-off” businesses (which may be formally autonomous though with large shareholdings by the former owner).

The effect of productive decentralisation on *individual labour relations* has been to reduce the scope of individual employment law, since in many cases the workers involved are recategorised as contractors rather than employees. As they work not under a contract of employment but under a “commercial” contract, they are not covered by Australian labour law in either its individual or its collective aspects.

The effect of productive decentralisation on *collective labour relations* has been to limit the scope of collective bargaining though the making of agreements. Although unions may be entitled to represent workers who have been outsourced to other firms or are employed by agencies, they have often found it more difficult to bargain since they now must deal with several employers. More significantly, the trend towards productive decentralisation has been accompanied by a culture of resistance by employers towards collective bargaining, and a shift towards individualisation of employment relations. These trends are linked by an increased concern by large corporate businesses to increase control over their resources and environment, by internalising employment relations within the firm and by controlling inputs through contractual networks.

The *Workplace Relations Act 1996*, the legislation which governs collective labour law at the federal level, has facilitated the shift towards individualisation. Further changes to this legislation, titled *WorkChoices*, was introduced in late 2005 and is expected to become law in early 2006. This legislation is likely to promote individualisation and productive decentralisation by deregulating and reconstituting labour relations in favour of a focus on the corporate employer entity and its interests. The full impact of these amendments on the topic of this report is as yet uncertain, although the authors have attempted to indicate briefly the immediate effect of the changes.¹

¹ This discussion is based on the federal government’s *WorkChoices* document released in October 2005, and *the Workplace Relations Amendment (WorkChoices) Bill* as presented to parliament in November 2005.

2 – GROUPS OF COMPANIES AND UNITY OF ENTERPRISE

Australian law does not recognise related companies as forming a single enterprise for the purposes of labour or social security law. The “unity of enterprise” approach – which treats the members of a corporate group as effectively a single entity, each company available to meet the liabilities of other members of the group – has been discussed but is thought to be debarred by high judicial authority confirming the conventional approach of the separateness of corporate entities.² Each company within a corporate group is treated for the purposes of labour law as an entity completely separate from the others, and no special obligations arise between related companies for employment purposes. Even under corporate law it is still only in exceptional circumstances that the courts are able or willing to “lift the corporate veil” and consider shareholdings in or control of companies as creating wider legal obligations. This may potentially occur in cases of fraud, or where the two companies are really identical or where one company is merely a cipher for another, in which case an implied agency arises; however these exceptions are rarely applied.

The corporate veil was recently lifted in a labour law situation when a parent company transferred its cleaning operations, along with the cleaning staff, to a specially-created subsidiary company in order to evade its obligations under a recently concluded collective agreement. The state industrial tribunal imposed an award on the subsidiary company in the same terms as the agreement. In so doing, it explicitly looked beyond the corporate veil on the basis that the subsidiary was the agent of the parent company and in no way independent. Another ground for making the award was that the corporate restructuring had been undertaken for a purpose (amongst others) of avoiding the parent company’s legal obligations.³ The tribunal’s approach has been criticised as going beyond the proper application of the exception to

² The “unity of enterprise” approach has been mooted in several United Kingdom decisions but rejected in appellate courts: *DHN Food Distributors Ltd v Tower Hamlets LBC* [1976] 1 WLR 852; *Adams v Cape Industries Plc* [1990] Ch 433. The High Court of Australia confirmed the sanctity of the corporate veil (the *Salomon* principle) in *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567; see John H Farrar, ‘Legal Issues involving Corporate Groups’, *Company and Securities Law Journal* 16 (1998) 184-206; Joellen Riley, ‘Australia’ in Takashi Araki and Shinya Ouchi, eds, *Corporate Restructuring and the Role of Labour Law*, The Hague, Kluwer Law International, 2003 (*Bulletin of Comparative Labour Relations*, 47), p. 17. Under the *Workplace Relations Act 1996* (Cth) s.70LB(2), related corporations may be treated as a single business for the purpose of certifying collective agreements.

³ *Australian Liquor Hospitality and Miscellaneous Workers Union, Western Australian Branch v Burswood Catering and Entertainment Pty Ltd* 2002 WAIRC 04778 (a decision of the Western Australian Industrial Relations Commission in Court Session, an appellate tribunal equivalent in status to a high level court). A further appeal to the Western Australian Industrial Appeal Court was rejected: *Burswood Catering and Entertainment Pty Ltd v AHLMWU (WA Branch)* [2002] WASCA 354.

separate corporate personality.⁴ In most cases, such an approach is unnecessary because successors in a business are bound by the former owner's awards and agreements (see section 3 below).

There are few restrictions on the use of multiple corporate entities for businesses in Australia. A study in 1998 showed that 90 percent of the 500 largest companies had subsidiaries, the vast majority of which were wholly owned. It is common for large businesses to use a pyramid structure comprising several levels of controlled corporate entities within a group.⁵ Australian businesses often make use of multiple corporate entities to separate the employment of workers from the holding of group assets. The doctrine of separate legal personality means that in such situations corporate groups may be able to avoid liability for employment obligations. In the event of insolvency or labour shedding, the employees may find that their direct employer has insufficient assets to meet their entitlements, especially accrued leave, severance or redundancy payments and superannuation (retirement benefits). Other companies within the group will not be responsible for these liabilities. The separation of employees from group assets seems to be an increasing phenomenon; one academic writer has said that such arrangements are being required by lenders in order to increase their security over the assets of the corporate borrowers, at the expense of the interests of employees.⁶ Even where there is no fraudulent or evasive intention, the existence of multiple personalities may make it unclear which one is the employer, resulting in increased cost, delay and uncertainty for employees pursuing their claims in insolvency cases.⁷

The problems arising from separation of the employing and asset-holding entities are "endemic to the holding company / subsidiary companies

⁴ Jason Harris, 'Lifting the Corporate Veil on the Basis of an Implied Agency: A Reevaluation of Smith, Stone and Knight', *Company and Securities Law Journal* 23 (2005), pp. 21-25.

⁵ Ian Ramsay and Geoff Stapledon, *Corporate Groups in Australia*, Centre for Corporate Law and Securities Regulation, University of Melbourne, 1998, pp. 4, 7 <<http://cclsr.law.unimelb.edu.au/go/centre-activities/research/research-reports-and-research-papers/>>. Australian corporations law uses the term "subsidiary", which covers ownership of a majority of shares or control over appointment of the board of directors; while the Australian Stock Exchange use the term "controlled entity" which includes directly owned subsidiaries and indirectly controlled related companies (ie companies owned or partly owned and effectively controlled by a subsidiary).

⁶ Michael Gronow. "Insolvent Corporate Groups and their Employees; The Case for Further Reform", (2003) 21 *Company and Securities Law Journal*, p. 196-7.

⁷ One example is *Romero v Auty* [2000] VSC 462, involving a small carpentry business employing 13 workers. The uncertainty caused by multiple entities was decided by an appeal against the decision of the company liquidators.

structure which is a feature of Australia's corporate sector."⁸ It may be difficult in such cases to distinguish an avoidance strategy from a genuine business failure. Indeed, the term "strategic insolvency" is often used for situations when corporate insolvency law is viewed by management as the best means of achieving their business goals.⁹

One deliberate strategy involves a "phoenix" company: the business owner sets up a new corporate entity, and transfers the assets of the business to the new entity, often in return for worthless securities (or loans, share buy-backs and other capital transfers). The old corporate entity has thus become a "shell" with no real assets, but remains the employer of the business's workers. The shell company is allowed to fail, and the business becomes reborn, though without the debts and obligations which it had to its former employees and other creditors.

In recent years there have been many cases where, following a business collapse, former employees have been left to recover their unpaid entitlements from company receivers and liquidators along with other creditors. Such business failures have often raised allegations that assets had been transferred to related entities before the collapse, reducing the pool of assets available to creditors, including employees.¹⁰ As employees are not secured creditors, they usually fail to obtain more than a token part of the amounts owed to them.¹¹ As employers are not required to give financial information to employees, employees may be unaware of the state of their employer's business until it has collapsed.¹² Employers are not required to make provision for payment of employee entitlements on insolvency; in fact, corporate directors and managers would be regarded as imprudent and possibly in breach of their duties if they did.¹³

⁸ Graeme Dean, Frank Clarke and Erne Houghton, "Corporate Restructuring, Creditors' rights, cross-guarantees and group behaviour", (1999) 17 *Company and Securities Law Journal*, p. 86.

⁹ David Noakes, "Measuring the Impact of Strategic Insolvency on Employees", (2003) 11 *Insolvency Law Journal* 91-116. Noakes concluded on the basis of a questionnaire to insolvency practitioners that clear cases were comparatively uncommon.

¹⁰ Justice Simon Whelan and Leon Zwier, *Employee Entitlements and Corporate Insolvency and Reconstruction*, Centre for Corporate Law and Securities Regulation, University of Melbourne, 2005, p. 11 <<http://cclsr.law.unimelb.edu.au/go/centre-activities/research/research-reports-and-research-papers/>>; Gronow, *op cit*, p. 196.

¹¹ Riley, "Australia", *op cit*, p. 31.

¹² In the case of the failure of the airline Ansett (which did not involve "strategic insolvency"), employees and unions were unaware that the company had sold and leased back its aircraft, leaving it with few tangible assets to meet the claims of employees.

¹³ Directors owe employees, along with other creditors, a "duty of imperfect obligation" on impending insolvency; however this cannot be enforced directly: *Spies v R* (2000) 201 CLR 603 at 636.

Australian corporations law has attempted to deal with the problems arising from corporate groups by creating stronger reporting requirements and more stringent directors' duties (together with tightened restrictions on insolvent trading), rather than by lifting the corporate veil. Recent changes to corporations legislation provide that persons who engage in transactions with the purpose of avoiding the company's obligations to pay employee entitlements, they may be personally liable for any loss suffered by the employee.¹⁴ This would include company directors as well as other companies involved in the transaction. After a series of contentious corporate collapses in the late 1990s which left employees with little recourse to recover their entitlements, in 2001 the federal government introduced a scheme (partly underwritten by the government) for payment of part of the amounts owed to employees.¹⁵ These changes have been of only limited effectiveness in dealing with the problem; and attempts to pursue persons involved in schemes through other legal means have also been largely ineffective, resulting in proposals for more radical solutions such as insurance or trust funds, and the pooling of group assets to meet liabilities.¹⁶

The most notorious instance of corporate group restructuring with labour law implications was the Waterfront Case in 1998. The controllers of the Patrick group (a major stevedoring business and component of the Lang group with widespread transport and infrastructure interests) were well-known as wanting to eliminate many of the labour practices which were associated with the wharf labourers' union, the Maritime Workers Union of Australia (MUA). These conditions were regarded by both Patrick and the federal government as restrictive and entrenching low productivity. In the course of 1997 the Patrick group was restructured in a complex series of transactions, which resulted in the assets of the business being moved from four employer companies (which continued to perform the loading and unloading ships) to separate companies within the group.¹⁷

The 1,400 employees and the MUA were unaware of these changes. As a consequence, the employer companies became empty shells, with their only significant assets being their contracts (labour supply agreements) to provide stevedoring services to the group's "operations" company. These contracts

¹⁴ *Corporations Act 2001* (Cth) s. 596AB.

¹⁵ The General Employee Entitlements and Redundancy Scheme (GEERS) is discretionary and does not obligate the government to provide funds. It replaced a specific scheme which was introduced in response to the collapse of Ansett Airlines, which made redundant 16,000 employees who were together owed \$A686 million.

¹⁶ Gronow, *op cit.*

¹⁷ Graeme Orr, "Conspiracy on the Waterfront", (1998) 11 *Australian Journal of Labour Law* 159-185; David Noakes, "Dogs on the Wharves: Corporate Groups and the Waterfront Dispute", (1999) 11 *Australian Journal of Corporate Law*, p. 5.

were terminated by the operations company using the pretext of a strike by MUA members, making the employer companies insolvent and in the hands of an administrator — who had no option but to dismiss the employees. The stevedoring contracts were placed with other companies within the Lang group, which were apparently set up with the intention of taking over this business using non-union labour.

It was fortuitous that the MUA was able to obtain a court injunction preventing the Patrick group from disposing of assets, and ordering the reinstatement of the employees on an interim basis. The union claimed that the companies engaged in the restructuring and the termination of the labour supply agreements unlawfully, both by tortious conspiracy to interfere with the employment contracts of the workers, and by discriminating against unionists in violation of the freedom of association provisions of the *Workplace Relations Act*. The union also claimed that the federal government was a party to this conduct. The interim case was appealed, finally reaching the country's ultimate court, the High Court of Australia, which upheld the injunctions. However there was a qualification that the injunctions could not interfere with the responsibilities of the administrator (who had taken over the employer companies once they became insolvent).¹⁸ A final judicial decision on these claims was not made because Patrick and the MUA reached an agreement on the reinstatement of half of the workers on condition that further legal action be dropped. The other workers were given voluntary redundancy payments.

If it had gone ahead unchallenged, the use of multiple corporate entities combined with "strategic insolvency" (placing the subsidiary employer companies in voluntary administration) would have effectively allowed the Patrick group to retrench its workforce without liability for unfair dismissal, accrued entitlements and redundancy payments. (It was originally proposed that workers would be paid a proportion of their entitlements out of a fund provided by the federal government). The waterfront scenario has been repeated in several similar instances, with employers apparently copying the Patrick strategy.¹⁹

The case illustrates what corporate lawyers describe as the capital boundary problem: that entrepreneurs are able, through the corporate group structure, to move capital between corporate entities at will without regard to the interests of non-shareholders, particularly employees. The lack of transparency of such transactions is aided by consolidated group

¹⁸ *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* [1998] HCA 30; (1998) 195 CLR 1.

¹⁹ Noakes, *op cit*, pp. 18-20.

accounting, which does not require details to be revealed of the financial relationships between individual companies within the group.

In recent years Australian trade unions have become more involved in pursuing workers' interests following business collapses, in political campaigns, through participation in insolvency proceedings, and by pursuing former directors.²⁰

3 - TRANSFER OF UNDERTAKING AND OTHER MODIFICATIONS IN THE LEGAL SITUATION OF AN UNDERTAKING OR PARTS THEREOF

(a) Definition of "transfer of undertaking or parts thereof"; and applicability to the externalization of certain operations of an undertaking

For constitutional reasons, awards made under the national or federal system of industrial relations regulation are binding only on named parties; although it has been common for awards to name a large number of employers, it follows that a transfer of undertaking did not necessarily bind the transferee unless they were specifically bound by the award as a party. (By contrast, awards made under the State systems could bind all parties in the industry as a "common rule" award.) The legislation governing the federal system has, since 1914, made awards binding on "any successor, assignee or transmittee (whether immediate or not) to or of the business or part of the business of an employer who was a party to the industrial dispute, including a corporation that has acquired or taken over the business or part of the business of the employer".²¹ Similar provisions apply to collective agreements registered under the federal law, as well as to statutory individual agreements.²²

The statutory provisions were first established at a time prior to the prominence now given to registered collective agreements and statutory individual agreements under federal law. Awards, made by the federal industrial tribunal through a process of conciliation and arbitration as an instrument of settlement of industrial disputes, were the primary form of industrial regulation. In that context, the transmission of business provisions in federal law were created to make the power to settle industrial

²⁰ Louise Willans Floyd, "Insolvency, Trade Unions – and the Third Way?", (2005) 13 *Insolvency Law Journal* 153-162.

²¹ *Workplace Relations Act 1996* (Cth), s. 149(1)(d).

²² *Workplace Relations Act 1996* (Cth), ss. 170MB(1)(c); 170VS(1).

disputes effective by extending the instrument of settlement to "the ever changing body of persons within the area of such disturbances".²³

These provisions have created practical difficulties of interpretation. The concepts of "business" and "part of the business" are not defined in the statute. However, few problems arise with the application of the provisions in the situation of the outright sale of a business. If company A disposes of the whole of its operations, assets, goodwill and other aspects of its enterprise, and the whole of that enterprise is embraced by company B, then employees who follow that enterprise to company B are unlikely to encounter difficulty in establishing that company B is a "successor, assignee or transmittee" of the business of company A. The federal statute operates to impose upon company B the obligations of a party to the industrial instruments which previously bound company A in respect of its employees in the business.

For most of the 20th century, few disputes over the application of these provisions gave rise to litigation requiring courts to interpret their meaning. From the late 1990s there have been several significant cases in the courts where the application of those provisions has had to be considered closely. This has come about largely because of the complexity and increasing prevalence of arrangements such as contracting out and outsourcing, and the difficulties in application of concepts such as "part of a business" to such arrangements.²⁴ The High Court of Australia recently posed the fundamental question in this way:

Plainly, the purpose of the section and its predecessor succession provisions is, and always has been, to extend the operation of awards beyond those who were parties to the dispute that the award determined. But identifying that purpose does not answer the question that arises in this matter — how far does the extension go?²⁵

Parliament has left to the Courts the task of determining what circumstances amount to a succession, assignation or transmission in the relevant sense, and what counts as "the business" or "part" of the business sufficient to enliven the operation of these statutory provisions.

In its decision in the *PP Consultants* case, the High Court recently expressed some reluctance to formulate a general test to ascertain whether a commercial enterprise had succeeded to the business of another commercial enterprise. The Court stated that was because the question of succession is a mixed question of fact and law and because the concept of "business" is "chameleon like". In its decision, the High Court held that when considering

²³ *George Hudson v Australian Timber Workers' Union* (1933) 32 CLR 413 at 455 per Starke J.

²⁴ See Trent Sebbens, "Wake, O wake - Transmission of Business Provisions in Outsourcing and Privatisation", (2003) 16 *Australian Journal of Labour Law* 133-171.

²⁵ *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* [2005] HCA 9 at [21] per Gleeson CJ, Hayne, Callinan and Heydon JJ.

whether a part of a business has been transmitted in the relevant sense, it is necessary to identify or characterise the business or the relevant part of the business of the first employer, identify the character of the transferred business activities in the hands of the new employer and then compare the two. “If in substance, they bear the same character then it will usually be the case that the new employer has succeeded to the business or part of the business of the previous employer.”²⁶

In the most recent “transmission of business” case before the High Court, *Gribbles Radiology*, the Court identified two key questions which must be considered in relation to the transmission of business provisions of the federal law. First, there must be an identification of exactly what is meant, in the context of the particular case, by “the business or part of the business of the former employer”. Second, there must be an identification of what part of the business the former employer once had which is now enjoyed by the person allegedly bound by the relevant industrial instrument.²⁷

The consequence of this approach is that when a part of a business is outsourced, the new operator will not be bound the awards or agreements covering the former operator if the business of the new operator, considered as a whole, is substantially different from that of the former operator. In *PP Consultants*, a pharmacy shop took over the business of the local bank branch which had recently been closed. Two former employees of the bank were employed by the pharmacy to do the bank agency work (which they had previously done for the bank). Although the workers continued to do the same work, the High Court held that they were not entitled to the conditions under the bank’s certified agreement as the business of the pharmacy was not substantially of the same character as that of the bank. While the pharmacy had taken over banking functions for the bank, it was not engaged in the business of banking: it was simply acting as an agent on behalf of the bank rather than operating as a bank itself.

In the dispute which led to the *Gribbles Radiology* litigation, a number of radiographers were employed to work at a particular radiography clinic over a period of time. During that time their duties and arrangement of their work did not materially change, but they were employed by a succession of different employers. What was distinctive about these circumstances was that the operator of the premises was not the employer at any stage, but it was a licensor to each of the employers in turn. When employer A held a licence to operate radiography services at the premises, the employer engaged the radiographers in question, and it was bound by various

²⁶ *PP Consultants Pty Ltd v Finance Sector Union of Australia* (2000) 201 CLR 648 at 655.

²⁷ *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* (2005) 214 ALR 24.

industrial instruments. When that license was terminated, the operator of the premises entered into a new licence arrangement with Gribbles, and Gribbles then engaged the radiographers as its employees. The question which arose in the case was whether Gribbles was then bound by the industrial instruments which employer A had been a party to. The Court held that the mere entry into a license arrangement with a third party, an arrangement relevantly identical to that of employer A's earlier arrangement with the third party, is not sufficient to constitute a "business or part thereof" for the purposes of the transmission provisions of the Act. The Court held that, to satisfy the requirements of the provisions, it will usually be necessary to identify a particular activity that is pursued, and some tangible or intangible assets that are used in that pursuit. This approach is significantly narrower than an alternative approach which may focus particularly on the identity of the employees or continuity of their work function alone.

In legislative amendments made as a part of the *WorkChoices Bill* in November 2005, the transmission of business provision as they have previously been understood have been effectively abolished. They remain in only a very limited form and as a kind of a kind of transition arrangement. The test for establishing whether a transmission of business event has occurred remains substantially the same under the new legislative provisions. A business or part of a business will be treated as a "business being transferred" for the purposes of the new legislation in circumstances where the new employer is the "successor, transmittee or assignee" of the business of the old employer. However, the continuing operation of the old transmitted industrial instrument obligations is significantly truncated. First, unlike the old provisions, the transmitted obligations will simply cease to operate at all after an initial period of 12 months following the transmission of the business. Further, the transmitted obligations will only apply in respect of employees in the new business who were employed in the business as at the date of transmission. Accordingly, any new employees engaged by the transmitted business within that initial 12 month period will not enjoy the benefits of the transmitted obligations. This is in contrast to the old arrangements where the business was continuing to be bound by the obligations in respect of all of its employees, regardless of when they were employed.

Further, there is provision for the new employer to apply to the federal tribunal for an order that would have the effect of releasing the new employer from the obligations transmitted at the times of the transmission of the business. The discretion of the tribunal to grant such an application is unfettered.

The effect of all of these limitations is that a transmission of business event will relieve employers of obligations to comply with industrial instruments (both awards and agreements) following a short transitional period. This has particular significance with respect to awards which (unlike collective agreements) generally operate indefinitely into the future, as a settlement or part settlement of an industrial dispute.

(b) Rules for the protection of workers' rights in situations involving the transfer of an undertaking or parts thereof

The effect of the "transmission of business" provisions referred to is that employees who continue to work in the business (by taking up work with the new employer), enjoy the same pay and conditions provided by the award or agreement. There is no requirement that all employees in the business must continue to be employed by the new operator of the business (although this is common), and employees who are not taken up may be entitled to redundancy pay. Given the complexity of the legislation, however, it can be difficult to identify in advance whether an award or agreement will be binding on the new operator of only part of a transmitted business.

Where a function is outsourced, but there is no transfer of the business or part of the business the federal legislation provides some protection by prohibiting conduct which adversely affects the employees in the first business for the reason or for reasons including the fact that those employees are protected by relevant industrial instruments. In *AMASCU v Greater Dandenong City Council*,²⁸ a union representing workers employed to provide home and community care services brought an application alleging that the municipal Council had breached the freedom of association provisions of the federal law during an outsourcing operation. The Council had sought tenders to operate its home and community care services. The Council's own employees submitted their own tender to perform the work, but the tender was granted to an external service provider which had submitted a lower rate for the performance of the work. The Council's employees had based their tender on their pre-existing award entitlements. The external service provider was not bound by those same instruments and was able to construct a proposal based on significantly lower rates of pay. The Court found that the Council was in breach of the federal law's prohibition on injuring its employees in their employment for the prohibited reasons that those employees were entitled to the benefits of an industrial instrument.²⁹

²⁸ (2001) 49 AILR 4-437.

²⁹ *Workplace Relations Act 1996* (Cth), s. 298K.

(c) Consultation with employee representatives at the time of a transfer of an undertaking or parts thereof

There is no national statutory requirement for consultation with or notice to employees representatives at the time of a transfer of an undertaking or parts thereof. There are provisions under the federal law enabling the federal industrial tribunal to make whatever orders it thinks appropriate in the public interest to remedy any failure by an employer to inform and consult relevant trade unions about the termination of employment of 15 or more employees for reasons of an economic, technological structure or similar nature.³⁰ Although that provision does not specifically deal with outsourcing and/or transmission of business, it is the one statutory source of an obligation to discuss and consult with trade unions in a transmission of business circumstance.

In the absence of direct statutory requirement that employers consult with unions and their members in circumstances where outsourcing all transmission of business is contemplated, many unions have sought to regulate these matters by inclusion of particular provisions in collective industrial agreements through collective bargaining. For example, such provision may impose a duty on the employer to consult with the union parties to the agreement in the event that the employer party is considering, and before it has decided upon, proposals for the implementation for significant change. Such change may be defined broadly to include any proposal to transmit the business or part thereof or to outsource any particular function.

(d) - (e) Regulation of relations when the transferee continues to operate in the transferor's premises

This is not a topic which is regulated at all, in any direct sense, by federal statute. It is not a topic that is commonly regulated by the express terms of any award or certified agreement. No particular significance is given to the location at which the work is performed by the transferred employees subsequent to the transfer.

³⁰ *Workplace Relations Act 1996* (Cth), s. 170GA.

4 - THE LEGAL SITUATION OF EMPLOYEES OF CONTRACTORS AND OTHER AFFILIATED ENTERPRISES VIS-À-VIS THE PRINCIPAL/PARENT ENTERPRISE

(a) liability of principal companies for contractors

A principal company is not generally liable for the acts of contractors. There are certain exceptions which have been created by legislation in the fields of occupational health and safety, and the payment of wages.

i. liability for health and safety

Occupational health and safety (OHS) legislation of the Australian States imposes criminal liability (punishable by large fines), while workers compensation legislation and the common law provide civil liability (with monetary compensation for loss). The workers compensation legislation applies only to employees and allows them to recover compensation from their employer's insurer for amounts set by the legislation. OHS legislation establishes a high-level duty of care which is absolute and not dependent on proof of negligence; in some cases the duty is qualified as imposing a duty to eliminate risks as far as is reasonably practicable — although this is still considered to impose very significant responsibilities to avoid risks.³¹ The duty imposed is personal, which means that if a principal is liable for an injury to a contractor's employee, this is not because they are vicariously liable for the contractor's own omission but because the law also imposes a separate duty on the principal. Thus a number of persons may be liable for breaches of their own separate duties in relation to a single event.

The OHS statutes create liability for principal corporations in relation to employees of contractors in several ways. The main duty under the legislation is the duty of the employer. The employer's duty is two-fold and extends to both employees and other persons. In one case in the State of Victoria it was recognised that the OHS legislation could accommodate modes of working such as sub-contracting, and it was held that the employer's duty to employees encompasses the employees of sub-contractors over whom the principal retains some control.³² Usually the employer's duty is limited to the employer's place of work, although in some States the reach

³¹ *Occupational Health and Safety Act 2004* (Vic) s. 20. The NSW and Queensland statutes are not qualified in this way.

³² *R v ACR Roofing Pty Ltd* [2004] VSCA 215 (Victorian Supreme Court, Court of Appeal).

is very wide, covering risks wherever they arise.³³ A similar duty is imposed on self-employed persons and contractors in relation to others.

In some states there is a separate duty of persons conducting a business, which is expressly owed to all persons who do work for the business whether or not they are an employee or contractor of the business.³⁴

Generally the legislation also imposes a duty of care on occupiers or controllers of workplaces for risks arising from their operation. Under the most stringent statutory provision (in New South Wales), the controller of any premises, plant or substance owes a duty to all persons who use it for work. The duty extends beyond contractors and their employees to include other entrants under contract or license, as well as members of the public.³⁵ As this duty extends to persons who have even only limited control over the premises, it has been held to apply to franchisors in relation to premises and plant operated by the franchisee: because the franchisor was able to determine operational aspects of the franchisee's business under the franchise contract. The franchisor was made criminally liable when the employee of a franchise was killed by an electrical fault which arose from the operation of equipment according to standard operational procedures determined by the franchisor.³⁶

ii. liability for wages and conditions of employment

Generally a principal is not liable for the contractor's failure to provide appropriate wages or conditions. In exceptional situations the principal might be regarded as the agent of the contractor. There is also legislation which is designed to cover specific situations involving sub-contracting and similar triangular relationships.

In New South Wales (the largest State) there is a statutory provision which has been designed to apply particularly to sub-contracting in the building industry. It makes a principal contractor liable for wage payments to the sub-contractor's employees during the period of work for the principal. The duty is discharged when the sub-contractor gives the principal contractor a statement indicating that all outstanding wage payments have been made. It is a criminal offence for a sub-contractor to make a false statement. The principal may deduct wage payments which have been made to the sub-

³³ *Occupational Health and Safety Act 2004* (Vic) ss. 21(3), 23; *Workplace Health and Safety Act 1995* (Qld), s.28(3) states that "An employer has an obligation to ensure other persons are not exposed to risks to their health and safety arising out of the conduct of the employer's business or undertaking."

³⁴ *Workplace Health and Safety Act 1995* (Qld), s.29A..

³⁵ *Occupational Health and Safety Act 2000* (NSW) s. 10.

³⁶ *WorkCover Authority of NSW v McDonald's Australia Ltd* (1999) 95 IR 383.

contractor's employees from contract payments owed to the sub-contractor.³⁷ Although this provision attempts to impose some personal responsibility on both principal and sub-contractor, it is of limited usefulness in situations of sudden bankruptcy, and does not displace normal bankruptcy or insolvency law. The provision does not apply when the sub-contractor becomes bankrupt or goes into receivership and the principal's contract payments are payable to the receiver or liquidator.

There is a simpler provision under the legislation of Queensland: the employee of a sub-contractor can recover unpaid wages from the principal contractor as if directly employed. The principal contractor may then recover the amount paid from the sub-contractor and has priority for satisfaction of this claim in bankruptcy proceedings (although it is unclear whether this priority is effective to displace insolvency law).³⁸

In New South Wales, Queensland and South Australia there are also specific statutory provisions covering payment of outworkers in the clothing trades, where it is often uncertain who is the actual employer. In such cases the outworker may make a claim for unpaid remuneration against a person who is their apparent employer. The apparent employer is liable to pay the claim but may also refer the claim to a person who is the actual employer. This allows a court to determine who is liable as the employer, and in the meantime the outworker is at least paid by the apparent employer.³⁹

(b) Is it mandatory for contractor to inform employees of identity of principal?

Australian law does not require a contracting employer to inform their employees about the identity of the principal for whom they are working indirectly.

³⁷ *Industrial Relations Act 1996* (NSW), s. 127.

³⁸ *Industrial Relations Act 1999* (Qld), ss. 388, 389). Section 388 states: "If an employer has let the performance of work to a subcontractor, an employee employed by the subcontractor in that work has the same rights and remedies for a claim for wages against the employer under this division as an employee of the employer has against a prime contractor."

³⁹ *Industrial Relations Act 1996* (NSW), ss. 127B-127D; *Industrial Relations Act 1999* (Qld), ss. 400B-400F; *Fair Work Act 1994* (SA), ss.99D-99H.

(c) Judicial decisions on the existence of a direct employment relationship between a principal company and employees of contractors or subsidiary companies

Because of the contractual basis of the employment relationship at common law in Australia, it is not possible for a direct employment relationship to arise between the principal company and the employees of a contractor or subsidiary unless there is a contract between the principal and the employees. Nonetheless, an employment relationship may exist between a principal or holding company and a (supposed) employee of its subsidiary or contractor in several situations:

- (a) an ineffective transfer of the employee from principal to contractor or subsidiary – the principal remains the “true employer” of the worker;
- (b) joint employment: both principal and contractor are employers.

(a) Ineffective transfer; Principal is the “true employer”

When faced with a contest as to which of two parties is liable as an employer, the courts attempt to ascertain who is the “true employer.” The issue has traditionally arisen in the case of the “hired worker”, as when large equipment is hired out along with a skilled operator. More recently the issue has arisen with “triangular relationships”, particularly in relation to agency workers on a long-term placement with a single client. The question of which person is the employer has traditionally been answered by determining which one is ultimately entitled to control the worker’s performance of the job in a detailed manner.⁴⁰ Usually it is the original (“general”) employer - the agency / contractor rather than the principal / client - who is considered to be the employer, although in rare cases it has been held that sufficient control was exercised by the client to make them the employer.⁴¹

The “true employer” approach, as it may be called, sometimes looks beyond the corporate veil. It reflects the modern test for an employment relationship, which relies on all relevant factors, particularly control and the “economic reality” of the relationship.⁴² In the case of related companies within a corporate group, the true employer is not necessarily the company which pays the worker; rather it is the company (or person) which stands in the position of employer and exercises authority as such. All the circumstances

⁴⁰ *Mersey Docks and Harbour Board v Coggins and Griffith Ltd* [1947] AC 1;

⁴¹ eg *Drake Personnel Ltd v Commissioner for State Revenue (Vic)* (1998) 40 ATR 304 (taxation).

⁴² *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.

of the relationship are relevant, in particular the beliefs of the employees as to the identity of their employer.⁴³ Courts and tribunals may find that the holding company is the true or real employer of the worker, on the basis that it was the holding company rather than its subsidiary which actually paid and controlled the worker.

In the case of outsourcing (where the employee was originally directly employed by the principal, and the principal supposedly transferred the employee to a subsidiary or contractor), the true employer test may mean that a purported transfer of the employee from the controlling corporation to its subsidiary was ineffective and the true nature of the employment relationship remained unchanged.⁴⁴ It is a fundamental principle of common law that an employee cannot be transferred without their consent; in order to transfer the employment relationship, a new contract must be created between the employee and the new employer. If this does not occur, the employee remains employed by the principal. In some cases, the courts have held that a purported transfer of employment was ineffective as no new contract was created.

The absence of a new contractual relationship may be indicated by the fact that there was no real change in the relationship: the principal might retain complete and effective control over the employee, and the contracting or subsidiary company might be regarded as merely an agent of the principal, simply acting as a conduit for the payment of wages. This is what happened in a recent case, *Damevski v Giudice*,⁴⁵ where an employer purported to “contract out” its cleaning operations by making its employee cleaners into independent contractors engaged by a new intermediary company. The court held that there was no real change in the employment relationship. A significant factor was that the employee was given no choice: he was simply told that in future he would be working for a new entity, but no other aspects of his job changed. The court held that a reasonable bystander would conclude that the original contractual relationship remained and that the intermediary corporation was really only engaged to provide payment services.

In *McCluskey v Karagiozis*⁴⁶ the controllers of the Coogi group of companies (which designed, manufactured and retailed clothing), undertook a restructure of the group, transferring the 240 employees to several different

⁴³ *Australian Insurance Employees Union v W P Insurance Services Pty Ltd* (1982) 42 IR 598; *Pitcher v Langford* (1991) 37 IR 338; *Textile Footwear & Clothing Union of Australia v Bellechic Pty Ltd* [1998] 1465 FCA.

⁴⁴ *Damevski v Giudice* [2003] FCAFC 252; (2003) 202 ALR 494.

⁴⁵ [2003] FCAFC 252.

⁴⁶ [2002] FCA 1137.

operational companies within the group. The workers were not informed of this. The companies then went into liquidation and it emerged that the new employing companies did not have sufficient assets to cover accrued leave and other entitlements. The judge held that the employees were creditors of the pre-restructure companies which had employed them, as the purported transfer was ineffective because it had occurred without their assent. Following English authority that employees have the right to choose their employer and cannot be transferred without their knowledge and consent,⁴⁷ Merkel J said that:

the controllers appear to have pursued their own interests in disregard of the entitlements and interests of their long serving and loyal employees by transferring the employment of the employees, and the responsibility for their employee entitlements, to shell companies thereby treating those employees as if they were serfs, rather than free citizens entitled to choose their own employer.⁴⁸

An alternative approach in this vein may be reached through the unfair contracts jurisdiction of some State industrial courts. The special feature of this jurisdiction is that the industrial court or tribunal may, taking into account all the circumstances of the case and acting according to “equity and good conscience”, vary the employment contract itself to reflect the true situation and defeat a sham arrangement. Special remedies may then be available to allow the employee to pursue all persons involved in the arrangement. In one case the transfer of employees from one corporation to a “spin-off” subsidiary corporation (which had no assets) was made ineffective by turning the subsidiary into the agent of the principal company.⁴⁹ However the *WorkChoices Bill* would remove all recourse under unfair contracts legislation for employees.

(b) Joint employment

The doctrine of joint employment has been derived from US law. (In that country, the doctrine originated when courts began treating corporations engaged in a joint venture as joint employers of the workers hired to carry out the venture; but subsequently courts expanded the doctrine to cover a range of situations where control of the worker is shared, such as agency situations). The doctrine of joint employment has been discussed by judges of Australian tribunals; however the doctrine has been directly applied in only a few decisions and has not received authoritative acceptance.⁵⁰ It has

⁴⁷ *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014.

⁴⁸ [2002] FCA 1137 at [16].

⁴⁹ *AOS Group Australia Pty Ltd (in liquidation) v Arrogante* [2004] NSWIRComm 80; see Raper, *op cit*, p. 6.

⁵⁰ Rohen Cullen, "A Servant and Two Masters? - The Doctrine of Joint Employment in Australia", (2003) 16 *Australian Journal of Labour Law* 358; Elizabeth Raper, "To what extent has the use of the concept of joint-employment assisted other recent law

been raised in response to attempts by corporations to avoid obligations as employers by the use of outsourcing, or corporate devices such as related or subsidiary “shell” companies.

In several decisions, industrial tribunals at state and federal level have indicated a willingness to apply such a doctrine, in effect to pierce the corporate veil. The effect would be to hold a controlling company jointly liable for the employment liabilities of its subsidiary. The doctrine seems to be most applicable to labour hire situations involving related corporations, for example where workers are outsourced to a subsidiary. In such a situation, essentially the same result would be reached by finding that the employer-subsidiary company was acting as agent for its parent corporation. Where the corporations are unrelated, an Australian court or tribunal would be more likely to find one or the other corporation to be the sole and true employer.⁵¹

The concept has also been thought to be relevant where a worker was provided by a nominee service company to a business operation, and the service company was owned and controlled by the proprietor of the business. Both the service company and the business operation were considered to be the joint employers of the worker. However the doctrine of joint employment was considered unnecessary for the decision, as the statutory successorship provisions applied (see section 3 above).⁵²

The concept has also been thought applicable in more “modern” employment situations where there is no single employer. In one decision, a supposed transfer of the manager of a group of businesses to a shell company was held to be ineffective: although there was a change in the company which paid his salary, his true employer remained the same. As an alternative, at least one judge of the tribunal was prepared to hold that the manager was employed by all the companies as a group. The presiding judge thought that the case warranted the piercing of the corporate veil by use of the joint employment doctrine, as the arrangement was a mere facade or sham; however he found that this was unnecessary as the situation was adequately resolved by the “true employer” test.⁵³

reforms in curtailing the use of strategic insolvency as a device to avoid the payment of employee entitlements?", paper presented to 2nd Australian Labour Law Association Conference, Sydney, September 2004.

⁵¹ *Costello v Allstaff Industrial Personnel (SA) Pty Ltd* [2004] SAIRComm 13; (2005) AILR 350-031

⁵² *Morgan v Kitchichide Nominees Pty Ltd* (2002) 117 IR 152; *Workplace Relations Act 1996*, s.149(d).

⁵³ *Matthews v Cool or Cosy Pty Ltd; Ceil Comfort Home Insulation Pty Ltd*, 3003 WAIRC 10388 (Full Bench, WA Industrial Relations Commission), per Sharkey P at [312], [321-323].

5 - LEASE OF WORKERS AND OTHER FORMS OF SUPPLY OF WORKERS

(a) Can two or more legally distinct enterprises lease workers between them?

Australian law contains no general prohibition which restricts an employer from supplying the services of its employees to a third party. As a general proposition, it is a matter wholly for the contracting parties — that is, for the employer of the labour, and the purchaser of the services of that labour — to determine between themselves the authority over the performance of work by the workers, the assignment of tasks, wages and other conditions of employment. In general, the purchaser of the services (the “host” employer) would determine the duties and tasks to be performed, and the enterprise which formally employs and supplies those workers would set the price for the services, and determine the rate at which the workers would be paid.⁵⁴

In fact the supply of workers on a lease-type contract basis, known generally as labour hire, is a rapidly growing form of work arrangement in Australia. Labour hire employees currently comprise approximately 3 percent of the Australian employee workforce.⁵⁵ The use of labour hire continues to be mainly for the provision of specialised or additional workers, usually on a short-term basis; however many large businesses systematically use workers supplied by an agency as a means of outsourcing some of their functions. Such arrangements also have the advantage of externalising risks associated with the use of labour (notably compensation for injuries). The growth of labour hire has prompted several recent public inquiries, and is generally opposed by the trade union movement. The federal government has announced its intention to introduce legislation which will protect the use of labour hire (both independent contractors and agency-employed employees).

⁵⁴ Some research indicates that 70% of labour hire workers in Australia are engaged as direct employees of the labour hire agency. Linda Brennan, Michael Valos and Kevin Hindle, *On-hired Workers in Australia: Motivations and Outcomes*, Occasional Research Report, Melbourne, School of Applied Communication, RMIT University, 2003, pp 50-51.

⁵⁵ Australia, Productivity Commission, *The Growth of Labour Hire Employment in Australia*, Staff Working Paper (February 2005); Richard Hall, *Labour Hire in Australia: Motivation, Dynamics and Prospects*, Working Paper 76, Australian Centre for Industrial Relations Research and Training, University of Sydney (April 2002); Australian Parliament, House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, *Making it Work: Inquiry into Independent Contracting and Labour Hire Arrangements*, Canberra (August 2005) <http://www.aph.gov.au/house/committee/ewrwp/independentcontracting/report.htm>.

The question of identifying the laws which protect the rights of leased workers can be a complicated one. The one most clearly articulated and unambiguous legal protection which will apply to workers engaged through labour hire arrangements is the statutory protection from being exposed to safety hazards in the workplace (see above, question 4(a)). Each jurisdiction in Australia has laws which impose general duties on employers, employees, suppliers of plant and equipment and, crucially, persons who have control of workplaces. These general duties require that measures be taken by those persons to ensure that, so far as practicable, the workplace does not expose workers and others to safety hazards. Because these duties are not restricted persons engaged in an employment relationship, and come into operation merely by a worker's presence in a particular workplace, they are generally not compromised by questions as to the identity of the worker's employer, or whether the worker is an employee or an independent contractor.

With the exception of workplace safety laws, most other labour law protections — whether at common law, by statute or by operation of industrial instruments — depend upon the existence of a particular kind of legal relationship between a worker and an enterprise engaging them. Therefore, the task of determining such a worker's rights is twofold: first, the legal relationship must be ascertained, and then the legal rights associated with that relationship must be identified.

There are no laws of general application which are addressed specifically at workers who are hired out by an agency. If the leased employee is a direct employee of the labour hire agency (the most common situation), then that employee will be protected by (a) any award which binds that agency in respect of the employee's employment, (b) any collective industrial instrument which binds that agency in respect of that employee and (c) any contract of employment between the agency and the employee.

When labour hire workers are engaged as employees of the agencies, they are overwhelmingly engaged on a "casual" basis, rather than on a permanent basis.⁵⁶ Casual employees are generally entitled to payment at a specified casual rate for the hours of work performed (with a casual loading, usually 20 to 25% above the normal rate, to compensate for absence of leave entitlements). They are not entitled to a specific amount of work, and generally have no access to remedies for unfair dismissal.

⁵⁶ Analysis performed on behalf of the Economic Development Committee of the Parliament of Victoria suggests that around 80% of labour hire employees are casual employees: *Enquiry into Labour Hire Employment in Victoria, Final Report* (June 2005) p. 17.

The other most significant form of engagement is one where there is no employment relationship between the worker and either the “host” employer or the agency. Such workers are regarded as self-employed, or independent contractors; the terms and conditions of their engagement are found exclusively within a contract, and agreements and awards do not apply to them. Arrangements of this kind were established and promoted in the late 1980s, before being tested in court in a series of cases in the early 1990s. In the *Odco* Case (also known as the *Troubleshooters* Case), such arrangements were examined and it was held found that no employment relationships existed between the workers and either the agency or the host enterprise.⁵⁷ Following that judicial endorsement, the agency further promoted its particular form of contractual arrangements, licensing them to other firms as “the Odco system”. Such arrangements have since spread, although they still embrace only a small minority of labour hire workers.

(b) Regulation of the supply of workers through temporary work agencies

There are essentially two primary forms of regulation of the supply of work through temporary work agencies: first, there is some state legislation requiring the licensing of such agencies; and second, there has been a pattern of localized regulation of the use of such agencies’ services imposed by terms of industrial instruments created through collective bargaining.

In Australian jurisdictions, employment agents are required to be licensed.⁵⁸ These legislative schemes deal with such matters such as regulating the fees that may be charged by employment agents, limiting the circumstances in which fees might be made payable by employees for the services of the employment agents and imposed obligations on the employment agent to maintain records of certain kinds of transactions. These registration schemes do not generally purport to otherwise regulate the contractual arrangements between the “host” employers and the agency, or between the workers and the agency.

Workers in the “host” employers’ businesses and their unions, have themselves attempted to regulate the use of labour hire arrangements by seeking to negotiate terms in their own collective industrial which impose limits on the circumstances under which, and the terms and conditions which may apply when, labour hire is engaged. For example, many of the

⁵⁷ *BWIU v Odco Pty Ltd* (1991) 99 ALR 735.

⁵⁸ See for example *Employment Agents Act 1976* (Western Australia); *Employment Agents Registration Act 1993* (South Australia); *Private Employment Agencies Act 1983* (Queensland); *Agents Act 1968* (Australian Capital Territory).

permanent employees and their unions would seek to secure agreement which provide that labour hire employees may only be introduced into the business for specific purposes or for specific periods of time, or following performance of an obligation to consult with the union and permanent employees in a particular manner, after providing particular categories of information or after having first attempted to secure the additional required labour in specific other ways (such as the provision of overtime or the rehiring of former employees). Another particularly important aspect of provisions such as these has been the attempt to secure agreement that provide that the workers engaged through labour hire agencies and employed within the “host” employer should be paid such rates and enjoy such conditions that are no less favourable than those enjoyed by the permanent employees within the “host” business. Terms such as these are plainly designed in an attempt to minimise any incentive that might otherwise exist for the “host” employer to undercut the terms and conditions provided to its permanent employees, and thereby reduce the job security of those employees.

Although these kinds of terms are not uncommon, they have been controversial in recent years. The controversial question has been whether terms of this kind may lawfully be included in collective industrial agreements certified under federal law. Industrial parties are not free to include in registered industrial agreement any terms and conditions that may agree to between themselves. Statute provides that the agreement must be “about matters pertaining to” the relationship between the employer and the employees in the business whose employment is subject to the agreement⁵⁹. The High Court of Australia has recently held that this statutory requirement means that every single term of an agreement must pertain to the relevant relationship before such an agreement may be certified under the federal law.⁶⁰ This decision has not, however, clarified the situation greatly, and currently is considerable uncertainty whether certified agreements can validly regulate the use of independent contractors, use of labour hire agencies, or the pay and conditions of employees of labour hire agencies.

The Federal industrial tribunal has had to grapple with a range of differently expressed clauses presented to it by industrial parties which seek to regulate or restrict the use of labour hire in different ways. Those decisions reveal a tension between, on the one hand, a recognition that employees within a “host” business have a legitimate interest in protecting their job security and that this is a question that pertains to their relationship with their employer;

⁵⁹ Prior to the passage of the Work Choices Bill in November 2005, that requirement was set out in the *Workplace Relations Act 1996*, s.170LI(1).

⁶⁰ *Electrolux Home Products Pty Ltd. v Australian Workers Union* [2004] HCA 40

on the other hand, the tribunal has been wary of terms that go beyond protecting this legitimate interest and appear to pertain not the relationship between the permanent employees and the “host” employer, but rather pertain to the relationship between the host employer and the labour hire agency.

There have been several recent interpretations over whether such matters are “matters pertaining to” the relationship between the employer and employee, as required by the legislation. In one decision an agreement which contained detailed requirements for the use of agency workers was declared certifiable. This agreement obliged the employer to consult over the use of such workers and set a maximum proportion of the total workforce who could be sourced from labour hire agencies rather than employed directly by the employer. The clause was held to be valid because it directly affected the job security of the employees covered by it.⁶¹ In another case, the tribunal upheld a clause which required the employer company to ensure that any labour hire agencies which it used would pay their employees at the same level as the company’s own employees. This had the indirect effect of extending pay increases under the collective agreement to the labour hire agencies.⁶² However an agreement which restricts the use of independent contractors is not valid: the distinction is whether there is an absolute restriction on the use of “external” labour or simply a condition on the terms under which contractors or workers are engaged.⁶³

(c) Judicial decisions holding that there was a direct employment relationship between a user enterprise and employees supplied to it

This question really raises the same issues under Australian labour law as those dealt with in question 4(c).

In most cases it will be clear, as determined by the contractual arrangements between the worker and the agency, and between the agency and the “host” employer, that there is no direct employment relationship between the “host” employer and the worker. In unclear cases, however, it may be possible for a worker to show that he or she has a direct employment relationship with the “host” employer. One example of such a circumstance arising is provided by the case of *Damevski v Guidice* (discussed above, question 4(c)). There, a worker was asked to sign documentation with the intended effect of terminating the employment relationship with the previous

⁶¹ *Re Schefenacker*, AIRC, PR956575, (18/3/05); (2005) 56 AILR 100-341

⁶² *Transport Workers’ Union of Australia v Australian Air Express* (2005) 57 AILR 100-381.

⁶³ *Wesfarmers Premier Coal Ltd v AFMEPKIU (no 2)* [2004] FCA 1737

employer, and establishing a new employment relationship between the worker and a labour hire agency. In that particular case, it was found that, notwithstanding what was said in the signed documents, the original employer had given the worker assurances that “nothing would change”. The effect of these assurances was held to be that the documents purporting to transfer the employment relationship to the labour hire agency were ineffective, and the original employment contract with the original employer was still on foot. On that basis, it was concluded that, when the worker was later dismissed, he was still entitled to bring an unfair dismissal claim against the original employer.

In some circumstances, it has been held that a lengthy period of service with a “host” employer, in circumstances where there is little contact between the agency and the worker, may lead to a conclusion that the “host” employer is the true employer of the worker. This conclusion may directly contradict the intention of the contracting parties apparent from the contract documents created at the commencement of the arrangement. Nevertheless, it might be concluded in some circumstances that a lengthy period of service within a “host” employer’s business, with little or no contact or dealings between the agency and the worker, may give the worker grounds to assert that the original contractual arrangements had effectively been abandoned or superceded by a new contract of employment which must be implied to exist between the host employer and the worker. This possibility was discussed obliquely in a decision of the South Australian Industrial Commission.⁶⁴ In practice, arguments of this kind would be generally be difficult to sustain.

As discussed above, it is possible that, in some circumstances, Australian courts may apply the concept of joint employment which may operate where multiple employers share or co-determine those matters governing essential terms and conditions of employment. Until now, in situations where control and the obligation to pay wages are separated (as is typical in labour hire arrangements), Australian jurisprudence has rarely resorted to the doctrine of dual or joint employment in order to characterize the employment relationship. Recently in *Morgan’s* case, the federal tribunal speculated that there was no reason why Australian law could not follow American authority and recognize the concept of “dual” or “joint” employment.⁶⁵ This suggestion has yet to be taken up in any authoritative way by courts or tribunals in Australia. The concept of joint employment may be materially relevant where an employee, engaged through a labour hire agency, may wish to assert against the “host” employer some right or entitlement – particularly some statutory right or entitlement, such as statutory protection against harsh,

⁶⁴ *Jeanette Melbourne v JC Techforce Pty Ltd* (1998) 65 SAIR 372 at 390-1.

⁶⁵ *Morgan v Kitchside Nominees Pty Ltd* (2002) 117 IR 152 at 175.

unjust or unreasonable termination – that can only be asserted as against an employer.

6 - FRANCHISING

(a) Franchising Regulation and Practice

Australia has a high level of franchised business operations, with the number of franchised operations reportedly three times that of the United States on a per capita basis. Franchising took off in the 1980s and grew dramatically in the following decade, principally in consumer goods retailing and food outlet sectors. Franchising has become a major method of business expansion in Australia in recent years. Most of the large and fast-growing franchise operations are less than ten years old, and half of these are in the retail trade sector. Franchise operations have been growing in size, with nearly half operating more than one outlet and many now operating internationally. Such growth naturally results in an increasing number of people employed in franchised operations.⁶⁶

Most franchising follow the “business format” model which involves the franchisee operating a business under license from and according to the format created by the franchisor, generally on a long-term basis of 5 to 10 years. It may include the franchisor providing or co-coordinating any or all of: materials, product, equipment, training, intellectual property, marketing strategies, operational standards and procedures. The relationship may give rise to a high degree of dependency of the franchisee on the franchisor. Under the franchise agreement, the franchisor may exert considerable detailed control over the operation of the franchisee’s business, which may be similar to (or even exceed) that arising under an employment contract. In the two years from 2002 to 2004, there was a 14 percent growth in the number of business format franchised units.

Franchising has been used as a means of business propagation rather than employee substitution, although its widespread use in retailing and services has no doubt affected the number of direct employees in those sectors. There has been some use of franchising models in the supply of labour. One of the fastest-growing franchisors in recent years is a labor-hire company. Some companies have recently begun using franchising as a method of outsourcing: one whitegoods manufacturer has shifted its maintenance and repairs operation from direct employees to franchises.⁶⁷

⁶⁶ Jacqui Walker, ‘Chain Reaction’, *Business Review Weekly*, 22 January 2004, p. 36.

⁶⁷ *Inside Retailing*, 4 July 2005.

Currently there are about 850 franchisors and 54,000 franchisees operating in Australia under the business format model. About half of all franchisees are small, either sole operators or partnerships, and are therefore a form of self-employment. Nonetheless, the number of large “chain” franchisees (operating more than one outlet) has been growing, and franchised operations currently employ over 500,000 workers (this includes franchisor head offices, franchisor operated outlets, and franchisee outlets). Thus employees in franchise operations comprise 4.5 percent of the total Australian labour force and 5 percent of all employees.⁶⁸ Franchising tends to result in a higher rate of casual employment among employees. Among the franchisee outlets, 44 percent of employees are permanent full-time, 31 percent are permanent part-time, and 25 percent are casual. Outlets operated directly by franchisors tend to have a higher proportion of permanent employees.⁶⁹

(b) Legal Position of a Franchisee vis-à-vis their Franchisor

The franchisor and franchisee are completely separate business entities, operating within the framework of a franchise contract which only affects rights and liabilities as between themselves. Generally the franchisee is regarded as an independent entrepreneur and not as an agent of the franchisor. However the franchise agreement itself may allow for one party (normally the franchisor) to exercise rights of agency or subrogation. As with all other commercial relationships, franchise operations are generally governed by contract law as developed by the courts at common law (including the principles devised by higher courts exercising the special equity jurisdiction). Trade practices legislation also lays down general rules of commercial conduct as well as specific codes of practice for franchising.

At common law Australian courts have recently developed an implied contractual obligation of good faith and fair dealing, under which both parties are obliged to exercise the powers conferred by the agreement reasonably and in good faith, and not capriciously or for an extraneous purpose.⁷⁰ This concept is particularly relevant to franchise arrangements

⁶⁸ Lorelle Frazer and Scott Weaven, *Franchising Australia 2004*, Service Industry Research Centre, Griffith University, Brisbane, 2004, p. 68 <<http://www.franchise.org.au/content/?id=19>>. Labour force figures are from: Australian Bureau of Statistics, *Labour Force Experience, February 2005*, catalogue no 6206.0 (released July 2005); *Labour Force, August 2005*, catalogue no 6202.0 (released September 2005).

⁶⁹ Frazer and Weaven, *Franchising Australia 2004*, p. 68.

⁷⁰ *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.

and has been applied in such situations by first-instance courts on several occasions.⁷¹

It is commonly accepted that franchise agreements are relational in nature: they require ongoing commitment to the relationship by both parties, are incomplete (since not all risks and contingencies are known or allocated), and tend to evolve over a long time. (In these respects they resemble employment contracts.) Despite this, however, the notion of relational contracts has not been embraced by appellate courts, and Australian law does not recognise a separate class of relational contracts, although the relational features of particular arrangements have been taken into account in judicial decision-making.⁷²

Franchise arrangements are subject to trade practices legislation which prohibits misleading, deceptive or unconscionable conduct in trade or commerce. Such legislation is designed to promote honesty in business relationships, but does not extend so far as to provide redress for unfair or disadvantageous relationships.⁷³

A compulsory industry code of conduct has been enacted under the trade practices legislation for all franchising operations. Functioning as a form of enforced self-regulation, and enforced by the main business and consumer regulation agency, it establishes mandatory disclosure obligations and dispute-settlement procedures.⁷⁴ Employer-employee relationships are not covered by the Code, which specifically excludes them from its definition of franchise agreements.⁷⁵ However the Code contemplates that the franchise agreement may allow the franchisor to regulate employment relationships between the franchisee and its own employees. The Code allows the franchisor to impose conditions on the franchisee in relation to “participation requirements” by employees (as well as on the franchisees

⁷¹ Eg *Far Horizons Pty Ltd v McDonald's Australia Ltd* [2000] VSC 310; see Bill Dixon, ‘What is the content of the common law obligation of good faith in commercial franchises?’, *Australian Business Law Review* 33 (2005) 207-223.

⁷² *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2002] 2 All ER (Comm) 849 (Privy Council, on appeal from New Zealand Court of Appeal); see Andrew Terry, ‘Franchising, relational contracts and the vibe’, *Australian Business Law Review* 33 (2005) 289-300.

⁷³ *Trade Practices Act 1974* (Cth), ss. 52, 51AA. In the case of small business transactions (less than \$3 million), additional provisions allow for the fairness of the transaction to be challenged and redressed: *Trade Practices Act 1974* (Cth), s. 51AC.

⁷⁴ Franchising Industry Code of Conduct, regulation made under the *Trade Practices Act 1974* (Cth), s. 51AD; Joellen Riley, ‘Regulating Unequal Work Relationships for Fairness and Efficiency: A Study of Business Format Franchising’, paper presented to Conference on *Labour Law, Equity and Efficiency: Structuring and Regulating the Labour Market for the 21st Century*, University of Melbourne, 8-9 July 2005, pp. 11-16.

⁷⁵ Franchising Industry Code of Conduct, clause 4.

themselves).⁷⁶ This could conceivably include training and access to benefits by employees of the franchisee.

In addition, some franchise arrangements may be subject to the “unfair contracts” jurisdiction which operates under the industrial relations systems of some states. These provisions allow a party who “performs work” under or in accordance with a contract to obtain relief for the unfair consequences of the terms of the contract or its unfairness in operation. The provisions were originally designed to apply to situations where normal employment regulation (through industrial awards) is circumvented by the creation of non-employment relationships such as the sale of a business or a lease arrangement. The legislation has also been applied to several different forms of franchise agreements.⁷⁷

The unfair contracts legislation allows for a wide range of remedies, including orders for restitutionary payments, performance of contractual duties and rescission of agreements. The jurisdiction has become popular amongst plaintiff litigants in the state of New South Wales, where the unfair contracts jurisdiction originated and is most highly developed.

The unfair work contracts provisions would apply where a franchise agreement is used in a situation “whereby a person performs work” and the result is “unfair, harsh or unconscionable”, or is against the public interest, or provides less remuneration than would be received by an employee.⁷⁸ The proviso that the agreement must contemplate performance of work by a person limits the provisions to employment-like situations rather than purely commercial relations, such the sale or lease of a business. The distinction is, however, not clear, and the scope of the provisions has been narrowed recently as the result of recent appellate court. Accordingly, there is currently considerable doubt as to which kinds of relationship are regarded as business-like in nature and thus not susceptible to challenge under the unfair contracts jurisdiction. This includes larger Some larger franchise arrangements. A recent decision has established that where the franchisee is itself a large employer, ordinary commercial law rather than the unfair contracts provision should apply.⁷⁹

⁷⁶ Franchising Industry Code of Conduct, clause 16.

⁷⁷ *Caltex Oil Pty Ltd v Feenan* [1980] 1 NSWLR 724; *Majik Markets Pty Ltd v Brakes and Service Centre Drummoyne Pty Ltd* (1992) 28 NSWLR 443.

⁷⁸ *Industrial Relations Act 1996* (NSW), ss.105-106; *Industrial Relations Act 1999* (Qld) s. 276. Similar though more limited provisions exist under the *Workplace Relations Act 1996* (Cth), ss. 127A-127C.

⁷⁹ *McDonald’s Australia Holdings Ltd v Industrial Relations Commission of New South Wales* [2005] NSWCA 28.

(c) Legal Position of the Franchisee's employees

At common law the employees of a franchisee have no legal relationship with the franchisor; their contract of employment is exclusively with the franchisee. The franchisor is not liable for anything done by the franchisee while acting in their capacity as an employer. Under the doctrine of privity of contract, nor do the employees of the franchisee have standing to enforce the terms of the franchise agreement.

There are some ways in which the franchisor could become liable to the franchisee's employees, but these are unlikely to arise in ordinary employment situations. The franchisor could be held liable if they were a party to injurious conduct affecting the franchisee's employee, or if the franchisee were deemed to be acting under the authority of the franchisor according to the principles of agency. Conceivably, any action by the franchisor which injured the employee's ability to perform work or enjoy the benefits of their employment contract, either directly or indirectly, would be actionable by the employee utilising the so-called industrial torts of interference with contractual relations, intimidation and conspiracy. These torts have been developed primarily in the suppression of strikes and boycotts, although they remain open to use in other situations. A franchisor's insistence that the franchisee dismiss or not employ a particular person would fall into this category.

Under trade practices legislation, a franchisor would be liable if they engaged in misleading practices towards prospective employees of a franchisee, such as false promises of benefits or skills that would be gained during employment with the franchisee.⁸⁰ This would particularly be the case if the franchisor acted as the agent for the franchisee in hiring workers.⁸¹

The unfair contracts legislation allows a person who works in accordance with a contract or agreement between two other persons (a "related condition or collateral arrangement") to challenge the agreement as it applies to them on fairness grounds. Hence the legislation could potentially be used by an employee of a franchisee who experiences unfair treatment arising from the franchise agreement between their employer and the franchisor. However the work would need to be performed as a direct consequence of the franchise agreement (the work-relatedness requirement).

⁸⁰ *Trade Practices Act 1974* (Cth) s. 53B.

⁸¹ In this case the principal would be liable for any misleading or deceptive conduct of the agent involved in hiring: *Trade Practices Act 1974* (Cth) s. 52; *O'Neill v Medical Benefits Fund of Australia* [2002] FCAFC 188.

7 - COLLECTIVE ACTION AND COLLECTIVE BARGAINING IN A CONTEXT OF PRODUCTIVE DECENTRALISATION

(a) Unions and Productive Decentralisation

The Australian union movement has been opposed to various forms of productive decentralisation. Sub-contracting and outsourcing of services has been strongly contested in a number of industries, particularly in construction. The recent trend of outsourcing of services (eg customer services to call centres), has been strongly criticised by unions, which have also sought to unionise the outsourced workforces. The national peak union body, the Australian Council of Trade Unions, has established a campaign for decent working conditions at call centres, including a charter and code of minimum standards, which has been endorsed by some call centre operators.⁸²

A number of campaigns have been directed at various forms of productive decentralisation. Unions in the public sector have opposed outsourcing of government services which have occurred mainly at the level of the States since the late 1980s. The textile industry union has run a campaign which has attempted to reduce abuse of clothing outworkers (contractors or sometimes employees who work in their own homes), with some success in gaining government support for a code of practice and for legislation aimed at securing prompt payment and leave benefits for such workers.

Unions in several sectors have expressed concern at the effects of outsourcing and contracting on occupational health and safety. In one recent case involving the death of a worker, the union highlighted the fact that the worker was effectively forced into becoming an independent contractor, and that as a result safety standards had suffered. Unions have also been concerned at the effects of outsourcing on stress levels of workers, and on the impact of reduced services in increasing the level of "customer rage" — violence by the public towards front-line workers.

(b) Representation at Corporate Group Level

There is no provision for representation of workers at group level, or indeed at individual corporate level. Australia has not adopted the works council model of worker representation, and forms of industrial democracy have declined over the last decade after an initial burst of interest in the 1980s.

⁸² <<http://www.actu.asn.au/public/resources/aboutcallcentral/>>

There is provision for worker representation on safety committees under the occupational health and safety legislation at state level. Generally the composition of such committees must take account of the different sections within the firm's workforce. While the safety committee system is focused on direct employer entities, it does allow for representation by the employees of a subsidiary company on the workplace safety committee of a parent company.

(c) Trade Unions Representing Workers in Corporate Groups

Restructuring by the union movement has provided the potential for more effective representation of workers at corporate group level. However the development of enterprise bargaining, with its focus on the particular workplace, has reduced wider-level bargaining and representation at either the industry or the group level. In particular, the system of bargaining endorsed by the *Workplace Relations Act 1996* effectively discourages bargaining at the level of the corporate group. In fact the current federal government's industrial relations policy, which it is pursuing through the WorkChoices Bill, is designed to reduce the significance of unions and collective bargaining.

During the 1980s, union structure and coverage in Australia was extensively changed from an occupational to an industry or sectoral basis. Most of the nation's union members are concentrated in eight large unions, which cover a range of related (and sometimes unrelated) industries. Coverage of particular workers has tended to be exclusive, so that workers in a particular industry are only eligible to join a single union.

As a result, it is now normal for corporate employers to deal with only one union which covers all or most of their workers. It is still common, however, for a minority of workers in a particular occupation at a workplace to be covered by different union to the majority; for example cleaners or electricians in a factory may be covered by a different union to the process workers. Hence if most or all the corporations in a group are engaged in the same type of business or are in the same industry, it is likely that their employees will be represented by the same union, or at least two or three unions. At an informal level, this means that representation and bargaining may occur at a group level; however this is not reflected in the formal system of agreement-making.

In the last decade legislative changes have resulted in Australian collective labour law becoming principally oriented towards the enterprise level. Bargaining at the federal level generally involves a single business or part of a business, so that corporate group representation and involvement (at least formally) does not arise. Although there is provision for multi-employer

agreements, they are rare. The “single business” is defined according to the operational structure of a specific corporate employer entity. Legislation limits the coverage of agreements to the employees directly employed by a particular employer. There is no provision for a single agreement to cover employees of subsidiary or related companies.

Since the introduction of enterprise bargaining, it has been common for unions to combine together in collective negotiations, forming a "single bargaining unit" for the joint representation of employees in enterprise bargaining negotiations with a single employer. However the current federal legislation, the *Workplace Relations Act 1996*, does not give any preference or priority to union agreements (a matter of criticism by the ILO's Committee of Experts) and only a small proportion of registered agreements involve unions as parties or participants.

There have been several amendments to the federal legislation designed to prevent industry-wide agreement making through "pattern bargaining" whereby similar agreements are pursued for different workplaces by an industry union.⁸³ Under the *WorkChoices Bill*, the Australian Industrial Relations Commission will be able to suspend or terminate a bargaining period if pattern bargaining is taking place. The effect of this will be to make illegal any subsequent industrial action, with employers able to either seek orders to cease the dispute (with substantial fines for non-compliance) or to seek damages and injunctions at common law.

⁸³ “Pattern bargaining” is defined as occurring when a person who is a negotiating party for two or more collective agreements seeks common wages or conditions in two or more of those agreements, by engaging in a course of conduct that extends beyond a single business.