NOT VERY FAR FROM MODERN SLAVERY?  
LABOUR-HIRE REFORM IN THE NORTHERN TERRITORY

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I  INTRODUCTION

Labour law, understood through the ‘accepted wisdom’1 of Kahn-Freund,2 operates as a protective mechanism that supports workers’ rights3 and ‘counteract[s] the inequality of bargaining power … inherent in the employment relationship’.4 Labour-hire, as a work structure that ‘poses a fundamental challenge to the integrity of the labour law system’5 undercuts this objective.6 This is particularly clear when the characteristics of labour-hire are considered by reference to the defining features of slavery and slavery-like practices, together regarded as ‘modern slavery’. This report firstly discusses the concept of labour-hire and then concentrates on the regulation, prevalence and consequences of labour-hire employment in the context of the Northern Territory (‘NT’). It then analyses the prohibition of modern slavery7 and draws comparisons to labour-hire. The report argues that further regulation of labour-hire is necessary given the fundamental normative and international law values underpinning the global repugnance of modern slavery and, by extension, its constituent elements of human control, coercion, domination and de facto ownership, which exist, albeit to differing degrees, within labour-hire structures, and which undermine the protective function of labour law.8 As preliminary and short-term measures to achieve this in the NT, this report proposes undertaking additional studies to examine the key demographics specially affected by labour-hire in the region, in addition to the implementation of NT labour-hire licencing legislation.

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3 Stewart et al (n 2) 5.
7 See, eg, Davidov (n 1) 35–9, 48.
II  LABOUR-HIRE IN AUSTRALIA

A  The Concept of Labour-Hire

Labour-hire has operated in Australia since at least the 1950s. Beginning as an industry that provided short-term labour alternatives in ‘clerical, administrative and other white collar’ roles, labour-hire work is now also performed on a ‘casual, part-time, full-time [and] on-going basis’ in a broader class of industries, including ‘communications, mining, manufacturing, finance … property and business services’. The growth of labour-hire has been particularly driven by demand by employers and workers for flexible and financially attractive alternative work options. Labour-hire provides these opportunities through ‘triangular relationships’, under which workers are contracted or, more commonly, employed, paid and ‘ultimately controlled’ by a labour-hire agency (‘LHA’), which provides workers to perform services for, and under the functional direction of, hosts, who, in return, pay fees to the LHA. Unlike employment agencies, which recruit workers for direct engagement with a third-party, who becomes the ultimate employer/contractee, labour-hire arrangements administered by LHAs actively divert workers from formal contractual or employment relationships

10 Hall (n 5) 6.
19 Stewart, Independent Contractors (n 14) 3; Making it Work (n 9) 31–2.
21 Stewart et al (n 2) 256; Thai (n 11) 156. See also Kool v Adecco Industrial Pty Ltd (t/as Adecco) [2016] FWC 925, [45]–[46] (‘Kool v Adecco’).
22 Stewart, ‘Redefining Employment?’ (n 5) 17; O’Neil (n 17) 1, 3.
with an assigned host. Consequently, whilst labour-hire facilitates adaptability and responsiveness in the labour market, it also manipulates the boundaries of managerial authority exercisable by LHAs and hosts, which distorts workplace rights and obligations, often to the detriment of workers.

The labour-hire construct

B Pervasiveness of Labour-Hire in the Northern Territory

In 2020 it was estimated that between 1.1% and 2% of employees nationally were affiliated with LHAs. Current NT-specific labour-hire research is, however, limited and of varying reliability due to methodological deficiencies in data collection, and because of distinctive regional factors, including ‘highly volatile’ annual interstate migration to and from the NT, and the movement of an estimated 8,700 inbound, and around 1,700 outbound, fly-in fly-out (‘FIFO’) workers, who are not counted in NT labour force or population statistics. Nevertheless, available information suggests that in 2020 in

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23 Thai (n 11) 159–60, 169. But see Fair Work Ombudsman v Quest South Holdings Pty Ltd (2015) 326 ALR 470, [167]. See also Building Workers’ Industrial Union of Australia v Odco Pty Ltd (1991) 29 FCR 104, 119; Wilton v Coal (n 18) [53]–[61], [190], [193].

24 Thai (n 11) 157–60.


27 Report of the Migrant Workers’ Taskforce (n 9) 100.


30 ‘NT Economy: Population’ (n 29).
the NT there were between 500 and up to 2600 LHEs\textsuperscript{31} registered with around 37 NT-based LHAs.\textsuperscript{32} This suggests that LHEs constitute between 0.48% and, at upper estimates, 2.47% of the approximately 105,100 employees counted in the NT labour force.\textsuperscript{33} This is the lowest rate of labour-hire employment in any state or territory in Australia.\textsuperscript{34} Nevertheless, manual labour, construction, manufacturing, machinery operation, mining and agriculture, forestry, fishing and administration services, which are relatively regular users of labour-hire\textsuperscript{35} (generating approximately 80% of all demand for labour-hire employee services nationally\textsuperscript{36}), are financially significant industries in the NT, which contribute approximately 83.5% of gross state product\textsuperscript{37} and engage 39,148 workers, who represent approximately 38% of the NT labour force.\textsuperscript{38} It is clear, therefore, that labour-hire is entrenched in the NT and relied upon by the majority of key sectors in the region. This is supported by information provided by the Darwin Community Legal Service, which indicates that labour-hire is being utilised locally by various private enterprises, NT quasi-government entities and NT government departments.\textsuperscript{39}

\textbf{C \hspace{5mm} Rights and Vulnerabilities of Labour-Hire Employees in the Northern Territory}

Approximately 97\% of labour-hire workers are employees of LHAs.\textsuperscript{40} In the NT, all employees, including LHEs, are, through national system employee classification,\textsuperscript{41} guaranteed minimum employment conditions under the \textit{Fair Work Act 2009} (Cth) (‘FW Act’),\textsuperscript{42} albeit to differing degrees dependent upon employment category. NT LHEs, like other employees, are also afforded protection under common law employer duties,\textsuperscript{43} and work health and safety and anti-discrimination legislation,

\begin{footnotesize}
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\item \textsuperscript{31} \textit{Characteristics of Employment, August 2020} (n 26).
\item \textsuperscript{32} Australian Bureau of Statistics, \textit{Counts of Australian Businesses, including Entries and Exits}, June 2016 to June 2020 (Catalogue No 8165.0, 16 February 2021).
\item \textsuperscript{33} See also ‘NT Economy: Population’ (n 29); ‘NT Economy: Labour Market’ (n 29); \textit{Characteristics of Employment, August 2020} (n 26).
\item \textsuperscript{34} \textit{Characteristics of Employment, August 2020} (n 26).
\item \textsuperscript{35} Laplagne, Glover and Fry (n 13) 27.
\item \textsuperscript{36} \textit{Characteristics of Employment, August 2020} (n 26).
\item \textsuperscript{38} Informed Decisions, 2016 Census Results Northern Territory: Community Profile (Report) 60; <https://profile.id.com.au/australia/industries?WebID=160>.
\item \textsuperscript{39} Interview with Judy Harrison, Principal Solicitor at the Darwin Community Legal Service, (Scanlon Williams, College of Law, Australian National University, 18 October 2021).
\item \textsuperscript{40} \textit{Australian Labour Market Statistics} (n 16). See also \textit{Victorian Inquiry into the Labour Hire Industry} (n 14) 18.
\item \textsuperscript{41} Ibid ss 13, 14(a)–(f). See also \textit{New South Wales v Commonwealth of Australia} (2006) 229 CLR 1, 158 [335]–[337], [341]; Stewart et al (n 2) 128.
\item \textsuperscript{43} See Stewart et al (n 2) 522–31; \textit{Commonwealth Bank of Australia v Barker} (2014) 253 CLR 168; \textit{Goldman Sachs JB Were Services Pty Limited v Nikolich} [2007] FCAFC 120. See also \textit{Burger King Corp v Hungry Jack’s Pty Ltd} (2001) 69 NSWLR 588; \textit{Adventure World Travel Pty Ltd v Newsom} (2014) 86 NSWLR 515.
\end{enumerate}
\end{footnotesize}
which imposes obligations on LHAs and hosts to maintain safe and non-discriminatory workplaces.\textsuperscript{44} Beyond these general safeguards, however, there is no specific statutory regulation of LHAs or protection for LHEs in the NT.\textsuperscript{45} Given the high degree of nationwide LHA non-compliance with applicable workplace laws,\textsuperscript{46} these legislative gaps inadvertently incentivise mistreatment of LHEs in the NT, which is now the only jurisdiction in Australia ‘without some form of regulation touching upon [labour-hire]’.\textsuperscript{47}

The consequences of negligible legislative development in the NT are further illuminated by inherent LHE vulnerability stemming from the warped employment structure created by labour-hire. The labour-hire construct precludes, in accordance with the unitary concept of employment,\textsuperscript{48} enforcement of minimum statutory employment rights against hosts; generally only LHAs, as employers, are subject to employer duties. However, by dispersing managerial authority, which disguises employer responsibility, labour-hire also creates mechanisms for lawful FW Act non-compliance by LHAs, thereby practically undermining formal remedial options.\textsuperscript{49} This especially reduces unfair dismissal protections as it enables hosts to lawfully terminate an LHE without notice in a manner that could constitute unfair dismissal but for the interposition of the labour-hire construct.\textsuperscript{50} Following termination by a host, the LHA may also, in practice, end the employment relationship with the LHE without infringing unfair dismissal protections by maintaining the LHE ‘on the books’ without providing work and remuneration, and without pursuing formal dismissal,\textsuperscript{51} providing that the LHA

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\item Victorian Inquiry into the Labour Hire Industry (n 14) 229.
\item Thai (n 11) 156, 159.
\item See FW Act (n 42) ss 61(2), 335, 339–40, 342, 351(1). But see, Work Health and Safety Act (n 44) ss 17–26, 31–3; Racial Discrimination Act (n 44) ss 9, 14–15; Sex Discrimination Act (n 44) ss 5, 6–7B, 14; Disability Discrimination Act (n 44) ss 5–6, 15, 35; Age Discrimination Act (n 44) ss 14–18; Anti-Discrimination Act (n 44) ss 19–20; 31–37A; Australian Human Rights Commission Act 1986 (Cth) ss 346P, 346P.
\item Stewart, ‘Redefining Employment?’ (n 5) 4; Victorian Inquiry into the Labour Hire Industry (n 14) 20. See also FW Act (n 42) ss 309(1)(a), 382, 385; Selvachandran v Peteron Plastics Pty Ltd (1995) 62 IR 371.
\item Thai (n 11) 158; Victorian Inquiry into the Labour Hire Industry (n 14) 109, 112–13.
\end{enumerate}
\end{footnotesize}
‘consider[s] redeployment’ of the worker.52 This limits options for LHEs for ‘effective redress’ for ostensible infringements of the FW Act53 and shields LHAs and hosts from legal accountability.54 Given that LHEs are ‘frequently unaware’ of the limitations imposed upon employee rights created by labour-hire arrangements, confusion and uncertainty abounds, which undermines LHE confidence, aggravates perceptions of job insecurity and heightens power imbalances in the employment relationship.55

Consequently, labour-hire also increases the risk of diminished workplace safety by disincentivising reporting of malpractice for fear of victimisation for discussing ‘safety incidents, risks or hazards … [which] may jeopardise [an LHE’s] future engagement at the host’s worksite, or their employment with the [LHA]’.56 Further undermining job safety is the lack of ‘skills development’57 offered by LHAs, only around half of whom provide training to LHEs,58 which is below the national average.59

Additionally, the nature of labour-hire payment structures means that, because LHEs may not be covered by an award or enterprise agreement that applies to host employees,60 LHEs may be paid at lower rates than other workers performing the same or similar work.61 Remuneration disparity is proliferated further through ‘labour market segmentation’,62 which exploits the ‘itinerant and flexible nature of [LHAs] and [LHEs]’,63 and isolates LHEs from unionised structures64 to ‘make enterprise bargaining challenging’.65

The unique socio-cultural, socio-economic and business conditions affecting work in northern Australia adds additional practical challenges to the lives of workers, which exacerbates the general vulnerability of LHEs in the region.66 Given that the work conducted by key NT industries, like

52 Chapman v Sepos Track Trust (t/as J&S Transport) [2021] FWC 5173, [230]; Campbell v Serco Australia Pty Ltd [2021] FWC 2865, [69]. See also Kool v Adecco (n 21) [62]–[65]; Pettifer v MODEC Management Service Pty Ltd [2016] FWCFB 5243.
53 Thai (n 11) 157–8.
54 Thai (n 11) 160; Victorian Inquiry into the Labour Hire Industry (n 14) 20.
55 Brennan and Valos (n 13) 14.
56 Victorian Inquiry into the Labour Hire Industry (n 14) 21, 85, 118–20, 136. See also Brennan and Valos (n 13) 29, 34.
57 Hall (n 5) 6; Making it Work (n 9) 39; Brennan and Valos (n 13) 8.
58 Brennan and Valos (n 13) 79.
60 Hall (n 5) 6–7. But see Victorian Inquiry into the Labour Hire Industry (n 14) 94–5; Forsyth (n 46) 471.
62 Howe et al (n 61) 89–90.
63 Workplace Relations Framework (n 13) 707.
64 See Stewart et al (n 2) 852; Fair Work (Registered Organisations) Act 2009 (Cth) ss 141(1)(a), 166.
65 Workplace Relations Framework (n 13) 707–8. See also Brennan and Valos (n 13) 103.
mining, often ‘require[s] workers to be onsite, … away from … famil[y] and without typical suburban conveniences’, 67 NT workers, including LHEs, are subject to heightened risk of exposure to difficult working conditions. In addition, Indigenous people in the NT, 68 who comprise between approximately 25.5% 69 and 30.3% 70 of the local population (which is the highest proportion of Indigenous people by population in any state or territory 71), are subject to special disadvantage due to low rates of secondary 72 and post-secondary 73 educational attainment, and higher incidence of unemployment, 74 financial and income disadvantage, 75 domestic instability, 76 poor health and disability, 77 and racism and other discrimination. 78 Considered in combination, these industry conditions and societal characteristics especially expose LHEs in the NT to greater risk of exploitation.

Moreover, the pre-existing socio-cultural, financial, linguistic and legal epistemic 79 vulnerabilities of a growing number of migrant LHEs, 80 including in the NT, compound job insecurity endemic in labour-hire for non-citizen workers. Because the ongoing eligibility for residence of migrant workers is inextricably linked to continuing employment, termination of which without alternative work usually after 60 days results in removal from Australia, 81 migrant workers, especially those engaged in precarious employment like labour-hire, are more likely to tolerate exploitative practices by employers. 82 These factors have facilitated a ‘long-standing’ history of non-compliance with

67 Ibid.
68 Productivity Commission, Overcoming Indigenous Disadvantage: Key Indicators 2020 (Report, December 2020) 4.59 (‘Overcoming Indigenous Disadvantage’).
69 Australian Bureau of Statistics, Census of Population and Housing – Counts of Aboriginal and Torres Strait Islander Australians 2016: Table 3a Census Counts by Indigenous Status, by Usual Residence and Place of Enumeration – State/Territory, 2016 (Catalogue 2075.0, 31 August 2017) (‘Counts of Aboriginal and Torres Strait Islander Australians’).
70 ‘NT Economy: Population’ (n 29).
71 Counts of Aboriginal and Torres Strait Islander Australians (n 69).
72 Overcoming Indigenous Disadvantage (n 68) 4.57.
73 Ibid 4.75, 4.77, 4.80–4.81.
74 Ibid 4.66.
76 Ibid 4.58, 4.87, 4.89–4.91.
78 Overcoming Indigenous Disadvantage (n 68) 4.71.
79 Report of the Migrant Workers’ Taskforce (n 9) 32.
employment law obligations by a ‘significant’ number of employers of migrant workers, including, to some extent, in the NT, where limited case studies demonstrate high engagement of migrant workers through labour-hire, and where the absence of LHA statutory regulation provides no additional protection for NT-based migrant LHEs.

Moreover, embedded and pervasive casualisation further compounds the disadvantages encountered by the majority of LHEs across Australia, 79% of whom are employed casually. Despite purported flexibility and financial benefits for both employers and employees, the ‘well-known’ disadvantages of casual employment, including the non-guarantee of annual leave, notice of termination and redundancy payment, place casual employees, including the majority of LHEs, under more precarious minimum conditions than other employment categories. For LHEs, this exacerbates pre-existing factors affecting job insecurity. Further cementing this vulnerability is the test for classification of employment status, which prioritises express contractual terms over the ‘conduct of the parties to the employment relationship and the real substance, practical reality and true nature of that relationship’. This position ensures that, irrespective of length of employment, ‘actual hours or pattern of work’, an employee, including an LHE, will be regarded as casual, unless there is evidence of some mutual agreement constituting a ‘firm advance commitment to continuing employment’.

84 See Howe et al (n 61) 95–6.
86 Australian Labour Market Statistics (n 16). See also FW Act (n 42) s 15A(1).
88 Ibid 97.
89 Guy Standing, ‘Economic Insecurity and Global Casualisation: Threat or Promise?’ (2008) 88(1) Social Indicators Research 15, 25–8; O’Neil (n 17) 4; Hall (n 5) 8–11. See also Campbell (n 44) 91–2.
90 Victorian Inquiry into the Labour Hire Industry (n 14) 18, 20. See also, FW Act (n 42) ss 12, 62(1)(b), 65(1A), 65(2)(b), 65(3)–(6), 66B(1)–(2), 66C(1)–(2), 66F, 67(2), 70, 72A, 80, 82A, 85–6, 102, 104, 106–106A, 108, 111(1)(b), 117, 119, 123(1)(c), 382–84(2)(a), 386–87, 394.
91 FW Act (n 42) ss 86, 117, 119, 123(1)(c).
92 Standing (n 89) 26; Davidov (n 1) 36.
93 Victorian Inquiry into the Labour Hire Industry (n 14) 20.
94 WorkPac v Rossato (n 88) [65].
95 WorkPac v Skene (n 88) 576 [180].
97 WorkPac v Rossato (n 88) [65], [96].
derivative employment rights of as many as 31,000 long-term LHEs nationwide, including in the NT. 98

III MODERN SLAVERY

In 2016 an estimated 40.3 million people globally were subject to modern slavery. 99 Whilst modern slavery is an advocacy tool, 100 which is ‘not presently a legal term of art’, 101 it broadly reflects practices captured under international and domestic prohibitions of slavery and slavery-like conduct, which includes forced labour and servitude.

A Modern Slavery in International and Australian Law

The prohibition of slavery 102 is a *jus cogens* norm 103 owed to the international community as a whole. 104 Slavery is considered a violation of universal human rights 105 and enslavement 106 can constitute a crime against humanity. 107 Consequently, slavey is ‘a type of exploitation to be

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98 Characteristics of Employment, August 2020 (n 26).
100 Hidden in Plain Sight (n 82) 43, 47.
104 Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Judgement) [1970] ICJ Rep 3, 32; Allain, Slavery in International Law (n 103) 110.
105 Universal Declaration of Human Rights (n 102) art 6(1); ICCPR (n 102) arts 8(1)–(2); Weissbrodt and Anti-Slavery International (n 103) 7. See also Responsibility of States for Internationally Wrongful Acts, UN GAOR, 56th sess, 85th plen mtg, Agenda item 162 UN Doc A/RES/56/83 (12 December 2001) annex arts 1, 2, 30, 31, 34–7.
106 Siller (n 101) 412–15, 424.
107 Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 7(1)(b) (‘Rome Statute’); Weissbrodt and Anti-Slavery International (n 103) 8; Oxford Public International Law, Max Planck Encyclopedias of International Law (online at 23 August 2021) ‘Crimes Against Humanity’ [1]–[2], [15].
suppressed.108 Australian law, largely consistent with the international community,109 also treats slavery as a criminal offence,110 which is ‘designed to punish those who exploit in the most egregious manner’.111

Traditionally, slavery was understood strictly as constituting the exercise of powers arising from rights of ownership112 over persons ‘as possessions’.113 In contemporary domestic and international law, slavery continues to manifest this fundamental premise,114 as reflected in the universally accepted definition of slavery as ‘the status or condition of a person over whom any or all of the powers attaching to the right of [de facto but effective115] ownership are exercised’.116 However, the modern definition of slavery has also evolved117 to focus on the ‘circumstances of the enslaved person’118 and ‘the substance of a practice versus its form’.119 Consequently, the concept of slavery now accommodates a broader class of conduct,120 which imposes ‘servile status’121 and exhibits mere ‘indicia of enslavement’.122 Therefore, practices enabling the exercise of any powers arising from a right of ownership,123 including conduct involving control of movement or environment or psychological control or coercion124 through serfdom, debt bondage, unfree marriage, abuse of

109 Ibid 249; Allain, Slavery in International Law (n 103) 117.
110 Modern Slavery Act 2018 (Cth) s 4; Criminal Code Act 1995 (Cth) ss 270.1–270.2, 270.3(1)–(2) (‘Criminal Code’).
111 Siller (n 101) 426.
114 Allain, ‘The Definition of Slavery in International Law’ (n 7) 251; Allain, Slavery in International Law (n 103) 116, 120.
115 Allain, Slavery in International Law (n 103) 121; Allain, ‘Case Notes R v Tang’ (n 108) 249. See also R v Tang (2008) 249 ALR 200, 209 [25], 212 [33] (Gleeson CJ) (‘R v Tang’).
116 Slavery Convention, opened for signature 25 September 1926, 60 LNTS 254 (entered into force 9 March 1927) art 1(1) (‘Slavery Convention’). See also Rome Statute (n 107) art 7(2)(c).
117 Rome Statute (n 107) art 7(1)(b); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, opened for signature 7 September 1956, 266 UNTS 3 (entered into force 30 April 1957) (‘Supplementary Convention’). See also VCLT (n 103) art 31(3)(a); Allain, Slavery in International Law (n 103) 111–12.
118 ‘Max Planck: Slavery’ (n 113) [2].
119 Allain, Slavery in International Law (n 103) 116–17.
120 ‘Max Planck: Slavery’ (n 113) [8]–[24]. See also R v Tang (n 115) 210 [26] (Gleeson CJ); Allain, ‘Case Notes R v Tang’ (n 108) 251; Jon Altman, ‘Modern Slavery in Remote Australia?’ (2017) 150 Arena Magazine 12, 13–14; Hidden in Plain Sight (n 82) 1, 29.
121 Weissbrodt and Anti-Slavery International (n 103) 6.
122 Allain, Slavery in International Law (n 103) 119.
123 See Allain, ‘The Definition of Slavery in International Law’ (n 7) 241.
124 Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic v Prosecutor (Judgement) (International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the
migrant workers and human and sex trafficking,\textsuperscript{125} can also constitute slavery.\textsuperscript{126} It is this legal understanding of slavery which encapsulates one aspect of the concept of modern slavery.

B Slavery-Like Practices in International and Australian Law

Forced labour is also prohibited under international\textsuperscript{127} and domestic law.\textsuperscript{128} The international community,\textsuperscript{129} including Australia,\textsuperscript{130} regards forced labour as ‘all work or service which is exacted from any person under the menace of any penalty and for which [a] person has not offered [themselves] voluntarily’.\textsuperscript{131} Servitude is also prohibited.\textsuperscript{132} Whilst not firmly defined at international law,\textsuperscript{133} servitude is, nevertheless, regarded as a ‘general idea conveying all possible forms of man’s domination over man that [reduces] dignity’,\textsuperscript{134} except domination involving powers arising from a right of ownership.\textsuperscript{135} In Australia, servitude is understood more concretely and narrowly as ‘the condition of a person … who provides labour … because of the use of coercion, threat or deception,’ whilst reasonably supposedly deprived of general personal freedoms.\textsuperscript{136} Although forced labour and servitude, as slavery-like practices, are definitionally distinct from slavery at law due to the absence of ‘an attribute of ownership’,\textsuperscript{137} given that these practices feature, to a more than incidental degree,\textsuperscript{138}

\begin{itemize}
\item \textsuperscript{125} Rassam (n 102) 305; Supplementary Convention (n 117) arts 1, 5.
\item \textsuperscript{126} See, Report of the Secretary-General on Slavery, the Slave Trade and Other Forms of Servitude, UN Doc E/2357 (27 January 1953) 27. See also Siller (n 101) 409, 422.
\item \textsuperscript{127} Slavery Convention (n 116) art 5; Convention Concerning Forced or Compulsory Labour, 1930 (No 29) opened for signature, C029 (entered into force 28 June 1930) arts 1(1), 2(a)–(e) (‘Forced Labour Convention’); Convention Concerning the Abolition of Forced Labour, 1957 (No 105), opened for signature 25 June 1957, C105 (entered into force 17 January 1959) arts 1–2; ICCPR (n 102) arts 6(1), 8(1), 12; Protocol of 2014 to the Forced Labour Convention, 1930, opened for signature 11 June 2014, P029 (entered into force 9 November 2016) Preamble paras 2–5, art 1 (‘Protocol of 2014’). See also Rassam (n 102) 328; Weissbrodt and Anti-Slavery International (n 103) 13.
\item \textsuperscript{128} See Criminal Code (n 110) s 270.6.
\item \textsuperscript{129} Weissbrodt and Anti-Slavery International (n 103) 14.
\item \textsuperscript{130} Hidden in Plain Sight (n 82) 33. But see Criminal Code (n 110) ss 270.6A, 270.6(1)(a)–(b).
\item \textsuperscript{131} Forced Labour Convention (n 127) art 2(1); Protocol of 2014 (n 127) art 1(3). See also Hidden in Plain Sight (n 82) 41.
\item \textsuperscript{132} Universal Declaration of Human Rights (n 102) art 4; Supplementary Convention (n 117) art 1; Bales and Robbins (n 113) 23–5. See also Convention for the Protection of Human Rights and Fundamental Freedoms (n 102) art 4.
\item \textsuperscript{133} Weissbrodt and Anti-Slavery International (n 103) 22.
\item \textsuperscript{134} Rassam (n 102) 334.
\item \textsuperscript{135} David Harris et al, Harris, O’Boyle and Warbrick: Law of the European Convention on Human Rights (Oxford University Press, 4th ed, 2018) 282; Allain, ‘The Definition of Slavery in International Law’ (n 7) 271. See also Siller (n 101) 413.
\item \textsuperscript{136} Criminal Code (n 110) ss 240.4(1). See also Hidden in Plain Sight (n 82) 41.
\item \textsuperscript{137} ‘Max Planck: Slavery’ (n 113) [13]. See also Allain, ‘The Definition of Slavery in International Law’ (n 7) 242. But see Oxford University Press, Max Planck Encyclopedia of International Law (online at 18 August 2021) ‘Forced Labour/Slave Labour’ [14]; Oxford Public International Law, Max Planck Encyclopedia of International Law (online at 18 August 2021) ‘Labour Law, International’ [28].
\item \textsuperscript{138} R v Tang (n 115) 212 [32] (Gleeson CJ).
\end{itemize}
shared elements of human control, coercion and domination, it is ‘helpful’\textsuperscript{139} to regard such conduct as another limb comprising the concept of modern slavery.

\section*{IV \hspace{1cm} LABOUR-HIRE AND MODERN SLAVERY}

The normative undesirability of labour-hire, as currently regulated, is particularly apparent when assessed by reference to common features of de facto human ownership, control, coercion and domination that exist within the components of modern slavery.

All employment relationships inherently involve a limited degree of employee subjugation.\textsuperscript{140} However, the ‘sale’ of LHEs by LHAs and the ‘purchase’ of LHEs by hosts, occasionally ‘without compensation commensurate to the value of … labour’,\textsuperscript{141} and the concomitant permissible exercise of broad functional control by hosts,\textsuperscript{142} constitute ‘powerful indication[s]’ of modern slavery.\textsuperscript{143} The legal shield of the labour-hire structure, which subverts ‘responsibility for labour standards … and [channels] workers into precarious work’\textsuperscript{144} by protecting hosts and LHAs from common law and statutory employer obligations also distorts the degree of exercisable de facto ownership power accepted in other employment contexts.\textsuperscript{145} These conditions stimulate coercive working environments, which disincentivise employee complaint and enhance subservience. Domination of LHEs is proliferated further, especially in the NT, by pre-existing demographic disadvantage and vulnerability amongst the preponderance of LHEs, including migrant and Indigenous workers. The prevalence of casualisation in labour-hire arrangements, which removes employee rights, and allows for immediate dismissal of LHEs, also further embeds characteristics of de facto human ownership, control and coercion.\textsuperscript{146}

These modern slavery characteristics are steadily becoming inescapable due to the expansion of labour-hire as a model of work,\textsuperscript{147} which presents workers with a Hobson’s choice\textsuperscript{148} between labour-hire employment with low minimum protections or unemployment and destitution. The impossibility

\begin{thebibliography}{99}
\bibitem{139} \textit{Hidden in Plain Sight} (n 82) 46–7.
\bibitem{140} Allain, ‘The Definition of Slavery in International Law’ (n 7) 264; Davidov (n 1) 14, 54.
\bibitem{141} \textit{R v Tang} (n 115) 210 [26] (Gleeson CJ); Stewart et al (n 2) 8–10; 496–521. See also Brennan and Valos (n 13) 24.
\bibitem{142} Stewart et al (n 2) 8. See also \textit{R v Tang} (n 115) 216 [50] (Gleeson CJ). See also Allain, ‘The Definition of Slavery in International Law’ (n 7) 264.
\bibitem{143} \textit{R v Tang} (n 115) 215 [44] (Gleeson CJ); Allain, ‘Case Notes \textit{R v Tang}’ (n 108) 253.
\bibitem{144} Howe et al (n 61) 84.
\bibitem{145} See Siller (n 101) 410.
\bibitem{146} See Thai (n 11) 158–60.
\bibitem{147} Ibid 152; Laplagne, Glover and Fry (n 13) 7–9; Burgess and Connell (n 15) 25.
\bibitem{148} \textit{Macquarie Dictionary} (online at 3 October 2021) ‘Hobson’s choice’ <https://www.macquariedictionary.com.au/features/word/search?search_word_type=Dictionary&word=hobson%27s+choice>. See also Brennan and Valos (n 13) 89–90.
\end{thebibliography}
of such decisions enables labour-hire to entrap workers by relying on innate social/psychological and economic dependency upon employment as a means to develop and maintain meaning, dignity, ‘personal identity’ and financial security. Considered in totality, these features present a particularly potent mix of conditions which facilitate the exercise of de facto ownership, control, coercion and domination over LHEs by LHAs and hosts in a fashion that is not dissimilar to modern slavery.

Nevertheless, ‘harsh and exploitative conditions of labour do not of themselves amount to slavery,’ although this will always ‘involve questions of degree’ considered along ‘a continuum of exploitation’. Moreover, whilst ‘forms of enslavement are … varied’ and definitions of slavery continue to evolve, the concept of modern slavery should not become ‘so broad as to be meaningless’. Considering the nature of historic slavery offences, and the rarity of modern slavery prosecutions, it is highly unlikely that domestic modern slavery provisions operate to criminalise labour-hire. Although the power imbalance within labour-hire arrangements places LHEs in relatively higher positions of vulnerability to LHAs and hosts, and, thereby, reflects key features of modern slavery, fundamentally absent from these relationships is the significant deprivation of voluntariness and freedom, and the exercise of powers of ownership ‘which would amount to [de facto] possession’. Consequently, in practice and in law, LHEs remain empowered to ‘walk away [and] their freedom to [choose] remains intact.’

Nevertheless, ‘[b]y not describing these less extreme forms as exploitation, the moral wrong of exploitation is obscured, and employers remain unaccountable for their actions.’ It is clear that, given the commonality between features of labour-hire employment and modern slavery, the prohibition of which reflects normative values and the ‘ethically minimum content of international

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149 Davidov (n 1) 43.
151 R v Tang (n 115) 211 [32] (Gleeson CJ); Allain, Slavery in International Law (n 103) 134.
152 R v Tang (n 115) 211 [232] (Gleeson CJ).
153 Hidden in Plain Sight (n 82) 44, 47.
155 Rassam (n 102) 339.
156 Weissbrodt and Anti-Slavery International (n 103) 4. See also Siller (n 101) 406, 408; Suzanne Miers, Slavery in the Twentieth Century: The Evolution of a Global Problem (AltaMira Press, 2003) 453.
157 See, eg, Director of Public Prosecutions (Ch) v Kannan [2021] VSC 439; R v Tang (n 115); R v McIvor & Tanuchit [2010] NSWDC 310; Ho v The Queen; Leech v The Queen [2011] VSCA 344; Director of Public Prosecutions (Ch) v Shaik [2020] VCC 909; Fair Work Ombudsman v Maroochy Sunshine Pty Ltd & Anor [2017] FCCA 559.
158 See, eg, David Gadd and Rose Broad, ‘Troubling Recognitions in Responses to Modern Slavery’ (2018) 58 British Journal of Criminology 1440, 1449; Rassam (n 102) 322, 325.
159 Allain, Slavery in International Law (n 103) 134.
160 Ibid 131.
161 Ibid.
162 Collins, Lester and Mantouvalou, (n 80) 203.
V REFORM OPTIONS

There are two preliminary and practical measures that should be implemented to address the challenges of labour-hire employment in the NT in the short-term.

Firstly, in light of the lack of reliable region-specific data, further studies, undertaken by a neutral, but local and qualified third-party, should be conducted to fill informational gaps. Specifically, this research should aim to build a more accurate estimation of the number of LHEs in the NT, including FIFO workers. Furthermore, future studies should be used to determine key industries employing LHEs in the NT and the education levels, age, remuneration, resident status, socio-cultural, socio-economic and linguistic background of those employees, as well as personal experiences and perceptions of local LHAs and hosts. Similar inquiries have been undertaken in other states and territories and have provided compelling bases for reform in those regions. Equally, an NT-based study would provide a clearer picture of the nature of local problems created by labour-hire, which is essential for future NT reform.

Secondly, ‘in the absence of Commonwealth action’ NT-specific labour-hire licencing legislation should be implemented. This legislation would, like similar legislation in other jurisdictions, at a minimum, mandate the licencing of LHAs, grant, suspend and cancel labour-hire licenses based on suitability criteria and legal compliance by LHAs and financially penalise unlicenced LHAs and

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165 Davidov (n 1) 14, 34.


168 Forsyth (n 46) 483.


170 See, eg, ACT Labour Hire Licensing Act (n 169) ss 23–4; Schofield-Georgeason (n 96) 387.

171 See, eg, ACT Labour Hire Licensing Act (n 169) ss 27–8, 42. See also Forsyth (n 46) 477–8.
clients/users of unlicenced LHAs.\textsuperscript{172} Although statutory regulation of LHAs in the NT would not fundamentally alter the rights imbalance in labour-hire, it would, nevertheless, ensure, through threat of fine and/or licence revocation, that current and prospective LHAs and, to some degree, their clients operate in accordance with designated standards.\textsuperscript{173}

**VI CONCLUSION**

The labour-hire construct, creating ‘triangular’ employment relationships which intersect with socio-cultural, socio-economic and regional conditions and the consequences of casualisation, renders LHEs vulnerable. In so doing, LHAs and hosts are imbued with heightened powers of human control, coercion, domination and de facto ownership; these features also form the constituent elements of modern slavery, the prohibition of which reflects fundamental international law principles and normative values. Through its analogy to modern slavery, labour-hire, too, embodies characteristics which are repugnant to international standards, and which counteract the Kahn-Freund conceptualisation of labour law as a protective device for workers. Therefore, the lawful operation of labour-hire must be reformed in order to expunge the elements of modern slavery extant within its structure. In the NT, short-term preliminary steps to achieve this involve the implementation of independent and localised demographic studies into labour-hire in the region, and the enactment of labour-hire licencing legislation to regulate operators. These are small but vital first steps towards impactful future change.

\textsuperscript{172} See, eg, *ACT Labour Hire Licensing Act* (n 169) ss 33–5; *Victorian Labour Hire Licensing Act* (n 169) ss 13–16, 94. See also Forsyth (n 46) 476–7.

\textsuperscript{173} Forsyth (n 46) 479, 483.
VII BIBLIOGRAPHY

A Articles/Books/Reports


27. Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia (Report, December 2017)


43. *Report of the Secretary-General on Slavery, the Slave Trade and Other Forms of Servitude*, UN Doc E/2357 (27 January 1953)
47. Siller, Nicole, ‘“Modern Slavery”: Does International Law Distinguish Between Slavery, Enslavement and Trafficking?’ (2016) 14 *Journal of International Criminal Justice* 405
48. Smith, Belinda, ‘Australian Anti-Discrimination Laws: Framework, Developments and Issues’ (Research Paper No 08/24, Faculty of Law, The University of Sydney)
50. Standing, Guy, ‘Economic Insecurity and Global Casualisation: Threat or Promise?’ (2008) 88(1) *Social Indicators Research* 15


### B Cases

61. *Adventure World Travel Pty Ltd v Newsom* (2014) 86 NSWLR 515


63. *Burger King Corp v Hungry Jack’s Pty Ltd* (2001) 69 NSWLR 588

64. *Campbell v Serco Australia Pty Ltd* [2021] FWC 2865

65. *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Judgement) [1970] ICJ Rep 3

66. *Chapman v Sepos Truck Trust (t/as J&S Transport)* [2021] FWC 5173


68. *Director of Public Prosecutions (Cth) v Kannan* [2021] VSC 439

69. *Director of Public Prosecutions (Cth) v Shaik* [2020] VCC 909

70. *Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic v Prosecutor* (Judgement) (International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of
International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Appeals Chamber, Case No IT-96-23 & IT-96-23/1-A, 12 June 2002)

71. Fair Work Ombudsman v Maroochy Sunshine Pty Ltd & Anor [2017] FCCA 559
72. Fair Work Ombudsman v Quest South Holdings Pty Ltd (2015) 326 ALR 470
73. Forstaff v Chief Commissioner of State Revenue (2004) 144 IR 1
74. Goldman Sachs JB Were Services Pty Limited v Nikolich [2007] FCAFC 120
75. Ho v The Queen; Leech v The Queen [2011] VSCA 344
76. Kool v Adecco Industrial Pty Ltd (t/as Adecco) [2016] FWC 925
78. Melrose Farm Pty Ltd v Milward (2008) 175 IR 455
79. Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141
81. Pettifer v MODEC Management Service Pty Ltd [2016] FWC 5243
82. R v McIvor & Tanuchit [2010] NSWDC 310
86. WorkPac Pty Ltd v Rossato [2021] HCA 23
87. WorkPac Pty Ltd v Skene (2018) 264 FCR 536
88. Yanner v Eaton (1999) 201 CLR 351

C Legislation

89. Age Discrimination Act 2004 (Cth)
90. Anti-Discrimination Act 1992 (NT)
91. Australian Human Rights Commission Act 1986 (Cth)
92. Criminal Code Act 1995 (Cth)
93. Disability Discrimination Act 1992 (Cth)
94. Fair Work Act 2009 (Cth)
95. Fair Work (Registered Organisations) Act 2009 (Cth)
96. Labour Hire Licensing Act 2017 (SA)
97. Labour Hire Licensing Act 2017 (Qld)
98. Labour Hire Licensing Act 2018 (Vic)
99. Labour Hire Licensing Act 2020 (ACT)
100. Migration Act 1958 (Cth)
101. Modern Slavery Act 2018 (Cth)
102. Racial Discrimination Act 1975 (Cth)
103. Sex Discrimination Act 1984 (Cth)
104. Work Health and Safety (National Uniform Legislation) Act 2011 (NT)

D Treaties

105. Convention Concerning Forced or Compulsory Labour, 1930 (No 29) opened for signature, C029 (entered into force 28 June 1930)
113. Slavery Convention, opened for signature 25 September 1926, 60 LNTS 254 (entered into force 9 March 1927)
114. Statute of the International Court of Justice
115. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, opened for signature 7 September 1956, 266 UNTS 3 (entered into force 30 April 1957)
E  Other

<https://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/6105.0Feature%20Article1Jan%202010>


120.  Australian Bureau of Statistics, *Characteristics of Employment, Australia, August 2020: Table 13.3 Employees by Status of Labour Hire and Demographic Characteristics* (Catalogue No 6333.0, 11 December 2020)

121.  Australian Bureau of Statistics, *Counts of Australian Businesses, including Entries and Exits, June 2016 to June 2020* (Catalogue No 8165.0, 16 February 2021)


124.  ‘Casual Employees’, *Fair Work Ombudsman* (Web Page)  


129.  Interview with Judy Harrison, Principal Solicitor at the Darwin Community Legal Service, (Scanlon Williams, College of Law, Australian National University, 18 October 2021)
130. *Macquarie Dictionary* (online at 3 October 2021) ‘Hobson’s choice’  
https://www.macquariedictionary.com.au/features/word/search/?search_word_type=Dictionary&word=hobson%27s+choice


132. ‘Northern Territory Economy: Industries’, *Northern Territory Government Department of Treasury and Finance* (Web Page)  
https://nteconomy.nt.gov.au/industry-analysis

133. ‘Northern Territory Economy: Labour Market’ *Northern Territory Government Department of Treasury and Finance* (Web Page)  
https://nteconomy.nt.gov.au/labour-market

134. ‘Northern Territory Economy: Population’, *Northern Territory Government Department of Treasury and Finance* (Web Page)  
https://nteconomy.nt.gov.au/population


136. Oxford Public International Law, *Max Planck Encyclopedias of International Law* (online at 23 August 2021) ‘Crimes Against Humanity’


140. Oxford Public International Law, *Max Planck Encyclopedias of International Law* (online at 18 August 2021) ‘Slavery’

141. Oxford Public International Law, *Max Planck Encyclopedias of International Law* (online at 15 September 2021) ‘Treaties’
