

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.

¹ Guy Davidov, *A Purposive Approach to Labour Law* (Oxford University Press, 2016) 52.

² Adrian Merritt, ‘The Historical Role of Law in the Regulation of Employment: Abstentionist or Interventionist?’ (1982) 1(1) *Australian Journal of Law and Society* 56, 57–8, 63, 75, 83; Andrew Stewart et al, *Creighton and Stewart’s Labour Law* (The Federation Press, 6th ed, 2016) 44–91; Richard Mitchell et al, ‘The Evolution of Labour Law in Australia: Measuring the Change’ (2010) 23 *Australian Journal of Labour Law* 61, 68. See also Carolyn Steedman, *Master and Servant: Love and Labour in the English Industrial Age* (Cambridge University Press, 2007) 66. See also Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Unfinished Business: Indigenous Stolen Wages* (Report, December 2006) 19–22.

³ Stewart et al (n 2) 5.

⁴ Paul Davis and Mark Freedland, *Kahn-Freund’s Labour and the Law* (London Stevens and Sons, 3rd ed, 1983) 15–18.

⁵ Andrew Stewart, ‘Redefining Employment? Meeting the Challenge of Contract and Agency Labour’ (2002) 15 *Australian Labour Law Journal* 1, 25 (‘Redefining Employment?’); Richard Hall, ‘Labour Hire in Australia: Motivation, Dynamics and Prospects’ (Working Paper No 76, University of Sydney, April 2002) 16.

⁶ Stewart, ‘Redefining Employment?’ (n 5) 25–30.

⁷ Jean Allain, ‘The Definition of Slavery in International Law’ (2009) 52(2) *Howard Law Journal* 239, 240 (‘The Definition of Slavery’).

⁸ 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.⁹ Beginning as an industry that provided short-term labour alternatives in ‘clerical, administrative and other white collar’ roles,¹⁰ labour-hire work is now also performed on a ‘casual, part-time, full-time [and] on-going basis’¹¹ in a broader class of industries, including ‘communications, mining, manufacturing, finance ... property and business services’.¹² The growth of labour-hire has been particularly driven by demand by employers and workers for flexible and financially attractive alternative work options.¹³ Labour-hire provides these opportunities through ‘triangular relationships’,¹⁴ under which workers are contracted¹⁵ or, more commonly,¹⁶ employed, paid¹⁷ and ‘ultimately controlled’¹⁸ by a labour-hire agency (‘LHA’),¹⁹ which provides workers to perform services for, and under the functional direction of,²⁰ hosts, who, in return, pay fees to the LHA.²¹ Unlike employment agencies, which recruit workers for direct engagement with a third-party, who becomes the ultimate employer/contractee,²² labour-hire arrangements administered by LHAs actively divert workers from formal contractual or employment relationships

⁹ House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, Parliament of Australia, *Making it Work: Inquiry into Independent Contracting and Labour Hire Arrangements* (Final Report, August 2005) 31 (‘*Making it Work*’). Migrant Worker’s Taskforce, *Report of the Migrant Workers’ Taskforce* (Report, March 2019) 100 (‘*Report of the Migrant Workers’ Taskforce*’).

¹⁰ Hall (n 5) 6.

¹¹ Stewart et al (n 2) 256; *Making it Work* (n 9) 32–3; Pauline Thai, ‘Unfair Dismissal Protection for Labour Hire Workers? Implementing the Doctrine of Joint Employment in Australia’ (2012) 25 *Australian Journal of Labour Law* 152, 153.

¹² *Making it Work* (n 9) 31.

¹³ Linda Brennan and Michael J Valos, *On-Hired Workers in Australia: Motivations and Outcomes* (Report, January 2003) 6–7, 12–13; Hall (n 5) 8, 18; Patrick Laplagne, Maurice Glover and Tim Fry, *The Growth of Labour Hire in Australia* (Working Paper, Productivity Commission, February 2005) 3; Productivity Commission, *Workplace Relations Framework: Productivity Commission Inquiry Report* (Report No 76, 30 November 2015) 801–2 (‘*Workplace Relations Framework*’).

¹⁴ Andrew Stewart, *Independent Contractors: A Practical Guide* (CCH Australia Limited, 2013) 256 (‘*Independent Contractors*’); *Victorian Inquiry into the Labour Hire Industry and Insecure Work* (Final Report, August 2016) 48 (‘*Victorian Inquiry into the Labour Hire Industry*’); *Regulation of the Labour Hire Industry 2016* (Report, 15 December 2016) 6 (‘*Regulation of the Labour Hire Industry*’).

¹⁵ John Burgess and Julia Connell, ‘Temporary Agency Work: Conceptual, Measurement and Regulatory Issues’ (2005) 13(2) *International Journal of Employment Studies* 19, 20; *Making it Work* (n 9) 32; *Victorian Inquiry into the Labour Hire Industry* (n 14) 18; *Regulation of the Labour Hire Industry* (n 14) 6.

¹⁶ Australian Bureau of Statistics, *Australian Labour Market Statistics, Jan 2010* (Catalogue 6105.0, 8 January 2010) <<https://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/6105.0Feature%20Article1Jan%202010>> (‘*Australian Labour Market Statistics*’).

¹⁷ Thai (n 11) 169. See also *Making it Work* (n 9) 37–9; Steve O’Neil, ‘Labour Hire: Issues and Responses’ (Research Paper No 9, Parliamentary Library, Parliament of Australia, 8 March 2004) 1.

¹⁸ Thai (n 11) 156; *Forstaff v Chief Commissioner of State Revenue* (2004) 144 IR 1; *Wilton v Coal & Allied Operations Pty Ltd* (2007) 161 FCR 300 (‘*Wilton v Coal*’).

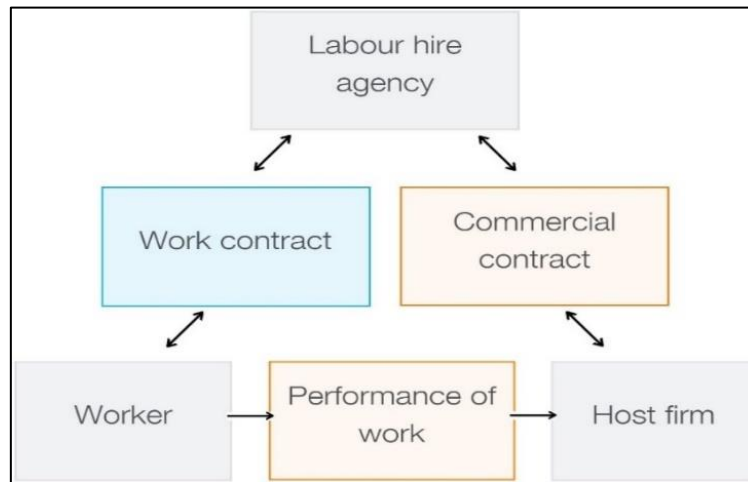
¹⁹ Stewart, *Independent Contractors* (n 14) 3; *Making it Work* (n 9) 31–2.

²⁰ Thai (n 11) 157–8. But see *Melbourne v JC Techforce Pty Ltd* (1998) 65 SAIR 372.

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.²³ 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.²⁴



The labour-hire construct²⁵

B Pervasiveness of Labour-Hire in the Northern Territory

In 2020 it was estimated that between 1.1%²⁶ and 2%²⁷ 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,²⁸ and because of distinctive regional factors, including ‘highly volatile’ annual interstate migration to and from the NT,²⁹ 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.³⁰ Nevertheless, available information suggests that in 2020 in

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.

²⁵ ‘Unfair Dismissals Benchbook: Labour Hire Workers’, *Fair Work Commission* (Web Page, 16 March 2021) <<https://www.fwc.gov.au/unfair-dismissals-benchbook/coverage/people-excluded/labour-hire-workers>>.

²⁶ Australian Bureau of Statistics, *Characteristics of Employment, Australia, August 2020 Table 13.3 Employees by Status of Labour Hire and Demographic Characteristics* (Catalogue 6333.0, 11 December 2020) (‘*Characteristics of Employment, August 2020*’). See also, Australian Bureau of Statistics, *Working Arrangements* (Catalogue No 6336.0, 11 December 2020) <<https://www.abs.gov.au/statistics/labour/earnings-and-work-hours/working-arrangements/latest-release>>; *Workplace Relations Framework* (n 13) 801.

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

²⁸ See ‘*Characteristics of Employment, Australia Methodology*’, *Australian Bureau of Statistics* (Web Page, 11 December 2020) <<https://www.abs.gov.au/methodologies/characteristics-employment-australia-methodology/aug-2020#accuracy-and-quality>>.

²⁹ ‘*Northern Territory Economy: Population*’, *Northern Territory Government Department of Treasury and Finance* (Web Page) <<https://nteconomy.nt.gov.au/population>> (‘*NT Economy: Population*’); ‘*Northern Territory Economy: Labour Market*’ *Northern Territory Government Department of Treasury and Finance* (Web Page) <<https://nteconomy.nt.gov.au/labour-market>> (‘*NT Economy: Labour Market*’).

³⁰ ‘*NT Economy: Population*’ (n 29).

the NT there were between 500 and up to 2600 LHEs³¹ registered with around 37 NT-based LHAs.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.³³ This is the lowest rate of labour-hire employment in any state or territory in Australia.³⁴ Nevertheless, manual labour, construction, manufacturing, machinery operation, mining and agriculture, forestry, fishing and administration services, which are relatively regular users of labour-hire³⁵ (generating approximately 80% of all demand for labour-hire employee services nationally³⁶), are financially significant industries in the NT, which contribute approximately 83.5% of gross state product³⁷ and engage 39,148 workers, who represent approximately 38% of the NT labour force.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.³⁹

C *Rights and Vulnerabilities of Labour-Hire Employees in the Northern Territory*

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

³¹ *Characteristics of Employment, August 2020* (n 26).

³² Australian Bureau of Statistics, *Counts of Australian Businesses, including Entries and Exits*, June 2016 to June 2020 (Catalogue No 8165.0, 16 February 2021).

³³ See also 'NT Economy: Population' (n 29); 'NT Economy: Labour Market' (n 29); *Characteristics of Employment, August 2020* (n 26).

³⁴ *Characteristics of Employment, August 2020* (n 26).

³⁵ Laplagne, Glover and Fry (n 13) 27.

³⁶ *Characteristics of Employment, August 2020* (n 26).

³⁷ 'Northern Territory Economy: Industries', *Northern Territory Government Department of Treasury and Finance* (Web Page) <<https://nteconomy.nt.gov.au/industry-analysis>>.

³⁸ *Informed Decisions, 2016 Census Results Northern Territory: Community Profile* (Report) 60; <<https://profile.id.com.au/australia/industries?WebID=160>>.

³⁹ Interview with Judy Harrison, Principal Solicitor at the Darwin Community Legal Service, (Scanlon Williams, College of Law, Australian National University, 18 October 2021).

⁴⁰ *Australian Labour Market Statistics* (n 16). See also *Victorian Inquiry into the Labour Hire Industry* (n 14) 18.

⁴¹ *Ibid* ss 13, 14(a)–(f). See also *New South Wales v Commonwealth of Australia* (2006) 229 CLR 1, 158 [335]–[337], [341]; Stewart et al (n 2) 128.

⁴² *Fair Work Act 2009* (Cth) ss 60–2, 65, 66A, 67, 70, 72A, 80, 82A, 87, 96, 102, 104, 106A, 108, 113, 114, 117, 119, 283–284, 293–294 ('FW Act').

⁴³ See Stewart et al (n 2) 522–31; *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 168; *Goldman Sachs JB Were Services Pty Limited v Nikolich* [2007] FCAFC 120. See also *Burger King Corp v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 588; *Adventure World Travel Pty Ltd v Newsom* (2014) 86 NSWLR 515.

which imposes obligations on LHAs and hosts to maintain safe and non-discriminatory workplaces.⁴⁴ Beyond these general safeguards, however, there is no specific statutory regulation of LHAs or protection for LHEs in the NT.⁴⁵ Given the high degree of nationwide LHA non-compliance with applicable workplace laws,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]’.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,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.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.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,⁵¹ providing that the LHA

⁴⁴ *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) ss 17–26, 31–3 (*‘Work Health and Safety Act’*); *Racial Discrimination Act 1975* (Cth) ss 9, 14–15 (*‘Racial Discrimination Act’*); *Sex Discrimination Act 1984* (Cth) ss 5, 6–7B, 14 (*‘Sex Discrimination Act’*); *Disability Discrimination Act 1992* (Cth) ss 5–6, 15, 35 (*‘Disability Discrimination Act’*); *Age Discrimination Act 2004* (Cth) ss 14–18 (*‘Age Discrimination Act’*); *Anti-Discrimination Act 1992* (NT) (*‘Anti-Discrimination Act’*). See also *FW Act* (n 42) s 351. See also Kathryn Dent, LexisNexis Butterworths, *Workplace Discrimination Commentary* (online at 21 September 2021) [350,070]–[350,100], [350,140]–[350,160]; Belinda Smith, ‘Australian Anti-Discrimination Laws: Framework, Developments and Issues’ (Research Paper No 08/24, Faculty of Law, The University of Sydney) 3–10, 13–6; Iain Campbell, ‘Casual Work and Casualisation: How Does Australia Compare?’ (2004) 15(2) *Journal of the Social and Economic Relations of Work* 85, 90–1; Brennan and Valos (n 13) 10.

⁴⁵ Blythe Dingwall, ‘Labour Hire Licensing Laws in Australia’, *LegalVision* (Web Page, 7 July 2020) <<https://legalvision.com.au/labour-hire-license-laws-australia/>>; *Victorian Inquiry into the Labour Hire Industry* (n 14) 229; ‘New ACT Labour Hire Laws’, *Law Compliance* (Web Page) <<https://lawcompliance.com.au/new-act-labour-hire-laws/>>.

⁴⁶ Anthony Forsyth, ‘Regulating Australia’s ‘Gangmasters’ Through Labour Hire Licensing’ (2019) 47(3) 469, 471–3; David Weil, ‘Afterword: Learning from a Fissured World – Reflections on International Essays Regarding *The Fissured Workplace*’ (2015) 37(1) *Comparative Labor Law and Policy Journal* 209, 211; Thai (n 11) 156–7.

⁴⁷ *Victorian Inquiry into the Labour Hire Industry* (n 14) 229.

⁴⁸ Thai (n 11) 156, 159.

⁴⁹ 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 46P, 46PF.

⁵⁰ 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.

⁵¹ Thai (n 11) 158; *Victorian Inquiry into the Labour Hire Industry* (n 14) 109, 112–13.

‘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 Truck 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.

⁵⁹ Australian Bureau of Statistics, *Employer Training Expenditure and Practices, Australia, 2001–02* (Catalogue 6362.0, 2 April 2003) <<https://www.abs.gov.au/ausstats/abs@.nsf/mf/6362.0>>.

⁶⁰ Hall (n 5) 6–7. But see *Victorian Inquiry into the Labour Hire Industry* (n 14) 94–5; Forsyth (n 46) 471.

⁶¹ *Making it Work* (n 9) 37–9; O’Neil (n 17) 1; Joanna Howe et al, ‘A Critical Examination of the Relationship Between Labour Hire Intermediaries and Growers in the Australian Horticulture Industry’ (2019) 32 *Australian Journal of Labour Law* 83, 88; Brennan and Valos (n 13) 24.

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.

⁶⁶ Australian Government, *Our North, Our Future: White Paper on Developing Northern Australia* (Report, 2015) 104.

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 territory⁷¹), are subject to special disadvantage due to low rates of secondary⁷² and post-secondary⁷³ 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 epistemic⁷⁹ 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.

⁷⁵ Ibid 4.58, 4.99, 4.103–4.105.

⁷⁶ Ibid 4.58, 4.87, 4.89–4.91.

⁷⁷ Ibid 4.58, 4.110, 4.112–4.115, 4.124, 4.127–4.128, 8.40; ‘Indigenous Australians: Overview’, *Australian Institute of Health and Welfare* (Web Page) <<https://www.aihw.gov.au/reports-data/population-groups/indigenous-australians/overview>>.

⁷⁸ *Overcoming Indigenous Disadvantage* (n 68) 4.71.

⁷⁹ *Report of the Migrant Workers’ Taskforce* (n 9) 32.

⁸⁰ Elsa Underhill and Malcolm Rimmer, ‘Layered Vulnerability: Temporary Migrants in Australian Horticulture’ (2016) 58(5) *Journal of Industrial Relations* 608, 609; Howe et al (n 61) 84; *Report of the Migrant Workers’ Taskforce* (n 9) 19–22. See also Virginia Mantouvalou, ‘Legal Construction of Structures of Exploitation’ in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press, 2018) 188, 198–9.

⁸¹ *Migration Act 1958* (Cth) ss 14, 198; Lisa Qiu, ‘What Do Employers Need to Consider When Terminating Someone on a Visa’, *Coleman Greig Lawyers* (Web Page, 5 August 2010) <<https://www.colemangreig.com.au/BlogPost-1314-what-do-employers-need-to-consider-when-terminating-someone-on-a-visa.aspx>>.

⁸² 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) 270, 280 (‘*Hidden in Plain Sight*’); *Regulation of the Labour Hire Industry* (n 14) 11; Senate Education and Employment References Committee, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (Report, March 2016) 154, 156, 247–8 (‘*A National Disgrace*’).

employment law obligations by a ‘significant’ number of employers of migrant workers,⁸³ including, to some extent, in the NT,⁸⁴ where limited case studies demonstrate high engagement of migrant workers through labour-hire,⁸⁵ and where the absence of LHA statutory regulation provides no additional protection for NT-based migrant LHEs.⁸⁶

Moreover, embedded and pervasive casualisation further compounds the disadvantages encountered by the majority of LHEs across Australia, 79%⁸⁷ of whom are employed casually.⁸⁸ Despite purported flexibility and financial benefits for both employers and employees,⁸⁹ the ‘well-known’ disadvantages of casual employment,⁹⁰ including the non-guarantee of annual leave, notice of termination and redundancy payment,⁹¹ place casual employees, including the majority of LHEs, under more precarious minimum conditions than other employment categories.⁹² For LHEs, this exacerbates pre-existing factors affecting job insecurity.⁹³ Further cementing this vulnerability is the test for classification of employment status, which prioritises express contractual terms⁹⁴ over the ‘conduct of the parties to the employment relationship and the real substance, practical reality and true nature of that relationship’.⁹⁵ This position ensures that, irrespective of length of employment, ‘actual hours or pattern of work’,⁹⁶ 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’.⁹⁷ This has a particularly regressive effect on the employment status and, therefore,

⁸³ *Report of the Migrant Workers’ Taskforce* (n 9) 32–8. See also Fair Work Ombudsman, *Harvest Trail Inquiry* (Report, 2018) 26–8; *Victorian Inquiry into the Labour Hire Industry* (n 14) 155–6; Peter Martin, Lucy Randall and Tom Jackson, *Labour Use in Australian Agriculture* (Report, December 2020) 4 <<https://www.agriculture.gov.au/abares/research-topics/labour>>; Howe et al (n 61) 83–4.

⁸⁴ See Howe et al (n 61) 95–6.

⁸⁵ *Ibid* 97.

⁸⁶ See *Victorian Inquiry into the Labour Hire Industry* (n 14) 253–4.

⁸⁷ *Australian Labour Market Statistics* (n 16). See also *FW Act* (n 42) s 15A(1).

⁸⁸ *FW Act* (n 42) s 15A(1); *WorkPac Pty Ltd v Rossato* [2021] HCA 23, [32], [35]–[36] (*WorkPac v Rossato*); *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536, [172]–[173] (*WorkPac v Skene*); *Melrose Farm Pty Ltd v Milward* (2008) 175 IR 455, [106]; ‘Casual Employees’, *Fair Work Ombudsman* (Web Page) <<https://www.fairwork.gov.au/employee-entitlements/types-of-employees/casual-part-time-and-full-time/casual-employees>>.

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].

⁹⁶ Eugene Schofield-Georgeson, ‘Industrial Legislation in Australia, 2020’ (2021) 63(3) *Journal of Industrial Relations* 377, 382.

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 slavery¹⁰² is a *jus cogens* norm¹⁰³ owed to the international community as a whole.¹⁰⁴ Slavery is considered a violation of universal human rights¹⁰⁵ and enslavement¹⁰⁶ can constitute a crime against humanity.¹⁰⁷ Consequently, slavery is ‘a type of exploitation to be

⁹⁸ *Characteristics of Employment, August 2020* (n 26).

⁹⁹ International Labour Organisation and Walk Free Foundation, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (Report, 2017) 9–11.

¹⁰⁰ *Hidden in Plain Sight* (n 82) 43, 47.

¹⁰¹ Nicole Siller, ‘Modern Slavery’: Does International Law Distinguish Between Slavery, Enslavement and Trafficking?’ (2016) 14 *Journal of International Criminal Justice* 405, 406.

¹⁰² Anne Yasmine Rassam, ‘Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law’ (1999) 39 *Virginia Journal of International Law* 303, 311; Oxford Public International Law, *Max Planck Encyclopedias of International Law* (online at 15 September 2021) ‘Customary International Law’ [8], [10]–[11]; *Statute of the International Court of Justice* art 38(1)(a)–(b); *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 4 (‘*Universal Declaration of Human Rights*’); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 6(1); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 8(1)–(2) (‘*ICCPR*’); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 4 (‘*Convention for the Protection of Human Rights*’). See also Oxford Public International Law, *Max Planck Encyclopedias of International Law* (online at 15 September 2021) ‘Treaties’ [13], [16], [22].

¹⁰³ David Weissbrodt and Anti-Slavery International, *Abolishing Slavery and its Contemporary Forms*, UN Doc HR/PUB/02/4 (2002) 3; Rassam (n 102) 303; Jean Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (BRILL, 2012) 110–11 (‘*Slavery in International Law*’). See also, *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 53 (‘*VCLT*’); International Law Commission, *Second Report on Jus Cogens by Dire Tladi, Special Rapporteur*, 69th sess, UN Doc A/CN.4/706 (16 March 2017) 10–15 (‘*Second Report on Jus Cogens by Dire Tladi*’); Oxford Public International Law, *Max Planck Encyclopedias of International Law* (online at 22 September 2021) ‘*Ius Cogens*’ [1], [5].

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

¹⁰⁸ Jean Allain, ‘Case Notes *R v Tang*: Clarifying the Definition of ‘Slavery’ in International Law’ (2009) 10 *Melbourne Journal of International Law* 246, 246 (‘Case Notes *R v Tang*’).

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.

¹¹² See especially Anthony Maurice Honoré, ‘Ownership’ in Anthony Gordon Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, 1961) 107–47; James E Penner, *Property Rights: A Re-Examination* (Oxford University Press, 2020) 3–18; *Milirpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 171 (Blackburn J); *Yanner v Eaton* (1999) 201 CLR 351, 365–6.

¹¹³ Kevin Bales and Peter T Robbins, ‘“No One Shall Be Held in Slavery or Servitude”: A Critical Analysis of International Slavery Agreements and Concepts of Slavery’ (2001) 2(2) *Human Rights Review* 18, 28; Oxford Public International Law, *Max Planck Encyclopedias of International Law* (online at 18 August 2021) ‘Slavery’ [4]–[7] (‘Max Planck: Slavery’).

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,¹²⁵ can also constitute slavery.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 international¹²⁷ and domestic law.¹²⁸ The international community,¹²⁹ including Australia,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’.¹³¹ Servitude is also prohibited.¹³² Whilst not firmly defined at international law,¹³³ servitude is, nevertheless, regarded as a ‘general idea conveying all possible forms of man’s domination over man that [reduces] dignity’,¹³⁴ except domination involving powers arising from a right of ownership.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.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’,¹³⁷ given that these practices feature, to a more than incidental degree,¹³⁸

Territory of the Former Yugoslavia since 1991, Appeals Chamber, Case No IT-96-23 & IT-96-23/1-A, 12 June 2002) 36 [119]. See also Allain, ‘Case Notes *R v Tang*’ (n 108) 250.

¹²⁵ Rassam (n 102) 305; *Supplementary Convention* (n 117) arts 1, 5.

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.

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.

¹²⁸ See *Criminal Code* (n 110) s 270.6.

¹²⁹ Weissbrodt and Anti-Slavery International (n 103) 14.

¹³⁰ *Hidden in Plain Sight* (n 82) 33. But see *Criminal Code* (n 110) ss 270.6A, 270.6(1)(a)–(b).

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.

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.

¹³³ Weissbrodt and Anti-Slavery International (n 103) 22.

¹³⁴ Rassam (n 102) 334.

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.

¹³⁶ *Criminal Code* (n 110) s 240.4(1). See also *Hidden in Plain Sight* (n 82) 41.

¹³⁷ ‘Max Planck: Slavery’ (n 113) [13]. See also Allain, ‘The Definition of Slavery in International Law’ (n 7) 242. But see Oxford Public International Law, *Max Planck Encyclopedias of International Law* (online at 18 August 2021) ‘Forced Labour/Slave Labour’ [14]; Oxford Public International Law, *Max Planck Encyclopedias of International Law* (online at 18 August 2021) ‘Labour Law, International’ [28].

¹³⁸ *R v Tang* (n 115) 212 [32] (Gleeson CJ).

shared elements of human control, coercion and domination, it is ‘helpful’¹³⁹ to regard such conduct as another limb comprising the concept of modern slavery.

IV 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.¹⁴⁰ However, the ‘sale’ of LHEs by LHAs and the ‘purchase’ of LHEs by hosts, occasionally ‘without compensation commensurate to the value of ... labour’,¹⁴¹ and the concomitant permissible exercise of broad functional control by hosts,¹⁴² constitute ‘powerful indication[s]’ of modern slavery.¹⁴³ The legal shield of the labour-hire structure, which subverts ‘responsibility for labour standards ... and [channels] workers into precarious work’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.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.¹⁴⁶

These modern slavery characteristics are steadily becoming inescapable due to the expansion of labour-hire as a model of work,¹⁴⁷ which presents workers with a Hobson’s choice¹⁴⁸ between labour-hire employment with low minimum protections or unemployment and destitution. The impossibility

¹³⁹ *Hidden in Plain Sight* (n 82) 46–7.

¹⁴⁰ Allain, ‘The Definition of Slavery in International Law’ (n 7) 264; Davidov (n 1) 14, 54.

¹⁴¹ *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.

¹⁴² Stewart et al (n 2) 8. See also *R v Tang* (n 115) 216 [50] (Gleeson CJ). See also Allain, ‘The Definition of Slavery in International Law’ (n 7) 264.

¹⁴³ *R v Tang* (n 115) 215 [44] (Gleeson CJ); Allain, ‘Case Notes *R v Tang*’ (n 108) 253.

¹⁴⁴ Howe et al (n 61) 84.

¹⁴⁵ See Siller (n 101) 410.

¹⁴⁶ See Thai (n 11) 158–60.

¹⁴⁷ *Ibid* 152; Laplagne, Glover and Fry (n 13) 7–9; Burgess and Connell (n 15) 25.

¹⁴⁸ *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.

of such decisions enables labour-hire to entrap workers by relying on innate social/psychological and economic dependency upon employment¹⁴⁹ as a means to develop and maintain meaning, dignity, ‘personal identity’ and financial security.¹⁵⁰ 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,’¹⁵¹ although this will always ‘involve questions of degree’¹⁵² considered along ‘a continuum of exploitation’.¹⁵³ Moreover, whilst ‘forms of enslavement are ... varied’¹⁵⁴ and definitions of slavery continue to evolve,¹⁵⁵ the concept of modern slavery should not become ‘so broad as to be meaningless’.¹⁵⁶ Considering the nature of historic slavery offences,¹⁵⁷ and the rarity of modern slavery prosecutions,¹⁵⁸ 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,¹⁵⁹ 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’.¹⁶⁰ Consequently, in practice and in law, LHEs remain empowered to ‘walk away [and] their freedom to [choose] remains intact.’¹⁶¹

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.’¹⁶² It is clear that, given the commonality between features of labour-hire employment and modern slavery, the prohibition of which reflects normative values¹⁶³ and the ‘ethically minimum content of international

¹⁴⁹ Davidov (n 1) 43.

¹⁵⁰ Ibid 43–4.

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.

¹⁵⁴ Kevin Bales, *Understanding Global Slavery: A Reader* (University of California Press, 2005) 8–9.

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 (Cth) 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 (Cth) 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.

¹⁶³ See, eg, Thomas Kleinlein, ‘Jus Cogens Re-Examined: Value Formalism in International Law’ (2017) 28(1) *The European Journal of International Law* 295, 295, 297, 314–15.

law’,¹⁶⁴ shared elements of human control, coercion, domination and de facto ownership, which diminish employee rights and strike at the protective purpose of labour law,¹⁶⁵ need to be tempered.¹⁶⁶

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 territories¹⁶⁷ 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’¹⁶⁸ NT-specific labour-hire licencing legislation should be implemented. This legislation would, like similar legislation in other jurisdictions,¹⁶⁹ at a minimum, mandate the licencing of LHAs,¹⁷⁰ grant, suspend and cancel labour-hire licenses based on suitability criteria and legal compliance by LHAs,¹⁷¹ and financially penalise unlicensed LHAs and

¹⁶⁴ Jens David Ohlin, ‘In Praise of *Jus Cogens*’ Conceptual Incoherence’ (2018) 63 *McGill Law Journal* 701, 703, 715; Asif Hameed, ‘Unravelling the Mystery of *Jus Cogens* in International Law’ (2014) 84(1) *The British Yearbook of International Law* 52, 77, 79–94; 98; Pamela J Stephens, ‘A Categorical Approach to Human Rights Claims: *Jus Cogens* as a Limitation on Enforcement?’ (2004) 22(2) *Wisconsin International Law Journal* 245, 249; *Second Report on Jus Cogens by Dire Tladi* (n 103) 11.

¹⁶⁵ Davidov (n 1) 14, 34.

¹⁶⁶ See Julia Eckert et al, ‘Introduction: Law’s Travels and Transformations’ in Julia Eckert et al (eds), *Law Against the State: Ethnographic Forays into Law’s Transformations* (Cambridge University Press, 2012) 1, 3–12. See also Robert Kolb, *Peremptory International Law – Jus Cogens: A General Inventory* (Hart Publishing, 2015) 31–44.

¹⁶⁷ See, eg, *Victorian Inquiry into the Labour Hire Industry* (n 14); *Regulation of the Labour Hire Industry* (n 14); Standing Committee on Education, Employment and Youth Affairs, Parliament of the Australian Capital Territory, *Inquiry into the Extent, Nature and Consequence of Insecure Work in the ACT* (Report, May 2018).

¹⁶⁸ Forsyth (n 46) 483.

¹⁶⁹ See, eg, *Labour Hire Licensing Act 2020 (ACT)* (‘*ACT Labour Hire Licensing Act*’); *Labour Hire Licensing Act 2017 (Qld)*; *Labour Hire Licensing Act 2017 (SA)*; *Labour Hire Licensing Act 2018 (Vic)* (‘*Victorian Labour Hire Licensing Act*’); *Victorian Inquiry into the Labour Hire Industry* (n 14) 198, 229–31; *A National Disgrace* (n 82) 312–14, 327–8. See also Forsyth (n 46) 474–9.

¹⁷⁰ See, eg, *ACT Labour Hire Licensing Act* (n 169) ss 23–4; Schofield-Georgeson (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 unlicensed LHAs.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.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.

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.

¹⁷³ Forsyth (n 46) 479, 483.

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