

## Sidestepping Labour Law Through the Corporate Form

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### I Introduction

Corporations with separate legal personalities are sometimes claimed to be the foundations upon which modern enterprise is built. Workers are major beneficiaries of corporations, both as a personal source of employment and as a generator of general economic prosperity. Nonetheless, workers can suffer as a result of their dealings with companies. This chapter examines situations where company controllers abuse the separate legal personality of the company to sidestep obligations to employees. This could be as a direct result of the corporate status of the employer or through forcing an employee to provide services through an interposed corporate entity. These abuses are particularly problematic in the small business context, where questionable practices may escape public and regulator scrutiny.

Recently, much of the attention in labour law has been on employees adversely affected by labour hire or franchising arrangements,<sup>1</sup> but these are not simply labour law problems. One cause of these employees' difficulties comes from company law, and so might a solution. Understanding company law's contribution to labour law problems is therefore essential. In addition, the plight of employees upon the insolvency of the corporate employer is often overlooked in labour law scholarship. This chapter seeks to provide an understanding of these issues on which recommendations for reform involving both corporate and labour law can evolve in the future.

The chapter begins by outlining the origins and importance of separate legal personality for business enterprises. It then sketches a range of temptations that separate legal personality affords. These are the non- or under-payment of wages by the corporate employer, sham contracting, the use of groups of companies to avoid employees' entitlements, a company entering into 'phoenix'

<sup>1</sup> See, for example, Fair Work Ombudsman, 'A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and Addressing the Drivers of Non-compliance in the 7-Eleven Network' (April 2016); see also Fair Work Ombudsman, 'A Report on the Fair Work Ombudsman's Inquiry into the Labour Procurement Arrangements of the Baiada Group in New South Wales' (June 2015).

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