This chapter examines whether ‘accessory liability’ could provide a way of attributing criminal liability to lead companies in supply chains where those lead companies are not functioning as ‘employers’. For example, company X subcontracts a particular economic activity to company Y, and Y then employs workers to fulfil the requirements of its commercial contract with X. Accessory liability criminalizes those who intentionally assist or encourage the commission of principal offences, thereby extending the web of criminal liability beyond principal parties. This could provide a principled way of responding to enforcement problems in the ‘fissured workplace’. Furthermore, this would be consistent with the requirements of fair labelling and culpability in general criminal law, by avoiding the fictional attribution of ‘employer’ status to entities that are not employing.

accessory liability; wage theft; secondary parties; enforcement; fissured workplace; fair labelling; culpability

C22

22

Accessory Liability for National Minimum Wage Violations in the Fissured Workplace

Alan Bogg and *Paul S Davies*[*]

C22.S1

A. Enforcement in Crisis: The Limits of Primary Liability

C22.P1

The Middlesex University report, *Unpaid Britain*, estimated that at least 2 million workers are losing over £3 billion in unpaid holiday pay and wages each year. On any view, these figures are staggering.[1] The report's lead author, Nick Clark, described this as a situation of 'wage default on an industrial scale'.[2] Many of the victims of wage default are workers

[*] We are grateful to Jen Collins, Serena Crawshay-Williams, Mark Freedland, and Tess Hardy for very helpful comments on a draft.

[1] <<<REFO:WBLN>>>Nick Clark and Eva Herman, 'Unpaid Britain: Wage Default in the British Labour Market' (Middlesex University November 2017) https://unpaidbritain.org/2017/11/30/unpaid-britain-wage-default-in-the-british-labour-market/ accessed 16 May 2019<<<REFC>>>.

[2] ibid.

being paid below the minimum wage in circumstances of extreme social and economic deprivation.

C22.P2 It is unlawful to pay below the minimum wage. Minimum wage breaches can also trigger criminal liability. The UK Labour Market Enforcement Strategy 2018/19 is an extremely significant moment in the development of a public enforcement strategy for labour standards. It represents the first systematic conceptualization of the nature and scale of enforcement problems in the UK labour market. The Report recommends increasing the scale of civil penalties for serious cases of non-compliance with National Minimum Wage (NMW) violations.[3] The Report recognizes that there are few prosecutions for NMW breaches: to date, there have only been fourteen prosecutions since the legislation was introduced in 1999.[4] It recommends that prosecutions might be deployed

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[3] David Metcalf, *UK Labour Market Enforcement Strategy 2018–2019: Full Report* (Home Office and Department for Business, Energy & Industrial Strategy 9 May 2018) 55 <www.gov.uk/government/publications/labour-market-enforcement-strategy-2018-to-2019> accessed 16 May 2019<<<REFC>>>.

[4] ibid 61.

more effectively for very serious cases of labour market violations, using publicity to maximize their deterrent effects.[5]

C22.P3 We are broadly in agreement with these proposals. Nevertheless, we think there is value in pausing to reflect on the structure of liability in any new enforcement strategy. The standard paradigm in employment law focuses on a bilateral relationship between an employer duty-bearer and a worker right-holder. There is a neat correlativity of rights and duties. This paradigm continues to exercise a strong influence over enforcement policies. The challenge is to design the right mix of incentives and sanctions to ensure that the employer meets the duties owed to its workers in the bilateral relation. There is undoubtedly much more to be done in improving enforcement within this context, through the proper resourcing of public agencies, credible risks of prosecution for serious violations, legal aid and 'access to justice' for workers, and so forth.

C22.P4 However, we think that enforcement discussions have been skewed by the dominance of this bilateral paradigm. For example, a

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[5] ibid 63.

recent *Guardian* report suggested that suppliers to one in ten British companies were failing to pay the minimum wage.[6] These lead companies are often not employers in an obvious sense, in that they are not in a direct employment relationship with the workers in their supply chains. They are nevertheless powerful economic actors whose commercial practices can affect the working conditions of the many thousands of workers employed by firms in their commercial networks. There might be a cascade of exploitation in these arrangements, which include subcontracting, franchising, and supply chains. Economically powerful lead companies exploit smaller firms that are clustered in highly competitive markets, and the resulting squeeze puts those firms in a position where it is impossible to operate profitably while meeting basic employment standards for their directly employed workforce. In these

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[6] <<<REFO:WBLN>>>Michael Savage, 'Workers Pay the Price as Big British Companies Squeeze their Suppliers *The Guardian* (18 August 2018) <www.theguardian.com/society/2018/aug/18/minimum-wage-workers-pay-price-big-british-companies-squeeze-suppliers> accessed 16 May 2019.<<<REFC>>>

situations, should lead companies get off the hook given their apparent complicity in serious exploitation?

C22.P5 English law already has an answer to this question. In certain circumstances, secondary parties can be liable where they have assisted or encouraged the principal in perpetrating the primary wrong. This model of liability is called accessory liability. It is a form of liability that is well developed in English criminal law and private law. Yet it has been relatively invisible in UK employment law.[7] UK employment law has been in thrall to the paradigm of primary liability focused on the employer. Accessory liability is much more highly developed in the

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[7] During the preparation of this chapter, the decision in *Antuzis v Houghton* [2019] EWHC 843 (QB), [2019] 4 WLUK 95 was handed down. Although not concerned with criminal liability, Mr Justice Lane treated two defendants (D2 and D3) as personally liable for inducing breaches of contract between the employing company (D1) and the workers in respect of their national minimum wage entitlements. This is an important recognition of the role of accessory liability for civil breaches under the minimum wage legislation.

Australian system of labour law, and we consider that comparative model later in the chapter.

C22.P6 The focus in this chapter is on accessory liability in the domain of criminalization. There is already scope for accessory liability in English criminal law in relation to labour market regulation. For example, section 14(4)(h) of the Immigration Act 2016 identifies accessory liability for various listed labour market offences including offences under the National Minimum Wage Act. Accessory participation in these offences is a 'trigger offence' for Labour Market Enforcement Undertakings and Orders. However, although our current concern is the criminal law, we think that accessory liability should also be developed within the context of civil breaches. There is much to be said for making the fullest use of liability in the civil law, securing reparation for wrongs against workers by enforcing their rights, before turning to the criminal law. Nevertheless, the principles of accessory liability have been developed principally in the field of criminal liability. There are sound analytical reasons to begin here, even if strategic enforcement focuses more on accessory liability in the wider context of general employment law.

C22.P7 We first examine the role of accessory liability within the fissured economy, identifying its underlying principles and its distinctive value in

ascribing liability to lead companies. We then examine the existing law on accessories, and the current scope for using that law to impose liability on lead companies. In so doing, we draw upon the Australian experience with accessory liability. In the final concluding section, we propose a draft statutory provision for accessory liability in the context of minimum wage violations. Putting this form of liability on a statutory footing, as part of a wider labour market enforcement strategy, will raise awareness of accessory liability as an enforcement option. This is important, given the lack of familiarity with accessory principles in employment law enforcement. It also clarifies some thorny issues under the current law, such as the 'knowledge' requirement for accessory liability. While it would be foolish to suggest that accessory liability is a panacea for the crisis of enforcement in the fissured economy, we do contend that it should form an important part of a comprehensive enforcement strategy.

C22.S2

B. Enforcement Strategies in the 'Fissured' Labour Market

C22.P8

The emergence of the 'fissured workplace' in modern labour markets is now central to explaining and responding to the crisis of enforcement in

employment law.[8] David Weil has described fissuring as a process whereby lead companies shed direct employment through a variety of organizational and contractual forms. For much of the twentieth century the modern company was structured around a model of direct employment organized through large internal labour markets. Recent decades have witnessed a significant contraction in direct employment. Capital markets have created intense pressures on lead companies to focus on their ‘core competencies’, and to divest functions that are not integral to those competencies. This has had significant effects on the organization of employment. Lead companies are using different contractual models, such as franchising, subcontracting, and supply chains. These contractual forms enable them to shift responsibility for labour standards to subcontractors, franchisees, and suppliers. At the same time, those lead companies have used their extensive market power, and the opportunities provided by modern technology, to exercise significant control over production processes and standards while

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[8] <<<REFO:BK>>>David Weil, *The Fissured Workplace: Why Work Became so Bad for so Many and what Can Be Done to Improve it* (Harvard University Press 2014)<<<REFC>>>.

shedding employment responsibilities (and associated costs of direct employment).

C22.P9 Fissuring has had profound effects on the labour conditions of workers in indirect employment. As Weil explains,

C22.P10 > [S]hedding the tasks and production activities to other businesses allows lead companies to lower their costs, since externalizing activities to other firms (particularly those operating in more competitive markets) eliminates the need to pay the higher wages and benefits that large enterprises typically provided.[9]

C22.P11 By setting prices in its commercial contracting arrangements with smaller firms in highly competitive markets, the lead company has a significant influence on the setting of wage rates in those subcontracting firms.[10] The responsibility for payment of the minimum wage rate remains with the 'employer' (the subcontracting firm, the franchisee, the supplier down the supply chain) in a bilateral relation with a 'worker'. The economic

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[9] ibid 11.

[10] ibid ch 4.

reality, however, is that the lead company's market behaviour will determine whether the worker receives the minimum wage from her employer. It is important, therefore, that the allocation of legal responsibilities for minimum wage compliance are aligned with economic realities in the fissured labour market.

C22.P12 Take the following scenario of simple fissuring:

C22.P13 **X** is a lead company. It subcontracts its cleaning operations to **Y**, which operates a cleaning franchise. **Y** engages **Z**, a cleaner, who is employed under her contract as a self-employed independent contractor. **X** has threatened not to renew its commercial contract with **Y** unless there are further reductions in the contract price. **Y** is desperate not to lose the contract so agrees to the price reduction, and **X** makes no enquiries into the ability of **Y** to meet its minimum wage duties.[11] **X** and **Y** enter into a

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[11] Drawing upon Israeli statutory terminology, Guy Davidov describes such a scenario as a 'losing contract': see <<<REFO:JART>>>Guy Davidov, 'Indirect Employment: Should Lead Companies Be Liable?'

new contractual arrangement on that basis, and **Z** is paid below the minimum wage. Which entity, if any, is liable for the failure to pay the minimum wage?

C22.P14 There is a sophisticated literature on enforcement strategies in the fissured economy. Much of the focus has been on expanding the scope of *primary* liability.[12] This usually involves widening the scope of the

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(2015) 37 Comparative Labor Law and Policy Journal 5, 12<<<REFC>>>. See further Weil 136–42.

[12] There are other regulatory approaches, of course. For example, the US Fair Labor Standards Act 1938 makes provision for a ‘hot goods’ embargo where goods are produced in violation of federal labour standards: for discussion, see <<<REFO:JART>>>Brishen Rogers, ‘Towards Third-Party Liability for Wage Theft’ (2010) 31 Berkeley Journal of Employment & Labor Law 1<<<REFC>>>. This might also be an area where freestanding ‘failure to prevent’ offences might be useful in imposing responsibilities on lead companies. For other examples of ‘failure to prevent’ offences, see, eg, s 7 of the Bribery Act 2010

'employer' concept, which is the entity that owes primary duties to the worker. In this context, the lead company is treated as an 'employer' for the purposes of the minimum wage entitlement. There are four regulatory techniques associated with this 'primary liability' strategy: 'sham' doctrine; the concept of 'joint employment'; the 'functional employer'; and targeted statutory extensions of primary liability to contracting parties. We examine the application of each to our simple fissuring scenario.

C22.P15 The first is the 'sham' doctrine. In the English courts, the 'sham' doctrine has directed the courts to examine the 'true' or 'real' agreement between the parties, where this is disguised by the formal written documentation.[13] This has been described by the Supreme Court of the UK in *Autoclenz* as a 'purposive' approach to the legal characterization of work contracts. It has been important in exposing false self-employment arrangements. In our scenario, this sham doctrine might be effective in displacing the written documentation's characterization of Z as self-

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(failure to prevent bribery) or ss 45 and 46 of the Criminal Finances Act 2017 (failure to prevent facilitation of UK or foreign tax evasion offence).

[13] *Autoclenz v Belcher* [2011] UKSC 41, [2011] 4 All ER 745.

employed. Unfortunately, the fissuring literature suggests that this will afford insufficient protection to Z even if Z is treated as a worker of Y. This is because Y's compliance is dependent upon its commercial arrangements with X. The intense competitive pressures on smaller firms such as Y means that 'noncompliance with a gamut of workplace standards is often the end result'.[14]

C22.P16 The sham doctrine must be complemented with regulatory strategies that address the allocation of legal responsibilities owed to the worker as a bearer of rights. In other words, the crucial enquiry is to ascertain the relevant duty-bearers in a given regulatory context. An important concept in this regard is the 'joint employer' doctrine. This is well established in US law under various labour standards statutes. According to Alan Hyde, the 'joint employer' doctrine addresses itself to the control and supervision of the employees' work by the lead company, alongside supervision and control by the direct employer.[15] Where the

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[14] Weil 17.

[15] <<<REFO:BKCH>>>Alan Hyde, 'To what Duties Do Global Labour Rights Correlate? Responsibility for Labour Standards Down the

work is integral to the lead company's commercial production and where it is the dominant purchaser of the labour, then in conjunction with supervision and control there will usually be strong support for a finding of joint employment.[16] An extension of this 'joint employer' idea is where the lead company has effective control over the activities of the direct employer rather than the workers themselves. In this situation, Hyde has proposed a form of vicarious liability for the labour torts of the direct employer where the lead company 'has the whip hand in

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Production Chain' in Yossi Dahan, Hanna Lerner, and Faina Milman-Sivan (eds), *Global Justice and International Labour Rights* (CUP 2016) 209, 215–18<<<REFC>>>. For a recent defence of 'joint employment' within the context of the fissured workplace, see <<<REFO:JART>>>Cynthia Estlund, 'Rethinking Autocracy at Work' (2018) 131 Harvard Law Review 795, 824<<<REFC>>>.

[16] Hyde, 'Responsibility for Labour Standards' (n 15) 215, discussing *Zheng v Liberty Apparel Co* 355 F3d 61 (2d Cir 2003).

structuring employment, the power to insist on better standards, and the pockets to compensate victims'.[17]

C22.P17 Accordingly, where the statute provides for 'joint employer' status, it might be possible to extend primary liability to **X** on the basis that **X** and **Y** are *joint* employers. This will be easier to do in certain types of fissuring, such as franchising, where supervision and control by the lead company is a dominant purpose of the arrangement. In other forms of fissuring, such as subcontracting, it might be more difficult to identify control. The standard approach would scrutinize control by **X** over **Z** as a basis for ascribing 'joint employer' status to **X**. Alternatively, Hyde's vicarious liability approach would examine the supervision and control exercised by **X** over **Y**.

C22.P18 A third possibility is Jeremias Prassl's proposal for a 'functional' approach to employer status.[18] There may be multiple employers in a

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[17] <<<REFO:BKCH>>>Alan Hyde, 'Legal Responsibility for Labour Conditions Down the Production Chain' in Judy Fudge, Shae McCrystal, and Kamala Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart 2012) 83, 94<<<REFC>>>.

given commercial arrangement. This is because different employer functions (eg inception and termination of the contract of employment; providing work and pay; managing the enterprise internal market) may be performed by distinct entities in a commercial arrangement. Where an entity performs a certain employer-function, Prassl argues that it is appropriate to ascribe the legal obligations corresponding to that function to that entity. It is possible for different employer-functions to be disaggregated, and the corresponding duties distributed amongst different actors. This functional approach allows for a more precise distribution of relevant duties than the 'joint employer' concept, by assigning duties to functions.

C22.P19 This notion of an 'employer function' imposes limits on the scope of primary liability. For example, Prassl argues:

C22.P20 [T]ermination of a commercial supply contract . . . would not be the exercise of an employer function, as neither the relationship between the supplier and producer nor the

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[18] <<<REFO:BK>>>Jeremias Prassl, *The Concept of the Employer* (OUP 2014)<<<REFC>>>.

action of not placing further orders falls within the scope of employment law.[19]

C22.P21 This limitation would seem to absolve **X** of primary liability as an employer because **X** is not exercising any employer functions in our scenario. The negotiation of commercial supply contracts is not an employer function.

C22.P22 Finally, it is possible to extend primary liability through specific statutory interventions. The statutory imposition of 'joint and several liability' has often occurred through specific statutory interventions targeted at fissuring in particular sectors. For example, Davidov discusses legislation in Israel that imposes liability on clients in the security and cleaning sectors where the subcontracting firm (as the direct 'employer') is not complying with its employment duties.[20] As Davidov notes, this extension of liability does not occur through an attribution of 'employer' status to the lead company. Rather, the lead company is treated as a guarantor of the employer's obligations under the relevant legislation.

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[19] ibid164.

[20] Davidov (n 11) 11.

The Director of Labour Market Enforcement (DLME) also discusses examples of joint liability in the European construction sector where lead companies might be jointly liable for non-payment of minimum wages by contractors in the supply chains.[21]

C22.P23 Reflecting back on the simple fissuring scenario, the basic problem with a ‘primary wrong’ analysis is that it is not so obvious that **X** is a primary wrongdoer. Or, to use the terminology in the labour law literature, **X** is not acting as an employer towards **Z**. As such, the extension of employer status to **X** involves a fictional attribution of primary liability. We think that this might account for some of the instability around the concept of joint employment in the US context at the current time. According to Hardy, the US jurisprudence is ‘inherently unstable and uncertainty abounds’.[22] When courts are being asked to

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[21] See the discussion of Germany, Italy, and the EU in Metcalf, *Labour Market Enforcement Strategy* (n 3) 85.

[22] <<<REFO:JART>>>Tess Hardy, ‘Big Brands, Big Responsibilities? An Examination of Franchisor Accountability for Employment Contraventions in the United States, Canada and Australia’ (2019) 40 Comparative Labor Law and Policy Journal 285, 312<<<REFC>>>.

strain beyond the ordinary and natural boundaries of the concept of employer, instability is inevitable because the interpretive exercise of making things up is antithetical to rule of law values. The statutory imposition of joint liability at least has the virtue of dispensing with the fiction that **X** is an employer. However, these interventions are carefully tailored to specific sectors of the labour market. This is not promising as a general basis for lead company liability in the fissured economy. Moreover, joint liability is particularly unsuitable where the responsibilities of the lead company are being enforced under criminal law, and where considerations of blame and culpability are rightly paramount.

C22.P24 If **X** is to incur liability, we suggest that it would be better to view **X** as an accessory to **Y**'s primary wrong. The gravamen of accessory participation is the culpable encouragement or assistance of another party's primary wrong. Accessory liability is derivative. It is based upon the accessory party's causal contribution to the commission of the primary wrong. Knowingly assisting or encouraging a subcontractor to breach employment laws is a distinctive type of wrong to the

subcontractor's primary breach. These differences should be reflected in the structures of legal liability.

C22.P25 In England and Wales, the model of accessory liability has been rather neglected in the sphere of civil liabilities for breaches of employment law.[23] Liability is based upon the statutory specification of primary rights that regulate the contractual relation between a worker and an employer. These primary rights in employment protection statutes are increasingly underpinned by criminal laws that criminalize statutory violations in certain circumstances. The criminal offence is attached as an auxiliary offence to civil liability under the national minimum wage legislation, which would require **X** to be an employer of **Z**.[24] This

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[23] Although see now *Antuzis v Houghton* [2019] EWHC 843 (QB), [2019] 4 WLUK 95.

[24] There is a specific statutory extension for agency workers in s 34 which applies if the individual is not classified as a 'worker' of either the 'agent' or 'principal'. In these circumstances, s 34(2) provides that 'the other provisions of this Act shall have effect as if there were a worker's contract for the doing of the work by the agency worker made between the agency worker and—(a) whichever of the agent and the principal is

conceptualization of criminal liability resembles the underlying structure of wrongs in employment law. That is to say, the *primary* wrong of an employer provides the gateway into its *principal* liability for certain serious breaches of labour standards. To date, little attention has been paid to the accessorial contribution of other powerful economic actors to those primary wrongs. The fissured economy literature suggests that adding further criminal liability as an auxiliary backing to existing forms of primary civil liability is unlikely to be effective in promoting compliance. By contrast, accessory liability will often be a more appropriate way of holding the lead company to account for employment breaches by the direct employer.

C22.P26 There are four key principles that underpin accessory liability in English employment law: regulatory effectiveness; causation; culpability; and fair labelling. The scope of application of these principles will depend upon whether civil or criminal accessory liability is at issue. The

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responsible for paying the agency worker in respect of the work; or (b) if neither the agent nor the principal is so responsible, whichever of them pays the agency worker in respect of the work'.

principles of culpability and fair labelling are especially important in relation to criminal accessory liability.

C22.P27 The **principle of regulatory effectiveness** requires that regulatory intervention should be targeted where it is most likely to improve legal compliance. This principle is central to Weil's analysis. It has also been adopted by the DLME.[25] There must be 'prioritization' of public resources so that public enforcement is targeted efficiently (eg where wrongdoing is widespread and/or particularly harmful). Regulatory interventions should also be selected in order to maximize their deterrent effect. It is better to achieve systemic impacts, identifying key points of leverage so that compliance can be achieved across many firms simultaneously. From this perspective, enforcement against lead companies with high turnovers that have a dominating presence in their spheres of economic activity should be prioritized. Their market behaviour is critical in influencing the compliance of many smaller firms with which they have commercial arrangements. This is also supported by a range of pragmatic considerations. It often makes more sense to pursue the accessory where the primary wrongdoer may be insolvent or

[25] Metcalf, *Labour Market Enforcement Strategy* (n 3) 17.

where there are large numbers of primary wrongs but a single dominant accessory party.[26] This might be the case where many smaller firms have been pressurized into 'losing contracts' by a single lead company. This principle is very important in relation to accessory liability in civil law. Its role is more circumscribed in the context of criminal liability, where considerations of blameworthiness and culpability are more important. Nevertheless, even in the criminal law context, this principle operates as an important negative constraint. That is to say, even if criminalization is justified *in principle*, it should be avoided where criminal regulation is unlikely to be effective in reducing offending behaviour.

C22.P28 The **principle of causation** requires a causal connection between the accessory and the primary wrongdoer's wrong. In our scenario, lead company **X**'s market behaviour must have some causal impact on employer **Y**'s labour law violations. This reflects the position that if there is no such causal link, there is no basis for holding **X** responsible as an accessory to **Y**'s wrongs. In the context of criminal liability, this seems to

[26] <<<REFO:BK>>>Paul S Davies, *Accessory Liability* (Hart 2015) 3–4<<<REFC>>>.

run into an immediate problem of a voluntary intervening act by subcontractor **Y** breaking the chain of causation. In *R v Kennedy (No 2)*,[27] for example, the House of Lords treated the ‘free, deliberate and informed’ act of the victim, as absolving the defendant of causal responsibility for the death. However, the scope of that decision should not be extended too far. The very existence of accessory liability represents an exception to the principle of *novus actus interveniens*, and cases on accessory liability continue to refer to a causal element.[28] Where

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[27] [2007] UKHL 38, [2008] 1 AC 269.

[28] See, eg, *R v Mendez* [2010] EWCA Crim 516, [2011] QB 876; *R v Stringer* [2011] EWCA Crim 1396, [2012] QB 160; *R v Gnango* [2011] UKSC 59, [2012] 1 AC 827 [90]. See too <<<REFO:JART>>>Sanford Kadish, ‘Complicity, Cause and Blame: A Study in the Interpretation of Doctrine’ (1985) 73 California Law Review 323, 405<<<REFC>>>; <<<REFO:JART>>>Robert Sullivan, ‘First Degree Murder and Complicity—Conditions for Parity of Culpability between Principal and Accomplice’ (2007) 1 Criminal Law and Philosophy 271, 277<<<REFC>>>; <<<REFO:JART>>>John Gardner, ‘Complicity and Causality’ (2007) 1 Criminal Law and Philosophy 127<<<REFC>>>.

the lead company has actively encouraged or assisted the direct employer to engage in violations of labour standards, the establishment of a causal link between X and Y should be relatively straightforward.[29] On the other hand, there is less likely to be a causal connection in situations where there is a long supply chain mediated through complex chains of commercial contracts between different commercial entities.[30] Where there is assistance or encouragement by omission, the causal enquiry will also be more difficult. In line with the principle of regulatory effectiveness, enforcement agencies ought in any event to be focusing their attention on more active instances of participation.

C22.P29 The principle of **culpability** is necessary for criminal accessory liability. The stigma of a criminal conviction and imposition of punishment should be restricted to parties who are blameworthy. Accordingly, it is not appropriate to criminalize the market behaviour of lead companies simply on the basis that they have deep pockets or significant commercial leverage. Lead companies must be sufficiently

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[29] Davidov (n 11) 21.

[30] ibid 22.

blameworthy to justify the stigmatic and punitive dimensions of criminalization. The highest degree of blameworthiness attaches to intention and knowledge. Intentional wrongdoing is likely to be unusual in the context of fissuring. The relevant culpability is more likely to be 'wilful blindness' to the plight of workers employed in contracting firms.[31] This should still be sufficient culpability for the purposes of criminal liability for accessories, and we shall return to this later in the chapter.

C22.P30 Finally, the principle of **fair labelling** demands that criminal liability should reflect moral distinctions between different types of blameworthiness and distinct categories of wrong.[32] In the context of fissuring, for example, we should avoid describing lead companies as 'employers' if they are not in fact employers, in order to shoehorn them

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[31] Interestingly, the DLME observes that 'it is all too easy for the brand name *to turn a blind eye* to what is happening further down the supply chain.' Metcalf, *Labour Market Enforcement Strategy* (n 3) 84 (emphasis added).

[32] <<<REFO:BK>>>Andrew Simester and others, *Simester and Sullivan's Criminal Law* (6th edn, Hart 2016) 32–33<<<REFC>>>.

into primary liability. Accessory liability is a distinctive form of wrongdoing, with its own structure and moral significance.

C22.P31 For example, there is some imprecision in the DLME's discussion of 'joint liability'. This seems to encompass the Australian system of accessory liability and 'joint and several liability' in the construction sector in some European countries.[33] It is important not to confuse the different categories of liability, as their rationales and constitutive elements may be distinct. Eliding the two, for example by the fictional attribution of 'employer' status to a lead company as a primary wrongdoer, involves a significant moral cost. This is particularly important in the criminal law. 'Joint liability' that involves no culpability on the part of a lead company should have no role in the criminal law, even if such liability is used as an enforcement tool in the civil law. Undifferentiated analysis of 'joint liability' can obscure these important differences between the specific demands of criminal and civil law. Nevertheless, wrongs should be labelled fairly in the criminal *and* the civil law. The fair labelling principle has close connections to the Rule of

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[33] Metcalf, *Labour Market Enforcement Strategy* (n 3) 84.

Law. It contributes to ‘moral clarity’ in the formulation of legal norms,[34] and this is a virtue in criminal *and* civil law. Accessory liability will often be the most appropriate form of liability for lead companies in the fissured economy in the circumstances of our minimum wage scenario. Two fundamental legal questions must then be addressed.

C22.P32 The first concerns the different modes of participation in another’s primary wrong: what will be sufficient to satisfy the conduct requirement for accessory liability? Lead company X might argue it is simply engaged in hard bargaining. This is lawful activity in a liberal market economy. Is it legitimate to criminalize commercial activity of this nature when it would be otherwise permissible in the general law of contract? The second concerns the degree of fault or culpability necessary for accessory liability. Is intention and knowledge required? Does knowledge extend to situations where the lead company turns a ‘blind eye’ to the likelihood of violations in its supply chains? And should we insist upon a more stringent fault element for criminal accessory liability than civil accessory

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[34] On ‘moral clarity’ and the rule of law, see <<<REFO:JART>>>John Gardner, ‘Rationality and the Rule of Law in Offences against the Person’ (1994) 53 Cambridge Law Journal 502<<<REFC>>>.

liability? In the next section, we will examine the existing rules regarding the *actus reus* and *mens rea* for accessory liability.

C22.P33 It is important to remember that civil and criminal liability can intersect in a variety of ways. For example, the criminal offence of non-payment of minimum wage is itself linked to the underlying civil duties in the relevant employment protection statutes. Furthermore, criminalization can provide a gateway into further forms of criminal liability. This is particularly true of accessory liability in UK employment law. Under the UK enforcement regime, accessory participation in a National Minimum Wage Act criminal offence is itself a 'trigger offence' for a 'labour market enforcement order'.[35] The breach of such an order can constitute a further criminal offence.[36] We must always be vigilant to the dangers of cascading criminalization, so it is always important to keep these wider regulatory connections in view.

C22.S3 C. The Structure of Criminal Accessory Liability

[35] Immigration Act 2016, s 14(4)(h).

[36] Immigration Act 2016, s 27.

C22.P34 The principles of accessory liability are well established and apply generally throughout the criminal law.[37] The contours of the law need to be highlighted for two main reasons. First, in order to understand when prosecutions may be brought against lead companies, or perhaps directors of lead companies, without any further reform. This is important: successful prosecutions against accessories may well have a deterrent effect and act as a strong incentive for lead companies to ensure that no minimum wage violations are committed within their supply chains.[38] Secondly, the limits of the current law must be appreciated in order to assess whether a broader approach should be adopted in the context of the

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[37] They also apply in the various compartments of private law. We hope to examine accessory liability for non-criminal breaches of labour standards in subsequent work.

[38] Similar considerations apply with other forms of business networks, such as franchise systems: see, eg, <<<REFO:BKCH>>>Tess Hardy, ‘Good Call: Extending Liability for Employment Contraventions Beyond the Direct Employer’ in Ron Levy and others (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press 2017)<<<REFC>>>.

offences considered in this chapter. This broader reform would require statutory intervention, and at the end of the chapter we set out what a statutory provision might look like.

C22.P35 It is important to distinguish accessory liability from other common law doctrines such as co-principals, vicarious liability, and inchoate liability. Where each defendant commits some of the conduct element of the crime, and together they commit the crime, each is liable as a co-principal. That is not accessory liability, which demands that one party participate culpably in an offence committed by another.[39] Nor should vicarious liability and accessory liability be confused. In *R v Huggins*, Raymond CJ said:

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[39] A defendant might be prosecuted as a principal or, in the alternative, as an accessory: see, eg, *R v Mercer* [2001] EWCA Crim 638, [2001] 3 WLUK 420. But the sentence may differ depending upon whether the defendant is convicted as a principal or accessory (with the exception of the mandatory life sentence for murder): *R v Broadbridge* (1983) 5 Cr App Rep (S) 269 (CA).

C22.P36 It is a point not to be disputed, but that in criminal cases the principal is not answerable for the act of the deputy, as he is in civil cases: they must each answer for their own acts, and stand or fall by their own behaviour.[40]

C22.P37 A defendant should only be liable for his or her own actions. This is consistent with accessory liability, but not vicarious liability.

C22.P38 It is also important to distinguish accessory liability from inchoate forms of liability, such as conspiracy[41] and the offences in Part 2 of the Serious Crime Act 2007. That statute establishes that an inchoate offence is committed where the lead actor does an act capable of assisting or encouraging the commission of an offence and intends to assist or encourage its commission, for example.[42] Such offences might usefully be prosecuted in situations where a lead actor encourages a subcontractor to commit various offences, and rather than going along with that plan the subcontractor contacts the police. Such whistleblowing is likely to be unusual. Subcontractors will be reluctant to turn their back on contracts,

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[40] *R v Huggins* (1730) 2 Str 883, 885.

[41] Criminal Law Act 1977, s 1.

[42] Serious Crime Act 2007, ss 44–46.

and lead actors are rarely explicit about the underpayment of workers in the supply chain. It is perhaps more likely that prosecutions could result from disgruntled subcontractors, who have been unsuccessful in tendering for work, reporting on unscrupulous lead actors.

C22.P39 Inchoate liability under the Serious Crime Act 2007 is not insignificant. Nor is conspiracy. In the context of supply chain liability, both serve to remind lead actors that their conduct may be punished under the criminal law regardless of whether the subcontractor ultimately pays its workers below minimum wage. But it is important to note that inchoate liability is different from common law accessory liability: inchoate liability is not parasitic upon the commission of a primary offence. Indeed, inchoate offences are most likely to be prosecuted where the principal offence has not occurred, and no victims' rights have been infringed. The present focus is on whether lead actors should be held responsible, and consequently punished, for the actual harm caused by paying workers below the minimum wage. Inchoate liability therefore obscures the real gravamen of the lead company's wrongdoing, which lies in its harmful impact on labour rights in the fissured labour market.

Furthermore, the requirement of intention will not capture many instances of culpable market behaviour, which might be better understood as involving 'wilful blindness' rather than intentional wrongdoing. For these reasons, the inchoate offence does not provide a suitable general model for criminalization in this context, although it has real value as a residual category for the most serious forms of intentional wrongdoing

C22.P40 Accessory liability is derivative in the sense that it is parasitic upon an offence committed by another party. The basis of accessory liability in English law is to be found in section 8 of the Accessories and Abettors Act 1861:

C22.P41

> Whosoever shall aid, abet, counsel, or procure the commission of any indictable offence, whether the same be an offence at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender.[43]

C22.P42 Although this statute applies only to indictable and not summary offences (pertinent examples include summary offences under the National Minimum Wage Act 1998) exactly the same language is used in section

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[43] As amended by the Criminal Law Act 1977, s 65(7), sch 12.

44 of the Magistrates' Courts Act 1980: 'A person who aids, abets, counsels or procures the commission by another person of a summary offence shall be guilty of the like offence'.

C22.P43 These statutory provisions set out the *actus reus* of accessory liability. The four conduct elements—'aid', 'abet', 'counsel', and 'procure'—continue to provide the basis of the criminal law of accessories.[44] These are often now phrased in the more modern language of assistance, encouragement, and procurement. They clearly illustrate that in order to be an accessory a party must participate in the commission of a principal offence.

C22.P44 On some facts, it will be relatively easy to establish that a lead actor satisfies the requisite elements of accessory liability. For example, the subcontractor, **Y**, might explain that it will have to pay its workers below the minimum wage, but the lead company, **X**, is content to enter into the contract with **Y** regardless of this fact. In such circumstances, **X**

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[44] See, eg, *R v Gnango* [2011] UKSC 59, [2012] 1 AC 827 [13] (Lord Phillips of Worth Matravers PSC and Lord Judge CJ, with whom Lord Wilson JSC agreed).

knows that the offence will be committed, and (at least tacitly) assists or encourages its commission. Indeed, in some cases **X** may play a more active role in suggesting that **Y** can ensure that the contract is profitable by paying its workers below the minimum wage. In these circumstances, **X** might successfully be prosecuted as an accessory. Such a prosecution would be consistent with the key principles already identified: **X** played an important causal role in the offence committed by **Y**; **X** is culpable; **X** can is labelled fairly as an accessory; prosecuting **X** seems well-suited to ensure regulatory effectiveness. Successful prosecutions against lead companies, or their directors, would send a clear message to the wider business community that actors should be very wary about becoming involved in national minimum wage violations.

C22.P45 Nevertheless, in many cases the participation of the lead actor may not be so strong. The lead actor may simply subcontract its cleaning services, use its economic power to negotiate a 'losing contract' with the subcontractor, and not discuss the issue of wages at all. In such a scenario, it is much more difficult to be clear that the lead actor has 'aided, abetted, counselled or procured' an offence of paying below the minimum wage.

C22.P46 Admittedly, some cases do suggest that it does not take much for a defendant to be found to have assisted or encouraged an offence. For example, in *R v Giannetto*,[45] the Court of Appeal did not criticize a judge who thought that a person could be found guilty as an accessory if all he did, upon being told by the principal of the principal's plan to commit a crime, was to pat the principal on the back and say 'Oh, goody!'. That might well seem dubious, however. More convincing is the recognition by the Supreme Court in *R v Jogee* that

C22.P47

> [T]here may be cases where anything said or done by [the accessory] has faded to the point of mere background, or has been spent of all possible force by some overwhelming intervening occurrence by the time the offence was committed.[46]

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[45] *R v Giannetto* [1997] 1 Cr App Rep 1 (CA), 13.

[46] *R v Jogee* [2016] UKSC 8, [2016] 2 WLR 681 [12]. See too *R v Stringer* [2011] EWCA Crim 1396, [2012] QB 160 [52].

C22.P48 It would be consistent with general principles of causation[47] for accessory liability only to arise if the conduct element played a more than minimal role in the commission of the primary offence.[48] It is only in such circumstances that an accessory can properly be considered to bear some responsibility for the primary offence.

C22.P49 There may be a general concern that the conduct of the lead company represents 'mere background' rather than a more than minimal causal contribution to the primary offence. This may be one reason why few prosecutions have been brought against lead actors as accessories to offences lower down the supply chain: the prosecution may not be confident in proving that the lead actor has aided, abetted, counselled, or procured the offence. However, the lead actor does provide the subcontractor with the opportunity to hire others, and may exert severe

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[47] cf *R v Cato* (1976) 62 Cr App Rep 41 (CA).

[48] <<<REFO:BK>>>Glanville Williams, *Criminal Law: The General Part* (Stevens & Sons 1953) 294<<<REFC>>>. See too <<<REFO:BK>>>Keith Smith, *A Modern Treatise on the Law of Criminal Complicity* (Clarendon Press 1991) 82–88<<<REFC>>>; Kadish (n 28) 362–63.

pressure on the subcontractor to pay them less than the minimum wage. Such facilitation may be sufficient to constitute assistance. Moreover, in some circumstances there clearly will be encouragement. Indeed, where the contract price is such that the subcontractor will necessarily only be able to pay below the minimum wage, the lead actor does bring about the primary offence. It seems preferable to recognize a broad *actus reus* in this context. After all, lead companies do bear some responsibility for violations of the national minimum wage requirements in their own supply chains. But the scope of liability may be narrowed by reference to the *mens rea* requirements, which reflect the demands of the general principle of culpability in criminal law.

C22.P50 Although neither section 8 of the Accessories and Abettors Act 1861 nor section 44 of the Magistrates' Courts Act 1980 mention *mens rea* at all, it is clear that strict liability would be inappropriate. A party's freedom of action should only be restricted through accessory liability if that party bears some responsibility for the primary offence (through the *actus reus*) and is culpable in some way (through the *mens rea*).

Unfortunately, the *mens rea* for accessory liability is difficult to define with precision.

C22.P51 In *R v Jogee*, the Supreme Court said that 'the mental element in assisting or encouraging is an intention to assist or encourage the commission of the crime and this requires knowledge of any existing facts necessary for it to be criminal'.[49] This is a high threshold. However, it is difficult to be sure exactly what 'intention' requires. It has always been clear that the accessory must intend his or her conduct. But the better view is that the accessory does not need to intend that those acts assist or encourage the principal's conduct, or that the principal offence be committed. The fact that the defendant is indifferent about whether or not the principal commits an offence should not matter. In *Jogee*, the Supreme Court cited with approval decisions such as *National Coal Board v Gamble*[50] and *Attorney General v Able*[51] which support this view;[52] in the latter, Woolf J commented that '[a]n intention to assist need

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[49] [2016] UKSC 8, [2016] 2 WLR 681 [9].

[50] [1959] 1 QB 11, [1958] 3 WLR 434.

[51] [1984] QB 795, [1983] 3 WLR 845.

[52] See further Davies (n 26) ch 3.

not, however, involve a desire that [the principal offence] should be committed or attempted'.[53]

C22.P52 It is suggested that it should be sufficient if the defendant knew that the primary offence would be committed. The Supreme Court in *Jogee* apparently approved[54] of the decision in *Johnson v Youden*.[55] In that case, Lord Goddard CJ said that '[b]efore a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute that offence'.[56] In any event, even if the *mens rea* is ultimately framed in terms of intention rather than knowledge, it is likely that wherever the accessory knows the essential matters of an offence, intention will readily be inferred.

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[53] *Able* (n 51) 811.

[54] *Jogee* (n 46) [16].

[55] [1950] 1 KB 544 (DC), [1950] 1 All ER 300.

[56] *Youden* (n 55) 546. For further consideration of difficulties involved in a knowledge requirement when considering lead actors, see Section D. below.

C22.P53 This mental element is, sensibly, very demanding. An accessory does not commit a free-standing offence itself, and should not have to operate constantly in fear of unwittingly committing a criminal offence as an accomplice. But where the defendant knows that it is participating in a criminal offence, then similar concerns to protect that party's freedom of action do not, generally, apply.[57] Significantly, *Jogee* is clear that recklessness is too low a threshold when seeking to establish the culpability of accessories: parties should not be convicted as accessories if they only foresaw a possibility that another person might commit an offence. That would intrude too greatly upon potential defendants' freedom of action.

C22.P54 The very narrow *mens rea* for accessory liability is probably a further reason why criminal prosecutions are rarely brought against lead actors in the context of fissuring involving illegal activity. It may well be very difficult to prove that the lead actor knew that the primary offence would occur. Often, that party may be just as happy if no offence is ever committed. The lead actor will normally be indifferent about whether

[57] For consideration of a defence of acting reasonably—cf s 50 of the Serious Crime Act 2007—see Section E below.

workers lower down the supply chain are paid above or below the minimum wage. It cares about maximizing its gains through its commercial contracts, and it may not care about the position of workers who are not directly employed by it. Moreover, the lead actor's disinterest in the payments of workers within its supply chain may mean that it simply does not know what payments will be made by its subcontractors, nor whether an offence will be committed at some point in its supply chain.

C22.P55 Given the difficulties in establishing both the *actus reus* and *mens rea* for accessory liability, it is understandable why prosecutors may decide not to prosecute lead actors as accessories for offences committed by its subcontractors.[58] But such prosecutions remain possible in principle, and can usefully be brought against unscrupulous companies who deliberately enter contracts at such low prices, knowing that the only

[58] For criticism of the role of prosecutorial discretion in cases of accessories, see, eg, <<<REFO:JART>>>Joshua Dressler, 'Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem' (1986) 37 Hastings Law Journal 91<<<REFC>>>.

way the subcontractor will be able to perform is by paying its workers below the minimum wage. It is suggested that criminal prosecutions are desirable in these serious 'losing contract' cases in order to ensure that the lead actor is properly punished, and to deter other companies from acting in a similar manner. The criminal liability of accessories is not addressed in the DLME's discussion of criminalization, which is strongly focused on the criminal liability of principals. Given the central significance of fissuring from an enforcement perspective, this represents something of a lacuna. The net of liability for accessories is cast very narrowly by the criminal law at present. This is understandable due to wider concerns about accessory liability catching relatively innocent parties who are only tangentially involved in the commission of a primary offence. However, it may be that the particular context of lead actors in fissured workplace scenarios warrants a different, broader approach. Some guidance for how liability might be expanded can be gleaned from the Australian experience. Although the focus of the Australian statutory framework is on the civil rather than criminal context, the ideas underpinning the regulatory approach adopted may well be applicable in this jurisdiction too. After all, a regulatory approach to enforcement is currently being pursued in the UK, although with less apparent fervour

than in Australia. In the context of fissured working arrangements, the DLME has acknowledged that 'changes are necessary in this area to improve labour enforcement'.[59] However, the Director's recommendations are focused upon 'joint responsibility' and a cooperative approach to non-compliance, whereby the lead actor is encouraged to try to sort out any issues in its supply chain which are not disclosed publicly.[60] This may be a pragmatic and workable compromise, which has been unsurprisingly welcomed by businesses since it is not at all onerous or intrusive.[61] But such focus distracts from the core reason for imposing liability upon lead companies: their culpable participation in an offence. This has been recognized as crucial in Australia.

C22.S4

D. Broadening Liability: Lessons from Australia

C22.P56

The Fair Work Act 2009 (Cth) established the Fair Work Ombudsman (FWO) in Australia. The FWO can employ a number of enforcement

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[59] Metcalf, *Labour Market Enforcement Strategy* (n 3) 83.

[60] ibid 87.

[61] ibid 87.

strategies, including investigations, campaigns, litigation, compliance notices, and enforceable undertakings. Given budgetary constraints, the FWO has tended to engage in targeted campaigns,[62] and resolved to focus on the role of accessories.[63]

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[62] <<<REFO:BK>>>John Howe, Tess Hardy, and Sean Cooney, *The Transformation of Enforcement of Minimum Employment Standards in Australia: A Review of the FWO's Activities from 2006–2012* (Centre for Employment and Labour Relations Law Melbourne Law School 2014) 9–10 <www.fairwork.gov.au/ArticleDocuments/763/melbourne-uni-report-on-enforcement.pdf.aspx> accessed 16 May 2019<<<REFC>>>.

[63] <<<REFO:BK>>>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* (Commonwealth of Australia, 2015) 3, 28–29 <www.fairwork.gov.au/ArticleDocuments/763/baiada-report.pdf.aspx> accessed 16 May 2019<<<REFC>>>. See too a speech given by the Australian Ombudsman: Natalie James, 'Risk, Reputation and Responsibility' (Australian Labor and Employment Relations Association Conference, Gold Coast, Queensland, 29 August 2014): 'We are using accessorial liability more and more, so that we can hold

C22.P57 The FWO has been true to its promise. It has launched inquiries into various sectors,[64] such as the horticultural sector and the use of migrant overseas workers,[65] trolley collectors in supermarkets,[66] and

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individuals involved in contraventions to account.' See generally, <<<REFO:WBLN>>>Fair Work Ombudsman, 'Litigation Policy' (Commonwealth of Australia 2018) esp 4–5 <www.fairwork.gov.au/ArticleDocuments/725/litigation-policy.pdf.aspx> accessed 16 May 2019<<<REFC>>>; Fair Work Ombudsman, 'Compliance and Enforcement Policy' (Commonwealth of Australia 2018) esp 26–27 <www.fairwork.gov.au/ArticleDocuments/725/compliance-and-enforcement-policy.docx.aspx> accessed 16 May 2019.

[64] See, eg, Hardy, 'Good Call' (n 38).

[65] Fair Work Ombudsman, *Inquiry into the Labour Procurement Arrangements* (n 63).

[66] See, eg, *Fair Work Ombudsman v Al Hilfi* [2016] FCA 193.

cleaners in supermarkets.[67] Natalie James, the FWO until 2018, has been keen to highlight the issue of accessorial liability in a number of speeches.[68] She has explicitly recognized a desire to look beyond

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[67] <<<REFO:BK>>>Fair Work Ombudsman, *An Inquiry into the Procurement of Cleaners in Tasmanian Supermarkets* (Commonwealth of Australia, 2018) <www.fairwork.gov.au/reports/inquiry-into-the-procurement-of-cleaners-in-tasmanian-supermarkets/download-pdf> accessed 16 May 2019<<<REFC>>>.

[68] For example, Speech of <<<REFO:WBLN>>>Natalie James, ‘Supporting Compliance in Far North Queensland—Reflections from the Fair Work Ombudsman’ (Australian Human Resources Institute, Cairns, 13 July 2017) <www.fairwork.gov.au/ArticleDocuments/764/ahri-cairns-speech-july-2017.pdf.aspx> accessed 16 May 2019<<<REFC>>>; ‘It takes more than wanting to do the right thing—The Fair Work Ombudsman’s approach to accessorial liability’ (Lander and Rogers Seminar Presentation 10 March 2017) <www.fairwork.gov.au/ArticleDocuments/764/lander-and-rogers-march-2017-speech-media-version.pdf.aspx> accessed 16 May 2019;

individual company directors when considering accessory liability,[69] expanding its focus to lead actors.[70] Forty-six of fifty matters filed by the FWO in 2015–16 involved accessories.[71]

C22.P58 A key weapon in the armoury of the FWO has been the ability to issue enforcement undertakings. These are statutory agreements between the FWO and another party in relation to alleged breaches of the Fair

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'Regulation of Work and Workplaces: The Fair Work Ombudsman's Role in the Development of Workplace Law' (Australian Labour Law Association National Conference 2016, 4 November 2016) <www.fairwork.gov.au/ArticleDocuments/764/speech-to-australian-labour-law-association-4-november-2016.pdf.aspx> accessed 16 May 2019.

[69] Australian Labour Law Association National Conference 2016 (n 68) 5–6.

[70] Although this should not obscure the potential to bring proceedings against individual directors: see, eg, *Fair Work Ombudsman v Step Ahead Security Services Pty Ltd* [2016] FCCA 1482.

[71] Lander and Rogers Seminar Presentation (n 68) 3.

Work Act 2009. The FWO can enter into such an undertaking if it has a 'reasonable belief' that there has been a breach and the undertaking is given by 'the person in relation to the contravention'.[72] Significantly, enforcement undertakings are published on the (excellent) website of the FWO. They have provoked interest from the wider media and may operate as a general deterrent.[73] However, it should be noted that whilst undertakings may 'be superior at engendering long-term compliance, they also risk being exposed as a too-soft option where the "stick" of stronger mechanisms are not effectively enforced'.[74] It is important that criminal prosecutions still be brought by the state where appropriate.[75] It is only

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[72] FWA 2009, s 715(1) and (2).

[73] <<<REFO:BKCH>>>Rosemary Owens, 'Temporary Labour Migration and Workplace Rights in Australia' in Joanna Howe and Rosemary Owens (eds), *Temporary Labour Migration in the Global Era* (Hart 2016) 402<<<REFC>>>.

[74] ibid.

[75] Although the FWO cannot bring criminal prosecutions but only civil penalty proceedings.

really through judicial clarification that a clear sense of the boundaries of the law in this area can be discerned.[76]

C22.P59 The crucial provision of the Fair Work Act 2009 concerning accessory liability is to be found in section 550:

C22.P60 Involvement in contravention treated in same way as actual contravention

[76] See generally <<<REFO:JART>>>Tess Hardy, 'Who Should Be Held Liable for Workplace Contraventions and on What Basis?' (2016) 29 Australian Journal of Labour Law 78, 90<<<REFC>>>; <<<REFO:JART>>>Tess Hardy and John Howe, 'Chain Reaction: A Strategic Approach to Addressing Employment Non-compliance in Complex Supply Chains' (2015) 57 Journal of Industrial Relations 563<<<REFC>>>; <<<REFO:JART>>>Tess Hardy and John Howe, 'Too Soft or Too Severe? Enforceable Undertakings and the Regulatory Dilemma Facing the Fair Work Ombudsman' (2013) 41 Federal Law Review 1<<<REFC>>>.

C22.P61 (1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.

C22.P62 (2) A person is involved in a contravention of a civil remedy provision if, and only if, the person:

C22.P63 (a) has aided, abetted, counselled or procured the contravention; or

C22.P64 (b) has induced the contravention, whether by threats or promises or otherwise; or

C22.P65 (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or

C22.P66 (d) has conspired with others to effect the contravention.

C22.P67 This is a statutory form of accessory liability. Since its basis is in statute rather than common law, the contours of liability can be modified from

the common law roots applicable more generally.[77] There are many Australian statutes which provide for a form of accessory liability,[78] and in this respect the Fair Work Act 2009 is not unusual.

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[77] It should also be noted that the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 (Cth) introduced a new s 558B into the Fair Work Act, which holds a 'responsible franchisor entity' liable for prescribed contraventions of the Fair Work Act by their franchisees where they knew or could reasonably have known that the contraventions would occur and failed to take reasonable steps to prevent the contravention. The ambit of this provision is narrow and limited to the context of franchisors. It significantly expands the scope of liability since it broadens both the conduct element and mental element, the latter seemingly being satisfied by mere negligence (for further discussion see T Hardy, 'Shifting Risk and Shirking Responsibility? The Challenge of Upholding Employment Standards Regulation within Franchise Networks' (2019) 32 Australian Journal of Labour Law 62). That generally seems inappropriate for accessory liability, especially in the criminal context, and is best explained on a different basis. Whether

C22.P68 The conduct element for accessory liability is ‘involvement’, which is defined in (a)–(d). The differences between these provisions is not clear. For instance, it is not entirely clear how ‘procurement’ in (a) differs from ‘inducement’ in (b).[79] More significantly, it may be that (c) expands the conduct element beyond the strictures of the common law: being ‘in any way, by act or omission, directly or indirectly, knowingly concerned in . . . the contravention’ may more readily encompass a lead actor in the context of offences committed in fissured working arrangements. In a different context the Australian courts have held that passively standing by may be sufficient for the conduct element of being ‘involved in’ a contravention, provided the defendant knows of the

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statutory reform in England should adopt a similar approach is considered in Section E below.

[78] See, eg, Australian Consumer Law, s 236; Competition and Consumer Act 2010, s 82. See generally <<<REFO:BK>>>Joachim Dietrich and Pauline Ridge, *Accessories in Private Law* (CUP 2015) ch 10<<<REFC>>>.

[79] Davies (n 26) 29–31.

contravention.[80] Nevertheless, such conduct may also be sufficient to fall within 'aid' or 'abet', such that this provision may not strictly be necessary.

C22.P69 In any event, the approach adopted in Australia may also be appropriate when considering liability in the fissured workplace in England and Wales, given the economic power of lead actors and the leverage they enjoy over smaller entities in the supply chain. Powerful lead actors should be encouraged to play an active role in ensuring that minimum labour standards are enforced. The Australian FWO has defended 'an expansionist approach for the regulator' since 'the community expects that the law will have an effective response to some of the serious stories we have seen in our court cases and the newspapers in recent times'.[82] Lead actors should be 'taking on greater responsibility

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[80] See, eg, *Sutton v A J Thompson Pty Ltd* (1987) 73 ALR 233, 241. For general discussion, see *FWO v Priority Matters Pty Ltd* [2017] FCA 833 [99]–[130].

[82] Australian Labour Law Association National Conference 2016 (n 68) 10.

in certain higher risk labour markets where low skilled, often migrant or young, labour is involved'.[83]

C22.P70 A wide conduct element may be accepted because the scope of liability is most naturally restricted by a narrow mental element. The courts have demanded actual, rather than constructive, knowledge of the essential matters of the contravention.[84] A high fault element is consistent with general principles of accessory liability: a lead actor who unwittingly participates in an offence should not be punished. Negligence is not an appropriate standard for accessory liability in any form.[85] But what, precisely, must the lead actor know? Must the lead actor know the amount workers are being paid by subcontractors? Must the lead actor also know that the payments are below the level set by the national

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[83] Lander and Rogers Seminar Presentation (n 68) 2.

[84] *FWO v Devine Marine Group Pty Ltd* [2013] FCA 1135 [44]–[46], [2014] FCA 1365 [177]; *Potter v Fair Work Ombudsman* [2014] FCA 187 [79]–[89]. In *Yorke v Lucas* (1985) 158 CLR 661 the Australian High Court applied the approach taken in the criminal law in *R v Giorgianni* (1985) 146 CLR 473.

[85] Davies (n 26) 52.

minimum wage? What if the lead actor turns a blind eye to the relevant offences?

C22.P71 The Australian cases have not yet clearly enunciated the proper approach to adopt. Actual knowledge is generally thought to encompass 'wilful blindness' but not 'recklessness or negligence'.[86] After all, a party should not be able to escape censure by deliberately turning a blind eye to known facts.[87] It is telling that Sir David Metcalf used the language of 'turning a blind eye' in his discussion of supply chain enforcement.[88] However, Taylor and Andelman have rightly observed that:

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[86] *Keller v LED Technologies Pty Ltd* (2010) 185 FCR 449, [2010] FCAFC 55 [335]; *Fair Work Ombudsman v Hu (No 2)* [2018] FCA 1034 (currently on appeal).

[87] *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469 [112] (Lord Scott): '"Blind-eye" knowledge approximates to knowledge . . . an imputation of blind-eye knowledge requires an amalgam of suspicion that certain facts may exist and a decision to refrain from taking any step to confirm their existence.'

[88] Metcalf, *Labour Market Enforcement Strategy* (n 3) 84.

C22.P72

> The critical question, yet to be authoritatively answered, is whether the applicant needs to prove more than knowledge of the underlying facts, but also knowledge that the conduct failed to meet an established standard (such that there is 'an absence of innocence') in circumstances where it is well established that ignorance of the law is no defence.[89]

C22.P73 Taylor and Andelman helpfully make it clear that in the context of minimum wage offences, the lead actor must know that (i) there was a person employed (ii) to do particular work and (iii) the amounts the employee was being paid, or at least how the pay was calculated.[90] But in addition, must the lead actor know that a minimum level existed and that

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[89] <<<REFO:WBLN>>>Ingmar Taylor and Larissa Andelman, 'Accessorial Liability under the Fair Work Act' (A paper prepared for the 2014 Australian Labour Law Association Conference, November 2014) [25] www.greenway.com.au/LiteratureRetrieve.aspx?ID=158469 accessed 16 May 2019<<<REFC>>>.

[90] ibid [43] ff.

payments were below that level? Some cases suggest not.[91] After all, ignorance of the law is no defence. We might view this principle as having particular force where corporate actors with ready access to legal advice are concerned. Other decisions, however, suggest that a defendant must be aware of (or wilfully blind to) the existence of a minimum standard (and that it was not being met).[92]

C22.P74 This is a difficult issue. In our view, there is merit in exploring a broader approach in the context of large companies who participate in the offence of paying workers below the minimum wage. This might, however, require legislative reform. It is understandable why the common law generally adopts a restrictive approach to the *mens rea* for accessory liability: if the accused is a natural person and genuinely did not know (or

[91] For example, *Fair Work Ombudsman v Access Embroidery (Australia) Pty Ltd & Anor* [2012] FMCA 835.

[92] *FWO v Kentwood Industries Pty Ltd (No2)* (2010) 201 IR 234. See further S Ranieri, 'Accessories and the Fair Work Act — Section 550 and an Individual's 'Involvement' in a Contravention: Is Reform Needed?' (2018) 31 Australian Journal of Labour Law 180.

turn a blind eye) to the fact that payments were below the level set by the national minimum wage, then accessory liability should not arise.

C22.P75 In any event, there are difficulties about whose knowledge can be attributed to the company which is the lead actor. Of course, if one director knew all the relevant facts then his or her knowledge can readily be attributed to the company.[93] A more difficult scenario arises where a number of directors all know different things and, if aggregated together, the sum total of all the knowledge elements would be sufficient for accessory liability. No director can be liable as an accessory since no individual satisfies the requisite mental element. But can knowledge be aggregated when attributing a mental state to the lead actor? This issue remains controversial beyond the context of accessories.[94] The principles underpinning this area of the law are not yet clear, but it appears that aggregation is most likely where two different directors 'had

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[93] *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

[94] See eg *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563, as discussed in *Commonwealth Bank v Kojik* [2016] FCAFC 186, [89]-[153] (Edelman J).

responsibility to act for the company in different aspects of the one transaction',[96] and that together the directors constituted the directing mind and will of the corporation. Nevertheless, scepticism remains about whether a high mental element 'can be established by theory of collective knowledge'.[97]

C22.P76 In the context of the Fair Work Act, section 793(2) provides that:

C22.P77 (2) If, for the purposes of this Act or the procedural rules, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is enough to show:

C22.P78 (a) that the conduct was engaged in by a person referred to in paragraph (1)(a) or (b); and

C22.P79 (b) that the person had that state of mind.

[96] *The Bell Group Ltd (In Liquidation) (No 3)* (2012) 89 ACSR 1 [2183] (Drummond AJA).

[97] *Port Stephens Shire Council v Tellamist Pty Ltd* [2004] NSWCA 353 (Ipp JA).

C22.P80 Although framed in the singular, in *Fair Work Ombudsman v Al Hilfi (No 2)* Besanko J recognized that it was at least reasonably arguable that the provision could be interpreted broadly to permit aggregation.[98] This is sensible. It could be very difficult to hold lead actors liable otherwise, and companies may be able to avoid accessory liability by deliberately diffusing roles amongst different directors or employees in order to ensure that no one individual possessed the requisite level of knowledge or intention. However, it must also be appreciated that allowing aggregation of all employees of a company could have ‘potentially alarming consequences for large, multi-function, corporations’.[99] Perhaps aggregation should only be permitted from actors who have both a duty and opportunity to communicate their knowledge.[100] Alternatively, a broader approach may be appropriate in the context of cases focused

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[98] [2013] FCA 16 [25].

[99] *Australian Competition and Consumer Commission v Radio Rentals Ltd* [2005] FCA 1133 [181] (Finn J).

[100] ibid [179]. For further discussion, see <<<REFO:BK>>>Celia Wells, *Corporations and Criminal Liability* (2nd edn, OUP 2001)<<<REFC>>>.

upon in this chapter, in order to ensure that substantial lead companies should not be able to circumvent liability by structuring their affairs such that no one individual knows too much.

C22.S5

E. Conclusion

C22.P81

Both the civil and criminal aspects of accessory liability in the context of labour law deserve to be explored more thoroughly. This chapter has suggested that greater use could be made of criminal accessory liability in the context of national minimum wage violations. This has the significant advantage of focusing upon a lead actor's participation in an offence committed by another party. It cannot readily be circumvented by manipulating the (contractual) nature of the relationships between parties in a supply chain, for example. The focus is on the culpable assistance or encouragement of the primary wrong. Of course, accessory liability cannot solve all the issues in this area by itself, and it would be foolish to suggest otherwise. It can be an important tool in promoting compliance with basic labour standards. For example, Focus on Labour Exploitation (FLEX) has recently proposed that public bodies should take leadership seriously in their own supply chains, identifying public procurement as a

powerful way of exercising leverage to promote labour standards compliance.[101] Accessory liability can only ever be a part of a range of liability and enforcement options. It must operate alongside other models such as vicarious liability, third-party liability enforced through embargoing 'hot goods' produced in breach of labour standards, 'joint employment', inchoate liability for assistance and encouragement under the Serious Crime Act 2007, and new 'failure to prevent' offences imposed on powerful corporate actors. Consideration might also be given to a corporate transparency duty setting out the steps taken to eradicate minimum wage underpayment and wage theft in supply chains, along the lines of the 'slavery and human trafficking statement' in section 54 of the Modern Slavery Act 2015. Nor should we assume that the most coercive

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[101] <<<REFO:WBLN>>>'It Is Time for the UK Government to Lead from the Front to Tackle Exploitation' *Focus on Labour Exploitation* (3 October 2018) <www.labourexploitation.org/news/it-time-uk-government-lead-front-tackle-exploitation> accessed 16 May 2019<<<REFC>>>. We are grateful to Jen Collins for drawing this to our attention.

mechanisms are the most effective. In the final analysis, regulatory effectiveness will always be an empirical question.

C22.P82 We suggest that greater use could be made of accessory liability as it currently applies at common law, in respect of both civil and criminal liability. If a criminal offence is committed under the National Minimum Wage Act, accessory liability can attach to that offence. Successful prosecutions may have a strong deterrent effect. However, it may be advantageous to introduce specific legislation in the context of the fissured workplace, to increase the visibility of accessory liability amongst enforcement agencies. This is because the mental element at common law is somewhat unsettled after *Jogee*, and it may be helpful explicitly to recognize that wilful blindness should be sufficient in this context.[102] Furthermore, considering a draft provision may help to increase awareness of the potential utility of accessory liability.

C22.P83 A possible provision is as follows:

C22.P84 1. Participation in National Minimum Wage Act offences

[102] Although we suggest that this would be appropriate in accessory liability more generally: Davies (n 26) ch 2.

C22.P85 (1) A person who participates in the commission of a criminal offence under the National Minimum Wage Act is taken to have contravened that provision of the National Minimum Wage Act

C22.P86 2. Conduct element for participation

C22.P87 (2) A person participates in the commission of a criminal offence under the National Minimum Wage Act if, and only if, the person:

C22.P88 (a) has aided, abetted, counselled or procured the contravention; or

C22.P89 (b) has induced or facilitated the contravention, whether by threats or promises etc.

C22.P90 3. Mental element for participation

C22.P91 (1) A person must intend the acts or omissions that constitute involvement under section 1.

C22.P92 (2) A person must have knowledge of the essential elements of the principal's contravention.

C22.P93 (3) Knowledge includes actual knowledge and wilful blindness.

C22.P94 (4) There is no wilful blindness if the defendant proves on a balance of probabilities that:

C22.P95 (a) it has taken reasonable steps to ensure that workers employed by firms in a direct commercial relationship with the defendant, or by franchisees, or by their subcontractors, are being paid in accordance with applicable laws; and that pricing of its commercial contracts has taken this factor into account; or

C22.P96 (b) it has taken reasonable steps to ensure that subcontracting firms in a direct commercial relationship with the defendant recognize an independent trade union for collective bargaining purposes.

C22.P97 3. Interpretation

C22.P98 (1) An act or omission will only constitute 'participation' where it is a more than merely minimal cause of the principal's contravention.

C22.P99 Some explanation of these provisions is helpful, which takes the Australian Fair Work Act legislation as a source of inspiration. As regards the conduct element, it may be that section 2(b) is unnecessary, since it could be swallowed up by section 2(a). There is authority to suggest that inducement falls within procurement, and facilitation can be

covered by assistance, such that subsection (b) would be redundant. But given some lack of clarity on this issue, it is worth setting out section 2(b) expressly. In any event, the conduct element of accessory liability should be interpreted broadly. If 'aid, abet, counsel or procure' covers inducement and facilitation then (a) alone would suffice. We have deliberately not adopted section 550 of the Fair Work Act in its entirety, since that appears to extend criminal liability too far: conspiracy[103] should be based upon intention rather than wilful blindness and should not fall within this scheme, whilst 'knowingly concerned'[104] is too vague for criminal liability.

C22.P100 The mental element ensures that in the simple example of fissuring given above, liability cannot easily be evaded by turning a blind eye to the national minimum wage violations in a supply chain. As discussed above, judges are familiar with this concept of wilful blindness, which should be applied in a manner that ensures that the accused is sufficiently culpable to be convicted. Given this restrictive mental element, no special defences seem necessary. However, where the

[103] s 550(2)(d).

[104] s 550(2)(c).

defendant has taken steps to ensure that workers will be paid properly, or that there is a recognized and independent trade union engaged in collective bargaining, then the defendant should not be considered to have the requisite level of culpability for accessory liability. What constitutes reasonable steps is inevitably sensitive to the particular facts at issue. Where the supply chain is very long, it may not be reasonable for the lead company to investigate the fourth and fifth links down the chain, for example. But that is a question of fact. Moreover, it should be noted that in such circumstances the second or third link in the chain could potentially also be liable as an accessory to offences committed by the fourth or fifth link. The scope of the statute is not limited to lead companies. It covers both natural and legal persons where they have culpably contributed to another's primary wrongdoing.

C22.P101 We are not suggesting that accessory liability is a panacea for the enforcement crisis in the fissured economy. Even with statutory clarification of the knowledge requirement, there will be cases where proving wilful blindness in fissuring situations is problematic. And there will also be cases where it is difficult to determine whether the

commercial practices of the lead company have a sufficient causal impact upon the primary offence. But the boundaries of an area of law can often not be drawn with precision. There are clearly some cases that will fall within the ambit of accessory liability, and it is important to recognize this.

C22.P102 Three further points should be emphasized. First, we are proposing accessory liability as only one element in a wider enforcement strategy. It must operate alongside a multitude of other regulatory techniques that have been referred to in this chapter. Yet we consider it remiss that an existing form of liability—accessory liability—is not being used to tackle unconscionable business practices in the fissured economy.

C22.P103 Secondly, it is artificial and confusing to describe lead companies as employers when their wrongdoing occurs through commercial rather than employment practices. In functional terms, a lead company is not acting as an employer when it is negotiating prices in its commercial contracts with other companies. We would do better to label the wrong accurately. This is likely to contribute to effective enforcement. In many cases, the wrong is accessorial in nature.

C22.P104 Finally, it is a basic requirement of the rule of law that liability should be labelled fairly in both the criminal and civil law. Accessory

liability is morally distinctive. It has its own structure and rationale. It is unnecessary to distort the category of primary liability (eg through an over-extension of 'employer') when English law already provides us with the concepts necessary for fair attribution of liability. The moral coherence and intelligibility of the law's distinctions and categories should not be sacrificed lightly, and there is a danger that these distinctive legal virtues can be overlooked when there is such a strong focus on enforcement outcomes. The DLME's strategy report is the first serious attempt by a public institution to get to grips with these difficult issues in a generation. As that strategy develops, accessory liability must be an integral part of the drive to eradicate the scandal of wage theft in the fissured economy.