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Article

The Legal Concept of Work-Related Injury and Disease in Australian OHS and Workers' Compensation Systems*

Alan Clayton,† Richard Johnstone‡ and Sonya Sceats§

This article canvasses the concept of 'work-relatedness' in the Australian workers' compensation and occupational health and safety systems. In relation to workers' compensation systems it finds that there are at least seven different notions of 'work-relatedness', the resort to which in statutory regimes has varied over time and in respect of context. Apart from the area of reporting requirements under OHS statutes, there is little commonality in the 'work-relatedness' concept between these workers' compensation and OHS systems. The article explores the nature of the 'work-relatedness' concept in a detailed consideration of the three core criteria of workers' compensation coverage, those of 'worker', 'injury/disease' and the requisite employment connection between a claimant's employment and the injury or disease. Similarly, in respect of OHS systems the 'work-relatedness' concept is explored both in regard to reporting requirements and in respect of the general duties and regulations that form the backbone of Robens-style OHS regulation.

1. Introduction

This article analyses the concept of 'work-relatedness' in Australian workers' compensation and occupational health and safety (OHS) systems. The concept of work-relatedness is important because it is a crucial element circumscribing the limits of the protection afforded to workers under the preventative OHS statutes, and is a threshold element which has to be satisfied before an injured or ill worker can recover statutory compensation. While the preventive and compensatory regimes do draw on some similar concepts of work-relatedness, as this article will illustrate, there are significant differences both between, and within, these regimes.

Pursuant to the federal division of power, both preventive OHS and workers' compensation schemes operate primarily at the level of the States and Territories with a smaller role reserved for the Commonwealth. Although there is a broad consistency in the general approaches to workers'

* An earlier version of this paper was presented to the National Occupational Health and Safety Commission in March 2002.

† National Research Centre for Occupational Health and Safety Regulation, Regulatory Institutions Network, Research School of Social Sciences, Australian National University.

‡ National Research Centre for Occupational Health and Safety Regulation, Regulatory Institutions Network, Research School of Social Sciences, Australian National University; and Faculty of Law, Griffith University.

§ National Research Centre for Occupational Health and Safety Regulation, Regulatory Institutions Network, Research School of Social Sciences, Australian National University.

compensation and OHS in all 10 jurisdictions, there can be significant variations between jurisdictions in the manner in which elements of these general approaches are operationalised. Some of these, such as eligibility criteria for workers' compensation coverage, coverage or non-coverage of journey injuries and reporting requirements (including the effect of employer excess periods), can make attempts to properly gauge the nature and extent of work-related injury and disease in Australia, and efforts to make meaningful comparisons between jurisdictions, a difficult task. A number of these difficulties have been faced in the endeavours of the Workplace Relations Ministers' Council in its three (to date) Comparative Performance Monitoring reports.[1]

This article offers a comparative survey of the statutory legal concept of work-related injury and disease across all 10 workers' compensation and OHS jurisdictions.[2] The notion of 'work-relatedness' is central to the boundary-setting task of workers' compensation systems in particular, but also has some importance in OHS schemes. However, as be will explored in the next section, the notion of work-relatedness, and in particular the manner in which this concept has been utilised — either explicitly or implicitly — as a control device in setting system boundaries and mandating threshold requirements for entitlement or system coverage, is one that varies according to context and time. Particularly in the workers' compensation context, this variation represents the playing out of political and economic struggles and their reflection in the balance between the broadening of entitlement (both in terms of access to, and level of, compensation benefits) on the one hand and scheme affordability (in terms of the level of employer premiums) on the other. In the OHS statutes, there has been a significant expansion in regulatory reach, but the precise scope of these developments, and the concepts upon which they have been built, have varied from jurisdiction to jurisdiction.

The article begins with an overview of the evolution of the different conceptions of work-relatedness in the Australian workers' compensation context, and is followed by a more detailed analysis of the different dimensions of work-relatedness in current Australian workers' compensation statutes. Many of these dimensions are also present in the evolution of the notion of work-relatedness in the OHS statutes, as will be explored in the latter part of this article. Throughout the article the analysis of the notion of work-relatedness in the workers' compensation and OHS statutes will be located within seven conceptions of work-relatedness which are outlined in the following section.

1 The latest is Workplace Relations Ministers' Council, *Comparative Performance Monitoring: Australian and New Zealand Occupational Health and Safety and Workers' Compensation Schemes*, 3rd Report, August 2001.

2 We do not examine the notion of 'work-relatedness' in common law compensation claims, because there is no legal requirement of work-relatedness for a common law claim for compensation for personal injury to be launched.

2. The Protean Nature of the 'Work-relatedness' Concept in Workers' Compensation Systems

The notion of work-relatedness is (and indeed always has been) either overtly or implicitly central to the issue of the coverage of workers' compensation systems. However, 'work-relatedness' is an extremely protean concept and its use as a control device takes a number of forms and operates on a number of levels. The nature of its invocation is often more reflective of political expedience and pragmatism rather than of principle. Indeed, its operation in this area is strongly emblematic of the aphorism of the US jurist Oliver Wendell Holmes that the life of the law is not logic but experience.

The experience of the operation of workers' compensation schemes in the Anglo-Australian context, over a period of little over a century, suggests at least seven dimensions in which work-relatedness is an issue. The context in which this operates can be either that of external boundary setting or that of an internal control mechanism. External boundary setting is quintessentially one of the political and economic concerns that become articulated through the legislative process. This is often more of a cyclical than a linear process. For instance, the 1940s and the late 1980s were generally characterised by expansion of coverage, including the recognition of journey claims in the former period and the removal of some coverage restrictions (for example, to outworkers) in the latter. Much of the 1990s, on the other hand, has seen a more restrictive approach to the nature and extent of coverage with, for instance, the removal of journey claims from coverage in a number of jurisdictions.

The swing between expansion and contraction of entitlements in part reflects the relative strength of the contending parties. However, the increasing globalisation of world trade has provided downward pressure on a range of worker entitlements, both in terms of a response to business competitiveness on a global stage and, sometimes, as repugnant to the new rules of engagement of international trade as being viewed as 'disguised protection'. This process is further complicated by the federal nature of workers' compensation in both Australia and North America, with the result that workers' compensation has long been part of the process of political gamesmanship between jurisdictions in the quest to attract and retain business investment. Consequently, there have been pressures to cut back on entitlements, in order to secure lower premiums, in the attempt to achieve a 'business friendly' environment. The countervailing pressure comes from groups, particularly the trade union movement, with a social justice perspective.

This is, however, a terrain that is not free of ambiguity. On the one hand, the different jurisdictions provide the opportunity for business groups to attempt to arbitrage more favourable conditions (in a whole range of areas relating to taxes and charges as well as work-related imposts such as workers' compensation) by playing off one State or Territory against another as the potential source for new or continuing investment. On the other hand, in a world of national and international markets, the need to comply with a substantial number of differing requirements in the various jurisdictions in which an enterprise carries on business brings with it significant administrative costs. Accordingly, there are recurrent pressures for greater

harmonisation and consistency in scheme arrangements across Australia. A push in this direction came from the then Labour Ministers' Council (now Workplace Relations Ministers' Council) in mid-1994 and produced a response from the State and Territory schemes in its publication, *Promoting Excellence*.[3] However, it was an initiative that petered out with little more than rhetorical compliance. Recently, this push has been revived by the current Federal Government with its proposed referral of the issue to the Productivity Commission for review.[4]

In this ongoing tale of action and reaction that has been played out over the last century, there can be discerned at least seven different notions of work-relatedness. These fall into two major areas. First, the external boundary setting process in which the statute defines the parameters of the system and hence its general interface with other systems such as motor accident compensation schemes and social security. Secondly, the process of internal boundary setting whereby the statute — and judicial gloss upon the statutory provisions — provides a shepherding exercise distinguishing between events and activities that fall within scheme coverage and those that do not. For instance, disentitling provisions, under which a certain indicium or certain indicia pertaining to the events in which the injury occurred, which act to remove from coverage an injury which is not tainted by these features.

External boundary setting

In terms of external boundary setting, the first form that work-relatedness takes is that of the *qualitative nature of the work or employment*. This is exemplified in the form of the initial Anglo-Australian workers' compensation statutes — for instance the English Workmen's Compensation Act of 1897 and the 1900 South Australian statute — in which coverage was restricted to specified areas of employment in which it was assumed that there were special risks associated with the employment. These areas of activity included being on, or in, or about a railway, factory, mine, quarry or engineering work and being on, or in, or about any building exceeding 30 feet in height.

This somewhat restricted framing of the issue of work-relatedness and scheme coverage gave way, with the 1906 English Act, and the Australian measures such as the 1914 Victorian Workers' Compensation Act that essentially copied it, to a more generalised basis for coverage control through resort to the notion of the *form of the work relationship*. It takes as a starting point the common law distinction between persons working under a contract of service (workers, employees) and those working under a contract for services (independent contractors) with (under this test) coverage extending to persons in the first of these two categories.

However, as with much else in respect of workers' compensation coverage and practice, this is not a neat divide, nor a seamless transition from one control concept or formula to another. Thus, elements of the former qualitative

3 Heads of Workers' Compensation Authorities, *Promoting Excellence: National Consistency in Australian Workers' Compensation, Interim Report to Labour Ministers' Council*, May 1996.

4 See the joint press release, dated 24 July 2002, titled 'Government to Consider Workers' Compensation Reform', issued by the Minister for Employment and Workplace Relations and the Parliamentary Secretary to the Treasurer.

nature of the work criterion for coverage still intruded into this more general framing of the issue. For instance, there was a strong blue collar stamp to the new formulation through the provision of a general exclusion of a worker whose income exceeded £250 a year unless that person was employed by way of manual labour. This aspect of an income threshold was not removed from Victorian workers' compensation law until 1972. Other more specific occupational exclusions also applied, for instance with respect to fishermen remunerated by a share or proceeds of the catch. As can be seen later in this article, a number of these older historical exclusions, together with some of more recent vintage, are still present in current Australian statutes. A prime basis for many of these more specific exclusions is still the old element of the qualitative nature of the work.

However, in some cases, a supplementary element, that of the *degree of employer control of the work*, provides a buttressing justification for exclusion. This third element is integrally related to the second, the form of the work relationship. For a long period, the essential touchstone for distinguishing between contracts of service from contracts for services was the control test. Even in the modern articulation of the basis for making such a distinction, the element of control is still central.[5] The resort to the test of the degree of employer control of the work as a basis for excluding coverage of, for instance, outworkers is somewhat problematical since a range of other largely unsupervised activities (for example, gardeners, commercial travellers etc) were not so excluded. It is likely that the formal and overt justification for exclusion cloaks the real basis, namely a subterranean fear by insurers and policy makers of a situation of moral hazard, a feature that is probably also operative in the historic exclusion of claims from members of the employer's family residing in the employer's home.

However, particularly in more recent times, the notion of the degree of employer control of the work has taken on a new life and dimension in establishing the boundaries of workers' compensation schemes. Thus, the concept of 'employer controllable risk' was utilised by the (then) Industry Commission, in its 1994 report on workers' compensation in Australia, as the basis upon which journey claims should be removed from workers' compensation coverage and that consideration should also be given to excluding recess claims, in the form of free-time breaks outside the workplace, from such coverage as well.[6]

A fourth dimension of work-relatedness that intrudes into aspects of workers' compensation coverage is that of requiring an element of *employer benefit* in the activities being undertaken at the time that an injury was sustained in order for such an injury to be compensable. This particular element of work-relatedness can sit somewhat uneasily with that of the employer's control of the work. During the 1940s the Australian jurisdictions embraced the extension of coverage to journey injuries on the basis that such journeys were simply an antecedent activity undertaken for the benefit of the

5 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; 63 ALR 513 and see below. See also *Hollis v Vabu Pty Ltd* (2001) 75 ALJR 1356; 106 IR 80.

6 Industry Commission, *Workers' Compensation in Australia*, Report No 36, AGPS, Canberra, February 1994.

employer: that is, a physical relocation from the worker's home to the place of work to undertake activities for the benefit of the employer. The notion of employer benefit was reinforced by exclusion from coverage of injuries sustained during an unreasonable deviation (whether in terms of time or distance) from such a journey as such a deviation bespoke more of an activity characterised by private benefit. However, as has been noted, viewed through the prism of employer controllable risk, the Industry Commission and others reached the opposite conclusion that even a direct journey between home and work should be outside scheme coverage.

Internal boundary setting

In terms of internal boundary setting, the principal control device for workers' compensation schemes is the primary expression of entitlement, one that denotes work-relatedness in causal and temporal elements. The original expression referred to an injury 'arising out of *and* in the course of employment', requiring the satisfaction of both these elements. In Australia, beginning from the 1920s, jurisdictions moved to a disjunctive formulation of this primary entitlement expression so that eligibility for compensation rested upon demonstrating an injury 'arising out of *or* in the course of employment'. Only Tasmania has resisted this trend. In the United States, however, the original expression is still the test in 43 states and under the Longshore and Harbor Workers' Compensation Act, with only Utah moving to the disjunctive form of this expression.

Arising out of the employment

The fifth dimension of work-relatedness, then, is one that is expressed in terms of a *causal relationship between the injury and the employment*. As with the other control measures governing the bounds of workers' compensation coverage and entitlement, this is a dynamic rather than static notion. Over the course of the last hundred years the courts in the United Kingdom, Australia and the United States have developed at least four different tests for determining this connection. The earliest of these was the *peculiar-risk test*, one that required that the source of harm in terms of its nature (as distinct from its quantity) be peculiar to the injured person's occupation. It is perhaps best illustrated by one celebrated early US case in which a labourer, whose foot froze while working all night during an extremely cold period, was denied compensation on the grounds that he was not exposed to any greater risk of freezing his foot than the ordinary person engaged in outdoor work in cold weather.[7] However, the essential point is that the ordinary person is not engaged in outdoor work during very cold weather and this flaw in the test has meant that it is now essentially obsolete in workers' compensation jurisprudence.

The successor doctrine, the *increased-risk test*, is the current dominant test in the United States, where, as already noted, 44 jurisdictions retain the original British dual requirement of an injury 'arising out of and in the course of employment'. The increased-risk test differs from the peculiar-risk test in

7 *Robinson's Case* 292 Mass 543; 198 NE 760 (1935).

that the distinctiveness of the employment risk can be contributed to by the increased quantity of a risk regardless of the fact that this may not be qualitatively peculiar to the employment.

In Australia, with the move towards the disjunctive formulation of the primary entitlement criterion, noted above, most cases could be dealt with on the basis of the 'in the course of employment' requirement. However, where a case did turn upon a finding that the injury arose out of the employment, the general test applied is what has been called the *actual risk test*. In terms of a plain reading of the statutory language of 'arising out of' the employment, this is the most defensible interpretation. It simply requires that the worker demonstrate that the employment subjected him or her to the actual risk that caused the injury. There is no additional requirement such as a peculiar or increased risk.

While the increased risk doctrine is still the dominant line of interpretation in the United States, an increasing number of courts have moved to embrace alternative positions. This includes a move to the actual risk test, but a number of other courts have moved further to adopt the *positional-risk test*. To a considerable degree this involves a conflation of the 'arising out of' requirement with the 'in the course of' condition. It regards an injury as being compensable where it would not have occurred but for the fact that the nature and requirements of the employment placed the worker in the position where he or she was injured. It thus allows compensability for an injury — for instance, as the result of being struck by a bullet fired by a fleeing bank robber — where the only connection with the employment is the fact of being in the place where the injury occurred by virtue of some employment duty (for example, making a delivery).

In the course of employment

The move in Australia to the disjunctive form of the primary entitlement provision allowed an avenue for compensability, through the 'in the course of' employment limb, which required a different rendering of the work-relatedness requirement and one that was, in most injury situations, more easily satisfied. The course of employment avenue brings into play a sixth form of work-relatedness, namely that of work-relatedness in terms of a *nexus of time, place and activity*. That is, a compensable injury must demonstrate a work connection in terms of having occurred within the time and space confines of the employment and also while engaged in an activity the purpose of which is related to the employment. In the OHS regulatory regimes, this nexus of time, place and activity is also important (see below).

The legislative changes to the primary entitlement provision in the workers' compensation schemes began to take place in Australia from the 1920s. This left to the courts the task of deciding the precise relationship between the two limbs of this entitlement provision, that is between the 'arising out of' and the 'in the course of employment' elements. In particular, the issue whether the 'in the course of employment' element was purely temporal in nature or had some residual causal component to it. This issue was not finally decided in a definitive manner until the High Court decision in *Kavanagh v*

Commonwealth[8] clearly established that this element was purely temporal in nature and that the worker need only be engaged in an activity that was part of or incidental to his or her employment.

The fact that a worker could recover compensation through this route, one in which there need be no additional causal relationship to the employment than engagement in an activity incidental to that employment, did not become a matter of concern until the late 1980s and early 1990s. However, a number of factors, from the late 1980s, began to coalesce and create a climate for legislative intervention, particularly in the direction of tightening access to workers' compensation benefits and requiring greater obligations on the part of claimants. These factors centred on the costs of workers' compensation but involved a number of different strands of concern. They included a reactive circumspection to aspects of the expansion of statutory benefit arrangements in a number of schemes during the late 1980s, unease over the nature of rehabilitation and a perceived lack of return-to-work focus and the highlighting of the relatively small (but, in scheme financial terms, costly) group of long-term claimants, often with connotations of 'bludging' on the system. This occurred as the legacy of the welfare state was largely extinguished and a new zeitgeist prevailed in which economic rationalist solutions achieved orthodoxy.

This shift came with the election of the Kennett Government in Victoria, in late 1992, which, in one of its earliest legislative initiatives, acted to restructure the bases of the Victorian workers' compensation scheme in a move from the former WorkCare scheme to a new WorkCover system. Quite fundamental changes to long-established principles were made, such as the removal of journey claims for injuries sustained between home and work. As well, the WorkCover measures included the grafting of a new, additional, general test of work-relatedness upon the traditional 'arising out of or in the course of employment' requirement as a basis for eligibility for workers' compensation benefits. This change introduced a seventh form of work-relatedness into workers' compensation law and practice. This form of work-relatedness is in terms of *the degree of employment contribution*. The Victorian phraseology was that the employment must be a 'significant contributing factor' to the injury or disease. In time, several other jurisdictions have followed suit in introducing such an additional requirement, although sometimes utilising different terminology.

During the 1990s a number of other developments contributed to a momentum of change and reassessment of the boundaries of workers' compensation coverage. In particular, a number of largely inchoate policy issues concerning the boundaries of an employer-financed workers' compensation scheme vis à vis the taxpayer-financed federal social security system crystallised as political issues for the Federal Government and those of the States and Territories. This wider question, typified in the 1996 report from the Heads of Workers' Compensation Authorities to the (then) Labour

8 (1960) 103 CLR 547; [1960] ALR 470.

Ministers' Council as the 'workers' compensation conundrum',[9] merged with other issues raised in a number of reports and discussion papers concerning the limits of employer responsibility under the rubric of 'employer controllable risk'. Important in this latter debate was the (then) Industry Commission's workers' compensation report which, as mentioned above, argued, on the basis of the doctrine of employer controllable risk, that journey claims should be removed from workers' compensation coverage and that consideration should similarly be given to excising certain recess claims from coverage.

Workers' compensation schemes in Australia have been in a process of continuing foment and change for more than two decades. There are no signs that this situation is about to change. As in the past, notions of work-relatedness will continue, either explicitly or implicitly, to be central to and often to inform this process of change. It is highly likely that new principles of work-relatedness will emerge from these developments.

With these shifting conceptions in mind, this article next examines the current tests for work-relatedness in Australian workers' compensation systems.

3. The General Elements of Eligibility in Current Australian Workers' Compensation Legislation

The 10 principal Australian workers' compensation schemes are governed by the following statutes:

- Commonwealth — Safety, Rehabilitation and Compensation Act 1988 (Cth) (Comcare) (public sector employment);
- Commonwealth — Seafarers Rehabilitation and Compensation Act 1992 (Cth) (Seacare) (overseas and interstate maritime employment);
- New South Wales — Workers' Compensation Act 1987 (NSW) (NSW (WCA)) and Workplace Injury Management and Workers' Compensation Act 1998 (NSW) (NSW (WIMWCA));
- Victoria — Accident Compensation Act 1985 (Vic);
- Queensland — WorkCover Queensland Act 1996 (Qld);
- South Australia — Workers Rehabilitation and Compensation Act 1986 (SA);
- Western Australia — Workers' Compensation and Rehabilitation Act 1981 (WA);
- Tasmania — Workers Rehabilitation and Compensation Act 1988 (Tas);
- Northern Territory — Work Health Act 1986 (NT);
- Australian Capital Territory — Workers' Compensation Act 1951 (ACT).

The form of Australian workers' compensation arrangements owes much to the founding English statutes, the Workmen's Compensation Acts of 1897 and 1906. This common heritage has meant a high degree of standardisation with

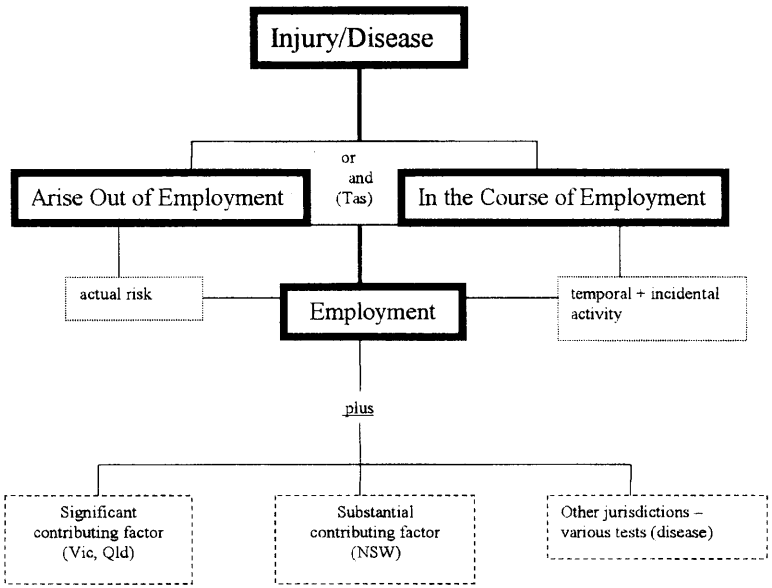
9 Heads of Workers' Compensation Authorities, *Promoting Excellence: National Consistency in Australian Workers' Compensation, Interim Report to Labour Ministers' Council*, May 1996.

respect to the core principles of workers' compensation in Australia. However, notwithstanding this broad congruency of themes, a century of policy and statutory adjustments has caused an increasingly complex array of features, peculiar to one or several jurisdictions, to be layered on top of this general approach. These divergences have been intensified in recent years by escalating amendments designed to address a range of pressures upon each of the workers' compensation systems in Australia.

Eligibility for workers' compensation hinges upon three core criteria. First, a claimant must fall within one of the categories of 'worker' to whom the relevant scheme applies. Second, the claimant must have suffered a type of injury or disease for which compensation is payable. Third, the requisite connection between the claimant's employment and the injury or disease must be proved. The combined operation of these three elements determines the coverage of any particular workers' compensation scheme. Divergences in relation to any aspect of these elements will impact on whether a particular injury or disease is compensable in a particular jurisdiction, and hence included in the reported statistics for work-related injury and disease. For example, while the nexus between a broken leg caused to an outworker while carrying piecework to a van for delivery to a retail outlet prima facie satisfies the requirement of an injury arising out of and in the course of employment, statutory exclusion of outworkers from the definition of 'worker' in Tasmania precludes a claim for workers' compensation.[10] The situation might be different if the same injury occurred in Victoria where the definition of 'worker' explicitly makes reference to the inclusion of outworkers.[11]

In simplified outline, the nature of the work-relatedness requirements in Australian schemes is encapsulated in Figure 1.

10 Tas s 4(5)(b).
11 Vic s 5(1) (definition of 'worker').



Australia's various workers' compensation schemes are therefore driven by the composite notion of a *worker who suffers an injury or disease that is work-related.* To understand the divergences in relation to the specific content of this notion, it is therefore necessary to compare the approach taken towards the three core criteria that inform this notion and hence determine eligibility for workers' compensation in the various jurisdictions.

Who is entitled to workers' compensation? The concept of 'worker'

As the notion of workers' compensation suggests, eligibility for benefits is restricted to persons who satisfy the relevant definition of 'worker' or, in relation to Comcare and Seacare, 'employee'. Over time, the general law has developed a legal concept of 'employee' to function as the touchstone for the duties and protections afforded by employment law. This distinguishes between 'employees' supplying services pursuant to a contract *of* (general) service, and 'independent contractors' operating a business in their own right and supplying services to another party pursuant to a contract *for* (specific) services. The courts have developed a range of tests to distinguish employees from independent contractors and other non-employees. The approach currently favoured by the Australian courts considers a range of factors including the degree of control over the worker's activities, the level of the worker's integration into the primary business, whether the worker supplies his or her own tools and equipment, whether the worker bears the financial

risks associated with the venture, whether the worker is free to perform work for other persons, and whether the worker receives wages or is paid according to invoice.[12]

Contract of employment

Each of the workers' compensation statutes provides a primary definition of 'worker' that tacitly imports the general law distinction between an employee and an independent contractor. A typical definition is that occurring in the ACT legislation providing that a worker is 'any person who has entered into or works under a *contract of service* or apprenticeship . . .'.[13] The relevant contract can be express or implied, oral or in writing. Subject to specific qualifications in relation to casuals in some jurisdictions, this general definition does not distinguish between full-time, part-time and casual workers.

The only significant departure from the primary definition of 'worker' being aligned with its general law meaning was that formerly taken in the Northern Territory and (for a lesser period of time) Queensland. The nature of this departure was based on a person's liability for payment of taxation as PAYE (Pay As You Earn) taxpayer. With the introduction of sweeping taxation arrangements by the Commonwealth, from 1 July 2000, both the Queensland and Northern Territory systems made changes to their definition of 'worker' to accommodate the Commonwealth changes. In Queensland there was a reversion to a traditional position of 'an individual who works under a contract of service'[14] while in the Northern Territory the organising principle has become the non-provision of an Australian Business Number (ABN).[15] From being the most restrictive in terms of coverage of workers, the current Northern Territory position, which involves 'a person who under an agreement or contract of any kind . . . performs work or a service of any kind for another person' and does not provide that other person with an ABN, is functionally similar to the other Australian jurisdictions and may potentially be even more liberal.

Extension to include independent contractors at general law

Notwithstanding the basic exclusion of independent contractors from workers' compensation entitlements, specific extensions to the definition of 'worker' in each jurisdiction have expanded the operation of workers' compensation schemes to encompass certain persons who at general law are characterised as independent contractors. This reflects specific policies to protect persons who perform contracts in certain types of circumstances or who work in certain industries, for example outworkers and rural workers, as well as a more general concern to counteract attempts by employers to evade workers'

12 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; 63 ALR 513 and *Hollis v Vabu Pty Ltd* (2001) 75 ALJR 1356; 106 IR 80.

13 ACT s 6(1) (emphasis added). There are similar provisions in Comcare, Seacare, NSW, Vic, Qld, SA, WA and Tas. The additional words in the Victorian legislation 'or otherwise' do not amount to an extension of coverage to persons who would not be regarded at general law as employees: *Bailey v Victorian Soccer Federation* [1976] VR 13.

14 Qld s 12(1).

15 NT s 3(1)(b) (definition of 'worker').

compensation obligations by falsely classifying as self-employed contractors persons whose duties are in reality those of an employee.

Significant complexity is added by the varying scope and manner in which extensions are framed across the different schemes. One provision which has been applied consistently across a number of jurisdictions extends coverage to any contractor engaged to perform work (not being incidental to a trade or business regularly carried on by the contractor in his or her own name or by means of a partnership or business or firm name) who neither sublets the contract nor employs workers (or although employing workers, actually performs some part of the work personally). In New South Wales, Victoria, Tasmania, Queensland and the ACT, such persons are deemed to be workers employed by the person who made the contract with the contractor.[16] This provision has been judicially interpreted as applying to persons who work for the principal but have no independent business or trade and persons who, though carrying on an independent trade or business, undertake a contract outside the scope or course of that trade or business.[17] New South Wales, Tasmania and the ACT impose threshold values on the relevant contracts before a contractor will be deemed to be a worker under this provision.[18] Similarly, in the Western Australian provision, the definition of 'worker' as persons engaged under a contract of service to perform work for the purposes of another person's trade or business where remuneration is received 'in substance' for his or her manual labour or services,[19] has been interpreted narrowly as meaning that 'the something else is comparatively so insignificant that in reality . . . it is a return for the manual labour so bestowed'.[20]

Other provisions extending the coverage of workers' compensation schemes to encompass particular contracting arrangements are peculiar to specific jurisdictions (see below). The Victorian scheme is the most far-reaching in its adoption of a measure, based on the anti-avoidance provisions of payroll-tax legislation, which has the effect of deeming as workers a broad range of contracting arrangements in which work is performed for a principal on a captive or largely captive basis, subject to a range of exemptions.[21] Specific exclusions include those relating to contractors supplying labour that is ancillary to the supply of equipment or materials, contractors supplying services that are outside the mainstream scope of the principal's business and who supply these services to the public generally, contractors supplying services pursuant to a contract with an annual value exceeding $500,000, and contractors supplying services for less than 90 days in a year.[22]

Victoria, Tasmania, New South Wales, the Northern Territory and the ACT

16 See for example Tas s 4B(1). There are similar provisions in NSW (WIMWCA), Vic, Qld and the ACT.

17 *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 at 401 per Dixon J; [1950] VLR 44.

18 Greater than $10 in NSW and ACT and more than $100 in Tasmania.

19 WA s 5(1)(b) (definition of 'worker').

20 *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 at 212; [1963] ALR 859. For instance, a tradesman who provides the hand tools to do the manual work required under the contract or a person whose work in performing the contract is not wholly manual.

21 Vic s 9.

22 Vic ss 9(1)(d)–(f).

expressly provide for the liability of the principal for workers' compensation payments to subcontractors in certain circumstances,[23] particularly in attaching liability to the principal in circumstances where a contractor is uninsured.[24]

Deemed exclusions

Each of the workers' compensation statutes specifically excludes certain categories of persons from the definition of 'worker'. There is little in the way of rational principle for making such exclusion from coverage, apart from areas of employment that are covered by other measures for disability benefits which are usually equivalent or superior to those provided by the particular workers' compensation scheme.[25] Many such categories of exclusion (for example, outworkers in Tasmania) represent an overhang from the early history of workers' compensation or else a policy response to particular court decisions (for example, the moves to exclude sportspersons from coverage following the decisions of superior courts in New South Wales and Victoria).

Apart from the exclusion of outworkers in Tasmania,[26] there are a number of other examples of exclusions that represent instances of historical overhang. Among these is the exclusion that operates in Western Australia, Tasmania, New South Wales and the ACT of persons employed on a casual basis where the purpose of the employment is other than for the employer's trade or business,[27] of domestic servants employed for less than 48 hours by the same employer at the time of injury,[28] and that in Western Australia, Northern Territory and the ACT of members of an employer's family who dwell in the employer's home, except where disclosure has been made to the relevant insurer.[29]

The treatment of sportspersons under the various schemes is often perplexing and contradictory. Following the decisions of the New South Wales Court of Appeal in *Peckham v Moore*[30] and of the Full Court of the Victorian Supreme Court in *Bailey v Victorian Soccer Federation*,[31] various jurisdictions moved to a general exclusion of professional sportspersons from coverage while engaged in training, competition or travel in respect of training and competition.[32] New South Wales is the only jurisdiction to have provided an alternative means of compensation for injured athletes.[33] However,

23 See, for example, ACT s 14(1). There are similar provisions in Vic, Tas, NT and NSW (WCA).
24 Vic s 10A. Similarly, NSW (WCA) s 20, although this does not apply to certain forms of agricultural work involving the use of mechanical machinery: s 20(3).
25 See, for example, Comcare s 5(8).
26 Tas s 4(5)(b).
27 See, for example, WA s 5(1). There are similar provisions in Tas, NSW (WIMWCA) and the ACT. The operation of the NSW provision is highly circumscribed in applying only to a single period of five or less working days: NSW (WIMWCA) s 4(1)(b).
28 Tas s 4(5)(c).
29 See, for example, ACT s 6(2). There are similar provisions in WA and NT.
30 [1975] 1 NSWLR 353.
31 [1976] VR 13.
32 New South Wales so legislated in 1977 and Victoria in 1978. (See also Qld, SA, WA, Tas). In the Northern Territory this exclusion does not operate where a sportsperson is entitled to remuneration of not less than 65% of the annual equivalent of average weekly earnings.
33 Sporting Injuries Insurance Act 1978 (NSW).

a number of classes of professional sportspersons (for example, jockeys) have long been covered under workers' compensation legislation and this has continued, notwithstanding the general exclusion, through specific coverage provisions. Persons who are both an employee and a director of a company are subject to either a complete or conditional exclusion from coverage in a number of jurisdictions. Queensland provides for a general exclusion from coverage of company directors, trustees and partners,[34] while in Western Australia[35] and the Northern Territory,[36] such a general exclusion of employee directors can be overcome by specified disclusre to the company's insurer. In Queensland, Tasmania and the Northern Territory, crewmembers of fishing vessels whose remuneration is based on a share of the catch or profits of the vessel are excluded.[37] A similar Western Australian provision only operates where the crewmember contributes to the cost of working the vessel.[38]

There is a potpourri of other miscellaneous exclusions such as foster parents and private providers of childcare services in the Northern Territory,[39] driving instructors in Queensland who supply their own vehicle,[40] certain delivery drivers in South Australia[41] and direct selling agents operating under a specific exemption in the Northern Territory.[42]

Deemed inclusions

In contrast to the deemed exclusions, each scheme has deemed that persons involved in certain activities or pursuits *are* 'workers' for the purposes of workers' compensation.

One significant area of deemed inclusion is in respect of persons who, although not employed under a 'contract of service' in the strict legal sense, are none the less considered appropriate beneficiaries of workers' compensation entitlements. Thus, taxi drivers who operate under a contract of bailment (paying a fixed amount or proportion of their receipts as consideration for the use of the vehicle) are deemed to be workers in five jurisdictions.[43] Similarly, ministers of religion, who have uniquely ambiguous employment status, are given such coverage in most jurisdictions.[44] In like vein, coverage is extended in Western Australia, New South Wales and Victoria to tributors[45] and also to sub-tributors in Victoria,[46] as well as to share farmers in Victoria and Queensland[47] and to salespersons, canvassers,

34 Qld Sch 2, Pt 2 cll 1(a), (b) and (c).
35 WA s 10A.
36 NT s 3(1) definition of 'worker' para (b)(v) and s 3(3).
37 See, for example, Qld Sch 2, Pt 2, cl 3. There are similar provisions in Tas and NT.
38 WA s 17.
39 Work Health Regulations (NT) regs 3A(2)(c) and (d) respectively.
40 Qld Sch 2, Pt 2 cl 4, unless such persons are working under a contract of service.
41 Workers' Rehabilitation and Compensation (Claims and Registration) Regulations 1999 (SA) reg 5(13).
42 Work Health Regulations (NT) reg 3A(2)(b).
43 See, for example, Vic s 7. There are similar provisions in NSW (WIMWCA), SA, Tas and NT.
44 See, for example, ACT s 6A. There are similar provisions in NSW (WIMWCA), Vic, SA, WA and Tas.
45 See, for example, WA s 7(1). There are similar provisions in NSW (WIMWCA) and Vic.
46 Vic ss 5(6) and (7).
47 See, for example, Vic s 11. There are similar provisions in Qld.

collectors or persons paid by commission in New South Wales, Queensland, Tasmania and the ACT.[48] Historically there were issues about the legal employment status of what were formerly called 'crown servants' including police officers.[49] This at least in part accounts for the deemed coverage of police under the Comcare, Northern Territory, Victorian and Tasmanian schemes.[50] Tasmania extends this coverage to police volunteers, as does Victoria where members of the retired police reserve are also covered.[51] Police in Western Australia are entitled to workers' compensation only where death ensues as a result of injury.[52]

A second area of deemed inclusion is in respect of persons engaged in voluntary yet socially important activities. All jurisdictions except Western Australia include volunteer fire fighters.[53] Volunteer ambulance officers are covered in New South Wales, Queensland (provided a contract has been concluded with WorkCover), Tasmania and the Northern Territory.[54] Comcare includes persons involved in search and rescue operations carried out by certain Commonwealth government departments.[55] Mine rescue personnel are covered in New South Wales.[56] The Northern Territory extends coverage to a range of state emergency personnel.[57] Queensland extends coverage generally to persons engaged in voluntary or community services and workers at non-profit organisations provided a contract is concluded with WorkCover.[58] Comcare covers volunteers at a range of museums and galleries and other organisations such as CSIRO and the Great Barrier Reef Marine Park Authority.[59] Jurors, who are covered by a special scheme in Victoria,[60] are expressly included under the general Northern Territory scheme.[61]

Thirdly, mention has already been made of deemed exceptions to the general exclusion of professional sportspersons. Jockeys are deemed to be

48 See, for example, Qld Sch 2 Pt 1 cl 3. There are similar provisions in NSW, Tasmania and the ACT.

49 See P Hogg, *Liability of the Crown in Australia, New Zealand and the United Kingdom*, Law Book Company, Sydney, 1971.

50 See, for example, Comcare s 5(2)(a). There are similar provisions in NT, Vic and Tas.

51 See, for example, Tas s 6A(1). There are similar provisions in Vic. For police volunteers see Police Assistance Compensation Act 1968 (Vic) s 2.

52 WA s 5(1).

53 See, for example, Tas s 5. There are similar provisions in Comcare, NSW (WIMWCA), Qld (where a contract is concluded with WorkCover), SA and NT. Volunteer and casual fire fighters are covered in Victoria by s 63 of the Country Fire Authorities Act 1958.

54 See, for example, Tas s 6(1). There are similar provisions in NSW (WIMWCA), Qld, Tas and NT.

55 Commonwealth Employees' Rehabilitation and Compensation Act 1998 — Notice of Declarations and Specifications — 1988 Notice. Note that Commonwealth Employees' Rehabilitation and Compensation Act 1998 is the former name of the Safety, Rehabilitation and Compensation Act 1998.

56 NSW (WIMWCA) Sch 1 cl 8.

57 NT s 3(7).

58 Qld ss 20–1, 23.

59 These deeming provisions are to be found in a range of Notices of Declarations and Specifications declared under Comcare s 5(6).

60 Juries Act 1967 (Vic) s 59.

61 Work Health Regulations (NT) s 3A(1)(aa).

workers in all jurisdictions except Tasmania.[62] The Northern Territory and ACT schemes include stable hands,[63] while New South Wales and South Australia extend coverage to harness racing drivers.[64] Boxers, wrestlers, referees or umpires are eligible for workers' compensation in New South Wales, South Australia and the ACT.[65]

A fourth area of deemed coverage is in regard to various work experience and training programmes. Thus, participants in certain school and TAFE work experience programs are covered in Victoria and Queensland,[66] while participants in certain work training programs are covered in New South Wales, Victoria, South Australia and Tasmania.[67] Contrarily, there is an explicit exclusion from coverage in relation to participants in approved programmes and certain work for unemployment schemes in both Queensland and Tasmania.[68]

Fifthly, there are areas of deemed coverage that reflect earlier historical concerns or, conversely (particularly with outworkers) the redressing of former explicit exclusions. One historical group, although with the sharp decline in rural employment not of great numerical significance, is the deemed inclusion of a range of rural workers. Timber contractors are deemed workers in New South Wales and Victoria as well as the ACT (provided the ACT Government is not the principal).[69] New South Wales, which has the most detailed provisions in relation to rural workers, also includes shearers' cooks and similar workers.[70] As well as the Victorian provision already noted of expressly including outworkers in the definition of 'worker', New South Wales deems outworkers (as defined) to be workers,[71] and South Australia does the same if any aspect of the work is governed by an award or agreement.[72]

Finally, there is a similar potpourri of examples of deemed inclusion paralleling the disparate and seemingly unrelated areas of exclusion listed at the end of the previous section. These include the coverage in Victoria of secretaries of cooperative societies earning more than $200 a year above expenses incurred,[73] coverage in Queensland of employees of corporations

62 See, for example, WA s 11A(1). There are similar provisions in all jurisdictions except Tasmania.

63 Work Health Regulations (NT) reg 3A(1)(b). There are similar provisions in the ACT.

64 NSW (WIMWCA) Sch 1 cl 9. There are similar provisions in SA.

65 NSW (WIMWCA) Sch 1 cl 15. There are similar provisions in SA and the ACT.

66 See, for example, Vic ss 5(1)(d)–(e). There are similar provisions in Qld.

67 See, for example, Tas s 4D. Similar provisions in NSW, Vic and SA.

68 See, for example, Qld Sch 2 pt 2 cl 5. There are similar provisions in Tas.

69 See, for example, NSW (WIMWCA) Sch 1 cll 3 and 4. There are similar provisions in Vic and the ACT. The qualification in relation to the ACT scheme is found in ACT s 6(3B).

70 NSW (WIMWCA) Sch 1 cl 12.

71 NSW (WIMWCA) Sch 1 cl 2(1)(b).

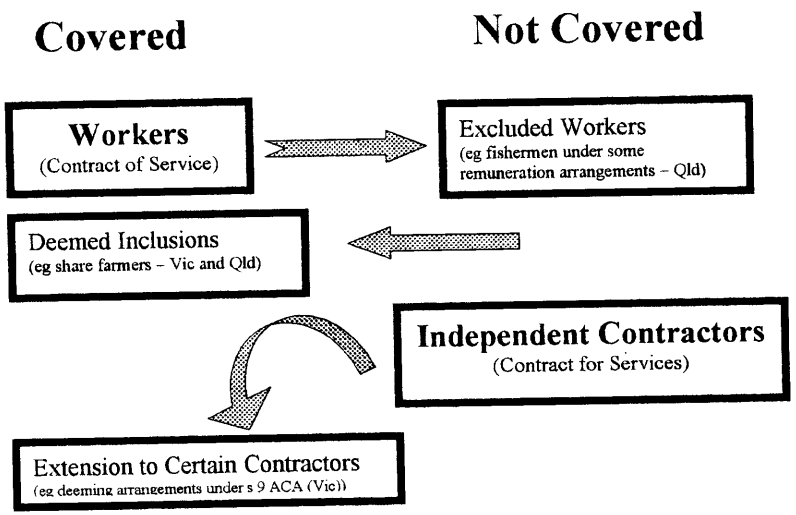
72 Workers Rehabilitation and Compensation (Claims and Registration) Regulations 1999 (SA) reg 4(1c).

73 Vic s 13.

placed under administration[74] and coverage in both New South Wales and South Australia of entertainers employed at certain types of performance venues.[75]

Summary

The nature of the coverage of work relationships under workers' compensation arrangements can be summarised in the form of Figure 2 below.



With the partial exception of the Northern Territory, the various jurisdictions essentially start from a common base in terms of coverage of work relationships, namely that of the common law contract of service or employment. From that starting point, variations emerge both in respect of exclusion of workers who would ordinarily be regarded as working under a contract of service and contrarily the deemed inclusion of other workers who would not be so regarded (for instance, taxi-drivers who operate under a contract of bailment). Many areas of exclusion (for instance domestic servants) represent the restrictive historical legacy of the early workers' compensation statutes; exclusions that cannot currently be justified on any grounds of principle, policy or scheme costs. They involve very few workers and extension of coverage to them would have an infinitesimal impact upon the costs of workers' compensation schemes.

The exclusion of crewmembers of fishing vessels in four jurisdictions rests upon the notion that these workers are in fact co-venturers. However, in functional terms, except perhaps in Western Australia, this is a fiction and such workers should be regarded as being in an employment relationship and given coverage for workers' compensation. The exclusion of sportspersons from coverage dates from a time when sporting bodies were generally unincorporated associations and stemmed from a fear of the possible personal

74 Qld Sch 2A cl 7.

75 See, for example, NSW (WIMWCA) Sch 1 cl 15. There are similar provisions in SA.

liability of club members for compensation payments and damages awards to injured players. Today such bodies, almost without exception, would be incorporated and consequently this rationale for exclusion has disappeared. In its place has come the fear of the premium impact of coverage. In the course of the last few decades there has been an astronomical increase in the remuneration of elite sportspersons and the current concern is about the impact upon a club's workers' compensation premiums of a serious injury to one or more star players. This concern is perhaps not so much with compensation payments (which generally have caps on maximum weekly benefits) but more with the impact of common law awards or settlements. However, such economic arguments do not justify exclusion of persons who are properly regarded as employees.

The deemed inclusion of a diverse range of workers represents a potpourri of examples without any single defining principle, apart from some inchoate notion that they represent socially desirable areas of coverage. In practice, they often represent the impact of political events over the years; for instance, the inclusion of share farmers in Victoria stems from the period when Victoria had a Country Party premier. The group of voluntary workers who are covered — particularly volunteer firefighters — is generally also testimony to political clout.

The substantial changes in the nature of the labour market and the form of employment relationships in recent decades have made it much more difficult to determine easily whether a work relationship falls within the notion of a contract of service. Consequently, the utility of recourse to this primary touchstone for determination of scheme coverage becomes increasingly problematic. As well, the process of deemed inclusion whereby coverage has been extended to a range of relationships that fall outside of the contract of service makes the situation of other similar relationships that do not receive such recognition, quite invidious. In these respects the situation of workers' compensation, in respect of who is covered, becomes increasingly difficult to justify, compared to the more generalised coverage of most social insurance schemes and also occupational health and safety systems. There is, at the beginning of the twenty-first century, a strong case for workers' compensation schemes providing coverage for all working relationships, including the self-employed, such as is the case in the comprehensive accident compensation arrangements in New Zealand and in many social insurance systems.

For what is compensation payable? The concepts of 'injury' and 'disease'

Entitlement to workers' compensation benefits arises where a 'worker' (see above) suffers an 'injury' or 'disease' that can be sufficiently linked to employment (see below). The manner in which the terms 'injury' and 'disease' are defined differs between various jurisdictions. Most schemes employ a compendious notion of 'injury' incorporating injury simpliciter, disease and industrial deafness.[76] South Australia and Western Australia have

76 See, for example, Vic s 5(1).

both adopted an umbrella concept of 'disability' defined to include both injury and disease.[77] The ACT separately defines the concepts of injury and disease.[78] As well, regardless of definitional form, entitlement also extends variously to the acceleration, aggravation, deterioration, exacerbation or recurrence of a pre-existing injury or disease.[79]

The concept of 'injury' or 'personal injury' bears its everyday ordinary meaning. This involves any harm caused to a person's body as the result of any form of trauma. As such it has wide compass including harm or damage sustained externally and internally. Apart from the more usual cases of contusions, fractures, abrasions and sprains, examples of external harm include situations of sunstroke and frostbite. All jurisdictions except New South Wales, Queensland and Tasmania expressly provide that mental as well as physical injuries are covered.[80] The concept of 'disease' is generally defined to include any physical or mental ailment, disorder, defect or morbid condition, whether of sudden or gradual development.[81] There is considerable overlap between the definitional reach of 'injury' as against that of 'disease', particularly in respect of conditions of internal harm such as internal rupture of muscle or tissue and collapsed vertabrae. Where there have been different conditions respecting compensation recovery with respect to injury, vis à vis disease, this overlap has been productive of extensive litigation.[82] It has been a traditional feature of Australian schemes for the need of some additional element of connection to the employment and the disease in order to found a compensation claim. However, in recent years, a number of jurisdictions also now require such an additional requirement in the case of injury claims as well.

Disease conditions present particular problems for compensation schemes, particularly with questions of causation and evidential issues for sustaining a claim. The response has sometimes been to enact separate statutory schemes or having special provisions relating to particular disease conditions within the primary workers' compensation statute. An example of a separate statutory scheme is that established in New South Wales by the Workers' Compensation (Dust Diseases) Act 1942.[83] All jurisdictions have occupational disease schedules listing a series of occupational diseases together with particular occupational categories or work descriptions. The effect of such scheduling is that where a worker of the scheduled occupational class or engaged in the scheduled work description develops a scheduled occupational disease the onus of proof is reversed so that the disease is regarded as being of

77 See, for example, SA s 3(1). There are similar provisions in WA.
78 ACT s 6(1).
79 See, for example, Vic s 5(1).
80 See, for example, Vic s 5(1). There are similar provisions in Comcare, Seacare, the ACT, WA, SA and NT. However, such coverage is implicit in the other three jurisdictions through the provisions to exclude compensation for mental injury resulting from particular circumstances, namely reasonable disciplinary action etc.
81 See, for instance, Vic s 5(1). See also SA, WA, Tas, ACT and NT.
82 See the summary of such litigation in respect of the NSW legislation in the judgment of Kirby J in *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 339–47; 71 ALJR 32 at 46–55.
83 See also the Workers' (Occupational Diseases) Relief Fund Act 1954 Tas; Waterfront Workers (Compensation for Asbestos Related Diseases) Act 1986 WA.

occupational origin unless it can be proven otherwise.[84] South Australia has a rebuttable presumption that employment has contributed to the aggravation etc of a pre-existing heart disease that has arisen in the course of employment.[85]

As well, particular jurisdictions have special provisions dealing with particular conditions governing compensation entitlements in respect to particular diseases.[86]

Each jurisdiction has excluded certain stress-related conditions from the range of injuries and diseases for which compensation is payable. All jurisdictions have excluded psychological injuries stemming either from reasonable disciplinary action taken by an employer against a worker or decisions made with respect to promotion, demotion, retrenchment or dismissal etc.[87] New South Wales, Comcare and the ACT expressly extend the exclusion to cover proposed action of this nature,[88] while Victoria, Western Australia and Queensland exclude stress-related injuries caused by a worker's expectation of this action.[89] The Queensland scheme also excludes psychological injuries caused by action taken by WorkCover or a self-insurer in connection with a workers' compensation claim.[90]

The nature of the employment connection

Provided a person can bring him or herself within the definition of 'worker' and provided a compensable injury or disease has been suffered, entitlement to compensation will arise provided the requisite nexus between the injury or disease and the employment relationship can be proven. As was mentioned above, the early Australian workers' compensation statutes followed the original English legislation in positing a test for compensability of an injury 'arising out of and in the course of employment'. Although this formula has been retained in Tasmania,[91] all other Australian jurisdictions have replaced the conjunctive ('and') with a disjunctive ('or') making compensation available where injury arises *either* 'out of' *or* 'in the course of' employment.[92] In this disjunctive requirement, 'arising out of employment' denotes a causal connection with the employment relationship, while 'arising in the course of employment' a temporal connection.

Arising out of the employment

Some consideration has been made earlier in this article of various tests that courts have utilised in determining whether a particular injury has arisen out

84 See, for example, SA Sch 2. There are similar provisions in all other statutes, or in declarations or proclamations made pursuant to a provision in such statute.
85 SA s 31(5).
86 For instance Qld ss 149–150 dealing with miners contracting silicosis or anthraco-silicosis and Tas s 25A dealing with claims for certain diseases arising from mining operations.
87 See, for example, Vic s 82(2A)(a).
88 See, for example, NSW (WCA) s 11A(1). There are similar provisions in Comcare and the ACT.
89 See, for example, Vic s 82(2A)(c). There are similar provisions in WA and Qld.
90 Qld s 34(5)(c).
91 Tas s 25(1).
92 See, for example NT s 3(1). There are similar provisions in Comcare, Seacare, NSW (WIMWCA), Vic, the ACT, WA, SA and Qld.