of the employment. As discussed above, the essential Australian position has been that of the actual risk test. This was established by the early 1930s by the decision of the Privy Council in *Brooker v Thomas Borthwick & Sons (Australasia) Ltd*[93] and that of the High Court in *Smith v Australian Woollen Mills Ltd*.[94] *Brooker* involved claims arising out of an earthquake in the Hawkes Bay district in New Zealand that led to a number of deaths and injuries, particularly as a result of a building collapse. The Privy Council rejected the argument (based on the peculiar risk test) that the deaths and injuries resulted from a natural disaster that affected the community generally and were therefore not connected to the employment. Instead it held that they did arise out of the employment since the immediate cause was associated with the employment by virtue of the fact that the employees were working inside the employer's premises when they were destroyed or were otherwise performing employment duties. This position was endorsed very soon after by the High Court in *Smith*, a case in which a worker fainted while engaged in his duties of working upon wool carding machines and fractured two ribs as he fell against some guard rails. The cause of the fainting spell was the worker's diabetes. The High Court held that while this diabetic condition was both the ultimate cause of the injury and one that was unrelated to his employment, the injury nevertheless arose out of the worker's employment since the nature and extent of the injury suffered was determined by the fact that he was at work and this work brought him into the proximity of the guard rails which were part of the employer's plant.

This is not to say that some court decisions that rest upon the arising out of employment limb of the primary entitlement requirement may not have utilised a different test. For instance, that in *Davis v Commonwealth*,[95] in which an airman based in Thailand contracted a virus infection, is essentially based upon the increased risk test. It was decided that the airman's incapacity arose out of his employment on the basis of evidence that demonstrated a greater risk of infection from that virus in Thailand. However, the general ruling test for the arising out of employment limb is that of the actual risk test.

In the course of the employment

With the move from the conjunctive to the disjunctive form of the primary entitlement provision that began to take place from the 1920s, most cases came to be determined under the in the course of employment limb of that formulation. As also mentioned above, it was not until the High Court decision in *Kavanagh v Commonwealth*[96] in 1960 that it was definitively determined 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.

This is not to say that the operation of the in the course of employment route to entitlement is without its own set of issues. In any formulation there will always be matters of dispute at the edges. In the case of the in the course of employment element these edges concern the time and space parameters of the

93 [1933] AC 669.
94 (1933) 50 CLR 504; [1934] ALR 129.
95 (1968) 13 FLR 312.
96 (1960) 103 CLR 547; [1960] ALR 470.

employment and also what constitutes an activity that is part of or incidental to the employment. Occasionally there may be some legislative assistance as to what constitutes the time boundary of the employment; for instance, the South Australia provisions that recognise, as being in the course of employment, injuries sustained during attendance at work in preparation for work, prior to the actual commencement of work, and such attendance after work ends while the worker is preparing to leave or is in the process of leaving the workplace.[97]

As well, the time boundary of the employment may be affected by statutory provision regulating the coverage of travel to and from work. At common law an employee is not ordinarily regarded as being within the course of his or her employment while travelling to or from work. This is even the case where the employer provides the transport, except in the additional circumstance where the worker is obliged by the terms of his or her contract of employment to make use of this method of transport.[98] As has already been noted, from the 1940s, the various Australian jurisdictions moved to enact specific deeming provisions whereby journeys to and from work, together with some other recognised forms of travel (for instance, in respect of medical treatment), were recognised as being in the course of the worker's employment. Then, during the 1990s, a number of jurisdictions reversed or modified this aspect of deemed coverage. The current situation is considered in the discussion of travel injuries below.

The deemed recognition of an employee's commuting to and from work brings with it another set of questions as to where does such a journey begin and end. The particular issues concerning the starting point when going from home to work are examined below. As well, there needs to be a determination of the boundaries of the employer's premises. While in general terms, apart from the precise determination of boundary lines in particular cases, this does not usually present great problems, there may be situations where ascertaining what constitutes the place of employment may be problematical.[99] More complex issues of determining the parameters of the time and space of the employment present themselves in respect of the activities of certain types of employees, such as salesmen and commercial travellers, whose working arrangements are characterised by a high degree of fluidity. Such matters can take on additional complexity in the context of arrangements governing work in remote regions of Australia which may take a person away for periods of months at a time. The leading case of *Hatzimanolis v ANI Corporation Ltd*[100] vividly illustrates some of these issues and the broad scope given to the notion of the course of employment in contemporary Australian jurisprudence. In that case, an electrician was engaged for a three-month project in a remote part of Western Australia. The work involved working six days a week and occasional Sundays in return for which the company provided full board and

97 SA ss 30(3)(a) and (c).
98 *St Helen's Colliery Co Ltd v Hewitson* [1924] AC 59; [1923] All ER Rep 249 and *Weaver v Tredegar Iron & Coal Co Ltd* [1940] AC 955; [1940] 3 All ER 157.
99 For instance, the New South Wales case of *Bull v Schweppes (Aust) Pty Ltd* [1960] WCR 67 where Wall J found that the place of a union picnic was a place of employment for those who attended it.
100 (1992) 173 CLR 473; 106 ALR 611.

accommodation and access to two company vehicles that could be used for company sanctioned sightseeing on Sundays on which the worker was not required to be on duty. On the return journey from one such sightseeing trip, Hatzimanolis was severely injured when the company vehicle overturned. The New South Wales Court of Appeal denied compensation on the grounds that the trip was not incidental to the worker's employment. However, the High Court overturned that decision. It took an expansive view of the nature of the employment and held that the entire time during which the worker was engaged constituted an overall period or episode of work. Although the worker's injuries were sustained in an interval between undertaking his ordinary duties, they occurred during a company-sanctioned activity and were consequently sustained in the course of his employment.

It may be that the expansive approach to this issue, exemplified by *Hatzimanolis*, and characteristic of the style of the Mason High Court, in part constituted a stimulus to the process of roll-back, in terms of a legislated requirement for a significant employment connection to found compensability of claims, that emerged during the 1990s. However, as already discussed, a combination of more generalised factors emerged to stamp upon the 1990s a radically different set of changes from those that emerged from the 1980s. Some of these are discussed in the succeeding sections of this article.

General test of employment connection

As previously mentioned Victoria, in 1992, legislated the requirement for a specific test of work-relatedness, in addition to the general 'arising out of or in the course of employment' condition. This was framed in terms of a condition that a worker's employment be 'a significant contributing factor' to the injury.[101] It was further provided that, in determining this issue, a number of issues must be taken into account. These are the duration of the worker's current employment, the nature of the work performed, the particular tasks of the employment, the probable development of the injury occurring if that employment had not taken place, the existence of any hereditary risks, the lifestyle of the worker and the activities of the worker outside the workplace.[102]

Similarly, New South Wales adopted its own additional test in 1996 (commencing 12 January 1997) but adopted the terminology of 'a substantial contributing factor' to the injury.[103] However, this additional requirement is not operative in respect of journey or recess claims, or for certain claims made by trade union representatives.[104] Again, similar to Victoria, the New South Wales provisions outline a range of (non-exhaustive) relevant considerations to be taken into account in determining whether a worker's employment was a substantial contributing factor to an injury. These involve the time and place of injury, the nature of the work performed and the particular tasks of the work, the duration of the employment, the probability that the injury or a similar injury would have happened anyway but for the employment, the state of the worker's health before the injury and the existence of any hereditary

101 Vic s 82(1).
102 Vic s 5(1B).
103 NSW (WCA) s 9A(1).
104 NSW (WCA) s 9A(4).

risks, the worker's lifestyle and his or her activities outside the workplace.[105]

Then Queensland, in 1999, moved to legislate for the Victorian test of 'a significant contributing factor',[106] with the proviso, however, that this additional requirement not apply with respect to recess[107] or journey injuries.[108]

The intention of the legislature with these moves was unambiguously in the direction of requiring a very clear degree of employment connection to the injury as a basis for compensability. The Victorian Minister in introducing the 1992 legislation made the point that the:

> word 'significant' has been included in the definition of injury and elsewhere in the Act to emphasise the point that workplace injuries will be compensable under WorkCover only if there is a strong connection between work and the injury.[109]

However, the judicial interpretation of what is meant by 'significant contributing factor' and 'substantial contributing factor' in the Victorian and New South Wales provisions, respectively, has been very opaque and unclear. Indeed, Meagher JA in a recent New South Wales Court of Appeal decision observed:

> Many judges have spent a great deal of time and difficulty analysing and pondering the meaning of the word 'substantial'. But this word is a plain English word which is understood by anyone who is not a judge. Nor have the endless judicial lucubrations on the word contributed to anyone's understanding of it. And nobody in their senses would regard a cause which could be correctly categorised as very 'minor' as 'substantial'.[110]

In Victoria, Ashley J, in examining the interpretation of 'significant contributing factor', in *Popovski v Ericsson Australia Pty Ltd*,[111] considered that it represented a less stringent requirement than that for the injury to 'arise out of the employment' in that it is possible to envisage situations where the injury might satisfy the former test but not the latter. As to the meaning of 'significant', Ashley J noted a spread of views in the County Court from that of 'more than de minimis but less than a major or dominant factor' to that 'of considerable amount of effect'. While inclining more to the second of these interpretative meanings, Ashley J went on to observe that 'at a practical as distinct from conceptual level, the distinction between an employment contribution exceeding de minimis and an employment contribution of considerable amount or effect may be more apparent than real'.[112] In a later decision, Ashley J has queried whether, as a matter of statutory construction, the 'significant contributing factor' test even applies to injuries in the primary

105 NSW (WCA) s 9A(2).
106 Qld s 34(1).
107 Qld s 36(2).
108 Qld s 37(2).
109 *Hansard*, Legislative Council, 13 November 1992, p 608.
110 *Dayton v Coles Supermarkets Pty Ltd* (2001) 22 NSWCCR 46 at [16].
111 [1998] VSC 61 (unreported, Ashley J, 4 September 1998, BC9804540). While the decision in *Popovski* was overturned by the Court of Appeal this was on grounds unrelated and Ashley J's position on these matters was not discussed in the appeal.
112 Ibid, at [61].

sense but rather simply to disease and aggravation of injury and disease claims.[113]

The New South Wales Court of Appeal has considered the 'substantial contributing factor' test in the New South Wales statute on two occasions. In *Mercer v ANZ Banking Group*,[114] Mason P (with whom Meagher and Beazley JJA agreed without supporting arguments of their own) rejected the position of Bishop J of the Compensation Court that 'a substantial contributing factor' is as stringent a concept as that of 'arising out of' the employment, explicitly endorsing the contrary view of Ashley J in *Popovski* noted above. In remitting the proceedings for a further hearing in the Compensation Court, Mason P acknowledged that s 9A leaves a broad area within which the personal judgment of the individual judge as to what is 'substantial' may be determinative. However, he also found that s 9A applies to cases of both injury and disease and does not require that employment be 'the' substantial contributing factor. Further, and importantly, Mason P held that the absence of 'employment characteristics' in the precise activity that led to the injury should not be treated as determinative by the judge deciding the issue. Perhaps not surprisingly, an attempt was made to appeal the case to the High Court. However, Gaudron and McHugh JJ, while not being convinced that the Court of Appeal had 'correctly analysed the decision' of the judge at first instance, nevertheless did not consider it an appropriate case for the grant of special leave.

Almost exactly a year after its decision in *Mercer*, the Court of Appeal again considered the meaning of s 9A in *Dayton v Coles Supermarkets Pty Ltd.*[115] This time all three judges (Meagher and Giles JJA and Davies AJA) delivered opinions. Giles JA noted that *Mercer* was the 'only appellate decision involving the meaning to be given to "substantial" in s 9A(1)' but found himself having 'some difficulty in gaining from the decision clear guidance as to the meaning of [this term]'.[116] Surprisingly, neither of two other judges alluded to *Mercer*.[117] Apart from rejecting the proposition that a cause that could be categorised as minor could meet the test of substantial, Meagher JA did not offer any further elucidation as to what is meant by 'substantial', while Giles JA concluded that a contributing factor which is minor, in comparison with two other substantial factors, is not a substantially contributing factor. Only Davies AJA attempted some definition, namely that the words 'substantial contributing factor' require that compensation only be paid when the employment contributed to the injury in 'a manner that is real and of substance'. However, this attempted definition suffers from its own opacity and it may be that the High Court will again, notwithstanding the refusal for special leave in *Mercer*, sometime be called to serve, in what has come to be a not uncommon role, as the arbiter on provisions in the New South Wales legislation.

The upshot is that there is currently considerable uncertainty as to the

113 *Hegedis v Carlton & United Breweries* [2000] VSC 380 (unreported, Ashley J, 27 September 2000, BC200005729). At time of writing this decision is on appeal.
114 (2000) 48 NSWLR 740.
115 (2001) 22 NSWCCR 46.
116 Ibid, at [24].
117 Meagher JA was a member of the court in both decisions.

precise nature of the work relatedness concept, in terms of a general test of employment connection. This should be of some concern since this test is the ruling doctrine in Victoria, New South Wales and Queensland, jurisdictions which collectively provide workers' compensation coverage for some 6.04 million workers.[118] The notion of what should be the proper nature of work-relatedness necessary to found a claim under the 'in the course of employment' limb of the primary entitlement provision has moved. The jurisprudence was settled by the decision of the High Court in *Kavanagh v Commonwealth* (in terms of a purely temporal requirement with a worker simply having to be engaged in an activity that was part of or incidental to his or her employment). Now, however there is uncertainty as to what is meant by the statutory requirement that a worker's employment must be a 'significant' (Victoria and Queensland) or a 'substantial' (New South Wales) 'contributing factor' to the injury. The attempts, to date, by the courts to give meaning to these provisions have smacked of judicial sophistry, and the intervention of the High Court may be needed for definitive guidance.

Test relating to disease

While the requirement of an element of work-relatedness, additional to that inherent in the primary entitlement provision, is a relatively new development with respect to injury claims, there has traditionally been some requirement of work-relatedness in respect to the compensability of disease claims. The test is often quite low. For instance, in the ACT, employment must simply be a 'contributing factor' to the contraction of a disease or the suffering of an aggravation, acceleration or recurrence of a disease.[119] Similarly, in South Australia, the employment must have 'contributed' to the disability in the case of diseases and secondary disabilities.[120] Under Comcare the employment must have 'contributed to in a material degree' to the contraction of the disease,[121] a requirement that has been found to be no more than 'pertinent or likely to influence'.[122]

In Tasmania the test was that the employment contributed to the disease 'to a substantial degree'.[123] The meaning of this term was considered by the Full Court of the Supreme Court of Tasmania in *University of Tasmania v Cane*.[124] In that case, Wright J considered that the word 'substantial' was used in a relative sense with a recognition that there may be other causes for the disease. Accordingly, there may be a number of 'substantial' factors causing a particular condition. In particular he held that the provision does not require that employment be 'the' substantial cause of the disease. Similarly, Slicer J found that the provision did not attempt to fix a percentage of employment contribution or to exclude the operation of other contributory factors including predisposition or susceptibility to a particular condition. More particularly he

118 Heads of Workplace Safety and Compensation Authorities, *Workers' Compensation Arrangements in Australia and New Zealand*, November 2001, pp 10–11.
119 ACT s 9(1).
120 SA s 30(2)(b).
121 Comcare s 4(1).
122 *Miers v Commonwealth* (1990) 20 ALD 483.
123 Tas s 25(1)(b) and 3(2A).
124 (1994) 4 Tas R 156.

found that the work component was one that was required to 'be more than trivial or inconsequential'.[125] In an effort to overcome the effect of this decision, amending legislation was enacted, taking effect from 1 July 2001, that stipulated that the term 'substantial degree' was to be regarded as meaning 'the major or most significant factor'.[126]

In Victoria, New South Wales and Queensland the legislative changes already referred to above require that the employment be a 'significant', 'substantial' or 'significant' contribution to the contraction of the disease or the aggravation etc of a pre-existing disease, respectively. In Western Australia, there is a requirement that, in respect of a disease or the recurrence, aggravation or acceleration of a pre-existing disease, the employment must be a contributing factor and contribute to a significant degree.[127] In determining the issue of employment contribution and that of contribution to a significant degree, a number of matters shall be taken into account. These are the duration of the employment; the nature of, and particular tasks involved in, the employment; the likelihood of the contraction, recurrence, etc of the disease occurring despite the employment; the existence of any hereditary factors in relation to contraction, recurrence etc of the disease; matters affecting the worker's health generally; and activities of the worker not related to the employment.[128]

In summary, while the requirement for an element of employment connection, in addition to the 'arising out of or in the course of employment' condition, has been a traditional prerequisite for disease claims, the nature of this requirement has varied considerably between jurisdictions. As well, as illustrated by the Tasmanian experience, there has been a similar degree of sophistry and opacity in the judicial treatment of the additional requirement as has been exhibited more recently with respect to such additional requirement in relation to injuries, discussed above.

Legislative modification of commuting and other travel arrangements

One difference between workers' compensation arrangements in Australia and those, for instance, in the United States is in the extension of the course of employment coverage to commuting arrangements. Such coverage was never part of English workers' compensation arrangements and the position at common law is that compensation is not available for injuries sustained during journeys to and from work except in the narrow circumstance that the worker is travelling in transport provided by the employer and is obliged by the terms of his or her contract of employment to make use of this method of transport.[129] During the 1940s most Australian jurisdictions reversed this general exclusion by enacting specific deeming provisions in relation to journeys to or from work to recognise them as being in the course of employment. Then, almost equally as dramatically, during the 1990s,

125 Cox J agreed with both Wright and Cox JJ.
126 Tas s 3(2A).
127 WA s 5(1).
128 WA s 5(5).
129 *St Helen's Colliery Ltd v Hewitson* [1924] AC 59; [1923] All ER Rep 249 and *Weaver v Tredegar Iron & Coal Co Ltd* [1940] AC 955; [1940] 3 All ER 158.

a number of jurisdictions either abrogated such coverage or continued its operation subject to particular restrictions.

However, apart from travel that is integral to employment duties, either generally (for example, transport drivers) or incidentally (such as undertaking employment-related errands), there exists a range of other situations where travel arrangements may be accorded the status of workers' compensation coverage. These include travel to educational institutions for trade or technical training etc or for receiving medical or allied examination or treatment. The result of recent changes means that the coverage for commuting and other travel arrangements, between the various jurisdictions represents a complex mosaic of disparate arrangements. Similarly complex, is the alternative compensation arrangements that may be available if workers' compensation coverage does not exist. Three Australian jurisdictions — Victoria, Tasmania and the Northern Territory — have no-fault motor accident compensation schemes of varying levels of comprehensiveness. In other jurisdictions recourse will have to be made for tort-based compensation under compulsory third-party insurance arrangements, with the requisite need to demonstrate fault in another party to ground recovery, or other alternatives. Such alternatives may include the federal social security system, private disability insurance, occupational sick pay or drawing upon personal savings.

Commuting arrangements

Journeys to and from home and the workplace generally still receive deemed coverage in all jurisdictions except for Victoria, Tasmania and Western Australia (where coverage has essentially been abrogated) and South Australia, where such coverage has been restricted. The South Australian journey provisions require that there be a 'real and substantial connection' between the employment and the accident out of which the disability arises, a connection that will not be satisfied by the mere fact that the journey is to or from work.[130] In the Northern Territory, amending legislation, in 1991, transferred most commuting coverage involving motor vehicles from the Work Health scheme to the no fault motor accident scheme governed by the Motor Accident (Compensation) Act (MACA).[131]

In Queensland the coverage is for a journey between a person's home and place of employment. The term 'home' is not defined. By contrast, in New South Wales the terminology is 'place of abode' which is defined as including the place where a worker has spent the night preceding a journey and from which the worker is journeying and also the place to which the worker is journeying with the intention of there spending the night following a journey.[132] New South Wales recognises the widest or most highly nuanced range of commuting arrangements of any jurisdiction including a journey between any camp or similar temporary residence connected with their work and place of abode and between their place of abode and a place of pickup.[133] Similarly, Comcare's definition of a 'place of residence' includes the place where the employee normally resides, another place where an employee

130 SA ss 30(5)(b)(i) and 30(6).
131 NT s 4(2A)(b), with some qualifications in s 4(2B).
132 NSW (WCA) s 10(6).
133 NSW (WCA) ss 10(3)(e) and (f).

temporarily resides for the purpose of their employment and any other place where an employee stays or intends to stay overnight. However, in respect of this last formulation of 'place of residence', there is an additional requirement that the journey from work to that place does not substantially increase the risk of injury compared with a journey from work to their normal place of residence.[134]

The recognition of coverage for journeys to and from work brings with it a requirement to specify where such journeys begin. Various jurisdictions have defined the boundary line of 'place of residence' in different ways. In New South Wales, the boundary of a worker's 'place of abode' is now defined as the boundary of the land on which the place of abode is situated.[135] Similar definitions exist in Queensland[136] and under Comcare, although the Comcare definition makes allowance for the fact that, where an employee owns or occupies a parcel of land contiguous with that upon which the employee's residence is situated, the relevant boundary is that of the contiguous parcels of land if treated as a single parcel.[137] The ACT legislation is silent upon this issue but the Supreme Court of the ACT has upheld claims by workers who slipped on stairs leading from their flat[138] or to their garage[139] while on their way to work as being in the course of employment.

Other journey arrangements

Journeys between the workplace and places the worker is required by the employer to attend for education or training are explicitly covered in all jurisdictions except the ACT.[140] While in South Australia there is still the requirement that there be a 'real and substantial connection' between the employment and the accident out of which the disability arises, the fact that this journey provision is framed in terms of attendance at an educational institution under the terms of an apprenticeship or other legal obligation or at the employer's request or with the employer's approval should mean that this requirement is essentially fulfilled without further requirement.[141]

Also, journeys between the workplace and places the worker is required to attend for the purposes of obtaining medical certificates or treatment etc or for picking up compensation payments are explicitly covered in all jurisdictions.[142] Comcare also extends coverage to members of the Australian Defence Force, Air Training corps, Australian Cadet corps and Naval Reserve Cadets who suffer injuries as an unintended consequence of medical treatment paid for by the Commonwealth.[143] The New South Wales scheme also covers journeys for consultation etc in relation to artificial aids.[144]

134 Comcare s 4(1).
135 NSW (WCA) s 10(4).
136 Qld s 37(3).
137 Comcare s 6(1A) and 6(1B).
138 *Evans v Manco Pty Ltd* (1977) 16 ACTR 11.
139 *Grace Bros Pty Ltd v Ubojcic* (1988) AWCCD ¶ 73-42.
140 See for example NT s 4(1)(c). There are similar provisions in Comcare, NSW (WCA), Vic, Qld, SA, WA and Tas.
141 SA s 30(5)(b).
142 See for example Comcare s 6(1)(b)(viii).
143 Comcare s 6A.
144 NSW (WCA) ss 10(3)(d) and 74(3).

Limitations on journey claims

The extension of coverage to journey injuries by the Australian schemes from the 1940s was subject to certain coverage qualifications. The most important of these was the loss of coverage in the case of a substantial interruption of, or substantial deviation from, the purpose of the journey (for example, commuting, attending an educational institution etc) that materially added to the risk of injury.[145] These limitations have been maintained in the current schemes with a number of jurisdictions either refining such limitations or adding new grounds for coverage exclusion. Thus, in New South Wales the traditional qualification is maintained in essentially the form just quoted,[146] but has been joined by an additional disqualifying element of serious and wilful misconduct in terms of being under the influence of alcohol or another drug unless this did not contribute to the injury or the substances were not consumed or taken voluntarily.[147] Additionally, coverage is denied where the injury results from a medical or other condition that was not caused by or contributed to by the journey.[148]

The other jurisdictions, apart from Tasmania, reflect variants of this situation, for instance in terms of maintaining the traditional exclusion for a substantial interruption to or deviation from a work-related journey that materially increases the risk of injury, although there may be some finessing of the terminology. Comcare precludes compensation where a worker has chosen a route that substantially increases the risk of an accident when compared with a more direct route or for an interruption that similarly increases such risk.[149] The ACT and the Northern Territory similarly require the worker to have been travelling by the 'shortest convenient route',[150] while South Australia requires that a worker must have taken a 'reasonably direct route'.[151] In Queensland the exclusion operates in respect of a substantial delay before the worker starts the journey or makes a substantial interruption of or deviation from the journey, except where the delay, interruption or deviation is connected with the worker's employment or arises from circumstances beyond the worker's control.[152]

Other statutory modifications — Coverage exclusions and inclusions

While workers' compensation is essentially a no-fault system of compensation, injuries that result from certain types of worker behaviour can be excluded from scheme coverage. On one level of analysis this can be seen as the introduction of some element of fault into the operation of the system. On another level, there may be mounted a justification for such exclusions that are explicitly tied to the notion of work-relatedness as a controlling element for scheme coverage (see above). On this level, there may be more than one

145 See, for example, Workers' Compensation Act 1958 (Vic) s 8(2)(b).
146 NSW (WCA) s 10(2).
147 NSW (WCA) ss 10(1A) and 10(1B).
148 NSW (WCA) s 10(1C).
149 Comcare s 6(2)(a).
150 See, for example NT s 4(1)(b), (c) and (e). There are similar provisions in the ACT.
151 SA s 30(7).
152 Qld ss 38(2)(b) and 38(3).

notion of work-relatedness to which an appeal may be made. For instance, the justification for excluding an injury resulting from serious and wilful misconduct may be attempted, variously, on the basis that there was no employer benefit; that there was no causal relationship between the injury and the employment; that, while there may be a nexus with the employment in terms of time and space, there was no nexus with an activity of an employment-like character.

The various schemes have retained a feature from the original English statutes, namely the exclusion from receipt of benefits for injuries that are self-inflicted.[153] Similarly with injuries that are caused by the serious and wilful misconduct of the worker unless the injury results in death or serious and permanent impairment or incapacity.[154] The only real difference in terminology is the use of 'long-term' in place of 'permanent' incapacity in the Northern Territory[155] and the attempt to quantify what is meant by permanent impairment in Queensland. This is specified to be where WorkCover considers that the injury could result in a work-related impairment (WRI) of 50% or more, except that compensation is still not payable for injuries that could result in a WRI of 50% or more where this arises from a psychiatric or psychological injury or combining such an injury with another injury.[156]

Traditionally, what is meant by 'serious and wilful misconduct' has not been further defined or illustrated. However, in recent years, a number of jurisdictions have specifically included injuries attributable to being under the influence of alcohol or other drugs as being encompassed within the serious and wilful misconduct exclusion[157] and/or specified particular offences (especially in respect of the use of motor vehicles) as amounting to serious and wilful misconduct.[158] In Western Australia, serious and wilful misconduct extends to the failure by a worker, without reasonable excuse, to use protective equipment etc provided by the employer.[159]

In respect to disease claims, a number of jurisdictions preclude compensation in circumstances where a worker has made a wilful and false representation that he or she does not suffer from the disease.[160] As well, there is a range of other express exclusions from coverage in particular jurisdictions such as in respect of social or sporting activities except where the activity forms part of the worker's employment or is undertaken at the request or direction of the employer.[161]

Just as the governing statute may exclude coverage as the result of particular actions by a worker or in respect to particular activities, concomitantly, there may be specific provisions enabling such coverage. As already discussed, one important area of statutory extension has been in respect of journey injuries. Just as this extension includes travel to places of

153 See, for example, Seacare s 26(2). There are similar provisions in all other jurisdictions.
154 See, for example, Seacare s 26(3). There are similar provisions in all other jurisdictions.
155 NT s 57(1).
156 Qld ss 157(1) and (2).
157 See, for example, Vic s 82(4). See also SA, WA, NSW (journeys).
158 For example, Vic s 82(4A). See also Qld (journeys).
159 WA s 22.
160 See for example Comcare s 7(7). There are similar provisions in the ACT, Vic and Tasmania.
161 See for example SA s 30(4). There are similar provisions in Tasmania.

education or training and travel to a place of medical treatment and like activities, the actual engagement, involvement or participation in such duties and activities has generally been recognised as being in the course of employment. Thus, there is general coverage in respect of an injury sustained while attending certain places or institutions for the purposes of work-related education[162] or at a place for receiving medical or hospital treatment or obtaining a medical certificate etc[163] or for picking up compensation payments etc.[164] As well, New South Wales expressly covers injuries sustained by trade union representatives while undertaking these duties or on an associated journey.[165]

Likewise, there is a general extension of coverage to provide that injuries sustained by a worker during temporary absences from work or ordinary recess are recognised as being in the course of employment, ordinarily subject to disentitlement where the worker has subjected himself or herself to an abnormal risk of injury during the recess.[166] Western Australia does not have any specific provisions in respect to recess injuries, while in Tasmania any temporary absence from the worker's place of employment has to be at the request or direction of the employer or with the employer's authority in order to be compensable.[167] In the Northern Territory, the coverage of recess claims is qualified by excluding such claims from being regarded as being in the course of employment where they are sustained in an accident to which the MACA applies.[168]

The discussion, in the preceding paragraphs, of the manner in which workers' compensation schemes weave a complex web of exclusions and deemed inclusions from coverage, is emblematic of the general treatment of 'work-relatedness' in contemporary systems. What emerges is the fact that there is no unified principle of work-relatedness underpinning the statutory regulation of entitlement and exclusion from entitlement. Rather a number of different renderings of the work-relatedness concept are pressed into service to serve particular policy objectives. In this regard, the protean nature of the work-relatedness concept provides a flexible instrument that can be invoked to justify changes in policy direction. As such it can be appealed to as a device to cloak political decisions with the mantle of principled authority.

4. Occupational Health and Safety Statutes

Alongside the 10 Australian workers' compensation regimes there are 10 OHS statutes. These are:

- Commonwealth — Occupational Health and Safety (Commonwealth Employment) Act 1991 (Cth) (OHS(CE)A Cth) (federal public sector employment);

162 See for example NT s 4(1)(d). There are similar provisions in Comcare, Vic, Qld, WA, SA.
163 See for example WA s 19(1)(b). There are provisions in Comcare, Vic, Qld, SA, NT.
164 See for example, Comcare s 6(1)(viii).
165 NSW (WCA) s 12.
166 See for example Comcare s 6(1)(b)(i). There are similar provisions in NSW (WCA), Vic, Qld, NT.
167 Tas s 25(6)(c).
168 NT s 4(2A)(a).

- Commonwealth — Occupational Health and Safety (Maritime Industry) Act 1993 (Cth) (OHS(MI)A Cth) (overseas and interstate maritime employment);
- New South Wales — Occupational Health and Safety Act 2000 (NSW) (OHSA NSW));
- Victoria — Occupational Health and Safety Act 1985 (OHSA Vic);
- Queensland — Workplace Health and Safety Act 1995 (WHSA Qld);
- South Australia — Occupational Health, Safety and Welfare Act 1986 (OHSWA SA);
- Western Australia — Occupational Safety and Health Act 1984 (OSHA WA);
- Tasmania — Workplace Health and Safety Act 1995 (WHSA Tas);
- Northern Territory — Work Health Act 1986 (WHA NT);
- Australian Capital Territory — Occupational Health and Safety Act 1989 (OHSA ACT).

Reported injuries and disease

There is a requirement under each of the Australian OHS statutes for the reporting of particular types of work-related injuries, diseases and 'dangerous occurrences' to the relevant OHS inspectorate by the employer whose workplace was so affected.[169] These provisions are important components of the inspection and enforcement strategies of the Australian OHS inspectorates. Much of the work of the inspectorates is reactive, principally in relation to reported incidents and complaints about unsafe conditions from workers and others. Aggregated statistics from incident reports also provide OHS agencies with data to guide their inspection and enforcement programs. Hence, these statutory reporting requirements are an important component of the 'discovery systems'[170] of the inspectorates. Most, if not all, of the Australian OHS inspectorates closely scrutinise reported fatalities, injuries, diseases and incidents and conduct investigations of those incidents considered to be the most serious. Such investigations can result in prosecutions, the issuing of improvement or prohibition notices, and other prevention activities. Reported incidents also have the potential to provide some measure of OHS performance within a jurisdiction, by measuring the incidence of injury, illness and 'near misses'. However, the realisation of this potential is currently severely constrained by the shortcomings in the level of reporting of incidents, especially the gross under-reporting of 'near misses'.

Usually these statutory reporting requirements specify the maximum time in which a report must be made and the form that such report should take. Only work-related incidents need to be reported and the notion of 'work-relatedness' can be analysed using the same broad categories as those used above in relation to the work-relatedness of illness and injury under the workers' compensation statutes. Essentially the reporting requirements reflect a notion of 'work-relatedness' that is an amalgam of the fifth and sixth forms of this concept outlined (above) in respect of workers' compensation

169 See also R Johnstone, *Occupational Health and Safety Law and Policy*, LBC, Sydney, 1997, pp 335–8.

170 K Hawkins, *Environment and Enforcement*, Clarendon Press, Oxford, 1984, p 90.

arrangements. That is, they are simply concerned with the reporting of injuries, diseases and 'dangerous occurrences' that are associated with work, although their reporting reach goes beyond that of workers' compensation statistics in that (as mentioned below) it covers both employees and non-employees, as well as events that do not result in an injury or illness. They are concerned both with matters (in practice, mainly injuries and dangerous occurrences) that are work-related in terms of the nexus of time, place and activity and with matters (in practice, mainly diseases) that do not fit into this first category but which have some causal relationship (by reference to the actual risk test) with work.

Whereas the workers' compensation provisions only apply to 'workers', the OHS statutory reporting requirements typically cover events involving both 'employees' and persons other than employees. This latter category will clearly include persons outside the expanded definitions of 'worker' in the workers' compensation statutes, as discussed earlier in this article. Indeed, it will cover persons who are not in a contractual relationship with an employer. For example, the relevant New South Wales provision defines some of the incidents that must be reported in terms of incidents involving 'employees' (for example, illnesses to employees that are related to work processes,[171] and incidences of workplace violence).[172] All of the other 'occurrences' listed as being reportable are expressed in terms of 'persons', or do not use the term employee, person or worker at all. The Victorian[173] and Tasmanian[174] provisions only make reference to 'persons'. Queensland, likewise, does not qualify the reporting requirements by reference to 'employees' or 'workers'.[175] Both Commonwealth provisions require fatalities and serious personal injuries involving 'any person' to be reported. Certain injuries to 'employees' must also be reported.[176] 'Dangerous occurrences' are defined in similar terms. The Northern Territory[177] and Australian Capital Territory[178] expressly require the reporting of injuries to persons who are not workers or employees, respectively. The South Australian provisions limit immediately notifiable work-related injuries to injuries and fatalities suffered by 'employees'. Notifiable 'dangerous occurrences', however, are not limited by reference to risks to 'employees'.[179] Western Australia only requires injuries or diseases suffered by 'employees' to be reported.[180] Thus, apart from the Western Australian requirements, which are narrower than the workers'

171 Occupational Health and Safety Regulations 2001 NSW cl 341(b).

172 Occupational Health and Safety Regulations 2001 cl 341(i). Note that subcl (g) refers to 'workers' exposed to lead risks.

173 Occupational Health and Safety (Incident Notification) Regulation 1997 Vic.

174 WHSA Tas s 47.

175 Workplace Health and Safety Regulation 1997 Qld s 52, and WHSA Sch 3.

176 OHS(CE)A Cth s 68 and OHS(MI)A Cth s 107.

177 For example Work Health (Occupational Health and Safety) Regulations (NT) reg 46(e).

178 OHSA ACT s 85(1)(d). Paragraph (a) makes reportable 'the death of person', and the risks in dangerous occurrences are defined in terms of risks to persons (Occupational Health and Safety Regulations 1991 (ACT) reg 2A).

179 Occupational Health, Safety and Welfare Regulations 1995 (SA) regs 6.6.2(1), 6.6.1(3) and 6.6.3.

180 OSHA WA s 19(3). See, however, recommendation 25 of the *Review of the Occupational Safety and Health Act 1984, Consultation Draft*, 2002.

compensation provisions, the Australian OHS statutes envisage that incidents to persons other than employees must be reported.

The particular events that must be reported are relatively similar across the various jurisdictions extending beyond the notions of injury and disease in the workers' compensation statutes, although there is considerable variation in the terminology used in respect of such events.

Unsurprisingly all jurisdictions require the reporting of accidents causing death.[181] Cases of serious injury must also be reported in all jurisdictions, although what amounts to serious injury and/or the terminology used sometimes varies considerably. In the two Commonwealth schemes cases of serious personal injury must be reported[182] as well as any accident causing incapacity for a period of five or more successive working days or (where shiftwork is involved) five or more successive shifts.[183] Similarly, in Tasmania, cases of serious bodily injury or illness, defined in terms of an injury or illness whose disabling effects result in admission to hospital as an inpatient, must be reported.[184]

In New South Wales injuries at work that result in the amputation of a limb or require a person to be placed on a life support system,[185] and any other injury or illness related to work processes (with a supporting medical certificate) that results in unfitness to attend a person's usual place of work or to perform their usual duties at work for a continuous period of at least seven days must be reported to WorkCover.[186]

In Victoria there are notification requirements in respect of a person requiring medical treatment within 48 hours of exposure to a substance or a person requiring immediate treatment as an inpatient in a hospital. Such notification also applies where a person requires immediate medical treatment for the amputation of any part of their body, a serious head injury, a serious eye injury, the separation of their skin from underlying tissue (for example, in degloving or scalping), electric shock, a spinal injury, the loss of a bodily function or serious lacerations.[187]

In Queensland notification is required in respect of a serious bodily injury[188] defined in terms of an injury that causes death or impairs a person to such an extent that as a consequence of the injury the person becomes an overnight or longer stay patient in a hospital.[189] Also requiring notification are

181 For example, OHS(CE)A Cth s 68(1)(a). There are similar provisions in all other jurisdictions. Note that death is encompassed within the definition of 'serious bodily injury' in Qld.

182 For example, OHS(MI)A Cth s 107. There are similar provisions in OHS(CE)A.

183 OHS(CE)A Cth s 68(1)(a) and Occupational Health and Safety (Commonwealth Employment) Regulations (Cth) reg 36A. Also mirrored in OHS(MI) Cth and regulations.

184 WHSA Tas s 47 (with definition in s 3).

185 OHSA NSW ss 86 and 87, and Occupational Health and Safety Regulations 2001 cl 344 of Pt 12.2.

186 OHSA NSW s 86(1)(b) and Occupational Health and Safety Regulations 2001 reg 341(a) and (b).

187 Occupational Health and Safety (Incident Notification) Regulations 1997 reg 7 made pursuant to OHSA Vic s 59.

188 Workplace Health and Safety Regulation 1997 reg 52(1)(a).

189 WHSA Qld Sch 3.

cases of 'work caused illness'.[190] This is defined in terms closely following that of its meaning within the workers' compensation system — namely, an illness contracted in the course of doing work and to which work was a contributing factor and the recurrence, aggravation, acceleration, exacerbation or deterioration in a person of an existing illness in the course of doing such work. However, in this context, its application extends to employers, self-employed persons and workers.[191]

In South Australia there is a division into immediately notifiable work-related injuries and generally notifiable work-related injuries. As well as a work-related injury that causes death, immediately notifiable work-related injuries are those that have acute symptoms associated with exposure to a substance at work, and those requiring treatment as an inpatient in a hospital immediately after the injury.[192] Generally, notifiable injuries are other work-related injuries that incapacitate an employee for work for three or more consecutive days.

In Western Australia a range of injuries must be notified forthwith. These are a fracture of the skull, spine or pelvis, a fracture of any bone in the arm (other than in wrists or hand) or in the leg (other than a bone in the ankle or foot), an amputation of an arm, hand, finger, finger joint, leg, foot, toe or toe joint and the loss of sight of an eye. In addition, any other injury which, in the opinion of a medical practitioner, is likely to prevent an employee from being able to work within 10 days from the date of injury must similarly be reported.[193] Such notification also applies in respect of four infectious diseases (tuberculosis, viral hepatitis, legionnaires' disease and HIV) resulting from work involving exposure to human blood products and similar material and four occupational zoonoses (Q fever, anthrax, leptospiroses and brucellosis) contracted from work involving the handling of or contact with animals, animal hides etc or animal waste products.[194]

In the Northern Territory all workplace accidents are required to be reported, whether or not they result in fatality or bodily injury.[195] In particular, however, other than fatalities, the reporting extends to any accident or occurrence where, on the basis of medical advice, it appears likely that a worker will be absent from work for five or more working days, where a worker receives an electric shock or where a worker is injured and admitted to hospital as an inpatient following exposure to a hazardous substance.[196] In the ACT an injury resulting in incapacity for work for a period of seven days must be reported.[197]

This survey of the types of injuries reportable under the OHS statutes shows

190 Workplace Health and Safety Regulation 1997 reg 52(1)(b).

191 WHSA Qld Sch 3.

192 For example, Occupational Health, Safety and Welfare Regulations 1995 (SA) reg 6.6.1.

193 Occupational Safety and Health Regulations 1996 (WA) reg 2.4, made pursuant to OSHA WA s 19(3). See, however, *Review of the Occupational Safety and Health Act 1984, Consultation Draft*, 2002, p 93 for discussion of a loophole in this provision which may permit long-term injuries to go unreported.

194 Occupational Safety and Health Regulations 1996 (WA) reg 2.5, made pursuant to OSHA WA s 19(3).

195 WHA NT s 48A(a).

196 Work Health (Occupational Health and Safety) Regulations (NT) reg 46(b)–(d).

197 OHSA ACT s 85(1)(c) and Occupational Health and Safety Regulations 1991 (ACT) reg 5.

that there may be injuries that are not reportable under the OHS statutes that are nevertheless compensable under the workers' compensation statutes. Workers' compensation schemes essentially provide generalised coverage for all traumatic injury and occupational disease, provided other threshold conditions of work-relatedness (such as being a 'worker' and having the requisite connection with employment) are met.[198] There is no threshold condition of the injury having to be of a particular degree of severity or result in absence from work for a specified period. Indeed, 'medical only, no time lost claims' represent a substantial proportion of all workers' compensation claims. On the other hand, all but one of the OHS statutes requires serious incidents that do not result in injury to be reported.

In the past decade or so, the OHS statutes and regulations (apart from those in Western Australia) have also required 'dangerous occurrences' to be reported, even if they do not result in injury or death. For example, both of the Commonwealth Acts require 'dangerous occurrences' to be reported, and define such occurrences as an occurrence arising from the undertaking which could have caused, but did not cause, the death or serious injury of any person, or incapacity of an employee for five or more working days or shifts.[199] In Queensland a 'dangerous event', defined as an event at a workplace involving imminent risk of explosion, fire or serious injury, must be reported.[200] Tasmania requires the reporting of a dangerous incident as a result of which a person could have been killed or could have suffered personal injury or illness.[201]

New South Wales, Victoria, South Australia and the two territories take a similar approach in listing events or incidents constituting dangerous occurrences. For example, in NSW, events that must be reported include any major damage to plant, equipment, building or structure; an uncontrolled fire or explosion; an uncontrolled escape of gas, dangerous goods or steam; imminent risk of explosion or fire; and the collapse of an excavation.[202] Victoria requires the immediate reporting of an incident at a workplace which exposes a person in the immediate vicinity of the incident to an immediate risk to the person's health and safety through the collapse, malfunction etc of specified plant; the collapse or failure of an excavation, or any part of a building or structure; an explosion, implosion or fire, the escape or spillage of dangerous goods, or the fall from height of any plant, substance or object.[203] South Australia lists incidents and events that constitute dangerous occurrences, and includes 'any other unintended or uncontrolled incident or

198 This statement needs qualification with respect to industrial deafness, where commonly threshold conditions operate, and psychological injuries and stress-related conditions, where compensability is denied in certain circumstances (for instance, reasonable disciplinary action carried out in a reasonable manner). Also, in some jurisdictions, there are additional requirements in respect to certain mining-related conditions such as silicosis.

199 OHS(CE)A Cth s 68 (and reg 3); OHS(MI)A Cth s 107 and reg 4. The OHS(CE) Regulations reg 3 provide examples of occurrences which are taken to be dangerous occurrences.

200 Workplace Health and Safety Regulation 1997 (Qld) reg 52.

201 WHA Tas s 47.

202 OHSA NSW s 86(1)(a) and Occupational Health and Safety Regulations 2001 cl 344 of Pt 12.2.

203 Occupational Health and Safety (Incident Notification) Regulations 1997 reg 8.

event arising from operations carried out at a workplace'.[204] The ACT includes 'any other occurrence involving imminent risk of . . . death or serious personal injury to any person, or substantial damage to property'.[205]

Finally, the statutory OHS reporting requirements mandate a connection between the incident and work. Once again, in most instances, the required nexus with work is based on criteria that differ from the tests in the workers' compensation statutes. South Australia merely requires injuries and fatalities to be 'work-related'. To be notifiable, a dangerous occurrence must occur 'at a workplace', and the 'immediate and significant risk to any person' must be 'in, on or near the relevant place', or to a person who 'could have been in, on or near the relevant place'.[206] Western Australia, in addition to limiting the reporting requirements to injuries and disease to employees, also mandates that the injury or disease must be suffered 'at a workplace', although this does not appear to be confined to the employer's workplace. The New South Wales provisions require that the reportable occurrence occur 'at the place of work' in some instances, and 'at or in relation to the place of work' in others.[207] In Victoria the incident must be 'in the workplace', and in the Northern Territory the incident must be 'at a workplace'.[208] As discussed above, Queensland's requirements for work-related injury mimic the workers' compensation provisions. Serious bodily injury, a work-caused illness or a dangerous event must be reported if 'they happen at a workplace'.[209] Tasmania also requires the incident to take place 'at a workplace'.[210] The OHS statutes tend to define 'workplace' or 'place of work' as premises or a place where people work (see below).

In the ACT it must be 'at or near the workplace' and 'attributable to the employer's undertaking at the workplace'.[211] The OHS(CE)A Cth stipulates that the required nexus is that the incident must arise 'out of the conduct of the undertaking or out of work performed by an employee in conjunction with the undertaking'.[212] The OHS(MI)A Cth uses similar terminology, but specifies that the incident must also be 'at or near a workplace'.[213] The expression 'undertaking' will be discussed in the next section of this article.

In summary, the notion of work-relatedness in the statutory OHS reporting requirements appear to be broader than those found in the workers' compensation statutes in some aspects, and narrower in others. Most of the OHS reporting requirements require reporting where injuries and fatalities are suffered by persons who are not employees, and also in relation to dangerous occurrences that do not result in injury, disease or death. On the other hand, most of the statutes limit reportable incidents to those occurring at the workplace. In this respect it is a narrower conception than that pertaining to

204 Occupational Health, Safety and Welfare Regulations 1995 (SA) reg 6.6.1(3)(x).

205 Occupational Health and Safety Regulations 1991 (ACT) reg 2A(d).

206 Occupational Health, Safety and Welfare Regulations 1995 (SA) regs 6.6.1 and 6.6.3.

207 OHSA NSW s 86(1).

208 WHA s 48A, which appears to be narrowed by the opening words of Work Health (Occupational Health and Safety) Regulations s 46(1).

209 Workplace Health and Safety Regulation 1997 s 52(1).

210 WHSA Tas s 47.

211 OHSA ACT s 85(1).

212 OHS(CE)A Cth s 68.

213 OHS(MI)A Cth s 107.

workers' compensation schemes under the 'arising out of employment' limb where a compensable injury may be causally related to employment but occur away from the workplace (for instance, a worker in a highly stressful work environment who suffers a heart attack at home).

Once again, although a common pattern is discernible amongst most of the reporting requirements in the OHS jurisdictions, closer analysis of the precise wording of the provisions shows that there are significant differences in their wording, which undermines comparisons of reported incidents from jurisdiction to jurisdiction. It should also be noted that there is, no doubt, a significant under-reporting of reportable incidents under the OHS statutes, with some reports suggesting that only 20% of reportable incidents are notified to the OHS authorities.[214]

4. General Duties and Regulations

The duties and obligations to be found in the general duties and regulations in each of the OHS statutes are notably different from the workers' compensation and OHS injury, illness and dangerous occurrence reporting provisions discussed so far in this article. Whereas the workers' compensation and OHS reporting requirements are triggered by injuries and disease (or, in the case of OHS reporting requirements, 'dangerous occurrences' not resulting in injury or death), the standards in the OHS statutes are preventive, and require OHS duty holders (see below) to remove or reduce work risks arising from workplace hazards. One consequence of this is that data on the extent of contraventions of these provisions is very difficult to obtain. The ratio of OHS inspectors to workplaces in the Australian jurisdictions varies from between 1:1000 to 1:1500,[215] and suggests that workplace inspections, and the detection of contraventions, are likely to be infrequent. The majority of detected contraventions are dealt with informally (advice, persuasion and warnings), and are unlikely to be recorded as formal contraventions by the inspectorate. Even where Australian OHS inspectorates do respond to detected contraventions with formal enforcement action (improvement and prohibition notices, infringement notices in some jurisdictions, and prosecution),[216] not all of the Australian inspectorates keep detailed records of the details of these contraventions. Even if such data was available, for the reasons outlined earlier in this section, it would not be consistent with workers' compensation and OHS reporting data.

Historically the notion of work-relatedness in the OHS statutes was determined largely by the traditional OHS regulatory paradigm, which was based on a number of assumptions about how and where workers worked. The traditional approach to OHS regulation, which evolved in nineteenth century

214 Western Australia, *Review of the Occupational Safety and Health Act 1984, Consultation Draft*, 2002, pp 91–2. As noted above, Western Australia has the narrowest OHS reporting requirements.

215 R Johnstone, 'Occupational Health and Safety Regulation in Australia: Overview and Reflections', WorkCongress 5 Conference, *Working Safely in a Changing World*, Adelaide, March 2001. See also Industry Commission, *Work, Health and Safety*, Vol II, Industry Commission, Melbourne, 1995, p 423, Table M.5.

216 See ibid.

Britain, and was adopted by Australian jurisdictions from the 1880s,[217] developed around the factory system. Initially it was principally concerned with factories, but later also applied to construction workplaces and other specific types of workplaces. It focused on machinery and other physical artefacts, relied on detailed technical specification standards which told employers exactly what safeguards to adopt, and, at least in its twentieth century manifestations here in Australia, covered the employer and the factory occupier's duties to employees. This model of OHS regulation was the norm in all of the Australian States until the British Robens Report of 1972.

Since the 1980s all Australian OHS statutes have been reformed to take up the 'Robens' model. These statutes are built around 'general duty' requirements. General duties are imposed upon:

- employers (in relation to both employees and persons other than employees);
- self-employed persons;
- persons in control of premises (called occupiers in some OHS statutes);
- manufacturers, suppliers and importers of plant and substances; designers, erectors and installers of plant for use at work; and
- employees at work or in the workplace (in relation to their own safety and the safety of others).

These general duties are supplemented by regulations and codes of practice (advisory standards in Queensland), which adopt a combination of performance, process and specification standards.[218] 'Performance standards' define the duty holder's duty in terms of goals they must achieve, or problems they must solve, and leaves it to the initiative of the duty holder to work out the best and most efficient method for achieving the specified standard. 'Process requirements' prescribe a process, or series of steps, that must be followed by a duty holder in managing specific hazards, or OHS generally. A typical example of a process requirement is the hazard identification and risk assessment process incorporated into many OHS regulations and codes of practice. These regulations not only introduced process requirements, but they also impose duties on a wide range of parties — designers, suppliers, manufacturers, employers, employees and so on. Process-based standards have spawned greater reliance on 'documentation requirements'. Increasingly OHS statutes are requiring duty holders to document measures they have taken to comply with process-based standards, performance standards and principle-based standards.

What, then, is the notion of 'work-relatedness' required by these statutory OHS standards? It bears repeating that, unlike the workers' compensation legislation, these provisions are preventive, and the obligations laid down by these duties and obligations are not triggered by an actual injury or disease. In other words, the OHS statutes create 'inchoate offences', which do not require

217 See N Gunningham, *Safeguarding the Worker*, Law Book Company, Sydney, 1984, ch 4; R Johnstone, *Occupational Health and Safety Law and Policy*, LBC, Sydney, 1997, ch 2.

218 See further N Gunningham and R Johnstone, *Regulating Workplace Safety: Systems and Sanctions*, OUP, Oxford, 1999, ch 2.

an actual injury or illness for an offence to be committed.[219] Thus, the notion of 'work-relatedness' in the general duties and obligations OHS statutes and regulations differ from that to be found in the workers' compensation statutes in that the former simply require a risk to health and safety to be work-related. The risk does not have to translate into an actual injury or disease for the duty to apply. The New South Wales courts, at least, have been firm, however, in requiring that there be a causal nexus between a contravention of a duty or obligation in the OHS statute, and 'the detriment occasioned to the employee or person' to whom the duty is owed.[220]

It is also clear that the notion of 'work-relatedness' is not confined to the employment relationship, because duties are imposed upon employers in relation to persons other than employees, and duties are imposed upon persons other than employers. The pivotal provisions in the OHS statutes are the duties owed by employers and self-employed persons. For example, s 21(1) of the OHSA Vic provides that 'an employer shall provide and maintain so far as is practicable for employees a working environment that is safe and without risks to health'. Section 22 of the OHSA Vic provides that:

> every employer and self-employed person shall ensure so far as is practicable that persons (other than the employees of the employer or self-employed persons) are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer or self-employed person.

It is well established that both of these duties are strict or absolute duties, qualified by 'practicability', ('reasonable practicability' in some jurisdictions). A measure is not (reasonably) practicable if a reasonable duty holder, weighing the risk of an accident against the measures (including the technological feasibility and cost of those measures) necessary to eliminate the risk, considers that the risk of injury or disease is insignificant relevant to the burden of taking the requisite measures. In other words, the duty is breached 'if there were practical steps available to [the employer] which, although not taken, would have reduced the risk of foreseeable accident if they had been taken'.[221]

An analysis of s 21 of the OHSA Vic reveals that the threshold 'work-relatedness' issue in the employer's general duty is the employment relationship.[222] In other words, the duty is only owed by an employer to an employee (although some jurisdictions, notably Queensland and the Northern Territory refer to 'workers' rather than 'employees'). Generally the Australian OHS statutes adopt the common law definition of 'employee' and 'employer' (see above). In some of the Australian OHS statutes, for the purposes of this employer's general duty to employees the definition of an employee is

219 *R v Australian Char Pty Ltd* (1995) 64 IR 387 at 400; and *Haynes v C I & D Manufacturing Pty Ltd* (1994) 60 IR 149 at 158.

220 *State Rail Authority v Dawson* (1990) 37 IR 110 at 120–1; *WorkCover Authority of NSW (Inspector Ankucic) v McDonald's Australia Ltd* (2000) 95 IR 383 at 439–40; *Drake v WorkCover Authority of NSW* (1999) 90 IR 432 at 448 and 452; *Haynes v C I & D Manufacturing Pty Ltd* (1994) 60 IR 149 at 158–9.

221 *Holmes v Spence* (1992) 5 VIR 119.

222 See again the discussion of the form of the work relationship and the degree of employer control of the work, in Part 2 above, and the discussion of the contract of employment in Part 3 above.

extended beyond the common law definition to include independent contractors and their employees.[223]

The other elements of work-relatedness in the employer's general duty to employees vary across the jurisdictions. In s 21 of the OHSA Vic and s 19 of the OSHA WA the duty requires an employer to ensure that the 'working environment' is safe and without risks to health. The expression 'working environment' is not defined in either statute, and commentators agree that it is to be given a broad interpretation.[224] The remaining statutes also define work-relatedness in terms of a nexus of time, place and activity.[225] The WHA NT refers to 'working environment at a workplace' and requires the workers so protected to be working at the workplace. Section 19(1) of the OHSWA SA and s 9(1) of the WHSA Tas express the duty as being owed to employees 'while at work'. Section 16(1) of the OHS(CE) Cth, s 8(1) of the OHSA NSW, s 28(1) of the WHSA Qld and s 27(1) of the OHSA ACT specify that the employer must protect the health, safety and welfare 'at work' of employees. These statutes generally provide that an employee is 'at work' when she or he is at her or his workplace or, in Queensland, at another workplace at her or his employer's direction. Workplace is generally defined as a place where an employer or self-employed person works. The phrases 'at work' and 'place of work' (or 'workplace') have been expansively interpreted by the courts.[226]

The employer and self-employed person's duties to persons other than employees have different touchstones for work-relatedness.[227] Rather than defining work-relatedness by reference to the form of the work relationship (the contract of employment), the OHS statutes in the eastern States, and in the ACT and Commonwealth, require employers and (in all but the Commonwealth) self-employed persons to protect others from risks arising from 'the conduct of the undertaking'. In some of these statutes there is a further requirement of a geographical nexus between the person to whom the duty is owed and the duty holder's workplace. The South Australian and Western Australian statutes take a different approach, and define 'work-relatedness' by reference to work undertaken by the duty holder. In Tasmania the nexus is 'work carried on at a workplace'.

Similar provisions to those in s 22 of the OHSA Vic are to be found in Queensland, New South Wales, the Commonwealth (where the duty is only

223 See OHSA Vic s 21(3). See also OHS(CE)A Cth s 16(4), OSHA WA ss 19(4) and (5), OHSWA SA s 4(2), WHA NT s 3(1) and WHSA Tas s 9(4)–(7). These provisions are quite different in form and content from the provisions in the workers' compensation statutes which extend to the coverage of 'worker' to certain kinds of independent contractors. The workers' compensation extensions (see above) extend the definition of 'worker' in an *ad hoc* and piecemeal manner, whereas the OHS extensions refer to independent contractors generally, but are restricted by reference to criteria such as the control exercised by the employer.

224 B Creighton and P Rozen, *Occupational Health and Safety Law in Victoria*, 2nd ed, Federation Press, Sydney, 1997, pp 65–6.

225 See the sixth form of work-relatedness discussed above.

226 See W Thompson, *Understanding New South Wales Occupational Health and Safety Legislation*, 3rd ed, CCH, Sydney, 2001, pp 18–19; R Johnstone, *Occupational Health and Safety Law and Policy*, LBC, Sydney, 1997, pp 121–3; M Tooma, *Tooma's Annotated Occupational Health and Safety Act 2000*, LBC, Sydney, 2001, pp 29–32.

227 See R Johnstone, 'Paradigm Crossed? The Statutory Occupational Health and Safety Obligations of the Business Undertaking' (1999) 12 *AJLL* 73–112.