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Discounts are available to lecturers.

This volume may be cited as
(1999) 12 *AJLL*

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Articles

Paradigm Crossed? The Statutory Occupational Health and Safety Obligations of the Business Undertaking

*Richard Johnstone**

In this article, Richard Johnstone examines Australian statutory OHS obligations in the context of the changing nature of the Australian labour market. The focus of the paper is on the statutory 'general duties' owed by employers and self employed persons to both employees and persons other than employees. The article explores the scope of these general duty provisions and applies them to the more traditional employment relationship and to newer forms of work arrangements including contracting, outworking, labour hire companies and franchising agreements.

Introduction

Over the past two decades, the Australian Labour market has undergone significant changes.[1] Permanent full-time employment has been in decline, with a corresponding increase in casual, or temporary, employment, particularly among young workers. Quinlan and Mayhew[2] report that the incidence of temporary employment in Australia from 1983 to 1994 increased from 15.6% to 23.5%.[3] In 1994 just over 30% of women,[4] and just under 59% of young workers (16 years to 19 years)[5] were in temporary employment.[6] The increase in part-time work in Australia has been even more conspicuous,

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1 See M Quinlan and C Mayhew, 'The Implications of Changing Labour Market Structures for Occupational Health and Safety Management', paper presented to Workshop on Policies for Occupational Health and Safety Management Systems and Workplace Change, Amsterdam, 21-4 September 1998; M Quinlan, 'Labour Market Restructuring in Industrialised Countries: An Overview' (1998) 9(1) *Economic and Labour Relations Review* 1. See also T Nichols, *The Sociology of Industrial Injury*, Mansell, London, 1997 and Parliament of New South Wales, Legislative Council, Standing Committee on Law and Justice, Report No 10, *Final Report of the Inquiry into Workplace Safety*, Vol 1, Parliament of New South Wales, Sydney, November 1998, ch 3.

2 Quinlan and Mayhew, above n 1, Table 1.

3 It has been estimated that 60% of the growth in employment from 1982 to 1995 was accounted for by casual employment: J Burgess and I Campbell, 'The Nature and Dimensions of Precarious Employment in Australia' (1998) 8(3) *Labour and Industry* 5 at 9. See also Australian Centre for Industrial Relations Research and Teaching (ACIRRT), *Australia at Work: Just Managing*, Prentice Hall, Sydney, 1999, pp 133-6, and I Campbell, *Casual Employment, Labour Regulation and Australian Trade Unions*, National Key Centre in Industrial Relations Working Paper No 43, National Key Centre in Industrial Relations, Monash University, Melbourne, 1996.

4 26.2% in 1983.

5 29.8% in 1983. The figures for workers aged 20-24 were 14% in 1983 and 26.1% in 1994.

rising from 11.4% in 1983 to 24.8% in 1995.[7] Part-time workers are predominantly women (79.6% in 1983 and 78.1% in 1990).[8] Australian Bureau of Statistics data shows that in the early 1990s self-employed workers constituted over 17% of the workforce.[9] The Second Australian Workplace Industrial Relations Survey reported that the number of agency workers, contractors, outworkers and volunteers had increased by almost 40% in the previous five years.[10] The survey found that a third of private firms surveyed engaged contractors to perform services such as cleaning, maintenance and production work, and over 50% of public sector organisations outsourced some of their operations.[11] A recent survey suggested that the use of labour hire firms by manufacturers increased from 14% of companies in 1990 to 21% in 1995.[12] Franchising arrangements are becoming more common in a wide range of industries.[13]

The origins of these changes are complex, but are a consequence of the changing employment and management practices of large business organisations and government.[14] In pursuit of more 'flexible' working arrangements,[15] large companies have increasingly resorted to management decentralisation, subcontracting, outsourcing, franchising and downsizing, leading to more casual, part-time and other contingent forms of work,[16]

6 Only Spain, of the industrialised countries surveyed, had a greater proportion of temporary workers.

7 Quinlan and Mayhew, above n 1, Table 2.

8 The Women's Bureau, 'Working from Home' (1996) 17(1) *Women & Work* 1 reports that women constituted 74.9% of the part-time labour force in January 1996.

9 See P Bohle and M Quinlan, *Marginal Workers, Subcontracting, Agency Labour and Occupational Health and Safety*, Topic 17, Course Materials, Occupational Health and Safety Management for Worksafe Australia, The University of Queensland and the University of New South Wales, Tertiary Education Institute, The University of Queensland, 1995 at 1. Research has also shown that over a large proportion (38% in Vandenheuvel and Wooden's study) of self-employed contractors are heavily dependent on the organisation hiring them; suggesting that their status more closely resembles workers: see A Vandenheuvel and M Wooden, 'Self-employed Contractors in Australia: How Many and Who Are They?' (1995) 37 *JIR* 263.

10 A Moorehead, M Steele, M Alexander, S Kerry and L Duffin, *Changes at Work: The Second Australian Workplace Industrial Survey*, Longman, Melbourne, 1997. See also Quinlan, above n 1.

11 ACIRRT, above n 3, p 142.

12 D Uren, 'It all gets down to wages and hours', *Weekend Australian*, 20 February 1999.

13 See below.

14 Quinlan and Mayhew, above n 1, especially Table 3. See also H Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 *Oxford Journal of Legal Studies* 353 (Collins, 1990a). For discussion of the political and economic forces behind changes in the Australian labour market, see ACIRRT, above n 3, especially ch 2.

15 For an explanation of the factors behind an organisation's choice between 'vertically integrated' production utilising employment relationships and bureaucratic control, and 'vertical disintegration of production' where the organisation substitutes commercial contracts (eg, sub-contracting) for employment relations, see Collins (1990a), above n 14, at 353-69.

16 As Rosemary Owens points out, the categories of sub-contractors, part-time workers, casual workers, home-based workers, agency workers and even franchisees, are sometimes overlapping. A home-based worker may be engaged as an independent contractor for some projects, and may work part-time or on a casual basis: see R J Owens, 'The Peripheral Worker: Women and the Legal Regulation of Outwork', in *Public and Private: Feminist Legal Debates*, M Thornton (Ed), Oxford University Press, Melbourne, 1995 (Owens, 1995a), p 41. Franchise agreements often specify that franchisees are independent contractors.

self-employment and small business.[17] Australian governments, state and federal, have produced similar effects through increasing resort to privatisation, corporatisation, competitive tendering and outsourcing.[18]

Recently, commentators have argued that labour lawyers have built the traditional labour law paradigm around the assumption of the permanent, full-time male employee.[19] This model posits labour law as the regulator of employment relationships, leaving other types of work relationships to be regulated by the market, mediated in some cases by legislation mitigating the harshness of contractual relationships. Consequently, the threshold for the application of most rights and obligations in the area of labour law has become the contract of employment, or as Creighton and Stewart put it, 'in legal terms the pivot of the entire structure of labour law is the individual employment relationship'.[20] For example, the Australian Industrial Relations Commission and state industrial relations tribunals may only exercise their jurisdiction over disputes which involve 'employees'.[21] Unfair dismissal and redundancy provisions generally only apply to 'employees'. Employers generally only have obligations to 'employees' in relation to pay-roll tax, workers' compensation,[22] training, entitlements to annual leave, parental leave and long service leave.[23]

Other commentators have pointed to the narrow basis upon which legal conceptions of employer responsibility have been founded.[24] In recognition of the degree of trust between the parties in a business partnership, a business

17 See also D Walters and P James, *Robens Revisited: The Case for a Review of the Occupational Health and Safety Legislation* (Interim Report), Institute of Employment Rights, London, 1998, pp 5 and 9-11.

18 Quinlan and Mayhew, above n 1; K Ewing (Ed), *Working Life: A New Perspective on Labour Law*, The Institute of Employment Rights, Lawrence and Wishart, London, 1995, pp 43-4.

19 See, eg, R Hunter, 'Representing Gender in Legal Analysis: A Case/Book Study in Labour Law' (1991) 18 *Melbourne University Law Review* 305; Owens (1995a), above n 16; R J Owens, 'Women, "Atypical" Work Relationships and the Law' (1993) 19 *Melbourne University Law Review* 399; and R J Owens, 'The Traditional Labour Law Framework: A Critical Evaluation' in *Redefining Labour Law: New Perspectives on the Future of Teaching and Research*, R Mitchell (Ed), Occasional Monograph No 3, Centre for Employment and Labour Relations Law, The University of Melbourne, 1995 (Owens, 1995b); Ewing, above n 18, at 44; Collins (1990a), above n 14, at 353 and, specifically in relation to the Robens model of OHS regulation, Walters and James, above n 17, p 10.

20 B Creighton, and A Stewart, *Labour Law: An Introduction*, 2nd ed, Federation Press, Sydney, 1994, p 128.

21 But note the exception in relation to 'unfair contracts' in New South Wales, noted above. The Workplace Relations Act 1996 (Cth) ss 127A-127C also gives the Federal Court of Australia limited powers to scrutinise contracts entered into by independent contractors. See J Macken, P O'Grady, and C Sappideen, *The Law of Employment*, 4th ed, LBC Information Services, Sydney, 1997, ch 14.

22 Although typically the workers' compensation statutes provide that the definition of a 'worker' extends beyond the common law definition of 'employee'.

23 Creighton and Stewart, above n 20, p 129. But note that anti-discrimination legislation tends to reach beyond the employment relationship, to protect the self-employed and persons applying for employment: see Ewing, above n 18, p 45.

24 See H Collins, 'Ascription of Legal Responsibility to Groups in Complex Patterns of

partner is responsible for the acts and omissions of other partners. The person or corporation identified as the owner of the means of production, the employer, will be responsible under the principles of agency and vicarious liability for the actions of 'employees' causing harm to others while acting within the course of employment. There appear to be sound policy reasons for the principle of vicarious liability. The employer should bear the burdens, as well as enjoying the benefits, of the employee's endeavours, and the employer generally is better able than the employee to bear the loss, to shift the burden of the loss to others (such as consumers), and to take action to prevent the loss. Here again we see the pivotal importance of the contract of employment, and the conceptual baggage of 'privity' of contract which accompanies it. Employer responsibility is limited to the acts of the employer's employees, but not for the wrongs of independent contractors.

As Hugh Collins has pointed out, however, this principle of corporate responsibility 'is contingent upon the recognition of a single personality for the group'[25] constituting the business organisation. This unity of corporate personality will not be present where firms adopt more complex patterns of economic integration and organise work through a number of legal entities. Collins succinctly argues that '[f]irms enjoy considerable freedom both in law and in practice to determine the limits of their boundaries. . . . No laws limit this freedom to organise production through external contractual relations with other firms or through subsidiaries'.[26]

Business organisations can 'determine the limits of their boundaries' and diffuse responsibility for legal obligations through various mechanisms. For example, a business organisation may decide to break up its operations and to vest responsibility for different operations in subsidiary companies, owned by a single holding company. Here the relationship between the corporate entities revolves around ownership of the various corporate entities by the holding company. Alternatively, a company might divest itself of certain functions, and enter into contractual relationships with other firms which perform those functions.[27] Such contracting patterns vary significantly from industry to industry, and even within industries.[28] In the construction industry, it is very common to find projects undertaken by a principal contractor operating through vertical and horizontal contracting and sub-contracting arrangements. Contracting also plays a significant role in the meat and transport industries. In manufacturing, firms might stop making certain components or performing certain services, and purchase the components or services from contractors. In the service industries, particularly the retail industry, a company may develop a business system, and then enter into licensing arrangements with other small businesses to enable the small business (the franchisee) to run franchise

Economic Integration' (1990) 53 *Modern Law Review* 731 at 731-2 (Collins, 1990b), and L Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law*, Law Book Company, Sydney, 1994, pp 171-83.

25 Collins (1990b), above n 24, at 732.

26 Id, at 736.

27 See Collins (1990a), above n 14. See also N Sargent, 'Corporate Groups and the Corporate Veil in Canada: A Penetrating Look at Parent-Subsidiary Relations in the Modern Corporate Enterprise' (1987) 17 *Manitoba Law Journal* 156.

28 Bennett, above n 24, p 171.

operations which implement those business systems. Collins argues that:

> These complex economic organisations bound together by ties of ownership, contract and authority may in reality comprise some form of team effort, which easily could be integrated into one capital unit, and may therefore be analysed from the point of view of institutional economics as quasi-firms. Yet, since in fact these groups comprise distinct legal entities which in law are regarded as independent persons, members of the group cannot in general be held responsible for the acts or omissions of other members without contradicting the basic principles of legal responsibility. Thus one company can only be held liable for its own torts or for breaches of its own contracts, not for those of other companies or independent contractors with which it has close economic ties. This engenders a serious problem for the application of the principle of group responsibility.[29]

These strategies to convert work relationships and forms of business organisation have been motivated by many factors,[30] including the need for firms to cut costs in the face of the worsening economic conditions of the past few decades, and a desire to evade the increased coverage and scope of the Australian industrial regulation since the early 1980s.[31] Firms have sought to cut wages and labour costs (such as the various forms of paid leave, allowances, workers' compensation premiums and superannuation), to shift the burden of downtime back to labour (by paying contractors for work actually done), to externalise many costs (such as electricity and telecommunications), and to increase labour flexibility and productivity.[32]

There is increasing evidence that these work organisation and labour market changes are having detrimental effects on the health and safety of workers.[33] For example, the competitive pressures that induce businesses to turn to outsourcing also encourage sub-contractors to cut costs by underbidding on contracts, using cheaper or inadequately maintained equipment, reducing staff levels, speeding up production, or working longer hours. Organisational forms relying on sub-contracting create fractured, complex and disorganised work processes, weaker chains of responsibility and 'buck-passing' and a lack of specific job knowledge (including knowledge about health and safety) among workers moving from job to job. Finally, occupational health and safety ('OHS') regulation, which traditionally has assumed factory work by full-time male workers in a continuing employment relationship governed by the contract of employment, has been slow to adapt to these new work patterns and organisational forms.

29 Collins (1990b), above n 24, at 734.

30 See Collins (1990a), above n 14 and Bennett, above n 24, pp 172-3.

31 Recently, of course, the federal government has itself wound back the role of the Australian Industrial Relations Commission.

32 See Collins (1990a), above n 14, especially at 356-62.

33 These are described in M Quinlan, *The Implications of Labour Market Restructuring in Industrialised Countries for Occupational Health and Safety*, University of New South Wales School of Industrial Relations and Organisational Behaviour Working Paper No 116, Kensington, NSW, 1997; C Mayhew, M Quinlan and L Bennett, *The Effects of Subcontracting/Outsourcing on Occupational Health and Safety*, Industrial Relations Research Centre Monograph, University of New South Wales, 1996. See also M Quinlan, and P Bohle, *Managing Occupational Health and Safety in Australia*, MacMillan, Melbourne, 1991, p 16.

Writers such as Collins[34] and Bennett[35] have shown how the law has been slow to develop concepts and institutions to ensure that firms do not evade legal obligations and responsibilities through choosing organisational forms and work relationships other than the relationship of single corporate employer and employee. In their analyses, neither chooses the example of OHS regulation.[36] This article is an initial attempt to show how some of the regulatory issues outlined above have, to a modest degree, been addressed in the Australian OHS statutes. I argue that the Australian OHS statutes cover to a significant degree both sides of a 'dualist' labour market, imposing duties on business organisations towards the traditional category of 'employees' as well as towards the 'peripheral' categories of 'contingent' workers.[37] The article does not attempt to examine all forms of contingent labour, or all forms of capital organisation.[38]

The article focuses on the 'general duty' of care owed by employers and self-employed persons under the modern Australian OHS statutes.[39] First, it analyses the obligations owed by a single employer to its employees. It then examines the duty owed by employers and self-employed persons to 'non-employees'. Third it applies this duty to 'non-employees' in the context of public health and safety and contracting and sub-contracting. Fourth, it discusses recent case law on the implementation of these general duties by corporations. Fifth, it examines the OHS obligations of organisations using outworkers, labour hire companies and employers engaging labour from such companies, and franchisors in relation to franchisees, and the employees and contractors engaged by franchisees. Finally, it makes some tentative suggestions for future developments in OHS regulation to ensure that regulators keep abreast of emerging forms of business organisations and work relationships.

The Statutory General Duties

A major development in OHS regulation in Australia since the 1970s has been the move away from detailed, technical *specification* or *prescriptive* standards,[40] to a combination of general duties, supplemented by performance standards, process-based standards and documentation requirements in

34 Collins (1990b), above n 24.
35 Bennett, above n 24.
36 But see Collins (1990a) above n 14, at 355.
37 A Stewart, '"Atypical" Employment and the Failure of Labour Law' (1992) 18 *Australian Bulletin of Labour* 217 at 218.
38 In particular, the issue of employer liability where capital units are linked though ownership (eg, where there are holding and subsidiary companies) will not be examined in this article.
39 Other general duties which may be relevant (eg, the duties of occupiers and persons in control of premises) are not discussed here. See R Johnstone, *Occupational Health and Safety Law and Policy: Text and Materials*, LBC Information Services, Sydney, 1997, pp 257-78.
40 For a discussion of the strengths and weaknesses of such standards, see N Gunningham, 'From Compliance to Best Practice in OHS: The Roles of Specification, Performance and Systems-based Standards' (1996) 9 *AJLL* 221. See also *Report of the Committee on Safety and Health at Work 1970-72*, HMSO, London, 1972 (Robens Report) at pp 1, 6, 8-13.

regulations and codes of practice made under the OHS statutes.[41] The general duty provisions have been introduced to ensure that the principal parties involved in all work processes are subjected to a range of interlocking and overlapping duties requiring them to do all that is reasonably practicable to ensure that work is carried out in a way that is safe and without risks to health. As the Robens report[42] recommended, OHS legislation should 'begin by enunciating the basic and overriding responsibilities of employers and employees'.

> A positive declaration of the over-riding duties, carrying the stamp of Parliamentary approval, would establish clearly in the minds of all concerned that the preservation of safety and health at work is a continuous legal and social responsibility of all those who have control over the conditions and circumstances under which work is performed. It would make it clear that this is an all-embracing responsibility, covering all workpeople and working circumstances unless specifically excluded.

The Australian OHS statutes[43] tend to impose duties upon employers (in relation to both employees and persons other than employees); self-employed persons; occupiers; manufacturers, suppliers and importers of plant and substances; designers, erectors and installers of plant; and employees. There is considerable overlap between the general duties owed by the various parties. It is well accepted that in any one work system, more than one general duty can be owed simultaneously, by one or more parties.[44] The fact that one person has breached a general duty does not provide a defence for a second person charged with a contravention of another general duty based on the same facts.[45]

The following sections of this article outline the duties placed upon employers and self-employed persons. First, it examines the courts' interpretation of the employer's duty to employees. These developments provide a platform for the discussion of the duties owed by employers and self-employed persons to persons other than employees.

The Duty of the Employer to Employees

Each of the Australian OHS statutes imposes a duty upon employers in relation to employees. For example, s 21(1) of the Victorian Occupational Health and Safety Act 1985 ('OHSA(Vic)') provides that 'an employer shall

41 A brief description of the different types of OHS standards and of the process of making regulations and codes of practice under the OHS statutes are to be found in Johnstone, above n 39, pp 156-60, and ch 7.
42 Robens Report, above n 40, paras 129-30.
43 These statutes are Occupational Health and Safety (Commonwealth Employment) Act 1991 (Cth) ('OHS(CE)A(Cth)'), Occupational Health and Safety Act 1983 (NSW) ('OHSA(NSW)'), Occupational Health and Safety Act 1985 (Vic) ('OHSA(Vic)'), Workplace Health and Safety Act 1995 (Qld) ('WHSA(Qld)'), Occupational Health and Safety and Welfare Act 1986 (SA) ('OHSWA(SA)'), Occupational Safety and Health Act 1984 (WA) ('OSHA(WA)'), Workplace Health and Safety Act 1995 (Tas) ('WHSA(Tas)'), Work Health Act 1986 (NT) ('WHA(NT)') and Occupational Health and Safety Act 1989 (ACT) ('OHSA(ACT)'). For an overview of these statutes, see Johnstone, above n 39, pp 80-4.
44 See WHSA(Qld) s 25.
45 See Johnstone, above n 39, pp 276-7.

provide and maintain so far as is practicable for employees a working environment that is safe and without risks to health'. Section 21(2) appears to provide examples of contraventions of the s 21(1) duty. It provides that 'without in any way limiting the generality of subs (1), an employer contravenes that subsection if the employer fails' to comply with the provisions set out in paras (a)-(e). To illustrate, para (a) requires an employer 'to provide and maintain plant and systems of work that are so far as is practicable safe and without risks to health'; para (b) requires the employer 'to make arrangements for ensuring so far as is practicable safety and absence of risks to health in connection with the use, handling, storage and transfer of dangerous plant and substances'; and para (e) requires an employer 'to provide such information, instruction, training and supervision to employees as are necessary to enable employees to perform their work in a manner that is safe and without risks to health'.[46]

The duty is s 21 is an absolute duty, qualified only by 'so far as is practicable'.[47] 'Practicable' is defined in s 4 of the OHSA(Vic) to mean:

> practicable having regard to —
> (a) the severity of the hazard or risk in question;
> (b) the state of knowledge about that hazard or risk and any ways of removing or mitigating that hazard or risk;
> (c) the availability or suitability of ways to remove or mitigate that hazard or risk; and
> (d) the cost of removing or mitigating that hazard or risk.

Similar definitions of 'practicable' are to be found in the WA and NT OHS statutes. All these definitions are effectively the same as the expression 'reasonably practicable' which is found in the British Health and Safety at Work Act 1974 ('HSAWA'),[48] and in the Cth, NSW, SA, Tas and ACT OHS

46 The link between ss 21(1) and (2) is not as straightforward as it might appear at first glance. Prosecution of the s 21(1) duty has been complicated by recent superior court decisions (*'Chugg v Pacific Dunlop Ltd* [1988] VR 411; *R v Australian Char Pty Ltd* (1996) 64 IR 387. See also Johnstone, above n 39, pp 186-98; B Creighton and P Rozen, *Occupational Health and Safety Law in Victoria*, 2nd ed, Federation Press, Sydney, 1997, pp 70-2). These decisions hold that each of the paragraphs in s 21(2) of the OHSA(Vic) has the effect of creating a separate offence, each consisting of an identifiable act or omission which constitutes a failure to comply with s 21(1). Consequently, if the prosecutor alleges that an employer has contravened more than one paragraph of subs (2) of the employer's general duty, then these contraventions must be set out in separate charges to avoid the rule against duplicity which states that no one charge can allege that the defendant has committed two or more offences. *Boral Gas (NSW) v Magill* (1995) 58 IR 363 laid down similar principles in relation to the corresponding provisions in the OHSA(NSW) ss 15(1) and (2). See R MacCallum (Chair), *Final Report of the Panel of Review of the Occupational Health and Safety Act 1983 (NSW)*, 1986, pp 51-5. The WHSA(Qld) provides (see s 164(2)) that the rule against duplicity does not apply to general duty prosecutions under that Act.

47 See *Chugg* (1988), above n 46 and *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 at 251 (*'Chugg* (1990)); and see Johnstone, above n 39, pp 199-202. See also Wallace and Rowland JJ in *Interstruct Pty Ltd v Wakelam* (1990) 3 WAR 100 and Stanley J in *Broken Hill Associated Smelters Pty Ltd v Stevenson; Stevenson v Broken Hill Associated Smelters Pty Ltd* [1991] 42 IR 130 at 144-5 (*'Broken Hill Associated Smelters'*).

48 See *Edwards v National Coal Board* [1949] 1 KB 704 at 712 per Asquith LJ and *Austin Rover Group v HM Inspector of Factories* [1990] 1 AC 619 at 625-7 per Lord Goff.

statutes.[49] The overriding question is whether, as a question of fact, it was (reasonably) practicable to take any precautions other than those which had been taken. The 'question . . . is not whether the detail of what happened was foreseeable, but whether accidents of some class or other might conceivably happen, and whether there is a practicable means of avoiding injury as a result'.[50] The 'state of knowledge of the hazard or risk' must be determined objectively (by reference to the knowledge in the industry, and in regulations, codes of practice, Australian Standards, other standards and articles in trade journals) and can take into account the subjective knowledge of the employer.[51]

All of the factors in the definition of 'practicable' or in the conception of 'reasonably practicable' are to be weighed up objectively[52] to determine whether, as a question of fact, the employer provided or maintained a safe working environment.[53] In short, a measure is not (reasonably) practicable if a reasonable employer, 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 relative to the burden of taking the requisite measures. The existence of a universal practice is evidence, but not conclusive evidence, that it was not reasonably practicable to use some other, and safer, method.[54]

The High Court has confirmed that the onus of proving practicability in a criminal prosecution for a breach of the duty in s 21 of the OHSA(Vic) lies on the prosecutor.[55] Nevertheless, in *Chugg v Pacific Dunlop Ltd* the High Court[56] pointed out that:

> The questions of safety and practicability, in many cases, raise issues of common sense rather than special knowledge . . . In some cases the mere identification of a perceptible risk may, as a matter of common sense, also constitute identification of a means of removing that risk, thereby giving rise to a strong inference that an employer failed to provide 'so far as is practicable' a safe workplace.

The employer's general duties to employees in the other Australian OHS statutes strongly resemble the Victorian provision. The only significant differences are in the Occupational Health and Safety Act 1983 (NSW) ('OHSA(NSW)') and the Workplace Health and Safety Act 1995 (Qld) ('WHSA(Qld)'). Section 15(1) of the OHSA(NSW) provides that '[e]very employer shall ensure the health, safety and welfare at work of all his employees'. Section 28(1) of the WHSA(Qld) provides that '[a]n employer

49 It is also very similar to the 'calculus of negligence' used to determine the standard of care in common law negligence cases. See *Wyong Shire Council v Shirt* (1980) 148 CLR 40 at 47-8 per Mason J.

50 *Holmes v R E Spence & Co Pty Ltd* (1993) 5 VIR 119 at 126 *'Holmes v Spence'*. See also *Shannon v Comalco Aluminium Ltd* (1986) 19 IR 358 at 362.

51 *Chugg v Pacific Dunlop Ltd* (SC(Vic), 5 May 1989, unreported) *'Chugg* (1989)', per Ormiston J (see also Beach and Kaye JJ).

52 *Shannon v Comalco*, above n 50, at 362.

53 *Chugg* (1989), above n 51, per Ormiston J.

54 *Martin v Boulton and Paul (Steel Construction) Ltd* [1982] ICR 366. There may, however, be other evidence that there were alternative ways of performing the operation which were safer and reasonably practicable.

55 *Chugg* (1990), above n 47.

56 Id, at 260.

has an obligation to ensure the workplace health and safety of each of the employer's workers at work.' These duties are clearly absolute.[57] Section 53 of the OHSA(NSW) sets out a defence of reasonable practicability, and a defence that the commission of the offence was due to factors over which a person had no control. The defendant has to prove the elements of these defences on the balance of probabilities (the civil onus).[58] In the WHSA(Qld), ss 26 and 37 provide that when there is in force a regulation covering the risk, it must be followed to comply with the general duty. A person must follow relevant advisory standards, or adopt another method that identifies and manages exposure to risk. Where there is no guidance in the regulations or in an advisory standard, the person must take reasonable precautions and exercise proper diligence to ensure the obligation is discharged. It is a defence for the duty holder to show (on the balance of probabilities) that she or he followed the relevant regulation or advisory standard, or, where there is no regulation or advisory standard about exposure to a risk, that she or he chose another appropriate measure and took reasonable precautions and exercised proper diligence to prevent the contravention.

Judicial decisions have clarified that:

- the employer's statutory general duty closely resembles the employer's common law duty,[59] and that the common law cases on the standard of care provide some guidance in interpreting the statutory duty.
- the expression 'health' in the general duty has been interpreted to:

  mean the ordinary dictionary definition — see OED. — of 'soundness of body', rather than confining it to something like 'freedom from illness or infection'. ... [T]he phrase ... 'safe and without risks to health' is a compendious phrase to cover all risks both of direct physical injury or subsequent illness, infection, disease or significant physical or mental handicap or disability caused or shown to be a likely cause of the conditions of the workplace.[60]
- the OHS Acts require employers to take

  such steps as are practicable to provide and maintain a safe working environment. The courts will best assist the attainment of this end by looking at the facts of each case as practical people would look at them: not with the benefit of hindsight, nor with the wisdom of Solomon, but nevertheless remembering that one of the chief responsibilities of all employers is the safety of those who work for them. Remembering also that, in the main, such a responsibility can only be discharged by taking an active, imaginative and flexible approach to potential dangers in the knowledge that human frailty is an every-present reality.[61]
- 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',[62]
- proof of an offence under the employer's general duty 'is not dependent on there having been an accident and injury to an employee'.[63]
- in implementing its statutory general duty, the employer must anticipate that workers might be careless or inadvertent, and must take steps to prevent an employee from suffering injury as a result of the employee's own negligence or inadvertence.[64]
- the state of plant, equipment or substances when purchased, and the issue of whether the system of work had previously been operated without injury, are not relevant to the question of whether the employer had discharged its statutory general duty.[65]
- the employer's duty to the employer's employees extends to requiring the employer to provide information, supervision and training to non-employees (such as independent contractors and their employees) to ensure that their activities do not put the employer's employees at risk.[66]

In addition to these principles, a line of NSW cases emphasises that a causal connection between the breach of the employer's statutory duty in s 15 and the detriment to the employees' health and safety must be established before the employer's duty is contravened.[67]

57 See *Carrington Slipways Pty Ltd v Callaghan* (1985) 11 IR 467; *State Rail Authority (NSW) v Dawson* (1990) 37 IR 110; *Boral Gas (NSW) Pty Ltd v Magill* (1995) 58 IR 363; and *Inspector Schultz v Council of the City of Tamworth (t/a Tamworth City Abbattoir)* (1994-5) 58 IR 221 at 226-7. But see *ABB Power Transmission Pty Ltd v WorkCover Authority (NSW)* (IRC(NSW) in court session, Fisher P, Bauer and Hungerford JJ, 2 May 1997, unreported) at p 8 of the transcript.

58 *Carrington Slipways*, above n 57; *Sydney City Council v Coulson* (1987) 21 IR 477.

59 See *Chugg* (1988) above n 46, at 415. *Chugg* (1989), above n 51, per Ormiston J; *Holmes v Spence*, above n 50, at 123; *Australian Char*, above n 46, at 399-400; *Broken Hill Associated Smelters*, above n 47; *Softwood Holdings Pty Ltd v Stevenson* (IR Court(SA), Jennings SJ, Cawthorne and Parsons JJ, No 489 of 1993, 24 November 1995, unreported); *Interstruct v Wakelam* above n 47; *R v Swan Hunter Shipbuilders* [1982] 1 All ER 264; *West Bromwich Building Society Ltd v Townsend* [1983] ICR 257.

60 *TTS Pty Ltd v Griffiths* (1991) 105 FLR 255 at 267 per Asche CJ, in the context of the employer's statutory duty in s 29 of WHA(NT)

61 *Holmes v Spence*, above n 50, at 123.

62 Id, at 127.

63 *Australian Char*, above n 46, at 400. See also *Haynes v C I and D Manufacturing Pty Ltd* (1995) 60 IR 149 at 159.

64 *Holmes v Spence*, above n 50; *Australian Char*, above n 46; *Inspector Ankucic v Rapid Packaging Services Pty Ltd* (Chief Industrial Magistrate (NSW), Miller CIM, 94/1324, 6 April 1995, unreported).

65 *Holmes v Spence*, above n 50; *Australian Char*, above n 46. In *Holmes v Spence* the court strongly suggested that the issue of whether the system of work had been previously inspected by the OHS inspectorate was also not relevant, even though, on the facts before the court, the inspectorate had not actually inspected the machine in question.

66 See *Swan Hunter Shipbuilders*, above n 59.

67 *State Rail Authority (NSW) v Dawson* (1990) 37 IR 110 at 120-1. This principle has also been applied to the employer's duty to non-employees: see *WorkCover Authority (NSW) v Maitland City Council* (1998) 83 IR 362 at 377; *WorkCover Authority of (NSW) v King Sound Corp Pty Ltd* (1998) 83 IR 253 (*'King Sound'*). *King Sound* illustrated the importance of the particulars of the alleged offence provided by the prosecution. In *Kings Sound* scaffolding collapsed killing one worker and seriously injuring another two. The particulars specified that the alleged breach of the employer's duty to non-employees in s 16 of OHSA(NSW) was due to the scaffolding being overloaded with bricks. The court held that the prosecution's evidence did not establish beyond reasonable doubt that the collapse of the scaffold was caused by overloading, rather than by the improper erection of the scaffolding or defective scaffolding components. The charge was dismissed. See also *WorkCover Authority (NSW) v Maitland City Council* and *Australia Meat Holdings Pty Ltd v WorkCover Authority (NSW)* (1998) 83 IR 343.

Some of the OHS statutes specify that the employer's duty is only owed when employees are 'at work'.[68] Recent NSW decisions have examined the phrase, and have held that it has both a temporal and purposive connotation.[69] 'It applies equally to all kinds of work. On a building site it would include entering, moving about and leaving a site, as well as ... inspection, reinspection, maintenance and periodic checks'.[70] A recent decision[71] has held that it could not be established beyond reasonable doubt that a deceased forklift driver was 'at work'[72] when his forklift went over the edge of an unguarded passageway at a marketplace. The deceased had been engaged on a regular casual basis and had arrived at the workplace an hour before the earliest time at which he would find out whether he was required to work on the evening in question. The court inferred that he did so for his 'own purpose', as a witness had 'found avocados and a hand of bananas in [the deceased's] bag even though the policy was that employees were not allowed to have fruit in their bags whilst working at the markets'.[73] This decision needs to be reconciled with the English decision in *Bolton Metropolitan Borough Council v Malrod Insulations Ltd*[74] where the English High Court held that the expression 'at work' did not mean that 'the duty to provide safe plant arises only when men are actually at work'[75] and extended to the provision and maintenance of plant and systems of work for employees who will be at work. The duty does not fall into limbo when workers leave work, only to be revived when they return the next day.

In all but the NT OHS statute, the employer's duty to employees is based upon the common law employment relationship. The definitions of 'employer' and 'employee' invoke the common law definitions of those terms.[76] Importantly, the definition of 'employee' in all of the OHS statutes does not exclude casual or part-time employees. The basic test to identify an employee laid down by the Australian courts is the 'multiple factor' test, in which the right of the 'employer' to control over the worker is the most important.[77] There is no fixed list of relevant indicia, but a number of factors are consistently mentioned by the courts as being particularly pertinent. These

68 See, eg, s 15(1) OHSA(NSW), s 28 (1) of WHSA(Qld), s 19(1) of OHSWA(SA), s 9(1) of WHSA(Tas). See also the wording of OHS(CE)A s 16(1), WHA(NT) s 29(1) and OHSA(ACT) s 27(1).

69 *Clarke v W L Meinhardt and Partners Pty Ltd* (IRC(NSW), Fisher CJ, 30 June 1992, unreported) at p11 of the transcript..

70 Id, at 11-12.

71 *Rech v F M Hire Pty Ltd* (1998) 83 IR 293 at 321-2.

72 Section 4(3) of OHSA(NSW) provides that an employee is at work throughout the time when an employee is at her or his place of work, but not otherwise. Section 16 of the WHSA(Qld) specifies that a worker is at work only if the work is at the worker's workplace or at another workplace at the worker's employer's direction. See also OHS(CE)A (Cth) s 5.

73 *Rech v F M Hire*, above n 71, at 321.

74 [1993] ICR 358.

75 Id, at 367.

76 See Johnstone, above n 39, pp 110-5.

77 The leading Australian case is *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16. See also *In the matter of an application by D J Porter for an Inquiry into an Election in the Transport Workers' Union of Australia* (1989) 34 IR 179, especially at 184-5. See Creighton and Stewart, above n 20, at pp 133-4.

include whether the worker is at liberty during the work relationship to work for other employers; whether the worker supplies her or his own equipment or tools; whether the worker is 'operating on his or her own account'; whether the nature of the worker's engagement is such as to provide the worker with an opportunity to make a profit, or to risk a loss; and whether the worker is free to pass the work on to another person. Answers in the affirmative to any of these questions will push the categorisation of the contract away from being one of employment, and hence will suggest that the worker is not an 'employee'.[78] The courts make it clear that the label placed by the parties on their relationship is only one factor to be considered when categorising the relationship, and is not conclusive of the issue.[79]

Section 29 of the Northern Territory Work Health Act 1986 ('WHA(NT)') imposes the duty on employers in relation to 'workers', where a 'worker' is defined in s 3(1) as a natural person who under any form of agreement performs work or a service of any kind for another person. In other words, the definition of worker includes an independent contractor.

Thus in all Australian jurisdictions apart from the Northern Territory, the employer's duty to employees assumes a single employer and a common law employment relationship. If the OHS statutes relied for their scope only upon the employer's statutory general duty to employees, the statutes would have minimal significance in regulating work relationships such as those arising from sub-contracting, franchising and some labour hire arrangements. The employer would owe a duty to its own employees, which would include ensuring that contractors and their employees were not a source of danger to the employer's employees.[80] A contractor would owe a duty to its own employees. But an employer would not owe a duty directly to a member of the public, contractors, sub-contractors, franchisees or any persons employed or engaged by a contractor, sub-contractor or franchisee. The following section looks at other provisions in the OHS statutes, which broaden the coverage of the OHS statutes.

The Duty of Employers to Persons Other Than Employees

Each of the Australian OHS statutes explicitly extends the scope of the general duties beyond the traditional employment relationship. We have already seen how the NT Act extends the duty owed by the employer to cover 'workers', which is defined to cover all an employer's work relationships with a natural

78 Recent research suggests that a large proportion (38% in Vandenheuvel and Wooden's study) of self-employed contractors are heavily dependent on the organisation hiring them, suggesting that their status more closely resembles workers: see A Vandenheuvel and M Wooden, 'Self-employed Contractors in Australia: How Many and Who Are They?' (1995) 37 *Journal of Industrial Relations* 263. See also Gray J *In the matter of an application by D J Porter for an Inquiry into an Election in the Transport Workers' Union of Australia* (1989) 34 IR 179 at 184-5.

79 See *Cam & Sons Pty Ltd v Sargent* (1940) 14 ALJR 162; *Australian Mutual Provident Society v Allan* (1978) 52 ALJR 407; *Narich Pty Ltd v Commissioner of Payroll Tax* [1983] 2 NSWLR 597.

80 See again *Swan Hunter Shipbuilders*, above n 59.

person. In the other Australian statutes, there are two types of provisions extending the employer's duties to persons other than employees.

One set of provisions extends the definition of an 'employee' for the purposes of the employer's duty to employees to include contractors and their employees. For example, s 21(3) of the OHSA(Vic) deems an independent contractor engaged by an employer, and the employees of the independent contractor, to be the employees of the employer for the purposes of the employer's general duty to employees in ss 21(1) and (2) in relation to all matters over which the employer has control.[81] Section 16(4) of the Occupational Health and Safety (Commonwealth Employment) Act 1991 (Cth) ('OHS(CE)A(Cth)') and ss 19(4) and (5) of the Occupational Safety and Health Act 1984 (WA) ('OSHA(WA)') contain provisions similar to s 21(3) of the OHSA(Vic), although the Cth provision does not refer to the contractor's employees. Section 4(2) of the Occupational Health, Safety and Welfare Act 1986 (SA) ('OHSWA(SA)') and s 9(4) of the Workplace Health and Safety Act 1995 (Tas) ('WHSA(Tas)') would appear to produce similar consequences, although the former provisions do not extend to cover the employees of the independent contractor, and the latter duty is limited to work done at 'any workplace under the control or management' of the employer who is also the principal.[82]

The second type of provision is a result of the Robens Report's recommendation that the OHS statutes contain provisions which protect the health and safety of the public.[83] The Report recommended that *self-employed* persons be brought within the scope of the OHS legislation,[84] and that the legislation also ensure that 'the general public' be protected 'from hazards arising directly from industrial and commercial activities',[85] regardless of whether the hazard was caused by employees or the self-employed. The Robens Committee believed that the OHS legislation needed to take into account the wide variety of situations in which the public might be involved — from their 'internal' involvement (as customers in department stores) to their role as 'external public', for example when there was large-scale use of explosive substances.[86] 'The area of risk may be fairly limited, or may extend to a whole neighbourhood'.[87]

Following the Robens' recommendation, the Australian OHS statutes impose a duty of care upon employers in relation to non-employees. Here an 'employer' is a person or an organisation which employs at least one

81 For an analysis of this latter expression see: *Stratton v Van Driel Ltd* (SC(Vic), Byrne J, [1998] VSC 75, 25 September 1998, unreported) where Byrne J favoured a very narrow interpretation of the concept of control (cf *R v Associated Octel Co Ltd* [1996] 4 All ER 846, discussed below at p 92. For a discussion of 'control' in the Mines Safety and Inspection Act 1994 (WA) s 9(3), see *Leighton Contractors Pty Ltd v Ridge* (SC(WA), Miller J, 23 November 1998, BC9806256, unreported).

82 As noted above, the broad definition of 'worker' in WHA(NT) would appear to go some way towards achieving the same result. See Johnstone, above n 39, p 184.

83 Robens Report, above n 40, para 176(c).

84 Robens Report, above n 40, paras 175 and 176(c).

85 Robens Report, above n 40, para 290.

86 Robens Report, above n 40, para 297.

87 Robens Report, above n 40, para 176(c).

'employee'.[88] With the exception of the OHS(CE)A(Cth) and the WHA(NT), the duty is also imposed on self-employed persons. Some of the statutes do not restrict the scope of the duty to any particular non-employees. For example, s 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.

Similarly, ss 28(2) and 29 of the WHSA(Qld) provide that an employer or self-employed person has an obligation to ensure that the workplace health and safety of others is not affected by the way the employer or self-employed person conducts their undertaking. 'Workplace health and safety is ensured when persons are free from . . . risk of death, injury or illness caused by any workplace [or] workplace activities'.[89]

The Cth, NSW and ACT provisions adopt a wording that is similar to the Vic and Qld provisions, but impose additional geographical limitations on the duty. Section 16 of OHSA(NSW) specifies that the duty only applies to non-employees 'while they are *at* the employer or self-employed person's place of work.' This duty has a clear geographical limitation, and does not extend beyond the duty holder's workplace. Section 17 of the OHS(CE)A(Cth) imposes the duty on the employer in relation to persons '*at or near* a workplace under the employer's control' who are not employees or contractors of the employer (emphasis added).[90] Section 29 of the OHSA(ACT) contains exactly the same wording, but imposes the duty on self-employed persons as well.

The other Australian OHS statutes do not use the concept of the employer or self-employed person's 'undertaking'. Section 22 of the OHSWA(SA) and s 21 of the OSHA(WA) couch the duty in terms of 'reasonable care', to 'avoid adversely affecting' the health and safety of others 'by an act or omission at work' (':OHSWA(SA)') and to 'ensure that the health and safety' of another person is 'not adversely affected wholly or in part as a result of work in which [the employer] or any of his employees is engaged' (':OSHA(WA)'). The employer's duty to persons other than workers in s 29(1)(b) of the WHA(NT) resembles the wording of the WA provision. The reference to 'at work'[91] and 'engaged in work' rather than 'conduct of the undertaking' might be significant with some kinds of work relationships, as will be discussed below.

Section 9(3) of the WHSA(Tas) requires an employer to ensure so far as is reasonably practicable that the health and safety of any person (other than an

88 See the discussion of who is an employee in the previous section. In *Rech v F M Hire*, above n 71, the NSW Industrial Relations Commission in court session held that it had not been proved to the satisfaction of the commission that Nomel Pty Ltd employed any employees at all. The evidence suggested that Nomel Pty Ltd hired labour and equipment from others, with the management function also being performed by an independent contractor. The commission referred to decisions such as *Hutton v West Cork Railway Co* (1883) 23 CH D654 at 671-2 and *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016 at 1027 as establishing that a director of a corporation is not, without more, an employee of the corporation.

89 WHSA(Qld) s 22(1).

90 Contractors being covered by s 16(4), discussed above.

91 See the case law on the interpretation of 'at work' discussed in the previous section.

employee or a contractor or employee of a contractor employed or engaged by the employer)[92] is not adversely affected as a result of 'work carried on at *a* workplace'[93], without requiring it specifically to be the employer's workplace. Section 9(8) requires employers and principals to ensure that visitors are aware of and comply with health and safety requirements. Section 13 requires every self-employed person to ensure as far as is reasonably practicable that persons not in the self-employed person's employment, 'are not exposed to risks to their health and safety arising from work carried on at the self-employed person's workplace.' Like the NSW duty, this duty is limited to the self-employed person's workplace.

Much of the case law discussed earlier in relation to the employer's duty to employees applies to these duties.[94] Like the employer's duty to employees, the duties to non-employees are absolute duties, qualified by the concept of (reasonable) practicability. Rather than being restricted to the employment relationship, the duties to non-employees are qualified by a nexus with the 'conduct of the undertaking', with work undertaken by the duty holder, and/or with the workplace.

Finally, it should be noted that one complication that might arise in relation to the employer's duties to employees and non-employees is that it may be hard to categorise the person to whom the duty is owed as either an employee or, say, an independent contractor. If the prosecutor chooses the wrong category, the prosecution might fail. The prosecutor may, of course, prosecute using alternative charges. The OHSA(NSW) (see ss 15(4) and 16(3)) provides a court with a discretion to impose an alternative conviction under ss 15 or 16 if the prosecutor incorrectly categorises the persons to whom the duty is owed. The WHSA(Qld) (see s 24A) enables a prosecution to be brought in the alternative, and provides that a court can convict a defendant without any further proof of the capacity in which the defendant committed the offence.[95]

The duties to non-employees do not make any distinctions as to how persons come to be involved in the undertaking or come to be at or near the workplace.[96] The category 'persons other than employees' can include a wide range of persons and business organisations, including customers in retail outlets, students in educational institutions, salespeople, contractors and government inspectors visiting business establishments. Where the duty is not limited to the workplace, it includes neighbouring members of the public. The following sections consider the application of the duty in the context of (i) public safety, (ii) contractors and sub-contractors, (iii) outworkers, (iv) labour hire arrangements, and (v) franchise arrangements.

92 As noted above, ss 9(4)-(7) impose a general duty upon the employer in relation to contractors and their employees, for work for the employer in the course of the employer's business.

93 Emphasis added.

94 The issue of duplicity is unlikely to arise, as none of the duties have provisions like ss 21(2) and 16(2) of OHSA(Vic) and OHSA(NSW) respectively. In the *WorkCover Authority (NSW) v Maitland City Council*, above n 67, Hill J held that s 16(1) of OHSA(NSW) creates only one offence. The prosecutor had issued two summonses alleging breaches of s 16(1) and was ordered to elect which of the two summonses it would pursue.

95 See further Johnstone, above n 39, p 256.

96 See MacCallum, above n 46, p 43.

Public Safety

A cursory reading of the Robens Report suggests that the primary motivation for the duty to non-employees is to protect members of the public from hazards arising from activities of the business enterprise. Australian OHS regulators have also been concerned to protect the 'external public' (passers by) from health and safety risks (such as explosions and falling objects) from business activities.[97] There are good reasons for such an approach. Members of the public are exposed to involuntary risks from business activities, and it is incontestable that business enterprises causing such risks are best placed in terms of knowledge and resources to remove those risks. The duty to the 'external public' is easily extended to members of the 'internal public', many of whom might be engaged in work activities.

This duty to the public is given full expression in those OHS statutes which do not limit the duty to persons who are 'at' the workplace or 'near to' the workplace.[98] In *Whittaker v Delmina Pty Ltd*[99] Hansen J observed that for the purposes of the duty to non-employees in s 22 of the OHSA(Vic) the pertinent act or omission is 'the act or omission in the conduct of the undertaking which gives rise to a potential risk'.[100] This is to be distinguished from 'the locality at which the risk is present and may materialise as an actual risk or event'. Section 22 'applies to potential risks to health or safety that arise from the conduct of an undertaking even if those risks may be present or operate outside the place at which the undertaking is conducted'.[101]

All of the statutes would, therefore, require an employer or self-employed person to ensure the safety of visitors to the workplace (the 'internal public'). This would cover customers, visiting salespeople, contractors, couriers and other delivery people, and students in education institutions. Where the geographical limitations extends to 'near the workplace', it would include passers by and nearby neighbours, who might, for example, be exposed to noxious fumes or to the risk of chemical explosion. The limitation in s 16 of the OHSA(NSW) requiring non-employees to be 'at the employer or self-employed person's place of work' is a severe restriction on the scope of

97 The most vivid example of this is the impact of the Queen St tragedy in Brisbane in 1988 (three pedestrians killed and eight seriously injured) on the development of OHS regulation in Queensland. The Board of Reference established to investigate the incident found that the exiting regulations under the Construction Safety Act were inadequate, and not effectively enforced by the inspectorate, which itself was found to be under-resourced: see Queensland, *Report of the Board of Reference into the Queen Street Accident 4th August 1988*, Brisbane, 1988. The Queen St tragedy focused OHS policy makers' attention on public health and safety issues, and was a major factor leading to the revision of the OHS legislation in the Workplace Health and Safety Act 1989.

98 See the discussion above.

99 *Whittaker v Delmina Pty Ltd* (SC(Vic), Hansen J, [1998] VSC 175, 18 December 1998, unreported). In *Delmina* Hansen J confirmed the scope of the duty to non-employees in s 22 of OHSA(Vic), countering County Court of Victoria authority seeking to confine the scope of duty to the traditional labour law paradigm and in particular, to the 'workplace': *R v AAA Auscarts Imports Pty Ltd* (CC(Vic), Ross J, 3 December 1997, unreported). Hansen J (at para 47) observed that Parliament deliberately used the term 'undertaking' rather than the narrower expression 'workplace'. See further the discussion of 'undertaking' below at p 21-2.

100 *Delmina*, above n 99, at para 49.

101 Id, at para 48.

the duty, and precludes members of the public close by the workplace from being protected from exposure to risks to their health and safety.[102]

Where there is no explicit geographical limitation (as in the Vic, Qld, SA and WA statutes), it is difficult to draw a clear line as to the range of persons protected. Arguably there is no real need to do so, because the duty is primarily preventive, and in all the OHS statutes apart from those of Queensland, South Australia, Western Australia and Tasmania there is express provision that a breach of a general duty will not itself found a civil action.[103] Where a breach of the duty will not lead to a civil action, the outer limits of the categories of persons protected by the duty is of no real consequence. To illustrate, if residents in the immediate proximity of a factory are owed a duty, a debate about whether residents three suburbs away are owed a duty would appear esoteric.[104]

Recent case law shows the extent of the duty to the public, particularly where the duty to non-employees contains the phrase 'exposed to risks', the wording adopted[105] in the Cth, Vic, NSW,[106] ACT and Tas[107] Acts. The phrase, which also appears in s 3 of the British HSAWA, was examined by the English Court of Appeal in *R v Board of Trustees of the Science Museum*.[108] Noting the 'preventive' aims of the OHS legislation, the court said that the word '"risks" conveys the idea of a possibility of danger. . . . The word "exposed" simply makes it clear that the section is concerned with persons potentially affected by the risks'.[109] In the *Science Museum* case an employer had been shown to have failed to follow procedures required to clean and disinfect cooling towers so as to prevent the escape of bacteria causing legionnaire's disease. It was accepted that escape of the bacteria from the cooling tower could expose members of the public within 450 m to risks to their health and safety. The prosecutor was not required to show that members of the public actually inhaled the bacteria, or that there were bacteria there to be inhaled. It was sufficient that there was risk of the bacteria being in that 450 m range.[110] Likewise, if there is a loose object on a roof of a building near a public walkway, a prosecutor does not have to show that the object actually fell, and hit, or could have hit, a pedestrian. The prosecutor need only to show that the 'loose object is in a position in which it might fall off and hit a pedestrian'.[111]

Where the duty is not expressed in terms of exposure to risk, the chosen

102 See A Brooks, *Occupational Health and Safety Law in Australia*, 4th ed, CCH Ltd, Sydney, 1993, p 436.

103 For details of the relevant statutory provisions, see Johnstone, above n 39, p 278.

104 For examples of just how esoteric the debate might become, see id, p 254. The outer limits of the duty may be relevant, however, if a factory is located in a remote area, and there are residents located far away from the factory who might nevertheless be affected by its operations.

105 Note also that WHSA(Qld) requires the employer to ensure that non-employees are 'free from risk of death, injury or illness created by any workplace, workplace activities . . .' (see s 22(1)).

106 Although, as noted above, the wording s 16 of OHSA(NSW) means that persons not at the workplace are not covered by the duty.

107 In relation to the duty of self-employed persons only.

108 [1993] ICR 876.

109 Id, at 888.

110 Id, at 880, 881 and 882.

111 Id, at 882. But see the difficulties of proving exposure to risk in *Hintz, Dept of Occupational Health Safety and Welfare v Burswood Resort (Management) Ltd (t/as Burswood Resort Casino)* (Court of Petty Sessions, Gething SM, No 19515 of 1992, 17 September 1995, unreported).

wording tends to be 'adversely affected' or a similar expression. The meaning of this expression has not been judicially considered in the context of the OHS statutes. It is arguable that by rejecting the expression 'exposure to risk' and adopting instead the word 'affected' the legislature intended the duty to extend to preventing actual harm, rather than simply exposure to the likelihood of harm. This would mean that it could be argued that where the duty is to prevent persons from being 'adversely affected' it is only breached where bacteria were actually inhaled, or a member of the public has actually been struck by the falling object. If this is correct, this would undermine the preventive power of the duty to non-employees.[112]

What of the situation where the non-employee is a contractor or sub-contractor, or where public safety is threatened by the activities of a contractor or sub-contractor engaged by an employer or self-employed person? These issues are considered in the next section.

Contractors and Sub-contractors

As Andrew Stewart argues, labour law, by imposing much higher labour costs in respect of employees than in respect of contractors, favours the replacement of employees with contractors,[113] or the substitution of 'commercial contracts for employment relations'.[114] This type of outsourcing is most common in large organisations, but is found across the board.[115]

The prevalence of outsourcing and the growing use of contractors would threaten the scope of OHS regulation unless contractor relationships fell within the protective umbrella of the OHS statutes. I argue in this section that the Australian OHS statutes do, to a large extent, impose similar OHS obligations towards contractors as are owed to employees. As noted above, the Cth, Vic, SA, WA, Tas, and to some extent the NT provisions deem contractors and their employees to be 'employees' for the purposes of the employer's duty to employees. But these provisions would not extend the employer's duty to sub-contractors engaged by a contractor,[116] or to situations where self-employed persons engaged contractors.

Only in one other provision in the Australian OHS statutes is there any express attempt to impose obligations on persons engaging contractors. Section 31 of the WHSA(Qld)[117] obliges a principal contractor of a

112 See again the reasoning of Steyn LJ in the *Science Museum* case, id, which relied on the preventive purpose of the OHS statutes.

113 Stewart, above n 37, at 221.

114 Collins (1990a), above n 14 at 354.

115 See Industry Commission, *A Portrait of Australian Business: Results of the 1995 Business Longitudinal Survey*, Industry Commission/Department of Industry, Science and Tourism, Canberra, 1997; and M Wooden and A Vandenheuvel, 'The Use of Contractors in Australian Workplaces' (1996) 8(2) *Labour Economics and Productivity* 163.

116 If the contractor were technically an employer, then the sub-contractor and the sub-contractor's employees would be deemed to be the employees of the contractor.

117 A comparison of these provisions in s 31 with the provisions in s 23 of the Qld Workplace Health and Safety Act 1989 shows that the 1995 provisions have shifted some of the responsibility for complying with OHS obligations on a construction site away from the

construction workplace:[118]

- to ensure the orderly conduct of all work at the construction workplace to the extent necessary to ensure OHS, and to assist the discharge of any employer's or self-employed person's OHS obligations;
- to ensure that persons at workplaces are not exposed to a hazard, or risks from something that has been provided for general use of persons at the workplace, for which 'no other person owes an OHS obligation";
- to ensure that workplace activities are safe and without risk of injury or disease to members of the public;
- if the principal contractor reasonably believes, or should reasonably believe, that an employer or self-employed person is not discharging their obligations under the Act, to direct the employer or self-employed person to comply with their obligations, and if the employer or self-employed person fails to comply with the direction, to direct the employer or self-employed person to stop work until they agree to comply with the obligation; and
- to provide safeguards and take safety measures prescribed under regulations made for principal contractors.

As these Qld provisions suggest, there is no real need to create a specific duty for principal contractors, because the obligations of principal contractors to contractors, and of contractors to sub-contractors, are governed by the employer's and self-employed person's duties to non-employees. Persons engaging contractors or sub-contractors will either be employers (in which case they have duties to their own employees and to non-employees such as contractors and sub-contractors) or self-employed persons (in which case they have duties to non-employees).

Most of the important case law in relation to the duty to non-employees has been developed in the context of employers engaging on-site contractors. Recent British cases have illustrated the breadth of the corresponding duty in s 3 of the HSAWA (which closely resembles s 22 of the OHSA(Vic)). The House of Lords in *R v Associated Octel Co Ltd*[119] held that if work conducted by a contractor falls within the conduct of an employer or self-employed person's undertaking (see below), the employer or self-employed person is under a duty to exercise control over the activity, and to ensure that it is done without exposing non-employees to risk.[120] Lord Hoffman held that:

> The provision is not concerned with vicarious liability. It imposes a duty upon the employer himself. That duty is defined by reference to a certain kind of activity, namely, the conduct by the employer [or self-employed person] of his undertaking. It is indifferent to the nature of the contractual relationships by which the employer chooses to conduct it. . . . [A] person conducting his own undertaking is free to decide how he will do so. Section 3 [of the British Act] requires the employer to [conduct his undertaking] in a way which, subject to all reasonable practicability, does not create risks to people's health and safety. If, therefore, the employer engages an independent contractor to do work which forms part of the employer's undertaking, he must stipulate for whatever conditions are needed to avoid those risks and are reasonably practicable. He cannot, having omitted to do so, say that he was not in a position to exercise any control. . . . The employer must take reasonably practical steps to avoid risks to the contractor's servants which arise, not merely from the physical state of the premises . . . but also from the inadequacy of the arrangements which the employer makes with the contractors for how they will do the work.[121]

These very important passages show how the employer or self-employed person is required to take responsibility for her or his choice of labour engaged to perform the work. They draw upon the notion of non-delegable duties, which has its origins in the employer's common law negligence duty to employees, and which was first used as a device to circumvent the common employment rule.[122] The employer is liable for the actions of a contractor, the contractor's employees or even the contractor's sub-contractors because the courts will not permit the employer to avoid liability by delegating the work to a non-employee.[123] This is a significant restriction on the employer's 'freedom of capital organisation',[124] because it means that the employer or self-employed person cannot manipulate different types of contracts for labour to outflank her or his OHS obligations.[125]

A threshold issue for the employer's or self-employed person's duty to non-employees in the OHS statutes (apart from those of South Australia, Western Australia, Tasmania and the Northern Territory) is whether the activities in question form part of the conduct of the employer's or self-employed person's undertaking. British cases examining s 3 of the

principal contractor and onto employers and self-employed persons (trade contractors). The principal contractor still has overarching obligations to ensure OHS at the site, but there is a clear realignment of responsibilities to place a greater onus of compliance onto the trade contractors, who have obligations under ss 28 and 29 as employers and self-employed persons.

118 A principal contractor of a construction workplace is defined by s 13 of the WHSA(Qld) to be a person appointed as principal contractor by the owner of the workplace. If no person is appointed, the owner of the workplace is deemed to play the role of principal contractor. Section 14 defines a 'construction workplace' to be a workplace where building work, civil construction or demolition work (each defined in the Dictionary in Sch 3 of the WHSA(Qld)) is done. See ss 14(2) and (3) for the duration of the period when a workplace is a construction workplace and s 14(4) for a refinement of the definition of 'building work'. The definitions of 'building work' and 'civil construction' in WHSA(Qld) require the estimated final price of the work at practical completion to be more than $40,000 or, if a greater amount is prescribed under a regulation, the greater amount.

119 [1996] 4 All ER 846.

120 See also *WorkCover Authority (NSW) v Boral Montoro Pty Ltd* (IRC(NSW), Peterson J, 19 December 1997, unreported).

121 *Associated Octel*, above n 119, at 850-1.

122 See *Wilson & Clyde Coal Co v English* [1938] AC 57. Australian courts have applied this principle to situations in which a 'special relationship' has arisen between the parties in which the duty holder has undertaken the care, supervision or control of the person or property of another person. See *Kondis v State Transport Authority* (1984) 154 CLR 672, especially the judgment of Mason J; and *Willis v CRA Exploration Pty Ltd* [1984] Aust Torts Rep 80-521. See Collins (1990b) above n 24, at 735.

123 But see s 21 of the OSHA(WA). Its wording suggests that the employer only owes a duty to non-employees arising out of work in which the employer, or an employee, is engaged. This suggests that the principal contractor does not owe a duty to sub-contractors engaged by a contractor.

124 Collins (1990b) above n 24, at 737. See p 76 above.

125 For examples of such manipulation, see Bennett (1994) above n 24, pp 171-85.