HSAWA make it clear that the 'conduct of the undertaking' is not limited to the operation of industrial processes, and includes ancillary matters, such as cleaning, repairing and maintaining the plant, obtaining supplies and making deliveries,[126] as well as trading, and supplying and selling to customers.[127] In *Delmina*, Hansen J observed that the word 'undertaking'

> is broad in its meaning. In my view, such a broad expression has been used deliberately to ensure that the section is effective to impose the duty it states. . . . The word must take its meaning from the context in which it is used. In my view it means the business or enterprise of the employer . . . and the word 'conduct' refers to the activity or what is done in the course of carrying on the business or enterprise. A business or enterprise . . . may be seen to be conducting its operation, performing work or providing services at one or more places, permanent or temporary and whether or not possessing a defined physical boundary. The circumstances may be as infinite as they may be variable.[128]

The courts have rejected the argument that an activity carried out by an independent contractor is not part of the conduct of the undertaking if the employer or self-employed person engaging the contractor does not have control over the activity. As Lord Hoffman stated in *Associated Octel*,[129] that argument relied on circular reasoning. The employer or self-employed person

> is under a duty under s 3(1) [of the HSAWA] to exercise control over an activity if it forms part of the conduct of his undertaking. The existence of such a duty cannot therefore be the test for deciding whether the activity is part of the undertaking or not.[130]

As if to illustrate just how broad the expression might be, the House of Lords[131] has said that activities such as the cleaning of an employer's office curtains at the dry cleaners or the repair of an employer's company car at a repairer's garage are not part of the conduct of the employer's undertaking. But if the employer

> has a repair shop as part of his plant, that is an ancillary part of his undertaking. Likewise . . . if he has independent contractors to do cleaning or repairs on his premises, as an activity integrated with the general conduct of his business. But not in the case of activities carried on by another person entirely separately from his own.[132]

In order to fully appreciate the extent of the employer's and self-employed person's duties in relation to contractors, it is necessary to examine the case law discussing the employer's implementation of the duties through the agency of employees, contractors and sub-contractors.

126 *Associated Octel*, above n 119, at 851-2; *R v Mara* [1987] 1 WLR 87.
127 *Sterling-Winthrop Group Ltd v Allen* (1987) SCCR 25, noted in F Wright, *Law of Health and Safety at Work*, Sweet & Maxwell, London, 1997, p 83.
128 *Delmina*, above n 99, at para 47.
129 Above, n 119.
130 Id, at 852.
131 Id, at 851-2.
132 Id, at 852.

Implementing the general duties of the employer and the self-employed person

A corporation can only conduct its operations through the activities of human agents, managers, directors, supervisors and employees. Recent British decisions make it clear that a corporation cannot argue that top level managers, the 'directing mind' of the company, had exercised all reasonable care so as to exonerate the company from the negligent actions of lower level employees.[133] In the absence of a due diligence defence in the OHS statute, the defendant corporation cannot argue that it should be exculpated because it had taken all due precautions and exercised all due diligence to avoid the commission of the offence, and that in spite of these efforts, the offence had been committed due to the act of a lower level employee. The only limitation on the employer's absolute liability is that the measures required to ensure work health and safety were not (reasonably) practicable.

The British courts have also held that the employer is personally, and not vicariously, liable under its duty to employees and non-employees.[134] The House of Lords in *Associated Octel* specifically stated that s 3 of the HSAWA 'is not concerned with vicarious liability. It imposes a duty upon the employer himself.'[135] In other words, employer liability is not confined to breaches from the acts or omissions of employees (vicarious liability). This principle of non-delegability means that while an employer must *implement* OHS procedures through the agency of its employees and contractors, it remains responsible for complying with its statutory OHS obligations and *cannot delegate responsibility* for the obligations to its employees or to contractors. In addition the courts have made it clear that the employer cannot simply establish 'a formal or idealised system, sometimes known as a "paper system". The system at issue is the actual system of work'.[136] The employer must ensure that its OHS policies and procedures are fully implemented. 'Paper systems are not enough.'[137]

These principles have important consequences for the implementation of the employer and self-employed person's duties, particularly in larger business organisations which have branch offices, or which outsource some of their activities or operations to contractors.

The employer cannot argue that it had discharged its duty because its senior management had taken all reasonable precautions and had exercised all due diligence in complying with the obligation, and that the commission of the offence was due to the act of a lower level manager, a branch store manager,

133 *R v British Steel plc* [1995] 1 WLR 1356 (*'British Steel'*), which held that the 'directing mind' principle in *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 did not apply to the British HSAWA. CF *Collins v State Rail Authority (NSW)* (1986) 5 NSWLR 209.
134 *British Steel*, above n 133; *Associated Octel*, above n 119; *R v Gateway Foodmarkets Ltd* [1997] 3 All ER 78 at 81-3 (*'Gateway Foodmarkets'*).
135 *Associated Octel*, above n 119, at 850, 851; *Gateway Foodmarkets*, above n 134, at 82.
136 *Inspector Schultz v Council of the City of Tamworth (t/a Tamworth City Abbattoir)* (1994-5) 58 IR 221 at 226-7.
137 *Sydney City Council v Coulson* (1987) 21 IR 447 at 480, following *Barcock v Brighton Corp* [1949] 1 KB 339 at 343 per Hilbery J.

employee, contractor or sub-contractor.[138] The courts have, however, left open the possibility that an employer which has otherwise exercised all proper precautions might not be liable for casual negligence on the part of low level employees or of contractors, where the company had adequately supervised the employees or contractors.[139] This is not a new principle, but an application of the (reasonable) practicability qualification discussed above. Indeed, in a very recent case examining the scope of the employer's duty to non-employees under s 3 of the HSAWA the British Court of Appeal has held that:

> The fact that the employee who was carrying out the work . . . has done the work carelessly or omitted to take a precaution he should have taken does not of itself preclude the employer from establishing that everything that was reasonably practicable in the conduct of the employer's undertaking to ensure that third persons affected by the employer's undertaking were not exposed to risks to their health and safety had been done. . . . It is not necessary for the adequate protection of the public that the employer should be held criminally liable even for an isolated act of negligence by the employee doing the work. Such persons are themselves liable to criminal sanctions under the Act or the Regulations. Moreover it is a sufficient obligation to place on the employer in order to protect the public to require the employer to show that everything reasonably practicable has been done to see that a person doing the work has the appropriate skill and instruction, has laid down for him safe systems of doing the work, has been subject to adequate supervision, and has been provided with safe plant and equipment for the proper performance of work.[140]

In other words, this is merely an application of the (reasonable) practicability formula,[141] although if the courts are too ready to recognise the impracticability of enforcing systems of work and ensuring that employees and contractors implement the OHS program developed by the employer or self-employed person, the principles of personal liability and non-delegability will be undermined.

The discussion so far of the OHS obligations of employers and self-employed persons to non-employees in the context of members of the public and contractors shows just how strict the duty is. The duty holder's freedom of capital organisation is significantly restricted. Furthermore, the duty holder is strictly responsible for the implementation of the duty, even in an organisational structure comprising branch offices and contractors.

Home-based Workers

A further assumption behind the traditional paradigm of labour law which is being eroded is that work will be performed at the employer's premises.[142]

138 See *Gateway Foodmarkets*, above n 134; but cf *Collins*, above n 133.

139 *Gateway Foodmarkets*, above n 134, at 82, 83 and 84.

140 *R v Nelson Group Services (Maintenance) Ltd* [1998] 4 All ER 331 at 351.

141 Cf *Collins*, above n 133, where the NSW Court of Criminal Appeal applied the principles in the *Tesco Supermarkets* case. The approach taken in *Collins* has been decisively rejected in the British Court of Appeal decisions in *British Steel*, above n 133, and *Gateway Foodmarkets*, above n 134, and by the House of Lords in *Associated Octel*, above n 119.

142 B Brooks, 'Labour Flexibility and Employment Law' (1990) *Economic and Labour Relations Review* 107 at 111-2; Stewart, above n 37.

Reversing the traditional trend in the industrialisation process, in recent years there has been a rise in the number of paid workers working at home.[143] Increasing levels of imports from countries with low wage structures, and reductions in government tariffs, have caused employers in some Australian industries to turn to home-based work to provide low cost labour flexibility. Rapid changes in telecommunications have spawned new forms of home-based workers such as teleworkers, who perform computer-based clerical and administrative work from home or from telecentres.[144] The most recent Australian Bureau of Statistics survey suggests that there were 343,000 home-based workers in 1995, comprising 4% of the Australian workforce.[145] Whereas previously most paid home-based work was carried out by outworkers in the manufacturing and clothing industries,[146] in the 1990s home-based work is to be found in a wide range of industries, the most important of which are manufacturing; finance, property and business services; recreational, personal and other services; community services; wholesale and retail trade; and construction.[147] Home-based workers are twice as likely to be women as men, and usually work on a part-time basis.[148] There is also evidence of the emergence of child labour within the outworking industry.[149] A recent study comparing the OHS experience of factory-based workers and outworkers in the clothing industry found that outworkers suffered three times the level of injuries experienced by factory-based workers.[150]

For years it was assumed that outworkers were independent contractors, and outside the protective scope of the award system.[151] In the last two decades, the situation has been reversed.[152] In some industries, particularly the

143 See J Peck 'Outwork and the Restructuring Processes in the Australian Clothing Industry' (1990) 3 *Labour and Industry* 302; Textile Clothing and Footwear Union of Australia, *The Hidden Cost of Fashion*, Report on the National Outwork Information Campaign, Textile Clothing and Footwear Union of Australia, Melbourne, March 1995.

144 The Women's Bureau, above n 8. The Women's Bureau suggests that men tend to work in better paid and more autonomous areas, like computer programming, whereas women do work involving data entry and word-processing.

145 G Lafferty, R Hall, W Harley and G Whitehouse, 'Homeworking in Australia: An Assessment of Current Trends' (1997) *Australian Bulletin of Labour* 143 at 145.

146 The Textile Clothing and Footwear Union of Australia (TCFUA) estimates that there are over 300,000 home-based workers in the TCF industries: Textile Clothing and Footwear Union of Australia (1995) above n 143. The TCF industries are build around outworking: Senate Economic References Committee, Parliament of the Commonwealth of Australia, *Outworkers in the Garment Industry*, AGPS, Canberra, 1998, Executive Summary, p 1.

147 The Women's Bureau (1996) above n 8 at 1. See also Owens (1995a), above n 16, pp 41-2.

148 Owens (1995a), above n 16, p 42.

149 New South Wales Legislative Council, Standing Committee on Law and Justice, above n 1, p 24-6 and NSW Dept of Community Services Legislation Review Unit, *Review of the Children (Care and Protection) Act 1987*, Sydney, December 1997.

150 C Mayhew and M Quinlan, *Outsourcing and Occupational Health and Safety: A Comparative Study of Factory-based and Outworkers in the Australian TCF Industry*, UNSW Studies in Australian Industrial Relations, Industrial Relations Research Centre, University of New South Wales, Sydney, 1998. The two main reasons for the differences in injury rates were the use of a piecework payment system and the long hours worked by outworkers. See also NSW Legislative Council id, pp 23-7.

151 Owens (1995a), above n 16, p 48; Hunter, above n 19 at 314.

152 For some homeworkers, the lack of a commitment by the organisation engaging them to

clothing,[153] and manufacturing industries, the majority of home-based workers are likely to be categorised as employees.[154] Market research interviewers working at home have been held to be employees.[155] Home-based teleworkers in the Federal public service have also been categorised as employees, particularly where they are under the direction and control of a single employer.[156] The categorisation may not be as clear cut in other industries. Home-based child-care workers[157] and family day-care workers[158] have been held not to be employees.

In many cases involving home-based working, it may be difficult to identify the employer or self-employed person who is in breach of the relevant general duty.[159] Home-based working often involves a series of vertical contracting relationships. For example, in the clothing industry, retailers contract with warehouse distributors, who themselves contract with manufacturers or a network of contractors, who in turn may engage one or more outworkers. The person contracting directly with the outworker will owe the statutory duty, either (as is most likely in the clothing industry) as an employer to an employee, but possibly (in other industries) as an employer or self-employed person to an independent contractor (or to a deemed employee).[160] The parties further up the contracting chain will be employers (of other employees) or self-employed persons, owing the outworker the duty to 'non-employees'. An enforcement agency seeking to enforce the employer or self-employed person's general duty might often find it difficult to ascertain which of the parties in the contracting chain is responsible for the system of work which

provide work, or their own inability to commit themselves to undertake whatever work becomes available, might make it difficult for a court to infer the existence of a contract of employment. See S Deakin and G Morris, *Labour Law*, Butterworths, London, 1995, p 166.

153 *Re Clothing Trades Award 1982* (1987) 19 IR 416. The award regulates manufacturers using outworkers. The working conditions of clothing outworkers are also governed by the *Homeworker Code of Practice*, drawn up in 1996 by the TCFUA and the Australian Retailers Association and the Council of Textile and Fashion Industries of Australia. The Code also covers retailers. Since 1997 the TCFUA has been enforcing the award clothing manufacturers: see M Davis, 'Outworker Cases Go to Court', *The Australian*, 29 June 1998. Home-based work is also regulated by the *Telstra Corp Ltd: Teleworking Agreement 1994* (Certified by Cox C, AIRC, 4 May 1994) and the *Australian Public Service Home Based Work Award 1994* (A0949 Dec 294/94, M Print L 1732, 14 February 1994). These are discussed in Owens (1995a), above n 16, and Owens (1995b), above n 19.

154 See also *Airfix Footwear Ltd v Cope* [1978] ICR 1210 (EAT) and *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612 (CA), where the women concerned worked full-time for a single employer. Note that the Textile, Clothing and Footwear Union has called for outworkers to be deemed to be employees under OHSA(NSW): New South Wales Legislative Council, Standing Committee on Law and Justice, above n 1, p 24.

155 *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue* (1996) 40 AILR para 7-053.

156 *Australian Public Sector and Broadcasting Union v Minister for Industry, Technology and Commerce* (1994) 36 AILR 186. See Creighton and Stewart, above n 20, p 138, and Stewart, above n 37 at 218.

157 *McCoy v Glastonbury Children's Home* (1991) 33 AILR para 19.

158 In *Re Municipal Association of Victoria* (1991) 4 CAR 35 such workers were also held not to be independent contractors. See L Bennett, 'Women, Exploitation and the Australian Child Care Industry: Breaking the Vicious Circle' (1991) 33 *Journal of Industrial Relations* 20; and Owens (1995a), above n 16, p 51.

159 See Mayhew and Quinlan, above n 150, pp 145-8.

160 See above, at pp 85–6.

has placed the health of the home-based worker at risk.[161]

The only other provisions that cause any difficulty are the provisions expressed to cover the employee 'while at work' (South Australia and Tasmania), which require the employee to be 'at work' (Commonwealth and Australian Capital Territory), or which require the employee to be 'at a workplace', defined as a 'place where workers work' (Northern Territory). Each of these provisions should cover home-based employees during such time as they are actually engaged in work for the employer.

If home-based workers are categorised as independent contractors, they are deemed 'employees' for the purpose of the employer's general duty in the Commonwealth jurisdiction, Victoria, South Australia, Western Australia and the Northern Territory. Where home-based workers are categorised as employees but are engaged at the bottom of a vertical contractual chain, the party (assuming she or he is an employer) contracting with the employer of the home-based worker will also be deemed to be an employer of the home-based worker under these deeming provisions.

Home-based independent contractors might also come within the scope of the employer and self-employed person's duty to non-employees. There would appear to be no difficulty in the application of s 22 of the OHSA(Vic) and ss 28(2) and 29 of the WHSA(Qld). The home-based independent contractor would appear to be engaged in the 'conduct' of the employer or self-employed person's 'undertaking'. There would also appear to be no doubt that home-based workers fall within the employer's duty to 'workers' in s 29(1)(b) of the WHSA(NT). Home-based employees at the bottom of a long vertical contractual chain might also be owed duties (as 'non-employees') by parties above the immediate 'employer' in the contractual chain.

The application of the equivalent provisions in the other Australian jurisdictions is less certain. The geographical limitations of the duty to non-employees in Cth, NSW,[162] and ACT[163] statutes put home-based workers beyond the scope of the duty. A similar limitation restricts the application of the duty on self-employed persons in Tasmania. The application of the SA and WA provisions depends on whether the home-based independent contractor is 'adversely affected' by 'an act or omission at work' on the part of the employer or self-employed person (':OHSWA(SA)') or 'as a result of work in which' the employer etc 'is engaged' (':OSHA(WA)'). As suggested in the discussion of franchisees below, it is arguable that off-premises workers are covered by such a provision, but it is far from certain that such an argument would be accepted by a court. The employer's duty to non-employees in s 9(3) of the WHSA(Tas) requires the home-based worker to be affected by work 'carried

161 Note, too, that amendments to OHSA(NSW) in 1987 have ensured that the WorkCover Authority (NSW) inspectorate is able to inspect domestic premises where outworkers are working: see OHSA(NSW) ss 30 and 30A. See Brooks, above n 102, pp 435 and 465-6. See also the discussion of the duty of persons in control of non-domestic premises under s 17 of the OHSA(NSW) in MacCallum, above n 46, pp 61-2, and Parliament of New South Wales, Legislative Council, Standing Committee on Law and Justice, Report No 8, *Report of the Inquiry into Workplace Safety, Interim Report*, Parliament of New South Wales, Sydney, December 1997, pp 28-30.

162 See Brooks, above n 102, p 436.

163 See above, at p 87.

on at a workplace',[164] which presumably does not have to be the employer's workplace. A 'workplace' includes any premises or place where an independent contractor is 'engaged in industry' (WHSA(Tas) s 3).

In sum, the lack of uniformity in the various duties to 'non-employees' in the different OHS statutes results in an uneven and uncertain coverage of home-based workers who are not classified as 'employees'.

Labour Hire Arrangements

Along with contracting and home-based work, a further 'evasion strategy' adopted by business organisations is to contract with a labour hire company for the use of labour within the hiring organisation. Agency labour is used in an increasing number of industries, and ranges from skilled tradespeople to building workers to temporary secretarial assistants. The 'temporally limited relationship' and lack of integration between the hiring organisation and the hired labour gives rise to significant OHS problems.[165]

The application of the OHS statutes to parties involved in labour hire practices is complicated by the fact that labour hire arrangements vary in form.[166] One type of agency merely provides a placement service. It introduces, for a fee, workers on its books to organisations requiring labour, leaving the worker and the organisation to conclude their own contractual arrangements, usually a conventional employment relationship. In a second type of arrangement, the business organisation contracts with the labour hire company for the labour hire company to supply labour on terms specified by the labour hire company. The labour hire company pays the wages of the workers, and the business organisation pays the labour hire company for the labour expended, at rates agreed between the organisation and the labour hire company.[167]

Some labour hire companies structure arrangements so that the labour hire company remains the employer, despite the fact that the hiring organisation has temporary control over the workers.[168] Here

> the traditional functions of the employer are split between two entities: the functions of payment and control are found in the agency, operating itself as a business, but the services provided by the employee are enjoyed by another — the client, who pays a fee to the agency for the benefit.[169]

Recently, however, labour hire practices have become more complex. Often the workers have a very loose arrangement with the labour hire company, in which the workers can choose whether or not they will be available for work

164 Emphasis added.

165 See Walters and James, above n 17, referring to European Foundation, for Improvement of Living and Working Conditions, *Second European Survey of the Working Environment*, Office for Official Publications of the European Communities, Luxembourg, 1997 and P Paoli, *Les Conditions de Travail en Europe*, Sante et Travail No 17, 1997. See also Collins (1990a), above n 14, at 366.

166 See Ewing (1995), above n 18; and Stewart (1992), above n 37, at 226.

167 See C Fenwick, 'Shooting for Trouble? Contract Labour-hire in the Victorian Building Industry' (1992) 5 *AJLL* 237 and in particular at 239-42 and 248-54.

168 For example, *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd* [1947] AC 1. See Stewart, above n 37, at 226.

169 Ewing, above n 18, p 52.

on any particular day. The contractual arrangements are generally between the client business organisation and between the labour hire company, and the labour hire company and the workers.[170] There is not, however, a contract between the actual workers and the business organisation requesting and utilising the labour.[171]

The courts have experienced difficulties in classifying the workers actually performing the labour in these types of arrangements. In the Troubleshooters' litigation[172] the full Federal Court held that on the facts before the court, the workers were not employees of the labour hire agency, but were to be categorised as independent contractors.[173] The court at first instance and on appeal held that the workers were never subject to the labour hire company's control or directions.[174] Each case will depend on its particular facts, and it cannot be assumed that a labour hire agency will be consistent in all the contractual arrangements it makes with various workers on its books. Arrangements will often be tailored to the specific requirements of the client in each instance.[175]

In short, depending on the exact circumstances of the arrangement between the *labour hire company* and the workers, the workers will either be employees of the labour hire company, or, more likely, will not be employees of either the labour hire company or the client. In the former case the labour hire company owes the workers a general duty of care under the employer's statutory general duty to employees, and the client owes the duty to

170 See *Building Workers' Industrial Union of Australia v Odco* (1991) 29 FCR 104 ('*Odco*') and *Accident Compensation Commission v Odco Pty Ltd* (1990) 64 ALJR 606. In *Drake Personnel Ltd v Commr of State Revenue of the State of Victoria* (SC(Vic), Balmford J, 23 June 1998, unreported), ('*Drake Personnel*' (1998)) at [19] Balmford J pointed out that there was 'no ongoing relevant legal relationship between Drake and the temporaries. Whatever the legal relationship may be, it is established at the time when the temporary is offered and accepts an assignment with a client of Drake, and continues only for the actual period of the assignment'. See also Stewart, above n 37, at 226-7.

171 See the *Odco* case, above n 170, at 113-22.

172 Id.

173 In the original trial of the issue, Woodward J suggested that the arrangements made by Troubleshooters with its workers 'were very different from those made by other labour hire agencies'. See the full court's quote from Woodward J's judgment in the *Odco* case, above n 170, at 123.

174 The *Odco* case above n 170, at 124-5. In *Drake Personnel* (1988), above n 170, Balmford J took a similar approach and held that temporary workers on the books of the labour hire agency were not 'employees as such', because, amongst other factors, they were not under the control of the labour hire company, were not bound to accept work offered by the company, were not guaranteed particular work by the company, and were free to be listed on the books of other labour hire agencies.

175 For example, in *WorkCover Authority (NSW) v Drake Personnel Ltd* (IRC(NSW) in court session, Hungerford J, 25 November 1997, IRC96/6465-68, unreported) ('*Drake Personnel*' (1997)) and '*WorkCover Authority(NSW) v Drake Personnel Ltd*' [1997] NSWIRComm 147 the parties and the court accepted that the relationship between Drake and the worker was one of employer-employee. See also '*WorkCover Authority (NSW) v Warman International Ltd*' (IRC(NSW) in court session, Marks J, 27 March 1997, unreported) ('*Warman International No 1*') and *WorkCover Authority (NSW) v Warman International Ltd* (IRC(NSW) in court session, Hungerford J, 25 November 1997, IRC 96/1050, 95/1371, 95/1351, unreported) ('*Warman International No 2*') (see also *Warman International Ltd v WorkCover Authority (NSW)* (1998) 80 IR 326; [1998] NSWIRComm 65, an appeal in relation to the penalties imposed by Hungerford J).

non-employees. In the latter situation, the exact categorisation of the contractual relationship is not important, and both the labour hire company and the client will owe the workers the duty to 'non-employees'. In light of the broad interpretation given to the duty to non-employees, and subject to the geographical restriction in some of the OHS statutes on the reach of the duty to non-employees (see below), it is unlikely that much turns on the categorisation of the parties. As always, the major factor governing the extent of the labour hire company's and client's duties will be the (reasonable) practicability qualification.

The extent of the duties owed to workers, however categorised, by the labour hire company and the client have not been definitively determined, but some recent cases give some guidance. In a case where it was assumed that the agency was to be categorised as an employer, it was accepted that it was not sufficient for the agency to rely upon its clients to 'take appropriate steps to ensure safety in the workplace for all persons engaged at its premises'.[176] The agency 'has a special responsibility to ensure the health, safety and welfare of its employees' at the client's workplace even though 'that workplace is removed from the employer's direct management and control', because it is usually 'at a location foreign, or at least unfamiliar, to the employees concerned'.[177] Although the agency entered a guilty plea to the charges, the particulars of the offences alleged against the agency give an outline of the scope of the agency's duties. The agency would need to inform the client of the experience and qualifications of the worker, and the additional training and instruction the worker requires to perform the work for the client. The agency would also need to ensure that the client provided appropriate training, provided and maintained a safe system of work, and properly supervised the workers. The agency should instruct the workers not to commence work until there was a safe system of work and until properly trained by the client.[178]

If the relationship between labour hire company and worker is found not to be one of employer and employee, the labour hire company's duty is owed under the employer or self-employed person's duty to non-employees.[179] As the discussion earlier in this article suggests, this will mean that labour hire companies in New South Wales, the Commonwealth or Australian Capital Territory will not owe a duty to workers on their books, because the workers are not working at (or near, in the case of the Commonwealth or Australian Capital Territory) the labour hire company's premises. The SA duty to non-employees would appear to cover workers engaged through a labour hire company because their OHS would be 'affected . . . through an act or omission at work'. The WA duty would cover workers engaged through a labour hire company as long as it could be established that the OHS of the workers was affected by 'work' in which the employer, or the employer's employees, are engaged. It is difficult to see how the employer could acquire the services of

176 *Drake Personnel* (1997), id, at 14.

177 Id, at 14.

178 These obligations formed the basis of the charges in *Drake Personnel* (1997), above n 175, at 2-3.

179 For example, *Warman International No 1*, above n 175, where the defendant entered guilty pleas.

labour hire workers, without being 'engaged' in the work carried out by those workers.

Regardless of the extent of the duties owed by the labour hire company to the workers, the *client* would owe the workers a duty under its general duty of care to non-employees.[180] The workers would clearly be part of the 'conduct' of the client's 'undertaking', or would be engaged in the client's 'work'. Only in the unlikely event that the workers are not working at the client's premises, might the scope of the duty to non-employees not cover labour hire workers in New South Wales, the Commonwealth or the Australian Capital Territory.

An agency merely operating as a placement service would owe workers the employer's or self-employed person's duty to non-employees as outlined above, although presumably the more remote the relationship between the agency and worker the more the agency's duties would probably be confined to providing the client with information about the experience and qualifications of the worker, and perhaps the training and instruction required. The logic of the *Associated Octel* case discussed above would suggest that the client cannot evade its statutory obligations by the contractual arrangements it concludes.

In sum, we can conclude that, subject to rare cases where the geographical limitations in the NSW, Cth and ACT statutes might apply in relation to the duty to non-employees, the employers' duties to employees and non-employees in the Australian OHS statutes can be interpreted to impose important OHS duties on both labour hire companies and their clients to workers engaged under labour hire arrangements. The next section of this article applies the principles examined so far to a burgeoning form of what Bennett[181] calls a 'complex commercial-legal strategy', namely franchising arrangements.

Franchise Arrangements[182]

Franchising 'is one of the fastest growing business sectors in Australia'.[183] A recent survey commissioned by the Franchising Council of Australia identified a total of 730 franchise systems and 44,800 franchised outlets in Australia, with a total turnover of $81.4 billion, expanding by 17% compound growth per annum.[184] Franchising arrangements are common in many industries, ranging from petroleum and fast food, to dentistry, to garden and home maintenance. The most significant form of franchise, and the focus of this section, is the 'business format' franchise, which entails:

180 See *Warman International No 2*, above n 175, and *WorkCover Authority (NSW) v Maitland City Council*, above n 67, (where it was held that the duty, as specified in the prosecutor's particulars, had not been breached).

181 Bennett, above n 24, p 177.

182 This section is drawn from research done by the author in 1998 for a National Occupational Health and Safety project on young workers in the fast food industry. The report had not been published at the time of writing.

183 P Reith, 'Foreword', *Franchising Code of Conduct*, Dept of Workplace Relations and Small Business, Canberra, 1 July 1998.

184 C McCosker and L Frazer, *Franchising Australia 1998: A Survey of Franchising Practice and Performance*, Franchising Council of Australia, Sydney, 1998.

the grant of a licence by one person (the franchisor) to another (the franchisee), which entitles the franchisee to trade under the trade mark/trade name of the franchisor and to make use of an entire package, comprising all the elements necessary to establish a previously untrained person in the business and to run it with continual assistance on a predetermined basis.[185]

In this type of franchise arrangement, the franchisor develops a system of doing business, and permits the franchisee to use that system in the operation of the franchisee's independently owned business, while requiring the franchisee closely to follow methods developed and specified by the franchisor.[186] The franchisee owns, and makes a capital investment in, the business. The franchisor provides the franchisee with a blueprint for running the business, the initial training in the operations of the franchised business, and ongoing marketing, business and technical assistance during the operation of the franchise.[187]

Franchise arrangements are primarily governed by contractual arrangements between franchisor and franchisee.[188] These relationships are subject to legislation which regulates contracts generally. Some legislation provides protection to the franchisee against unfair behaviour by the franchisor in contract negotiations.[189]

The contractual provisions in franchise agreements tend to follow the same pattern, regardless of the industry in which the franchise operates.[190] Within a particular franchise, franchise agreements tend to be in standard form, and are drafted by the franchisor.[191] Franchise agreements generally require the franchisee to follow the franchisor's management blueprint, and leave the franchisee with very little discretion in the way the business will be run.[192] Taylor has summarised the core elements in the typical agreements constituting a franchise arrangement as follows:

185 M Mendelson, *The Franchiser's Guide*, 5th ed, Franchise Association of Australia and New Zealand Ltd, Sydney, 1996, p 5.

186 C Champion, 'Franchising' in *Franchising and the Law*, Legal and Accounting Management Seminars Pty Ltd, Sydney, 1996, p 1.

187 Mendelson, above n 185, pp 6-7.

188 V Taylor, 'Contracts with the Lot: Franchises, Good Faith and Contract Regulation' (1997) *New Zealand Law Review* 459 at 469; and G Hadfield, 'Problematic Relations: Franchising and the Law of Incomplete Contracts' (1990) 42 *Stanford Law Review* 927 at 939.

189 The two most important statutory regimes regulating franchise agreements are the Trade Practices Act 1974 (Cth) (see ss 51AC, 52, 53 and 59(2)) and the unfair contracts provisions in the Industrial Relations Act 1996 (NSW). See also Petroleum Retail Marketing Franchise Act 1980 (Cth) (applying to petroleum franchises only). From 1 February 1995 until June 1998 the Franchise Association of Australia and New Zealand required its members (franchisors) to adhere to the voluntary Franchising Code of Practice, administered and maintained by the Franchising Code Council. In 1997 the federal government disbanded the Franchising Code Council and introduced a new Franchising Code of Practice, under the new Pt IVB of the Trade Practices Act 1974 (Cth). See Taylor, above n 188, at 466-71; Office of Small Business, *New Deal: Fair Deal: Giving Small Business a Fair Go*, Dept of Workplace Relations and Small Business, Canberra, 1997; Reith, above n 183.

190 Champion, above n 186, p 1.

191 Taylor, above n 188, at 469.

192 P Rubin, 'The Theory of the Firm and the Structure of the Franchise Contract' (1978) 21 *The Journal of Law and Economics* 233 at 224 and Bennett, above n 24, p 178.

(a) a franchise agreement setting out the basic rights and obligations of the franchisor and franchisee;

(b) a disclosure document which outlines what the franchisee is buying[193] . . . and provide[s] details of how the system works, basic obligations of the parties, financial commitment of the franchisee and any problems in the history of the system and its owners;

(c) franchise manuals, detailing how the system works;

(d) where there is a retail franchise, an agreement governing the basis on which the franchisee occupies the premises (for example, a lease with conditions protecting the franchisor, a sublease or a licence to occupy);

(e) where the franchisee is a company, guarantees signed by the directors and personal undertakings in relation to restrictions on competition;

(f) a record of pre-contractual negotiations.[194]

The franchisor typically can terminate the franchising agreement where the franchisee fails to comply with the material terms of the agreement, and in particular the terms specifying how the business system is to operate.[195]

Franchisees can be self-employed individuals, partnerships or small corporations. Rubin[196] suggests that even though the franchisor and franchisee are technically separate legal entities, the economic circumstances 'are such that the franchisee is in fact closer to being an employee of the franchisor than to being an independent entrepreneur'. Hadfield observes:

> Franchising relationships characteristically lie in the intermediate range between employment and independent contracting. With respect to control, franchising relationships are closest to the employment end of the continuum: the franchisor typically exercises significant amounts of relatively unrestricted decisionmaking authority. With respect to ownership, however, the franchisor is much closer to the independent contracting model: the franchisee typically owns the bulk of the assets that contribute to producing the fruit of the relationship. . . . A 'pure' franchising relationship would be one in which ownership resided completely in the franchisee and control completely in the franchisor.[197]

This analysis suggests that the only factor which would point to the franchisee arguably being an employee is the extremely high degree of control exercised by the franchisor over the operation, and the degree of economic dependence on the franchisor of the franchisee.[198] It is highly unlikely that an Australian court would find a franchisee to be an employee, particularly where the franchisee is an employer in its own right,[199] pays for all plant and equipment, and is clearly running a small, or even medium-sized, business on its own behalf. Franchise arrangements are generally established precisely to

193 In Australia this will follow the format of the Franchising Code of Practice, see above n 189.

194 Taylor, above n 188, at 469.

195 For a trenchant critique of the impact of franchising on work relations, see Bennett above n 24, pp 177-81.

196 Rubin, above n 192, at 232, quoted in Bennett, above n 24, p 179.

197 Hadfield, above n 188, at 932.

198 See *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 and *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 184-85.

199 Macken, O'Grady, and Sappideen, above n 21, p 16 comment that the 'right of a person to delegate that work which he or she has agreed to do and the right of the person to incorporate, will point almost conclusively against the existence of an employer-employee relationship'.

avoid an employment relationship between the parties.[200] It is possible, though, that in some types of franchising arrangements involving unincorporated franchisees the circumstances may be such that a court will determine that the franchisee is in fact an employee. The employees of a franchisee are not employees of the franchisor, because there is no contractual arrangement between the franchisor and employees of the franchisee.[201]

To what extent are the parties to franchise arrangements subject to the obligations set out in the OHS statutes? None of the OHS statutes make specific provision for the regulation of OHS in franchises. Provided that the franchisor employs its own head office employees, or employs employees in other company owned operations, the franchisor will be an 'employer' for the purposes of the OHS statutes. A franchisee employing employees owes those employees the employer's statutory general duty of care to employees. To the extent that franchisors and franchisees, as employers or as self-employed persons, engage contractors to perform work, they owe those contractors the general duty owed to 'non-employees' described above. A franchisee, and possibly even the franchisor, would owe the same duty to customers.

The outstanding issue is whether a franchisor owes a statutory duty of care to franchisees and to the employees and contractors engaged by the franchisee. One answer is that the OHS statutes which deem independent contractors to be employees for the purpose of the employer's general duty (eg, s 21(3) of the OHSA(Vic))[202] might operate to deem franchisees and their employees to be employees of the franchisor, particularly as the franchisor exercises significant control over the operations of the franchisee, and many franchise agreements attempt to label franchisees as 'independent contractors'. Against this it could be argued that a typical independent contractor is someone who provides services to the other contracting party, a form of relationship quite different from that between the franchisor and franchisee which involves the franchisee using a resource (a business system) provided by the franchisor. A party hiring a contractor relies on the contractor to bring expertise and work systems into the arrangements, whereas a franchisor already has the expertise and work systems, and relies on the licensing arrangement to transfer the business system to the franchisee.

At least in Victoria and Queensland, the employer franchisor is likely to owe the franchisee and the franchisee's employees and contractors a general duty of care under s 22 of the OHSA(Vic) and s 28(2) of the WHSA(Qld). If an employer chooses to conduct its operations by contractual arrangements such as franchising, it will still owe a duty to non-employees affected by the conduct of its undertaking. It cannot contract out of its general duty to non-employees. It must establish a safe system of work to be carried out by franchisees. Recall that Lord Hoffman in *Associated Octel* stated that the

200 Bennett, above n 24, p 177.

201 But see the 'deemed employee' provisions in relation to the employer's statutory duty of care to employees, discussed above, pp 85–6.

202 See also the provisions set out in ss 19(4) and (5) of OHSA(WA), which is similar to s 21(3) of OHSA(Vic). See also s 4(2) of OHSWA(SA) which defines an independent contractor as an employee, but makes no mention of the employees of independent contractors. Section 9(4) of WHSA(Tas) would appear to limit the employer's duty to the employer's workplace. The Northern Territory provision is discussed later in this section.

equivalent section (s 3) in the HSAWA:

> *is indifferent to the nature of the contractual relationships by which the employer chooses to conduct it.* . . . 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.* . . . The employer must take reasonably practical steps to avoid risks to the contractor's servants which arise ... *from the inadequacy of the arrangements which the employer makes with the contractors for how they will do the work.*[203]

In Victoria and Queensland a threshold issue for the employer's (franchisor's) duty to non-employees (franchisees, their employees, customers and contractors engaged by the franchisee) is whether the activities of the franchisee form part of the conduct of the franchisor's undertaking. The franchisees are established to implement the franchisor's business system, often on premises leased from the franchisor, and laid out following the franchisor's specifications. Often the franchisor itself operates its business system in company owned operations, which are clearly part of its undertaking. A common characteristic of franchising agreements is that the franchisor has tight control over the way in which the franchisee's enterprise is managed and operated. The broad judicial interpretation of 'the conduct of the undertaking' outlined above[204] suggests that the franchisee's operation falls within the 'conduct' of the franchisor's 'undertaking'. Consequently a franchisor would have a duty to conduct its undertaking to ensure, subject to the qualifications of practicability in Victoria or reasonable precautions and proper diligence in Queensland, that all persons affected by the franchisee's operations are not subjected to risks to their health and safety. This duty is owed to all 'non-employees', which would include the owners, managers and employees of the franchisee, the franchisee's customers, suppliers, and persons engaged by the franchisee as contractors.

The employer's duty to non-employees in the Cth, NSW and ACT OHS statutes is expressed in similar terms to the Vic and Qld provisions, but, as noted above, with one crucial difference — a geographical limitation to the employer's place of work (in New South Wales) or to near a workplace 'under the employer's control' (the Commonwealth and Australian Capital Territory). Does the level of control of the franchisor over the franchisee's operations mean that the franchisee's workplace is part of the franchisor's workplace, or is 'under the control of' the franchisor? If physical control is required, the answer would appear to be that the workplace is not under the franchisor's control. Nevertheless, it is at least arguable that, given the level of control that the franchisor exercises over the franchisee under the typical franchise arrangement, the franchisor might exercise control over the franchisee's workplace.

As discussed earlier in this article, the other Australian OHS statutes do not express the duty to non-employees in terms of the 'conduct of the undertaking', and consequently their provisions may not cover franchisors in relation to franchisees to the degree that the Vic and Qld statutes do. In South Australia and Western Australia the franchisor may not be 'at work'

203 Above, n 119, at 850-1. Emphasis added.

204 See pp 93–4, above.

('OHSWA(SA)') or 'engaged in work' ('OSHA(WA)') at the franchisee's workplace, and thus the duty to non-employees may not extend to the franchised premises.[205] The issue is far from clear, but an argument can be made for the duty to extend to franchisees and their employees. A breach of the OHWSA(SA) s 22 would occur because of an act or omission in the course of the franchisor's work, which would include the control of franchisees' operations, as described above. If the franchisor inspects the premises and operations of the franchisee a court might find that the franchisor's 'work' extends to the franchised operations. Similarly OSHA(WA) s 21 requires a nexus between the franchisor's (employer's) work and non-employees. A non-employee must at least be 'partly' affected 'as a result of the work in which' the employer 'is engaged.' The work of the franchisor and its employees arguably includes the control of the franchisee.[206]

As noted above, the WHSA(Tas) s 9(3) curiously qualifies the duty by reference to 'work carried on at *a* workplace', without requiring it specifically to be the employer's workplace. It may be that a workplace where the franchisee 'works' may come within '*a* workplace', although this is far from clear.

The WHA(NT) s 29(1)(b) with its broad definition of worker (see above) would appear to cover franchise agreements, but the possibility of the section covering all franchisees seems to be limited by the fact that the 'worker' must be a 'natural person'. Where the franchisee is a company, the section would not apply.

In sum, in Victoria and Queensland the provisions imposing a general duty upon employers in relation to non-employees would appear to impose an extensive duty upon franchisors to ensure the health and safety of the franchisee, the franchisee's employees, the franchisee's customers, and even contractors engaged by the franchisee. The wording of the OHS statutes in the other Australian states and territories is such that the duty may not extend this far, and in many instances probably does not cover franchise arrangements at all.

Of course, the scope of the duty owed by the franchisor in Victoria and Queensland will depend on the practicability of the measures required to discharge the duty. Most franchising agreements indicate that the franchisor considers it reasonably practicable to specify a detailed management system for the franchise operation, including the layout of the business, and training and instruction of management and employees. This system is often enforced by inspections by the franchisor, and the franchisor often reserves the right to terminate the agreement if the franchisee fails to follow the specified management system. The preceding analysis suggests that the franchisor is obliged to ensure that the management system set down for franchisees includes the best practicable OHS programs. The franchisor must also provide the franchisee with OHS information, instruction and training; require the

205 See again the discussion of the relevant provisions of OHSWA(SA)) and OSHA(WA) at p 87, above.

206 See also the analysis of Mahoney JA in *Production Spray Painting & Panel Pty Ltd v Newnham* (1991) 27 NSWLR 644, where he explores the nexus required between a contract and the performance of work for the purposes of the 'unfair contracts' provisions of the Industrial Relations Act 1996 (NSW) s 106.

franchisee to instruct and train its employees in OHS matters; and require the franchisee to supervise its employees and contractors to ensure that they fully implement the franchisor's OHS programs. The franchisor will need to ensure that the franchisee puts the specified OHS programs in place, and has systems to monitor and enforce the programs. It will not be reasonably practicable, however, for the franchisor to supervise the franchisee's OHS programs to the extent that the franchisor might supervise OHS programs in whatever operations it may own and operate itself. While the franchisor cannot practicably supervise the franchisee's employees on a daily basis, it should ensure that its monitoring of the franchisee's performance gives top priority to the implementation of OHS programs, and that it makes the franchisee fully accountable for the implementation of OHS programs laid down in the franchisor's management system.

The preceding analysis is based on a logical application to franchises of the case law, which developed principally in relation to an employer or self-employed person's duties to contractors. Given the degree to which the franchisor controls the operations of the franchisee there are good policy reasons for adopting this analysis. It is possible, however, that an Australian court, faced with a case specifically concerned with the obligations of a franchisor to the employees of a franchisee, may take a less strict approach in establishing the extent to which the analysis in *Associated Octel* applies to franchisors, and in particular, the extent to which a franchisor is responsible for the implementation and enforcement of the OHS management system by the franchisee.

Reforming the OHS Statutes to Regulate Complex Organisations and to Protect Contingent Workers

This article has examined the extent to which the general duties of care imposed upon employers and self-employed persons under the Australian OHS statutes are able to afford protection to workers in temporary employment, part-time workers, outworkers, workers engaged by labour hire agencies, workers engaged as independent contractors, and franchisees and their employees. To a far lesser extent, it has also investigated the problem of attributing legal responsibility for OHS to groups which lack a single identity.[207]

The analysis above suggests that the OHS statutes have a broad coverage of workers. The coverage would appear to be strongest in commercial arrangements involving contracting and sub-contracting, where some OHS statutes make explicit provision for such relationships. These kinds of relationships are most common in the male-dominated industries like construction, transport and manufacturing. Even where explicit provision is not made, the blanket protection given to 'persons other than employees', given the broad judicial interpretation of these provisions, means that most persons whose OHS is affected by the activities of an employer or self-employed person are afforded protection by the OHS statutes.

The one significant exception occurs where non-employees are not engaged

207 Collins (1990b), above n 24, at 735.

by an employer or self-employed person to work at the employer's or self-employed person's workplace. For example, in New South Wales the duty to non-employees does not extend to persons who are not at the employer's or self-employed person's place of work. This means that members of the public not at the workplace are not owed a statutory duty of care. It also means that home-based workers engaged by an employer or self-employed person as independent contractors rather than as employees[208] do not fall within the ambit of the duty.[209] These sorts of work relationships are most commonly entered into by women (making clothes, performing clerical work, working for publishers), although with the rise of teleworking more and more men are working from home for government agencies and computer companies.

When it comes to the issue of attributing responsibility to groups of employers and self-employed persons who do not constitute a single legal entity, the OHS statutes are far more successful than other areas of labour law, for two reasons.

The first is the approach taken by all the OHS statutes to set out a series of overlapping general duties on all parties whose activities affect the health and safety of employees and non-employees. Each duty holder is subject to the principle of individual responsibility for its business activities. The second major factor in the attribution of responsibility for OHS to groups of employers and self-employed persons is the principle now clearly established by the British courts that the duty is personal to the duty holder and non-delegable.[210] This principle has the effect of making one capital unit (an employer or self-employed person) responsible for the actions of another (an employer or self-employed person) and that other's employees or sub-contractors (who could, indeed, be a third capital unit). Even then the law tries to hide the derogation from the individual responsibility principle. As Hugh Collins observes, in another context:

> The rhetoric of non-delegable duty is designed to obfuscate this effect by describing the form of liability in terms of a personal duty on the subsidiary, and thus squaring the existence of liability with the general principles of responsibility.[211]

The question remains whether the employer and self-employed person's general duties would cover a holding company using its power and authority over a subsidiary company to impose management policies and procedures which put the health and safety of employees or non-employees at risk. In New South Wales, the geographical limitation on the employer's and self-employed person's duty to persons at the workplace would clearly prevent the duty being imposed on the holding company. Similar concerns would mitigate the operation of the general duties in all of the other Australian jurisdictions apart from Victoria and Queensland. In Victoria and Queensland

208 Or, as noted above, as an employee, but where the immediate employer is itself contracted to retailers or distributors.

209 There is no proposal to amend s 16 of OHSA(NSW) to remedy these difficulties in the recent Final Report of New South Wales Legislative Council's Standing Committee on Law and Justice, above n 1.

210 *British Steel*, above n 133; *Associated Octel*, above n 119; *Gateway Foodmarkets*, above n 133 at 81-3.

211 Collins (1990b), above n 24 at 735.

the issue would be whether the activities of the subsidiary or company below the subsidiary was part of the 'conduct of the undertaking' of the holding company. This will be a question of fact in each case, but does point to the need for statutory reform of the OHS statutes to make the coverage of the legislation less dependent on fortuitous wording in the statute, and on artful arguments about the interpretation of those expressions.

What the OHS statutes need to do is to recognise expressly modern forms of capital organisation, and modern work relationships. Other labour lawyers have called for a more subtle treatment of work relationships than the basic approach that envisages only two classes of workers, employees and non-employees, both of which are seen in undifferentiated and monolithic terms.[212] The OHS statutes, or more particularly, regulations made under the statutes, need to particularise more clearly the different organisational forms (holding and subsidiary companies, franchising, outsourcing and so on) and work relationships (homeworking, contracting, sub-contracting, labour hire, and so on) in a modern economy. The regulations need explicitly to outline the general OHS obligations of those in control of the work processes involved, and to provide for the co-ordination of OHS management efforts of all of the parties involved. For example, it is not sufficient for there to be a statutory duty on each entity (eg, principal contractors, contractors and sub-contractors) involved in a work process if those parties do not co-ordinate their work processes and OHS measures. The OHS statutes should include obligations on all business entities involved in a work process to develop their own OHS policies and procedures, to discuss these with all other parties involved in the process, and to co-ordinate the work process and the OHS measures required.[213]

If these suggested reforms are introduced, the general duties can then remain, as a 'catch all' to ensure that new forms of work organisation will be covered as and when they emerge. The general duties should not be left unamended. As this article has shown, the preferred wording of the duties to persons other than employees is that adopted in Vic OHS statute. The geographical limitations of the other statutes should be removed, and each statute should adopt the 'exposure to risks' wording found in the Cth, NSW, Vic and ACT statutes. The expression 'conduct of the undertaking' should be given an expansive legislative definition, to confirm that it embraces franchising operations and to ensure that it includes holding companies and their subsidiaries.

This will not solve all of the problems associated with regulating the health and safety of all types of workers in a modern labour market. The difficulties

212 See J Howe and R Mitchell, 'The Evolution of the Contract of Employment in Australia: A Discussion' (1999) 12 *AJLL* 113; and M Freedland, 'The Role of the Contract of Employment in Modern Law', *The Employment Contract in Transforming Labour Law*, L Betten (Ed), Kluwer Law International, The Hague, 1995, pp 17-28.

213 For examples of provisions that require such measures, see the 1992 European Community, *Directive To Implement Minimum Health and Safety Requirements at Temporary or Mobile Construction Sites* and the Qld WHS Work Plan requirements in Pt 8 of the Workplace Health and Safety Regulation 1997. For a discussion of each of these provisions, see R Johnstone, *Evaluation of Queensland Construction Safety 2000 Initiative*, National Occupational Health and Safety Commission, Sydney 1999.

of enforcement of the OHS obligations, particularly in relation to small businesses and workers working away from the employer's main work premises (eg, home-based workers) will remain,[214] and will require OHS inspectorates to develop more sophisticated record keeping requirements so that the locations of all workers can be ascertained and their conditions monitored. Even then, the resource constraints of the inspectorates will undermine their enforcement efforts. These difficulties are likely to be exacerbated if workers in the precarious forms of employment described in this article are not adequately covered or represented by trade unions,[215] and do not reap the benefits of health and safety representative and committee structures. But at least, in these situations, the law will be declaring relevant standards so that workers in these setting scan assert their rights, and call in inspectors to ensure that those engaging them in the work provide and maintain safe systems of work.

214 See Walters and James, above n 17, p 20.
215 Id, pp 6 and 24-5.

The Evolution of the Contract of Employment in Australia: A Discussion

John Howe and Richard Mitchell†*

The principal purpose of this article, building upon earlier research by Australian and British academics, is to investigate the emergence of the 'contract of employment' as a single legal concept covering all classes of dependant labour. Contrary to earlier supposition, this research shows that the emergence of the idea of a legal relation common to most forms of waged labour was a long, drawn-out process which did not meet general acceptance in the courts until well into this century. As a result there was considerable doubt over the extent of protective labour legislation, doubts not dispelled by the introduction of Australian compulsory arbitration system. The recent emergence of concerns over 'flexibility' and 'irregular' or 'atypical' employment has not reversed an historically settled legal position in relation to employment contracts. Rather it has merely revived doubts and concerns of earlier but relatively recent times. The discussion in this article is not intended in any way to address the present state of the law on employment contract and 'atypical' labour. However, some brief implications for the present debate arising from the historical argument are presented in conclusion.

Introduction

In 1977 Kahn-Freund published his seminal article on the historical evolution of the contract of employment in Britain.[1] His main concern in that work was to explain why Blackstone's *Commentaries on the Laws of England* dealt with the employment relation as one of status (master and servant) rather than in terms of its being a contractual relation. His basic conclusion was that Blackstone had missed the fundamental change in the character of the labour force from an essentially agrarian population steeped in servile obligation to a workforce 'employed' in a diverse range of industries under the capitalist mode of production.

As a result of Kahn-Freund's work, the origins of the evolution of the contract of employment have been located in the early nineteenth century. His article was quite emphatic on this point:

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1 O Kahn-Freund, 'Blackstone's Neglected Child: The Contract of Employment' (1977) 93 *Law Quarterly Review* 508.