

WORKING PAPER 22

**Statutory OHS Workplace Arrangements for the Modern
Labour Market**

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1. Introduction

Over the past decade there has been increased recognition that the growth of flexible work arrangements that have been labeled as precarious employment or contingent work in industrialized countries and the developing world pose a serious challenge to occupational health and safety (OHS). While, there is ongoing debate about what constitutes contingent work or precarious employment – or rather definitional boundaries for inclusion or exclusion (for a discussion, see Quinlan and Bohle, 2003) – there is wide consensus about the inclusion of some categories of work. These include self-employed subcontractors (including many mobile or home-based workers), temporary (including on-call), leased (or labour hire) and short-term fixed contract workers. More problematic inclusions are micro-small business workers (though many of these are subcontractors) and part-time workers (at least those with permanent positions). While the terms precarious employment and contingent work are often used interchangeably (and indeed there is considerable overlap) the former term has a somewhat wider coverage. However, even precarious employment fails to take full account of the changes that are occurring. The changes in work organisation and labour markets are not confined to the growth of jobs that are formally short-term or insecure. Repeated rounds of downsizing by large public and private employers (and associated changes in industrial relations regimes within at least some countries) have meant that even workers holding nominally permanent jobs are experiencing job insecurity.

There is increasing evidence that these work organisation and labour market changes are having detrimental effects on the OHS of workers (see Quinlan, Mayhew and Bohle, 2001). For example, the competitive pressures that induce businesses to adopt the above work and organisational arrangements also encourage corner-cutting on OHS, underbidding on contracts, the use of cheaper or inadequately maintained equipment, reductions in staff levels, speeding up production, or longer work hours. These organisational forms, particularly those which involve introducing third parties to work arrangements and creating multi-employer worksites, result in fractured, complex and disorganised work processes, weaker chains of responsibility and ‘buck-passing’, and a lack of specific job knowledge (including knowledge about OHS) among workers moving from job to job. They also make it more difficult for worker interests in OHS to be effectively represented. Finally, 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.

This paper addresses one issue arising from these work organisation and labour market changes – their impact upon worker representation under the OHS statutes. Worker participation in OHS is important, for a number of reasons. Participatory mechanisms at jurisdictional, industry and workplace level play a pivotal role in Post-Robens OHS legislation in Australia. The need to promote worker involvement in OHS is accepted at international level (see International Labour Organisation *Convention concerning Occupational Safety and Health and the Working Environment*, No 155 of 1981), and has

strong ethical (workers bear the burden of failure to manage risks at work) and practical foundations. With regard to the latter point it should be noted that there is a persuasive case for the positive benefits of worker participation in OHS (for a summary see Walters and Frick, 2000). Evidence for this comes from many countries, including those where participatory mechanisms are not universally mandated by legislation. Further, evidence suggests participatory mechanisms with higher levels of worker involvement are superior to those where involvement is more circumscribed.

To begin with, there are several studies of the relationship between indicators of objective health and safety performance, such as injury rates, and workplaces where joint arrangements are in place and/or when trade unions are engaged in worker representation. They include studies of specific exposures, where research demonstrates that incidence of ill-effects were greater in non-unionised situations. For example, Fuller and Suruda (2000), show that deaths from hydrogen sulphide poisoning were more frequent in non-unionised workplaces than unionised ones in the United States. Further examples include a comparison of unionised and non-unionised construction workers in the US (Dedobbelear *et al*, 1990) and Grunberg's (1983) early work on health and safety in manufacturing in Britain and France, both of which indicate that better standards of health and safety are achieved in unionised workplaces than in non-unionised ones. A Norwegian study found that improvement in sickness absence was greatest where firms had adopted a participatory approach and where trade union representatives were active (Anderson 1994).

Also in this category is an analysis of the British Workplace Industrial Relations Survey 1990 (WIRS) in which Reilly *et al* (1995) demonstrated that in workplaces where joint arrangements were in place and especially where trade unions were involved, injury rates were considerably reduced. Other studies of the same WIRS data set agree that the arrangements reported in WIRS that contribute to the highest injury rates are where management deals with OHS without consultation (see Beaumont and Harris 1993:51; Millward *et al* 1992; Nichols *et al*, 1995: 50-55).

Analyses of the more recent WERS 1998 have produced some comparable findings – although less clear cut than those of Reilly.¹ In the US there are studies on the role of joint health and safety committees in which no association between the mere presence of committees and improved health and safety performance is found, but where improvements are associated with particular facets of their operation such as the presence of trade unions, and trained participants for example (Boden *et al* 1984, Cooke and Gautchi, 1980, and Kochan *et al* 1977). Similar associations were reported in early British studies (for example, Beaumont *et al* 1982). In Canada, Lewchuk *et al* (1996) found that the presence of joint health and safety committees was associated with reduced lost-time injuries. The Canadian Labour Congress cites a 1993 study commissioned by the Canadian Ministries of Labour that concluded that union-supported health and safety committees have ‘a significant impact in reducing injury rates.’² Havlovic and McShane (1997) also concluded that ‘there was some support for the idea that structured joint

¹ See for example Litwin (2000), and Robinson and Smallman (2000).

² Referred to in O'Neill 2002

health and safety committees activities help to reduce accident rates'. Shannon *et al* (1996) found that 'participation of the workforce in health and safety decisions' was one of several factors related to lower claims rates. In an overview of Canadian work on this subject Shannon *et al* (1997) suggested that 'empowerment of the workforce' was one of a number of organisational factors consistently related to lower injury rates. In an earlier study Shannon (1992) indicated that such 'empowerment' included the presence of unions and shop stewards, union support for worker members of joint health and safety committees and general worker participation in decision-making. A study of OHS committees in public sector workplaces in New Jersey found that committees with more worker involvement reported fewer illnesses and injuries (Eaton and Nocerino, 2000: 265). A recent Irish study compared actual injury rates on construction sites with perceptions of workers and managers, the risk management system in place and OHS enforcement. It found 'the variable with the strongest relationship with safety compliance is the presence or absence of a safety representative'. It suggests that 'what is most eloquent about these results is the lack of any other significant relationships. In particular the general safety management factor is not significantly associated with effective response to audits and hazards and has no influence on behaviour or compliance' (McDonald and Hyrmak 2002).

While there is considerable variation in the detail of these findings, taken collectively they all lend support to the notion that joint arrangements, trade unions and trade union representation on health and safety at the workplace are associated with better health and safety outcomes than when employers manage OHS without representative worker participation.

A further group of studies provides more indirect evidence of the effect of worker representation by looking at the relationship between representative worker participation and OHS management arrangements. These studies investigate the relationship between, for example, the presence or absence of worker representatives, trade unions, joint health and safety committees or health and safety clauses in collective agreements and specific aspects of OHS management arrangements that are made by employers. Generally, they indicate that participatory workplace arrangements lead to improved OHS management practices that, in turn, could be expected to be associated with improved OHS performance outcomes. A range of early studies of this kind is reviewed by Walters (1996). They include investigations on the role of joint safety committees in the UK (Beaumont *et al.* 1982, see also Coyle and Leopold, 1981) and in the US (Kochan *et al* 1977)³ in which improved health and safety arrangements are associated not only with the presence of joint health and safety committees but with well trained committee members and their operation through established channels for relations between management and workers.

A series of Australian studies in addition to generally supporting the positive relationship between the presence of representative participation and improved OHS management

³ Findings in other countries are broadly comparable; see for example, Bryce and Manga, 1985 for Canada Roustang, 1983; Cassou and Pissaro 1988 on France, Assennato and Navarra (1980) on Italy and Walters *et al*, 1993 for EU countries generally.

arrangements, conclude that the introduction of such representative arrangements also lead to major changes in attitudes (Biggins *et al* 1991, Biggins and Phillips 1991a and b; Gaines and Biggins 1992; Biggins and Holland 1995; Warren-Langford *et al* 1993). In Canada, a study commissioned by the Ontario Workplace Health and Safety Agency ‘found that 78-79 per cent of unionised workplaces reported high compliance with health and safety legislation with only 54-61 per cent of non-unionised workplaces reporting such compliance’ (cited in O’Neill 2002).

Recent studies in the UK indicate that (trained) representatives stimulate and participate in workplace OHS management structures and procedures, tackle new OHS issues and ‘get things done’ to improve OHS arrangements (Walters *et al* 2001). Even in small workplaces, regional representatives stimulate ‘activation’ of health and safety as well as engaging with employers and workers in more prescriptive aspects of their tasks such as inspecting workplaces as is amply shown in the Swedish experience (Frick and Walters 1998). Such findings are further supported by reviews of experiences in other European countries such as Norway, Italy and Spain, where the engagement of trade unions and peripatetic workers’ representatives are influential in raising awareness and contributing to the establishment of better OHS arrangements in small firms (see Walters 2001 and 2002).

As we argue in this paper, the OHS statutes have built the principal institutions for workplace participation – occupational health and safety representatives and occupational health and safety committees – around the presumption of an identifiable and relatively stable group of employees located together or in very regular contact, and working for a single employer. We argue that many of the work arrangements outlined at the beginning of this paper and discussed in the next section break this nexus or weaken it to the point where it would be extremely difficult for these mechanisms to be used effectively. We conclude the paper with some suggestions as to how provisions for health and safety representatives and committees might be revised to enable all workers – not just employees working for a single employer – to benefit from statutory workplace arrangements.

2. Work relationships in the contemporary labour market

From the 1930s labour lawyers constructed a paradigm around which labour law regulation in general was organised (see Bennett 1994, 171-183; and Collins 1990). The key assumptions of this paradigm were:

- the assumption of permanent, full-time employment;
- the assumption that labour law was a regulator of employment relationships, with the contract of employment as the pivot;
- the assumption of a single entity employer, with considerable freedom to determine the limits of its boundaries, and responsible only under the principles of agency and vicarious liability.

Apart from the general duties of employers and self-employed person to persons other than employees (discussed in the next section), the OHS statutes have also largely been built on this paradigm. But as we have noted above, in the past 20 years there has been a significant growth of contingent or precarious work relationships, which include:

- casual (or temporary) workers, who are engaged on a short term (usually hourly or daily) where each period of work is a distinct period of service and there no continuity of service or expectation of permanent employment;
- short-term fixed contract workers, who are engaged in contract work of less than 12 months' duration;
- labour hire or leased workers, who are supplied by labour hire firms or agencies to work for client employers on a temporary basis – usually there is no contractual relationship between the worker and the client;
- self-employed contractors, who operate their own business without employees and who supply labour services to clients.
- teleworking, by workers who are able to work at a location remote from the employer's premises (for example, at the worker's home, at alternating locations, or entirely mobile) as a result of telecommunication technology such as on-line computer networks;
- telecall centre workers, who work in sales, service provision or telemarketing and are located at a venue dedicated to this task which might be part of the organisation (in-house) or remote to it. Such workers may be employed by the organisation, or outsourced;
- franchise arrangements, such as the 'business format' franchise where 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;
- part-time work, where the worker usually works a regular number of fixed or variable hours, but less than a full-time worker (who would normally work between 35 and 38 hours a week); and
- home-based work, where work is carried out at the workers home, rather than at the employer's premises – home-based workers might be employees or independent contractors, and some home-based workers might spend some of their working time working at the employer's premises.

Overall, persons holding casual or temporary employment and non-employees (subcontractors, self-employed etc) increased from less than 30 per cent in 1982 to approximately 40 per cent in 1999 (Burgess and de Ruyter 2000, 252). Casual or temporary employment in Australia increased from 18.2 per cent of workers in 1988 to 25 per cent in 1999 (Campbell and Burgess 2001). While women continue to occupy these jobs in far greater numbers than men, the proportion of these jobs held by males is growing over time. Statistics on other work arrangements mentioned above is fragmentary. Data on leased labour in Australia is difficult to find. The ABS Employment Services Survey (1998-99) identified 278,937 workers hired by businesses at the end of June 1999 and 1,357 firms mainly engaged in temporary or contract based work placements (cited in the NSW Labour Hire Task Force 2001, 18). An ABS survey in June 2000 indicated that 1.79 million Australians (or 20.9% of the workforce) undertook some paid work at home. While for the majority (1.1 million) home-based work was an extension of their work activity elsewhere, 692,000 (7.9% of the workforce) worked all

or most hours at home and for another 136,000 home was the location of a second paid job (cited in Burgess, Mitchell and Preston 2003, 138). Nearly half (48%) of predominantly home-based workers were self-employed (ACIRRT 2002, 6). It has been estimated that there were about 4000 call centres in Australia, employing 160,000 workers in 1999 (Australian Services Union 2002, 4). ABS surveys suggest that the number of teleworkers (defined as people with the ability to access the employer's computer from home) grew from 1.9 per cent in February 1998 to 6.4 per cent (544,000 persons) in November 1999, and the number of workers having a telework agreement with their employer increased from 1.6 per cent to 4.8 per cent (402,000 persons) during the same period (see Di Martino 2001, 33). The number of self-employed workers (excluding owner-managers of incorporated enterprises) has been relatively stable in Australia since the beginning of the 1990s at around 15.6 per cent of the workforce (ABS survey, cited in NOHSC 2002, 2). However, the percentage of the workforce who are owner-managers of incorporated enterprises increased from 1.8 per cent to 5.6 per cent between February 1989 and February 1997. Vanderheuvél and Wooden's (1995, 278) recent study suggested that just over 38 per cent of self-employed contractors identified in the study were heavily dependent on the organisation that hired them, with the result that their status more closely resembled that of employee than independent contractor. Hopkins (1995, 50) cites a study, which revealed that 64 per cent of rural workers and 85 per cent of farmers and farm managers were self-employed. A 1995 ABS survey found that 2.64 million Australian (or 19 per cent of the population aged 15 years or more) contributed some kind of voluntary work to an organisation (ABS 1995). A 1998 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 per cent compound growth per annum (McCosker and Frazer 1998). In sum, while the foregoing data is patchy it does demonstrate that the work arrangements being examined in this paper are significant, both in terms of absolute numbers and as a proportion of the total workforce.

3. OHS standard setting

When it comes to regulating non-employment relationships, the main strength of the OHS statutes lies in the scope of the general duties that reach beyond the employment relationship to protect persons other than employees. In general the OHS statutes impose general duties upon employers (in relation to both employees and persons other than employees); self-employed persons; persons in control of premises, or occupiers; manufacturers, suppliers and importers of plant and substances; designers, erectors and installers of plant; and employees. It is well established that these duties are absolute duties, qualified by 'reasonable practicability' or similar expressions. A measure is not reasonably practicable if a reasonable duty holder, weighing the risk of an accident against the measures (including the technological feasibility and cost of those measures) necessary to eliminate the risk, considers that the risk of injury or disease is insignificant relevant to the burden of taking the requisite measures (see Asquith LJ in *Edwards v National Coal Board* [1949] 1 KB 704 at 712; and *Holmes v R E Spence & Co Pty Ltd* (1993) 5 VIR 119 at 126-127; *WorkCover Authority of New South Wales (Inspector*

Bultitude) v Grice Constructions Pty Ltd (2002) 115 IR 59; and *WorkCover Authority of New South Wales v Cleary Bros (Bombo) Pty Ltd* (2001) 110 IR 182, at 203-209).

The case law interpreting the general duties shows that the courts have taken a broad approach to interpreting the duties. For example, in interpreting the employer's general duty to employees, the courts have held that: 'it is essential that the approach should be pro-active and not a reactive one; employers should be on the offensive to search for, detect and eliminate, so far as is reasonably practicable, any possible areas of risk to safety, health and welfare and which may exist or occur from time to time in the workplace': *WorkCover Authority of NSW (Insp Egan) v Atco Controls Pty Ltd* (1998) 82 IR 80 at 85. The courts have also made it clear that in implementing the 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 (*WorkCover Authority of New South Wales (Inspector Turnham-Perkins) v Maine Lighting* (1995) 100 IR 248 at 257; *State Rail Authority of NSW v WorkCover Authority of NSW (Inspector Dubois)* (2000) 102 IR 218 at 231; *Holmes v R E Spence & Co Pty Ltd* (1993) 5 VIR 119; *R v Australian Char Pty Ltd* (1995) 64 IR 387).

In South Australia, the employer's general duty to employees in section 19 has been held to apply to labour hire workers, because of the particular wording of that provision. Section 19(1) of the *Occupational Health, Safety and Welfare Act 1986* (SA) (OHSWA(SA)) provides that the employer's duty extends to "each employee ... engaged by the employer" and that the definition of "employee" (see also the definition of "employer") in section 4) includes "a person who is employed under a contract of service or *who works under a contract of service*" (emphasis and bold added). In *Moore v Fielders Steel Roofing Pty Ltd* [2003] SAIRC 75 the South Australian Industrial Relations Court held that this definition meant that an employer owes a duty under section 19(1) to a person employed under a contract of service by a third party (in this particular case, a labour hire agency, so that the person is an "employee" of the labour hire agency) but who works for the employer pursuant to an agreement between the employer and the third party, even though there is no contract between the employer and the person. The Industrial Relations Court interpreted "engaged" very broadly to mean "provide occupation (for a person)" (see para 40), noting (at para 41) that "It would seem to be reasonable to conclude that Parliament chose a word of such wide connotation as "engaged" to embrace the developing and evolving legal environment under which work is done." Jennings SJ was swayed by the fact that in "this case [the worker] was obliged by his contract of employment with the labour hire agency to obey the lawful instructions of the appellant [the employer]. In the sense set out above, he, in my view, was clearly 'engaged' by the appellant" (para 43).

Further, some of the Australian OHS statutes redefine the definition of 'employee' in the employer's general duty in order to deem contractors to be 'employees'. For example, section 21(3) of the *Occupational Health and Safety Act 1985* (Vic) (OHS(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 subsections 21(1) and (2) in relation to all matters over which the employer has control (see *Stratton v Van Driel Limited* (1998) 87 IR 151). See also sections 9(4)-9(7) of the *Workplace Health and Safety Act 1995* (Tas) (WHSa (Tas)), section 16(4) of the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cth) (OHS(CE)A (Cth)) and sections 19(4) and (5) of the *Occupational Safety and Health Act 1984* (WA) (OSHA (WA)), which are similar to the Victorian provision (although the Commonwealth provision does not refer to the contractor's employees). The definition of 'worker' in section 3(1) of the *Work Health Act 1986* (NT) (WHA (NT)) goes some way towards achieving the same result, by defining a 'worker' as a 'natural person who, under a contract or agreement of *any kind* ... performs work or a service of any kind for another person' (emphasis added).

Section 4(2) of the OSHWA(SA) deems a contractor to be an employee of a principal, but only in relation to work "performed .. in the course of a trade or business carried out by the principal", and only in relation to "matters over which the principal has control, or would have control but for some agreement to the contrary between the principal and the contractor". The former expression has been very narrowly interpreted by the South Australian Courts (see *Stevenson v The Broken Hill Proprietary Company Limited* [1995] SAIRC 2), but the rest of the provision has been broadly interpreted: see *Complete Scaffold v Adelaide Brighton Cement & Anor* [2001] SASC 1999. Doyle CJ in *Complete Scaffold* at paras 50-56 did, however, suggest that the deemed employer would have "limited duties under the Act" and that "control" in s 4(2) "should be read as referring to actual control, that is to things which the deemed employer is managing or organising." See also *Moore v Adelaide Brighton Cement Ltd* [2003] SAIRC 69.

More importantly, most of the Australian OHS statutes include provisions imposing duties upon employers and self-employed persons in relation to 'others', that is, persons other than employees. Although originally envisaged in the Robens Report as protecting members of the public, 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. The category 'others' or '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 other workers, government inspectors visiting business establishments and neighbouring members of the public.

For example, section 22 of the OHSa(Vic) provides that 'every employer and self-employed person shall ensure so far as is practicable that persons (other than the employees of the employer or self-employed persons) are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer or self-employed person.' Sections 8(2) and 9(1) of the *Occupational Health and Safety Act 2000* (NSW) (OHSa(NSW)) are similar, but specify that the duty only applies to non-employees 'while they are *at* the employer's [or self-employed person's] place of work.' The provisions in the *Occupational Health and Safety Act 1989* (ACT) (OHSa(ACT)) and in the Commonwealth OHS(CE)A are similar to the New South Wales provisions, but the qualification extends to areas at or near the workplace. Section 28(3) of the *Workplace Health and Safety Act 1995* (Qld) (WHSa(Qld)) provides that 'An employer has an obligation to ensure that persons are not exposed to risks to their health and safety arising

out of the conduct of the employer's business or undertaking,' and section 29 imposes a similar duty upon self-employed persons. Section 29A then provides that:

- (1) A person (the 'relevant person') who conducts a business or undertaking has an obligation to ensure the workplace health and safety of each person who performs a work activity for the purpose of the business or undertaking.
- (2) The obligation applies –
 - (a) whether or not the relevant person conducts the business or undertaking as an employer or self-employed person; and
 - (b) whether or not the business or undertaking is conducted for gain or reward;
 - (c) whether or not a person who performs a work activity for the purposes of the business or undertaking works on a voluntary basis.

Like the employer's duty to employees, the duties to non-employees are absolute duties, qualified by the concept of reasonable practicability (or a similar expression). Rather than being restricted to the employment relationship, the duties in Victoria, New South Wales, Queensland, the ACT and the Commonwealth that apply to non-employees are qualified by a nexus with the 'conduct of the undertaking'. Section 22 of the OHSWA (SA) and section 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)), rather than 'the conduct of the undertaking'.

The expression '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 (*R v Associated Octel Co Ltd* [1996] 4 All ER 846 at 851-852; *R v Mara* [1987] 1 WLR 87) as well as trading, and supplying and selling to customers (*Sterling-Winthrop Group Limited v Allen* (1987) SCCR 25). 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 (*R v Associated Octel*). Hansen J in *Delmina* (at 280-281) held that the expression 'conduct of the undertaking'

is broad in its meaning. ... 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. ... [The] word 'undertaking' should not be read as synonymous with 'workplace'. ... [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.

The application of the duty to contractors and sub-contractors was confirmed and illustrated by the House of Lords in *R v Associated Octel Co Ltd* [1996] 4 All ER 846. The Court held that if work conducted by a contractor falls within the conduct of an employer or self-employed person's undertaking, the employer or self-employed person is, under section 3 of the British *Health and Safety etc at Work Act 1974* (which is

virtually identical to section 22 of the OHSA(Vic)) 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. Lord Hoffmann (at 850-851) held that the provision imposes a personal and non-delegable duty upon the employer or self-employed person, and that the duty

‘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’, but must conduct the undertaking ‘in a way which, subject to all reasonable practicability, does not create risks to people’s health and safety.’

The importance of the wording of section 22 of the OHSA(Vic) and section 29A of the WHSA(Qld) becomes most apparent in relation to multi-tiered or pyramidal sub-contracting found in industries like clothing (see Nossar, Johnstone and Quinlan 2003), long-haul transport (see Quinlan 2001) and construction. Here sections 22 and 29A impose a hierarchy of overlapping and complementary responsibilities on the different levels of contractors and sub-contractors – that is employers, contractors and subcontractors at each level owe duties to all parties below them in the contractual chain. This reach is not achieved in the OHSA(NSW) where the duty is only owed to parties at the employer or self-employed person’s workplace, or in jurisdictions which rely on provisions which ‘deem’ contractors and their employees (but not their sub-contractors) to be employees.

The courts have also taken a tough approach to the implementation of the duty to employees and the duty to others. The duty is non-delegable and the employer is personally, not vicariously, liable under its duty to employees and non-employees (*Linework Limited v Department of Labour* [2001] 2 NZLR 639; *R v British Steel plc* [1995] 1 WLR 1356; *R v Associated Octel*; and *R v Gateway Foodmarkets Ltd* [1997] 3 All ER 78.) 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’ (*Inspector Schultz v The Council of the City of Tamworth trading as Tamworth City Abattoir* (1994-5) 58 IR 221 at 226-227. See also *Inspector Schultz v Leonard J Williams (Timber) Pty Ltd* [2001] NSWIRComm 286 at para 13; *WorkCover Authority of New South Wales (Inspector Yeung) v Thiess Pty Ltd* [2003] NSWIRComm 325 at para 40; *Sydney City Council v Coulson* (1987) 21 IR 477, following *Barcock v Brighton Corporation* [1949] 1 KB 339 at 343 *per* Hilbery J: but see *R v Nelson Group Services Ltd (Maintenance)* [1998] 4 All ER 331 (CA).)

It seems clear that in Victoria and Queensland the employer and self-employed person’s duty to others includes contractors, labour hire workers, home-based workers and franchisees (see Johnstone, 1999). We have already illustrated how contractors and sub-contractors will be covered. Labour hire workers will be owed a duty of care by both the labour hire agency (the employer’s duty to employees or to persons other than employees) and by the client (the duty to persons other than employees). The duties to non-employees in the other Australian OHS statutes will cover most contingent or precarious workers. In New South Wales, however, the duty not to expose non-employees to risks to their health and safety is *only* owed while they are at the employer’s workplace. This significantly limits the scope of the employer’s duty to contractors

carrying out work for the employer away from the employer's workplace, for example home-based workers, and labour hire workers. For example, it is arguable that consignors and clients owe duties to truck drivers under sections 8(2) and 9(1) only while drivers are *at* the consignor's 'place of work', and not once they leave the workplace. Labour hire workers who are not employees of the labour hire agency would not be owed a duty by the agency when they were at the client's workplace. Home-based workers who are not 'employees' would be owed no duty. As a consequence, where there is multi-tier or pyramidal contracting, these provisions have little impact., although, as discussed below, the geographical restrictions in the New South Wales. Similar limitations are to be found in the Commonwealth and Australian Capital Territory provision which limit the scope of the duty to persons at or near to the workplace.

The corresponding provisions in the South Australian, Western Australian and Tasmanian statute is not built around the concept of the 'conduct of the undertaking', and, consequently, may not have the reach of the Victorian and Queensland provisions (see further Johnstone, 1999).

A good example of the way in which the employer's general duty to employees covers labour hire workers is provided by *Drake Personnel Limited v WorkCover Authority of New South Wales (Inspector Ch'ng)* (1999) 90 IR 432 where a Drake employee was injured on an unguarded machine at the client's premises. Prior to placement Drake had shown the employee a training video, and provided her with an instructional booklet. Drake had also sent a field staff consultant to the client's premises to inspect the machine (which was properly guarded) upon which the employee was said by the client to be working, and going through the procedure she was to perform. The worker had been asked by the client to work on another, unguarded, machine, and had suffered an injury. The client had not told Drake that the employee would be required to work on that machine, and the field staff consultant had not been shown the machine when she visited the premises. Drake argued that it had taken all reasonable steps to protect the employee, and, having been shown by the client the machine that the employee was to work on, could not have been reasonably aware that she would be moved to another machine. Indeed, Drake argued that it had no knowledge of the existence of the machine upon which the injury had occurred. In upholding the Industrial Magistrate's decision to convict Drake, the Full Bench of the New South Wales Industrial Relations Commission accepted that the risk that Drake had to guard against was the risk that its employee would be instructed to work on an unguarded machine, and Drake's omission was a failure to require the client to notify Drake before transferring the employee to work on another machine.

The Industrial Relations Commission ((1999) 90 IR 432 at 455-56) stated that:

A labour hire company cannot escape liability merely because the client to whom an employee is hired out is also under a duty to ensure that persons working at their workplace are not exposed to risks to their health and safety or because of some alleged implied obligation to inform the labour hire company of the work to be performed. ... This obligation would, in appropriate circumstances, require it to ensure that its employees are not instructed to, and do not, carry out work in a manner that is unsafe. In the present case, it seems to us that this would require, at the very least, that the appellant give an express instruction to the client and its employee that it be notified before the employee is

instructed to work on a different machine. ... The labour hirer has a positive obligation under s 15(1) to directly supervise and monitor the work of the employee to ensure a safe working environment.

(See further, *Labour Co-operative Limited v WorkCover Authority of New South Wales (Ins Robins)* [2003] NSWIRComm 51).

The Victorian and Queensland provisions would appear to cover franchise arrangements. It is difficult to see how a franchisor in Queensland or Victoria could argue that contractual arrangements with a franchisee in which the franchisor licenses its business system for use by the franchisee is not part of the way in which the franchisor conducts its undertaking. Therefore a franchisor most likely owes a duty to a franchisee and the employees and contractors of the franchisee to ensure, as far as is practicable, that the system of work to be carried out by franchisees is safe and without risks to health.

In New South Wales, franchisors may, however, owe a duty of care to franchisees, persons employed or engaged by franchisees, and the clients or customers of franchisees by virtue of section 10 of the OHS Act (NSW). Section 10(1) provides that 'a person who has control of premises used by people as a place of work must ensure that the premises are safe and without risks to health.' Section 10(2) requires a 'person who has control of any plant or substance used by people at work' to 'ensure that the plant or substance is safe and without risks to health when properly used.' Section 10(3)(d) specifies that the duties in sections 10(1) and (2) only apply 'if the premises, plant or substances are controlled in the course of a trade, business or other undertaking (whether for profit or not) of the person.' These sections apply to persons who have even limited control over premises used as a place of work, but only extend to those matters over which it has control (see section 10(4)(a)). A person who has control of premises, plant or substances includes 'a person who has, under any contract or lease, an obligation to maintain or repair the premises, plant or substances (in which case [the] duty ... applies only to the matters covered in the contract or lease' (section 10(4)(b)).

The way in which section 10 may apply were illustrated in *WorkCover Authority of New South Wales v McDonald's Australia Limited and Another* (1999) 95 IR 383. McDonald's Australia Ltd had a franchise arrangement with a franchisee under which the franchisee operated a McDonald's Family Restaurant. A young worker employed by the franchisee was killed when he came into contact with an exposed inner core of a cable attached to certain kitchen equipment. The prosecutor alleged that McDonald's Australia had contravened section 17(1)(b) of the *Occupational Health and Safety Act 1983* (NSW) (the counterpart provision to section 10(2) in the predecessor of the current NSW Act) in that the franchisor had sufficient control over plant made available to persons who were not its employees at a place of work, and failed to ensure that the kitchen equipment was safe and without risks to health to the franchisee's employee. In particular, the franchisor had failed to ensure that the kitchen equipment was adequate for purpose in the way it was set up, had failed to ensure that the equipment was installed, and was used and operated, in a manner which did not give rise to risks to health and safety to persons using and operating the equipment. McDonald's Properties (Australia) Pty Ltd were the lessor to the chain of McDonald's restaurants, and leased the premises to the franchisee in this case. The prosecutor alleged that McDonald's Properties (Australia) Pty Ltd had

contravened section 17(1)(a) (the equivalent of section 10(1)) in that it had failed to provide adequately for and ensure the design, layout and specification of the premises, particularly the accessibility of power outlets to be used for the particular kitchen equipment, the installation of Residual Current Devices for each power outlet used for the kitchen equipment, the labeling of the power outlets and switchboard, and the suitability of the power outlet for the kitchen equipment in question. Both McDonald's Australia Ltd and McDonald's Properties (Australia) Pty Ltd pleaded guilty to the charges. This case shows that franchisors who exercise control over the franchisees operations owe duties to employees of franchises, and that franchisors, or persons associated with franchisors, who design, build or lease premises for use at work must properly consider safety aspects of those premises.

In conclusion, of the existing OHS statutory duties, particularly section 22 of the OHSA(Vic) and sections 28, 29 and 29A of the WHSA(Qld), impose flexible and wide-reaching duties on all persons (including employers) who engage any form of labour. Such duties are absolute (qualified by practicability) and non-delegable, so that, for example, labour hire agencies and clients using lease labour have overlapping (but not mutually excluding) duties to labour hire workers, whether they be categorised as 'employees' or 'independent contractors' of the labour hire agency. The provisions in the OHS statutes other than the OHSA(Vic) and the WHSA(Qld), however, may be limited in their reach by geographical restrictions (in New South Wales, the Commonwealth and the Australian Capital Territory) or by formulations of the duty which do not hinge around the "conduct of the undertaking" (see Johnstone, 1999).

4. Problems with existing regulatory framework for workplace arrangements

At workplace level the primary formal participatory mechanisms provided for under the Australian OHS statutes are employee health and safety representatives (HSRs) and workplace health and safety committees (HSCs). Depending on the jurisdiction, mechanisms include vesting the HSR with work group OHS dispute resolution procedures (for example, section 26 of the OHSA(Vic) and section 36 of the OHSWA(SA)), and, in New South Wales, the right of unions to initiate prosecutions under section 106(1)(d) of the OHSA(NSW) (see also Part 5 Division 3).

An example of provisions governing the election of HSRs is to be found in sections 29 to 36 of the OSHA(Vic), which set out procedures for employees to negotiate designated work groups with their employer, and then to elect a HSR for each designated work group. HSRs can request the employer to form a HSC for the workplace. Another is in sections 13-18 of the OHSA(NSW), which establish a series of requirements and procedures for consultation and employee participation that are further developed in clauses 21 to 26 of the *Occupational Health and Safety Regulation 2001*. For the relevant statutory provisions in the other jurisdictions, see Johnstone (2004, chapter 8). The centrality of participation is echoed in the guides, codes and other supporting documentation produced by all Australian jurisdictions. Consultation and active involvement is not only specifically provided for under legislation - it is widely viewed as an essential and effective means of improving OHS by regulatory authorities, unions, employers and other interested parties. Thus, a recent review of consultative

arrangements in South Australia undertaken by a tripartite committee (Consultative Arrangements Working Party, 2001) strongly endorsed participatory provisions in the OHS legislation of that state.

Downsizing, an increased temporary workforce, outsourcing, and the not-unrelated growth of small business have posed a number of problems for participatory mechanisms under OHS legislation. These problems are essentially of two kinds: those that reflect incomplete or inadequate legislative coverage of these emerging scenarios; and those resulting from operational difficulties with existing provisions — especially where the assumptions on which the original requirements were based no longer hold true.

The most obvious problem is that the statutory provisions for worker consultation and participation in OHS management are generally crafted around the traditional labour law paradigm. With a few exceptions, they couch the processes of negotiation for the election of HSRs in terms of ‘employees’ and their ‘employer’, and generally only ‘employees’ of the employer are eligible to stand for election as a HSR and to vote for the HSR (see Johnstone, 2004, chapter 8). For example, the OHSA(Vic) enables ‘employees’ to ask ‘the employer’ to establish designated work groups of ‘employees’ in respect ‘of the workplace’ (section 29), and then empowers group members to elect one of the group to be the HSR (section 30). Temporary workers can participate in these processes, as long as they are ‘employees’ of the employer in the legal technical sense, but contractors or labour hire workers working at the employer’s workplace cannot participate. It is far from clear that employee outworkers can be involved in these processes, because it might be argued that they are not employed at ‘*the* workplace’ (our emphasis). The WHSA(Qld) enables ‘the workers at a workplace’ to elect one or more HSRs for the workplace (sections 67-74). An independent contractor is excluded from the definition of ‘worker’ (see section 11), and therefore cannot be represented. A labour hire worker technically is not ‘engaged’ directly by the employer, and would appear not to be eligible to vote for a HSR. ‘Outworkers’ are usually engaged to work at home, and therefore would not be ‘at’ the workplace with their co-workers, and would also not be represented. Similarly, the OSHA(WA) (see sections 29 and 31) limits participation in HSR processes to ‘employees at a workplace’.

In those jurisdictions that ‘deem’ contractors and their employees to be ‘employees’ of the principal contractor (see above), these deeming provisions generally only operate in relation to the general duty provisions. An exception appears to be section 4(2) of the OHSWA(SA) in which the deeming provision would appear to operate throughout the Act. Part 4, which deals with HSRs and HSCs, limits the operation of section 4(2) in relation to Part 4 (see section 26) by specifying that for the purposes of Part 4, ‘employee’ does not include a self-employed contractor unless the work performed by the contractor is of a class prescribed in the regulations.

This failure to accommodate workers other than employees means that, for example, self-employed contractors working at that site and the employees of contractors working on-site are excluded from workplace arrangements, even if they are there on a long term basis. Labour hire workers have no rights to be represented in consultations between the host employer and host employees, and neither do contractors or sub-contractors (including those working at home or remote from the site on a regular basis).

An exception is to be found in the OHS(ACT), where section 39 enables principal contractors in the construction industry to request the commissioner to declare that the provisions pertaining to the negotiation of work groups and the selection of HSRs, their powers (except directions to cease work) and HSCs apply to principal contractors in the construction industry in relation to subcontractors' employees — enabling the construction site to be treated as one workplace under one employer. Similarly, section 44A of the WHA(NT) requires an employer employing more than 20 workers to establish a HSC within three weeks of being so requested by a majority of workers and provides that for the purposes of section 44A, where a principal contractor contracts with a sub-contractor for the execution by the sub-contractor of work undertaken by the principal contractor in the course of the principal contractor's business or trade, the principal contractor is deemed to be the employer of a worker employed by the sub-contractor in the execution of the work.

The need to consult part-time employees, temporary employees or those working at home on a full-time or regular basis is also generally ignored in legislative provisions (see for example sections 13 to 18 of the OHS(NSW)). In most cases this problem does not appear to have been addressed in regulations and codes supporting the legislation. However, this is not the case in New South Wales where clause 23 of the *Occupational Health and Safety Regulation 2001* (see WorkCover NSW 2002) does require these issues to be taken account of in setting up a workgroup. In particular, clause 23(2) requires that consideration be given to:

- The hours of work of employees, including the representation of employees on shift work;
- The pattern of work of employees, including the representation of part-time, seasonal or short term employees;
- The number and groupings of employees;
- The geographic location where employees work, including the representation of employees in dispersed locations such as transport work or working from home;
- The different types of work performed by employees and the different levels of responsibility;
- The attributes of employees, including gender, ethnicity, age and special needs;
- The nature of OHS hazards;
- The interaction of the employees with the employees of other employers (including contractors, labour hire etc).

Further, the New South Wales *OHS Consultation Code of Practice 2001* (WorkCover NSW 2001), at 2.4.2 in relation to the Duty to Consult, under the heading *Facilitation of Consultation*, states;

The employer (**who we will call Employer 'A'**) must facilitate the OHS consultation arrangements of another company (**Employer 'B'**) where the employees of Employer 'B' are working at the place of work of Employer 'A' [Reg: 27(1)(h)]. Employer 'B' might include for example, a contractor or labour

hire company. How Employer 'A' could facilitate the OHS consultation arrangements of Employer 'B' will vary. It will depend on the nature of their business and the number of contractors. In the example on page 12, Smith Manufacturing is Employer 'A' and Brown Labour Hire is Employer 'B'. The employees of Brown Labour Hire based at Smith Manufacturing elect an OHS Representative from themselves as the OHS consultation mechanism for Brown Labour Hire. To facilitate consultation between the management of Brown Labour Hire and their OHS Representatives, Smith Manufacturing provides a meeting room and assists arranging a suitable meeting time that minimises disruption to production. They also provide OHS Representatives with telephone and email access to assist communication with Brown Labour Hire management about OHS concerns. In a place of work that has many subcontractors, such as a construction site, Employer 'A' obligation to facilitate the OHS consultation arrangements of Employer 'B' might extend to establishing a consultation mechanism that enables communication and consultation about OHS matters between subcontractors and their employees. To determine the most effective way to facilitate the consultation arrangements of Employer 'B', Employer 'A' should consult with Employer 'B' in relation to:

- The most effective way for ensuring OHS information is communicated to all people working at the place under the control of Employer 'A'.
- The most effective way for ensuring that all employees are consulted in relation to risks to their health, safety and welfare as a consequence of work being undertaken by all employees at the place of work.

Principal contractors in the construction industry should be aware they have specific obligations to provide information to employees of subcontractors or their representatives under clause 226 of the OHS Regulation. Employer 'B' should advise employer 'A' prior to commencing work how consultation with Employer 'B's employees is proposed to be undertaken. If an employee has an OHS Committee or OHS Representative, the employer must consult about the relationship between their workgroup(s) and the representatives of a workgroup of another employer [Reg: 22(2)(i)].

It is not clear to what extent unions, workers and employers are conversant with these requirements or whether WorkCover inspectors are actively monitoring compliance with them.

Contingent work has other less apparent effects on participatory mechanisms. A growth of smaller workplaces due to downsizing and outsourcing will presumably mean fewer workplaces meet the legislative threshold in some OHS statutes for the establishment of HSR and HSC arrangements. For example, there must be 20 employees before a HSC must be established and more than 10 for an HSR to be elected under the WHSA (Tas) (see sections 26 and 32 respectively), and a threshold of 10 employees for the HSR provisions in OHSA(ACT) to operate (see section 36). In Queensland, unless otherwise prescribed, only workplaces with 30 or more workers are subject to the requirements for the appointment of Workplace Health and Safety Officers (see WHSA(Qld), section 93). In some jurisdictions this threshold is established law in terms of the minimum number of employees employed at the worksite before a HSR can be elected or a HSC established.

This can also occur in a de facto sense where the relevant OHS statute specifies that HSCs can be established following recommendation of the employee HSR because smaller and less unionised workplaces are less likely to have a HSR.

Particular categories of workers, such as home-based workers including some teleworkers, have difficulty participating in the formation of, or accessing, HSCs or HSRs established at workplaces remote from where these workers work. Further the ignorance and vulnerability of such workers makes it far less likely these workers will exercise the other basic 'participatory' mechanism found (if not formally enunciated) under virtually all OHS legislation, namely the right to report OHS concerns to their employer or the regulatory agency. For example, some research into downsizing (see for example Saksvik, 1996 and Daykin, 1997) found threats to job security and an overriding climate of cost control discouraged workers from taking sickness absence, joining health promotion, reporting OHS problems or taking part in HSCs (for similar findings in relation to contingent workers see Aronsson, 1999). Quinlan's (2003) research made similar findings. For example, in one large bank undergoing restructuring employees were reluctant to raise OHS issues that might have cost implications. Other factors may also play a part. As noted earlier, a Canadian study of teleworkers found they were reluctant to report health and safety problems for fear this would jeopardize their right to work at home (Tremblay 2001 and Montreuil and Lippel 2003).

A critical question is the extent to which the presence of a large proportion of contingent workers may discourage the establishment of a workplace HSC even where OHS legislation formally mandates their establishment. It does not appear that this issue has been subject to systematic investigation. While some jurisdictions may record instances where inspectors have identified a workplace where a committee was required but absent the precise extent of this problem needs to be investigated. Australian Workplace Industrial Relations Survey (AWIRS) data for 1995 provides some indirect evidence of the impact of contingent work arrangements on participatory mechanisms. This revealed that 47% of workplaces with between 0 and 25% part-timers had joint consultative committees (including workplace HSC) compared to just 30% of workplaces where more than 25% of the workforce was part-time (Markey et al, 2002). At the same time, there was little difference between these workplaces in terms of the extent to which OHS matters were raised (52 and 53% respectively - the single most important matter discussed in consultative committees). While doubts can be expressed as to whether part-time workers can be regarded as contingent unless they are also casual/temporary it needs to be noted that the degree of overlap is substantial in Australia (ie around two thirds of part-timers are also casuals). It is difficult to draw more from this data (unfortunately AWIRS was not repeated after 1995) than to say the presence of large numbers of part-timers in a workplace is not conducive to the establishment of consultative committees and therefore warrants further investigation to identify ways of remedying this.

Perhaps the clearest recognition of the problems just raised and the more subtle effects of contingent work arrangements on participatory mechanisms is to be found in a investigation of this issue and subsequent report prepared in South Australia by the Consultative Arrangements Working Party (2001, 21) which observed:

Participants reported that casual, part-timers, temporary and contract workers tended to be excluded from OHSW consultation and participation processes. Contributing to

this was the difficulty in providing training and induction at short notice. Participants suggested that contractors and other temporary employees are not part of the culture of the organisation. It was reported that in some industries, temporary staff are often rostered on shifts where there is no HSR, or other responsible person who can provide induction or other training. This, coupled with the lack of permanency of these workers, means that they have no access to consultative processes.

The outcome of this, as participants reported, is that these workers were seen to cause 'gaps' in the OHSW system. Their activities are regarded as outside of the organisation's normal procedures for control of OHSW issues. As one person put it, *'Contractors would get away with whatever they could if the company didn't enforce it. They don't care about OHSW. They just want to get the job done and get out of there.'*

Given the increase in part-time, casual and contract work in South Australia, it is important to include these workers in OHSW consultation and means of achieving this need to be addressed.

Another crucial aspect to worker involvement is the right to know about OHS issues relevant to their workplace, the right to be consulted about significant changes affecting that workplace (irrespective of whether a HSC or HSR are in place), the right to raise issues of concern with employers, and the right to refuse dangerous work. In most jurisdictions OHS legislation requires the employer to provide their employees with OHS information including their legislative rights and entitlements (see Johnstone 2004, chapter 8). As far as we know, there have been few, if any, attempts to measure compliance with these requirements. The situation with regard to temporary workers may be especially critical along with whether, and under what conditions, such information should also be provided to subcontractors.

Further, such workers might feel intimidated by the possibility of losing their jobs if they raise OHS issues (see Aronsson, 1999, and see also Industry Commission, 1995, Vol II, 510; Warren-Langford *et al* 1993, 596 and 604, Quinlan, 2001, Consultative Arrangements Working Party, 2001 and ACTU, 2002). A recent case Victorian highlights this issue (*CCH Australia OHS Alert* 9 September 2003). On 29 July 2003 Victorian transport company Boylan Distribution Services was convicted under section 54 of the OHSA(Vic) (which prevents an employer from dismissing an employee who makes an OHS-related complaint) in the Sunshine Magistrates Court (and later fined \$30,000 plus \$12,500 costs) for terminating the employment of a casual truck driver who refused to drive a B-double with faulty brakes. A mechanic had placed a 'Do Not Use' sign on the trailers and had told the man that the brakes needed work. When he refused to drive the truck, the man's supervisor told him to 'F**k off home'. The next day he was told his services were no longer required. This case received widespread publicity not because complaints about this sort of intimidatory behaviour were especially new or novel but because the prosecution was seen as novel. As noted in an earlier inquiry into the trucking industry, drivers might well be reluctant to make such complaints for fear they would jeopardize future employment prospects in the industry (Quinlan, 2001). The extent of these problems in trucking and other industries has not been investigated but clearly contingent and precarious workers are in a more vulnerable position, and workers

who are not technically ‘employees’ would not be protected by provisions such as section 54 (see further Johnstone, 2004, chapter 8).

Leased workers are in an especially vulnerable position because the host employer need not give a reason for asking for a worker to be removed and the labour hire firm may be reluctant to pursue the issue (even if it becomes aware of the underlying reason) for fear of losing a client. Further, a number regulators and others (including employers) interviewed in Quinlan’s (2003) research indicated that some industries and employers were using labour leasing as a form of probationary employment – a situation that is likely further inhibit the reporting of problems. These inhibitions are likely to extend to the use by contingent workers of the right to refuse dangerous work. There is no dedicated research into the extent of these problems in Australia. Research elsewhere indicates the exercise of these rights is problematic even for relatively secure workers, with a Canadian study of arbitrated decisions where workers had been disciplined for refusing unsafe work concluding the right was highly circumscribed by courts and generally seen as subordinate to the employer’s right to manage (Harcourt and Harcourt, 2000). In a recent study (Quinlan 2004) into changing work arrangements in Australia the particular inhibitions on contingent workers raising OHS issues was repeatedly referred to by regulators in most jurisdictions, with one typical observation being :

...the other thing is what happens if a casual worker or a labour leased worker in a host employer says “oh this thing’s not safe here, I want to get this thing fixed.” All of a sudden the consultant for the labour hire firm turns up and says “you’re not required here anymore. You’re finished and don’t come back.” They’ve had a call from the host employer (to say) they’re just not wanted...There’s a fellow I spoke to from a labour leasing firm who went to a host employer, he was a boilermaker and they gave him a grinder that had a ‘danger-out of service’ tag on it and he said “I can’t use that one” and the (manager) ripped the tag off and said “well there’s nothing wrong with it now.” These sorts of stories keep emanating from industry.

The effectiveness of participatory mechanisms depends not only on the formal requirements under OHS legislation but also on the infrastructure upon which these mechanisms to varying degrees rely. For example, by and large the training and logistical support for HSRs are provided by unions and they also play a more indirect role in workplace HSCs (Bohle and Quinlan 2000, 305-309). It is fair to say that as a product of the early 1970s the Robens Report, which served as the model for OHS legislation in the UK and to a significant extent also in Australia, presumed a level of union membership and influence to make participatory mechanisms work. A overall decline in union membership density over the past 20 years, partly the product of changing employment relationships and less favourable industrial relations legislation (less so in New South Wales than some other jurisdictions), has effectively weakened this infrastructural support both at a general level and, especially in relation to some categories of contingent work such as subcontractors and temporary workers (where union membership levels are on average far lower than for non-contingent workers). There is evidence both in Australia and elsewhere to indicate that union presence affects the willingness of workers to raise OHS issues (see Bohle and Quinlan 2000, 456-457). Recent Swedish research (Sverke and Hellgren 2001) points to a connection between union membership,

organisational commitment and the ways insecure workers express their dissatisfaction, most notably a preference for non-unionised workers to choose an ‘exit’ strategy.

Any legislative reforms seeking to bolster the relevance of OHS workplace arrangements to contingent and precarious workers clearly need to take account of the decline in membership, power and influence of trade unions. At the same time, however, there is no reliable evidence of the effectiveness of arrangements to represent workers’ interests in OHS in which trade unions are not involved in a supportive and enabling capacity. This is as true of the emerging work scenarios described above as it is of more traditional employment relations models.

Therefore, perhaps what is required are provisions that help to encourage and support the ability of organized workers to build effective representation for themselves and at the same time to extend such representation to reach those workers to whom, for the various reasons already described, it is increasingly denied. This of course also implies that trade unions will seek to develop strategies to strengthen their own role in worker representation on OHS (see for example, the 2003 ACTU Congress *Occupational Health and Safety Policy*, especially section 3, entitled “Making Health and Safety Representatives the Focus”). It is worth noting that in this respect the role of OHS issues in trade union strategies for their renewal is largely unexplored in the burgeoning international literature on this subject.⁴ Since OHS is a relatively peripheral issue in the academic industrial relations research and writing in which the debate on trade union renewal has been located, it is not clear whether the apparent absence of a prominent role for OHS representation in trade union renewal reflects a case in which trade unions have yet to recognize the potential significance of developing new strategies for worker representation in OHS, or whether it is simply that researchers themselves have not investigated this issue.

5. Ways forward

There would seem to be essentially two important considerations to take into account when considering the way forward for the legislative regulation of joint arrangements for OHS. The first is change that has taken place in structure and organisation and labour relations contexts of the work situations to which they apply. It needs to be asked whether present provisions continue to be relevant or whether revision (or the introduction of entirely new provisions) is necessary. However, a second consideration is that is also important is to establish the extent to which measures have been effective, to identify the situations in which they work best, and also to identify how they may be improved to address known *existing* deficiencies. This is important because regardless of the change that has taken place in the situations to which the legislation applies; it is far from certain that all the legislative provisions were ever entirely effective anyway. Thus, there is already evidence suggesting that existing measures — on such matters as training, rights to issue notices, to receive information, engage in risk assessment, to be consulted prior

⁴ See for example, Gall (2003), Fairbrother, (ed) (2002), Gospel and Wood (ed) (2003)

to workplace change that might affect OHS and to liaise with inspectors and OHS professionals — are inadequate or insufficient in content or coverage.

There is sufficient evidence to infer that strengthening regulatory provisions on worker representation would improve the work environment (James and Walters, 2002). Underpinning strategies to improve worker representation in OHS is the necessity of reforming OHS statutes to enable *all workers* engaged in the conduct of a firm's undertaking to be:

- involved in negotiating processes for electing HSRs and constituting HSCs,
- involved in participating in such processes, and
- represented by HSRs and HSCs.

For example, participants in the negotiation of HSR and HSC processes, in the election of HSRs (and where necessary, the membership of HSCs), and workers who are represented by both HSRs and HSCs might be defined as including all members of the firm's 'workforce', being all individuals who are engaged in the conduct of the firm's undertaking, whether as an employee of the firm or of another persons, or as a contractor of the firm or of another person, and regardless of whether the person actually works at the firm's premises.

Since measures based around notions of designated work groups may be limiting in extending representation to workers who fall outside them it may be worth questioning the value of such designation in practice. At the same time it could be useful to consider alternative approaches. In many European systems for example, legislative measures do not specify designated work groups for representational purposes. Instead they limit themselves to general requirements on representation in which the detailed matters of defining the constituencies of representatives are left to be resolved under local arrangements. Such approaches do not seem to have resulted in major operational barriers for representation.

The widespread concern about the adequacy of representation for contingent and other workers in for example, multi-employer worksites clearly needs to be addressed. It is possible this could be done though wider use of approaches such as found in the Australian Capital Territory and recently adopted in New South Wales in which regulations require the need to consult part-time, temporary and home working employees to be taken into account when setting up work groups. The reforms outlined above might be fleshed out by provisions resembling section 39 of the OHSA(ACT) and section 44A of the WHA(NT), discussed above, which enable the HSR and HSC provisions to be applied to contractors and their employees. These provisions could be expanded to include the other types of workers listed in section 2 of this paper.

Further, there is also a strong case for placing new and more embracing responsibilities about consultation processes on employers in charge of multi-employer worksites

involving subcontractors, leased labour and the like. Such reforms should include provisions based on the New South Wales *Occupational Health and Safety Regulation* 2001 clause 23(2) and section 2.4.2 of the New South Wales *OHS Consultation Code of Practice - the Duty to Consult*, *Facilitation of Consultation* provisions discussed earlier in this paper. These provisions address the co-ordination of worker participation where contractors are involved.

However, while these approaches may offer solutions in ideal cases there would seem to be several generally problematic aspects with applying current Australian work group and 'deeming' approaches to these fragmented work situations. For example, in the case of 'deeming' it is necessary to address not only the problems of access to representation and rights to make representations but at the same time to ensure that the contractual health and safety obligations between client, main employer, contractor and sub-contractors and between them and their respective workers are maintained. There is also a danger that while 'deeming' workers to be employees of the main employer for purposes of representation would work in situations in which small sub-contractor workforces are operating on premises/work-sites where the main contractor/employer is a large and well organised workforce with strong joint health and safety arrangements, such situations are not necessarily the general rule. There are many instances in which subcontractor employees may be quite numerous in comparison with those of the main contractor or employer. There are situations in which main employer/contractor workers may be relatively poorly organised and where they lack the capacity for better organization. There are also situations in which subcontractors are not only numerous but extremely varied in the trades and activities (and hence risks to their workers) in which they are involved in comparison with the main employer/contractor. In all these situations extending 'deeming' arrangements for representation may turn out to be both limiting and inadequate in addressing the realities of workers' OHS experience and organisation.

Relatedly, the representational needs of workers in small enterprises are of great concern. In some situations such small enterprises and their workers may be engaged in contracting work in the scenarios described above. In other situations they may be separate economic entities but with economic dependencies on larger client or supplier organizations. In still other situations such economic dependencies might be considerably more remote. In all cases however, the need for workers' representation on health and safety is important and frequently problematic as a consequence of the 'structures of vulnerability' with which workers in such enterprises are surrounded (see Nichols 1997 and also Walters 2001). There is no evidence to suggest that the size restrictions on the rights to representation that are imposed in many jurisdictions in Australia and also internationally, have any justification in practice and there is a strong ethical case that they serve to promote inequalities at the workplace. Consequently, we argue that these size restrictions should be removed.

Further, there is a demonstrable case for:

- improving representatives' access to workplaces and workers – especially in relation to small enterprises, contractor and sub-contractor and agency workforces;
- providing all worker representatives with powers, such as rights to intervene in situations of serious and imminent danger and to take action in disputed situations or in the face of uncooperative employers;
- ensuring that these provisions extend to representing workers' interests on issues of work intensity, work organisation and working time, all of which can increase the risk of ill health;
- enabling representatives to be more involved in risk assessment and advanced planning of measures affecting the work environment;
- enabling representatives to exercise rights to time off for training and to ensuring that the training they receive is appropriate and sufficient to meet their on-going needs
- better regulatory support for relations between HSRs and workers members of HSCs and OHS inspectors and practitioners;
- demanding that regulatory inspectors are more engaged with ensuring the proper operation of worker representation in all workplaces; and
- requiring employers to use competent preventive services and involve worker representatives in decisions concerning their use.⁵

These changes would help to address the problems identified in the previous section. The original conceptualisation of the legislation on worker participation and consultation was enabling and constitutive. That is, measures were envisaged to provide a clear message to employers concerning their obligations in the labour relations of OHS. They established basic institutions of worker representation via joint HSCs and HSRs and provided rights to information and consultation on OHS, thus helping to establish the basic floor of rights on which organised workers could build. While the more prescriptive elements of the provisions detail measures on such things as the designated workgroups to which they apply, information and facilities for representatives and committees, inspections and investigations and in some cases rights to issue notices and stop work as well as arrangements for training, there is very limited involvement of the responsible regulatory agencies in their enforcement. This is also true internationally, where it is well documented that such measures are enabling in the sense that they are largely based on assumptions concerning the abilities of their beneficiaries to achieve their operation in practice. Indeed, on their own, legislative measures provide little more than a framework

⁵ See Walters 2003 for a detailed account of the reasons for such change.

and stimulus for the activities of organised workers. They are therefore only one element of the supports for effective participation.

It is necessary to recognize this, especially in relation to the observations on the role of trade unions in OHS at the end of the previous section — that is, enabling rights are important if other factors are in place which allow such enabling rights to effectively ‘enable’. If such factors are not present then enabling rights benefit no one. This has been amply demonstrated for example by the case of the *Health and Safety (Consultation with Employees) Regulations 1995* that were introduced in the UK to achieve compliance with European Union requirements by extending consultation rights to all employees, not just those in unionized workplaces. The Regulations allowed employers such discretion in the means they chose to use to consult with workers on OHS that, in operational terms, their provisions on the election and rights of employee HSRs were rendered quite meaningless (James and Walters 1997).

Nevertheless, legislative measures are important and it is clearly necessary that they are relevant to the wider contexts of relations between workers, their managers and employers and that they are responsive to changes in these contexts. Elements that are enabling and constitutive therefore probably need to exist alongside other more prescriptive provisions. However, it is important that their formulation is both relevant and balanced. Excessive and specific prescription is likely to lead to situation in which the prescribed measure becomes a limiting factor when the circumstances for which it was intended change. Thus, in the case of designated work groups for example, it is arguable that in the changed work scenarios of multi-employer worksites, specifying designated work groups for representational purposes could act as a barrier to representation for many workers that fall outside such groups. In most European Union countries for example, such designation is not normally present in legislation. At the same time, more general enabling provisions that do not specify requirements on such things as information and training rights for example, risk being implemented at minimal and inadequate levels in situations where duty holders are ill-informed, lack the will and capacity to introduce better standards and where organised labour has insufficient capacity to demand them, as international evidence amply demonstrates.

As we have already shown, changes in the way in which work is structured and organised means that legislative provisions that were based on assumptions concerning the relations between workers, their representatives and management in large, relatively stable organizations will have limited relevance to the fractured and casualised situations currently found in increasing numbers of workplaces. We therefore need measures that address the realities of these situations and are able to promote effective worker representation on OHS issues in these contexts.

European studies on ways of stimulating and sustaining OHS arrangements in small enterprises point towards the beneficial effects of legislative measures for roving or regional health and safety representatives that are organised by trade unions such as is currently the case in Sweden, Norway and Italy, and under discussion in several other EU countries including the UK (see for example Frick and Walters 1998, also Walters 2002).

In Sweden legislative provisions for regional health and safety representatives (RSRs) have been in existence across all economic sectors since the *Work Environment Act* 1974 (in sectors such as construction and forestry since an earlier Act in 1949). They provide for the appointment of RSRs to represent workers in firms with less than 50 workers where there is at least one trade union member. The RSRs have rights of access to such workplaces and similar rights to investigation and inspection that are held by ordinary health and safety representatives in Sweden. As defined by the legislation the RSRs tasks are threefold:

- to act as itinerant safety representatives who inspect and investigate occupational health and safety conditions in small enterprises, and request such changes as they consider necessary to achieve improvements in the working environment;
- to promote employee participation in occupational health and safety, including the recruitment, training and support of in-house health and safety representatives;
- to activate local health and safety work, within the overall framework for systematic management of the working environment in small enterprises.

The scheme was originally funded from a worker protection contribution paid by employers, although in recent years this contribution has fallen far short of the cost of the whole scheme and the remainder is provided for by the trade unions. The scheme has been the subject of considerable international interest and is generally regarded as successful. It serves as the basic model on which most of the legislative measures on the subject adopted in other countries have been based.

In Norway for example, similar arrangements have been in place since 1981. Two essential differences however, are that the Norwegian arrangements only apply to the construction industry and not more widely as in Sweden and regional representatives only operate in workplaces without local representatives. Whereas, in Sweden RSRs not only help with the appointment of local representatives, but also remain as a source of support for them after their appointment.

In Italy measures allowing trade unions to appoint territorial representatives were included in the general reforms on legislation on worker representation in health that were introduced by Law 626 which came into force in 1997. For enterprises operating in the same industrial district and employing less than 15 workers, territorial representatives may be nominated or elected according to procedures for trade union representation determined by collective agreement. The effect of this is that in some sectors such as construction, crafts, and hospitality — especially in northern Italian regions — sectoral agreements between employers and unions provide detailed arrangements for the operation of the legislative provisions. A further support for the system, also provided for under Italian legislation is the creation of a national network of '*ente bilaterale*' These are joint trade union/employer bodies that act to support and promote initiatives on representation in OHS. They are also intended to be the first point of reference in cases of dispute on rights to representation, information and training that are defined in the law.

The essential legislative requirement of all these systems is one that gives workers in small enterprises the rights to representation on OHS and provides rights of access to such workers for HSRs from outside their workplaces. Beyond this, there are a variety of other provisions concerning the resourcing of the schemes, the means of selection of representatives and their functions and support that vary from country to country and sometimes appear as legislative measures and sometimes as voluntary arrangements.

These are the main issues that must be addressed if legislative requirements are to relate to problems created by the changing structure and organization of work. At the same time however, as we have previously noted, we cannot ignore the related issue of the effectiveness of existing provisions, since there would seem to be little point in extending measures that don't work to situations in which they are likely to work even less well. For example, risk assessment/evaluation is widely regarded as one of the operational corner stones of systematic OHS management, such as demanded by regulation in Australia and the European Union. Under the terms of the regulations, such management of OHS is expected to be not only systematic but also participative. Yet there is widespread evidence of the limited involvement of worker representatives in risk assessment. If consultation occurs at all it is usually at best consultation on the results of risk assessment rather than engagement with its planning and operation (Walters and Frick 2000). Similarly, relations between HSRs and inspectors and OHS practitioners are theoretically supposed to be quite close in participative approaches to self-regulation of OHS management. However, in practice in Australia (as in countries such as the UK) they are often quite distant or not at all, and tend to be reactive rather than proactive. This is in contrast with practice in some other EU countries such as in Sweden, Denmark, Germany and France, where evidence suggests that relations are closer and more proactive. Although this is partly explained by different models of regulation and labour relations, it is also the case that in all these countries legislative requirements concerning the relationships between employers, inspectors, OHS practitioners and worker representatives are both clearer and more prescriptive (Walters 2003).

Another major area of concern in relation to the effectiveness of worker representatives in OHS in Australia is their access to good quality training. There is a large body of evidence showing quite convincingly that well-trained representatives are effective in improving OHS (Walters *et al* 2001). This is likely to remain true whatever is the form of employment and labour relations in which worker representation in OHS occurs. However, Australian provisions on training for health and safety representatives are generally both limited in relation to both the quantity and quality of the training they prescribe when they are compared with other measures such as those found in British or Scandinavian legislation for example.

The way forward for legislative improvement to worker representation in Australia would therefore seem to rest on finding an effective balance between enabling, constitutive and prescriptive measures that addresses both the inherent inadequacies of the existing provisions as well as the challenges that are created by the new forms and organization of work. While the need for reform is evident there are nevertheless significant questions about what works best in achieving this balance. More research is needed to help to

understand these questions of achieving effective OHS representation of workers in emerging labour relations scenarios. However, whatever regulatory changes are eventually introduced, such evidence that exists suggests that they would be best aimed at providing a support for trade union representation of workers' interests in health and safety – not a substitute for it.

6. Conclusion

During the past three decades there has been a significant transformation of work arrangements in countries like Australia, characterized by a relative decline in permanent/secure full-time employees and a commensurate growth in short-term contract, casual and other contingent work arrangements. This shift poses a significant challenge for OHS legislation that was designed on a presumption of employment relationships and a level of unionization that are now no longer the norm. In particular, these changes undermine the mechanisms for worker involvement that were a critical component of post-Robens legislative reform in Australia and many other countries and which have been shown to be important in achieving tangible improvement in health and safety outcomes. This paper has highlighted the extent of these deficiencies, including the virtual exclusion of subcontractors, the self-employed and leased workers, from participatory mechanisms (notably workplace health and safety committees and being represented by HSRs). There is also evidence that the involvement of temporary employees and home-based workers (who are employees) in workplace committees is problematic even though they are not formally excluded by legislation. Further, it was noted that declines in union membership had weakened the logistical infrastructure for effective worker involvement, especially in industries and workplaces where insecure or contingent work arrangements are pervasive.

The paper then explored a number of ways of remedying these deficiencies, including revising general duty and participation provisions and associated codes and regulations; and developing new forms of representation. It has argued that new and more embracing responsibilities on consultation should be aimed at employers in multi-employer worksites and it suggests that the *WorkCover NSW OHS Consultation Code* may be a good example of one step in this direction. It points out that while the original measures on worker representation and consultation established a useful floor of rights, they were based on assumptions about the structure and organization of work as well as about the power of trade unions which no longer apply in the changed world of work we describe in the early part of the paper. As these changes appear to have negative consequences for both the health and safety and the representation of the increasing number of workers that experience them, we argue that measures on representation and consultation are in need of revision. We suggest for example that existing Australian measures on 'deeming' and qualifications in relation to 'designated work groups' may be both limiting and inadequate in addressing the realities of supporting representation on health and safety in a changed world of work. Moreover, we note that issues of representation on health and safety for workers in small enterprises strongly overlap with those in the other increasingly fragmented and precarious employment situations that we have described. Importantly, we have derived several further observations from this. First that there is

some evidence that representing workers' interests in small enterprises through the use of mobile representatives from outside the enterprises such as is the case in a number of European countries does lead to improved health and safety arrangements in the enterprises concerned. Second that legislative support for such representation is one of the factors that enhances both its coverage and effectiveness of workers as can be demonstrated in countries such as Sweden and Italy where such provisions exist and can be inferred from the limited and partial nature of both coverage and effectiveness of voluntary measures in countries in which they are the norm. Conversely, measures that exempt small enterprises from legislative provisions on health and safety and/or worker representation do nothing to support the improved health and safety outcomes in these firms. Furthermore there is a strong argument to suggest that such measures are in fact discriminatory and promote inequality at work.

Suggestions about the need for new and innovative regulatory approaches to address the unfavourable situations that are a product of the new structure and organization of work does not imply that existing measures have been entirely successful in dealing with the situations for which they were intended. We have noted that on some issues such as for example, training, issuing notices, risk assessment and consultation in advance of change there is still some way to go before such measures can be claimed to be fully operational — even in traditional workplaces. We have suggested that discussion of regulatory reform needs to take this observation into account alongside those we have made concerning the new situations of work.

This account has been specifically focused on regulatory reforms that could address current weaknesses in the Australian situation. However, it should be clear that there are similar challenges in most advanced market economies. This means there is much more to be learned from international comparative analysis of both regulatory and non-regulatory strategies in this field.

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