

Working Paper 34

Regulating Occupational Health and Safety in a Changing Labour Market

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- facilitate the integration of research into OHS regulation with research findings in other areas of regulation;
- produce regular reports on national and international developments in OHS regulation;
- develop the research skills of young OHS researchers; and
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Introduction

As many labour law scholars have pointed out (see, particularly, Collins 1990, Bennett 1994 and Howe and Mitchell 1999 and O'Donnell in this volume), labour law, particularly from the mid-twentieth century until recently (Howe and Mitchell 1999, and Johnstone and Mitchell 2004) assumed that its scope is the regulation of employment relationships (typically full-time and permanently, in the sense of indefinite duration), with the contract of employment as the pivot, and that an employer is a single (usually corporate) entity (see Deakin 2001), with considerable freedom to determine the limits of its boundaries, and responsible only under the principles of agency and vicarious liability.

This model of labour law also underpinned occupational health and safety (OHS) regulation, apart, perhaps, from the provisions regulating construction safety. Based on the British Factories Acts which were first enacted early in the nineteenth century (see Gunningham 1994, chapter 2, Creighton 1979, 19-26, Johnstone 2004, 34-45), and in force until the Robens-inspired statutes of the late 1970s to early 1990s, Australian OHS legislation regulated factories (which generally were defined as manufacturing establishments employing four or more persons (*Factories, Shops and Industries Act* 1962 (NSW) section 4; and see Merritt 1983, 122); focused on 'hardware' such as machinery, and limited 'health' matters such as ventilation, flooring, overcrowding and lighting; relied on detailed, technical specification standards which told employers exactly what safeguards to adopt, and covered the employer's and factory occupier's duties to employees (see, for example, *Factories, Shops and Industries Act* 1962 (NSW) and the *Construction Safety Act* 1912 (NSW); *Labour and Industry Act* 1958 (Vic); *Factories and Shops Act* 1960 (Qld), *Inspection of Machinery Act* 1951, and *Factories and Shops Act Rules*; *Factories and Shops Act* 1963 (WA) and regulations, *Machinery Safety Act* 1974 (WA); and *Industrial Code Act* 1967 (SA) and *Industrial Safety Code Regulations* (SA)).

From the late 1970s in Australia, and particularly during the 1980s, Australian OHS legislation was significantly reformed (for details, see Johnstone 2004, 63-87). For the purposes of this paper, the most significant changes in the reformed OHS statutes were the introduction of general duty provisions (the content of which was based largely on the common law negligence standard of care) (see Bluff and Johnstone 2004), including duties on employers and self-employed persons to ensure the OHS of persons other than employees, and provisions enabling 'employees' to have health and safety representatives, and to participate in health and safety committees. While this model is largely based on the twentieth century assumption that labour law is the regulator of employment relationships, in the provisions imposing general duties on employers and self-employed persons in relation to persons other than employees – introduced ostensibly to protect 'the public' from workplace hazards (Robens Report, 1972, paras 175, 176 and chapter 10 (especially 290 and 294-7) – there was the potential to interpret the duty as applying to workers other than employees.

As earlier papers in this conference have suggested, this reformed model soon confronted rapid changes to work organisation in Australia, driven by organisational restructuring, and greater resort to outsourcing, elaborate supply chains and management techniques

such as labour hire and franchising (Quinlan 2004, 120). These changes have largely resulted in more flexible or less secure forms of work, including the growth of part-time, temporary (or casual) and fixed term contract employment; the use of labour hire (or leased) workers; home-based work and telework; and increased use of self-employed contractors and franchise arrangements (see Burgess and De Ruyter 2000; Quinlan 2004, 121-122; Johnstone, 2004, 115-116). The worker may work for more than one person, occasionally it may be unclear who is the employer or principal, and the worker may be working away from the employer or principal's workplace.

There is now an extensive body of research showing the detrimental impact that contingent and precarious work has on the OHS and well being of workers engaged in those arrangements (see Quinlan, Mayhew and Bohle 2001a and 2001b and Quinlan 2004, 122-124). For example, the very same competitive pressures that induce firms to engage contingent or precarious work arrangements also encourage underbidding on contracts, cheaper or inadequately maintained equipment, reductions in staff levels, faster production, longer work hours and other forms of corner-cutting on OHS. These work arrangements, especially when they introduce third parties and/or create multi-employer worksites lead to fractured, complex and disorganised work processes, weaker chains of responsibility and 'buck-passing', and inadequate specific job knowledge (including knowledge about OHS) among workers moving from job to job (see Quinlan, Mayhew and Bohle 2001a and 2001b; Quinlan 2004, Mayhew, Quinlan and Bennett 1996, Johnstone, 2004 116-117). As organisations outsource tasks, they diminish in size and increasingly become small or medium sized firms – with the attendant difficulties in complying with OHS requirements (see Walters and Lamm 2004, and Walters 2001 and 2002). Further, as discussed above, OHS regulation has been slow to adjust to these changing work patterns.

It is this latter point that will be the focus of the remainder of this paper – which principally examines the legal rules regulating OHS, and suggests possible reforms to accommodate changing work relationships. I argue that quite fortuitously the general duties in the OHS statutes are flexible enough to require organisations, in many if not most cases, to take measures to ensure the OHS of most kinds of workers working in the different types of organisational networks commonly found in the Australian economy. I then show that a recent development in the regulation of corporate officers opens up the possibility of the OHS statutes placing responsibility for OHS compliance on entities operating within quite complex organisational and corporate arrangements. The fourth part of the paper examines the way in which OHS workplace arrangements (principally OHS representatives and committees) need to be modified to accommodate the range of workers operating within networked organisations. The final section outlines the kinds of challenges faced by OHS regulatory agencies concerned with ensuring that their regulatory efforts are focused on the range of workers operating within the modern Australian labour market.

The Application of the General Duties in the OHS Statutes to Work Relationships Other than Employer-Employee

All of the Australian OHS statutes have, at their heart, a duty imposed upon the 'employer' in broad terms to provide and maintain, so far as is reasonably practicable, for employees a working environment that is safe and without risks to health (see, for example, section 21 of the *Occupational Health and Safety Act 2004 (Vic)*(OHS(Vic)). The precise wording and scope of the duties varies from jurisdiction to jurisdiction. In New South Wales the duty is absolute and requires the employer to 'ensure' the health and safety of employees, with the onus of proving that measures to ensure OHS were not reasonably practicable placed on the employer (see *Occupational Health and Safety Act 2000 (NSW)* (OHS(NSW)) sections 8(1) and 28). The Queensland duty is similar, although the 'defence' includes complying with applicable regulations, or if there are no regulations, complying with an applicable code of practice or adopted other measures to manage exposure to the risk and took reasonable precautions or exercised proper diligence to prevent the contravention (see *Workplace Health and Safety Act 1995 (Qld)* (WHS(Qld) sections 28(1) and 37).

As is the case with all of the general duties in the Australian OHS statutes, these duties do not only prohibit employers from putting their employees health at risk, but are also 'constitutive' in the sense of seeking to change the employer's structures, processes, procedures, routines and organisational culture, so that employers routinely take a systematic approach to OHS management. For example, in a recent decision of the Industrial Relations Commission of New South Wales, Marks J noted that the general duties require:

a structured, systematic approach to safety in everything which is touched by the operations of the defendants. It is not enough to endeavour to comply with these obligations on an ad hoc basis looking at particular matters from time to time. Employers are required to actively assess and take account of all risks that might foreseeably arise. Systems need to be created to deal with these risks and, to the extent possible, eliminate them. Employees need to be instructed and trained to apply these systems. The employer needs to assess from time to time whether those systems are working and whether employees are following them. This involves supervision.¹

While at first blush these duties appear to be confined to the employment relationship, they have been broadly interpreted so as to have a reach outside the employment relationship and to affect dependent and semi-dependent workers who are not technically employees, independent businesses engaged by the employer, and volunteers. For example, it is clear that in providing a working environment for employees that is safe and without risks to health, the employer will have to ensure that all workers, including contractors, sub-contractors, and labour hire workers, and possibly clients and other members of the public, are, as far as is reasonably practicable, instructed, trained and supervised so that their work practices do not threaten the health and safety of *employees* (see, for example, *R v Swan Hunter Shipbuilders* [1982] 1 All ER 264; and see also *WorkCover Authority of NSW v Crown in the Right of the State of NSW (Police Service of*

¹ *Inspector Ching v Bros Bins Systems Pty Ltd; Inspector Ching v Expo Pty Ltd trading as Tibby Rose Auto* [2004] NSWIRComm 197 at para [32]

New South Wales) (*No 2*) (2001) 104 IR 268 at para 24). Some of the employer's general duty provisions are worded so as to enable the courts to find that the duty is owed to a worker who is technically an 'employee', even if not of the employer owing the duty. For example, section 19(1) of the *Occupational Health, Safety and Welfare Act 1986* (SA) (OHSWA(SA)) couches the employer's duty to apply 'in respect of each employee employed or engaged by the employer'. In *Moore v Fielders Steel Roofing Pty Ltd* [2003] SAIRC 75 the South Australian Industrial Court interpreted the expression 'engaged' very broadly to mean 'provide occupation (for a person)' so that a person employed under a contract of employment by a third party (in this case an 'employee' of a labour hire agency) and who works for 'the employer' pursuant to an agreement between the employer and labour hire agency is owed a duty because the 'employer' 'engages' the labour hire 'employee' even though there is no contract between the 'employer' and the 'employee' (see also the definition of 'employee' in section 4).

Most of the reformed OHS statutes include provisions which deem certain kinds of workers to be 'employees' protected by the employers general duty to 'employees'. The most extensive 'deeming' provision is to be found in Western Australia. The OSHA(WA) 'deems' contractors and 'any person employed or engaged by the contractor' to assist in carrying out work to be 'employees' of the principal for the purposes of the employer's general duty in relation to matters over which the principal has the capacity to exercise control (section 23D). It also deems all labour hire workers, whether employees or contractors of the labour hire agency, to be 'employees' of both the labour hire agency and the client, in relation to matters over which they respectively have the capacity to exercise control (section 23F). Section 23F of the Act purports to catch all other arrangements, by including similar deeming provisions in relation to 'labour arrangements in general', that is where any other worker who carries out work for another person even if there is no contract between the worker and the other person, provided the person has the power of direction and control in relation to that work 'in a similar manner to the power of an employer under a contract of employment' (section 23E).

None of the other OHS statutes contain such wide ranging deeming provisions, although most deem contractors and their employees to be 'employees' of the employer who engages them. For example, the OHS(Vic) deems, for the purposes of the employers duty to employees, independent contractors engaged by the employer, and the employees of the independent contractor, to be 'employees' of the 'employer' in matters over which the employer (i) has control, or (ii) would have control but for any agreement between the employer and the independent contractor to the contrary (OHS(Vic) section 21(3): see also *Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cth) (OHS(CE)A(Cth) s 16(4); OHSWA(SA) s 4(2); *Work Health Act 1986* (NT) (WHA(NT)) s 3(1); and Johnstone 2004, 187-188). These deeming provisions have generally been broadly interpreted by the courts: for example, in relation to section 21(3) of the OHS(Vic), in *The Queen v ACR Roofing Pty Ltd* [2004] VSCA 215 the Victorian Court of Appeal again interpreted the term 'engaged' very broadly to include any independent contractor in relation to matters over which the employer has control even if the contractor was not in a direct contractual relationship with the employer, but instead was engaged as a sub-contractor, or even further down the contractual chain (see particularly

Nettle J at para 54). (See also *Stratton v Van Driel Limited* (1998) 87 IR 151, discussed in Johnstone 2004 188-9; *Complete Scaffold v Adelaide Brighton Cement & Anor* [2001] SASC 1999; *Moore v Adelaide Brighton Cement* [2003] SAIRC 69; *Fielders v Adelaide Brighton Cement Ltd* [2003] SAIRC 69; and *Fielders Steel Roofing Pty Ltd v Moore* [2004] SAIRC 62: but cf *Stevenson v The Broken Hill Proprietary Company Company Limited* [1995] SAIRC 2).

The most significant provisions affecting firms' duties to workers other than employees are the employer and self-employed person's duties to persons other than employees. Here the most far-reaching provisions are to be found in the OHS(Vic) sections 23 and 24 and the WHSA(Qld) sections 28(3), and 29(2). Although the wording of these provisions differ, in essence they provide that employers and self employed persons must ensure persons who are not employees 'are not exposed' to risks to OHS arising from 'the conduct of the undertaking'.² Once again, the courts have taken a broad approach to interpreting the key expressions 'exposed to risk' (see *Science Museum* case) and 'conduct of the undertaking' (*Whittaker v Delmina Pty Ltd* (1998) 87 IR 268 at 280-281; *WorkCover Authority of New South Wales (Inspector Martin) v Edmund Hubert Kuipers and Civil Services Pty Ltd* [2004] NSWIRComm 303 para [55]); *R v Associated Octel Co Ltd* [1996] 4 All ER 846 at 851-852; *R v Mara* [1987] 1 WLR 87; and *Sterling-Winthrop Group Limited v Allen* (1987) SCCR 25). The application of the duty to contractors and sub-contractors was illustrated in *R v Associated Octel Co Ltd* [1996] 4 All ER 846 where the House of Lords held that if work conducted by a contractor falls within the conduct of an employer or self-employed person's undertaking, under section 3 of the British *Health and Safety etc at Work Act 1974* (which is similar to sections 23 and 24 of the OHS(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.

Sections 8(2) and 9(1) of the OHS(NSW) are similar to the Victorian and Queensland provisions, 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)* (OHS(ACT)) and in the OHS(CE)A (Cth) are similar to the New South Wales provisions, but the qualification extends to areas at or near the workplace. These geographical limitations are significant, and prevent the duties from extending to home-based work, labour hire agencies, truck drivers affected by consignment conditions and so on where worker not an 'employee'.

The other OHS statutes do not build the duty to others around concepts of exposure to risk from the conduct of the undertaking. The broadest of these other provisions is the OSHA(WA) which provides, in section 21, that an employer or a self-employed person must, as far as is reasonably practicable, ensure that the safety or health of a non-employee is not 'adversely affected wholly or in part as a result of' (a) work undertaken by an employer, employee of the employer or a self-employed person or (b) any hazard

² Note that the WHSA(Qld) includes also section 29A, which provides that a person (who may not necessarily be an employer or self-employed person) who conducts a business or undertaking (even if not conducted for gain or reward) has an obligation to ensure the OHS of each person who performs a work activity (even if on a voluntary basis) for the purposes of the business or undertaking.

that arises from or is increased by such work, or by a system of work operated by the employer or self-employed person. This latter focus on systems of work appears not to require the hazard to be based at the employer or self-employed person's workplace, and probably covers workers who are not employees who work remotely.

Sections 29(1) and 30A(b) of the *Work Health Act* 1986 (NT) (WHA(NT)) require an employer and self-employed person, so far as is reasonably practicable, to ensure that the OHS of any other person is not adversely affected as a result of the work in which the employer or self-employed person is engaged. Again, although not as far-reaching provision as the Victorian and Queensland duties, this would appear to have a relatively broad application, and arguably could cover persons working away from the employer and self-employed person's workplace.

The South Australian and Tasmanian duties to persons other than employees appear to be the narrowest in scope and reach. Section 22 of the OHSWA (SA) couches the duty in terms of 'reasonable care', to 'avoid adversely affecting' the health and safety of others 'by an act or omission at work', rather than 'the conduct of the undertaking'. This is a much narrower provision than the counterparts to be found in the Victorian and Queensland OHS statutes, and will probably protect non-employees at a workplace, but may not extend to workers who are not employees who are not at the employer or self-employed person's workplace. The WHSA(Tas) requires an employer to ensure, so far as is practicable, the OHS of persons who are not employees, contractors or employees of contractors, 'is not adversely affected as a result of work carried on at the workplace' (section 9(3)). A self-employed person has a duty to ensure, so far as is practicable, that others 'are not exposed to risks' to their OHS arising from work carried out at the self-employed person's workplace. Like the New South Wales provision, these provisions are limited geographically in application to the workplace.

The importance of the wording of sections 21(3), 23 and 24 of the OHSA(Vic) and sections 28(3), 29(2) and 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 2004), long-haul transport (see Quinlan 2001), construction and franchise arrangements. These provisions impose a hierarchy of overlapping and complementary responsibilities on the different levels of contractors and sub-contractors. For example, employers, contractors and subcontractors at each level owe duties to all parties below them in the contractual chain. Further, 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 short, these provisions in the OHSA(Vic) and WHSA(Qld) have a very broad reach, and ensure that a firm's OHS responsibilities extend not only to 'employees', but to dependent and semi-dependent workers, independent businesses and volunteers who are engaged by the firm in the conduct of the firm's undertaking.

This reach is not achieved in the OHS(A NSW) where the duty is only owed to parties at the employer or self-employed person's workplace. Neither is it achieved in jurisdictions which rely on provisions which 'deem' contractors and their employees (but not their sub-contractors) to be employees. On the other hand, the OHS(A NSW) has a broadly framed duty imposed on persons in control of premises, which has been interpreted to cover certain kinds of franchise arrangements. 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.' (See further sections 10(3) and (4)). Franchisors who exercise control over the franchisee's operations owe duties to employees of franchises, and franchisors, or persons associated with franchisors, who design, build or lease premises for use at work must properly consider safety aspects of those premises (see, for example, *WorkCover Authority of New South Wales v McDonald's Australia Limited and Another* (1999) 95 IR 383). The duties imposed upon persons on control of premises are not as broadly expressed in other Australian jurisdictions, but some of these provisions may, in certain circumstances apply to franchise arrangements – see in particular, OSHA(WA) s 22(a) and *Workplace Health and Safety Act 1995* (Tas) WHSA(Tas) s 15(3)).

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 1356l; *R v Associated Octel*; and *R v Gateway Foodmarkets Ltd* [1997] 3 All ER 78; *WorkCover Authority of New South Wales (Inspector Mansell) v Daly Smith Corporation (Aust) Pty Limited and Thomas Edwin Curtis Smith* [2004] NSWIRComm 349). The employer must ensure that not only does it have appropriate processes and procedures to manage OHS so as to eliminate, or at least reduce risks, but it must ensure that those processes and procedures are fully implemented throughout the organisation.

While the above analysis shows that at least in Victoria and Queensland the OHS general duties protect the OHS of all kinds of workers, this level of protection is not clear in the other OHS jurisdictions, where there are significant gaps in statutory protection, particularly in relation to dependent or semi-dependent workers who are not technically employees, and volunteers working at remote workplaces, including their homes and vehicles. At a minimum, the other OHS statutes should be modified to incorporate the Victorian duty to persons other than employees, and to ensure that all parties within corporate networks who influence, or who can influence the OHS of workers have a duty to manage OHS systematically. But even this reform is arguably not adequate to ensure that firms properly protect all workers engaged in activities for the benefit of their undertakings. The general duty provisions need to be supplemented by clear illustrations and examples, showing that and how the duties apply to different types of work arrangements.

In some industries these reforms will be of limited impact, because inadequate wage and workers' compensation regulation may undermine worker health even though the OHS statutes nominally protect workers. At the turn of the century it was common for all minimum labor standards to be regulated in a single *Factories and Shops* or *Labour and Industry Act*. With the development of the conciliation and arbitration system at federal level and within state jurisdictions, and the reform of OHS regulation since the late 1970s, this nexus has been broken. This bifurcation of labour regulation has been exacerbated with the increased use of self-employed contractors and sub-contractors who do not enjoy the benefits of minimum wages and maximum hours of work and other conditions (such as various leave arrangements). For example, in areas such as construction, home-based clothing production (see Nossar, Johnstone and Quinlan 2004) and road transport (see Quinlan 2001) the absence of minimum standards and the consequent competition for work has undermined the OHS of workers in the industry, by increasing the hours worked, and undermining compliance with OHS and workers' compensation provisions. What is required is an integrated approach to regulation, addressing the key issues. For example, recent developments in the clothing industry have sought to address the interlocking issues of long contractual chains, minimum wages, long hours of work and poor OHS. After much community pressure the NSW government responded to the risks to and exploitation of home-based clothing workers with the 'Behind the Label' strategy, which addressed the problems posed by an elaborate supply chain of multi-tiered subcontracting where the party exerting most influence (the fashion retailer) was remote from those actually fulfilling the tasks (the outworker) and the intermediary steps afforded ample opportunity for evading wages, hours, OHS and workers compensation legislation. In the *Industrial Relations (Ethical Clothing Trades) Act 2001* (NSW) the NSW government sought to develop a regulatory framework that effectively integrated industrial relations, OHS and workers compensation legislation. It has established a multi-agency approach to mutually assured standards with contractual tracking mechanisms and workplace/worker registration (to track the flow of work and conditions of employment), and utilising the technique of rebuttable presumption (with regard to dispute wages and workers compensation claims) to ensure that the top of the supply (mostly fashion houses and retailers) cannot not escape their legislative responsibilities. To further strengthen this process the package guaranteed union access to information and a role in enforcement as well community involvement. This reform has since been adopted or is under active consideration by other jurisdictions (see Nossar, Johnstone and Quinlan, 2004). For an example of a similar approach in the long haul trucking industry, see Quinlan (2001) and *Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005* (NSW).

Further, OHS regulators need to ensure that regulations and codes of practice focus not just on different types of hazards, but also on providing clear guidance on how firms can ensure the OHS of all types of workers (see Quinlan 2004, 128-130 and 137-9). Regulations should contain clear provisions ensuring that firms' duties to each type of worker are clearly articulated, and the key elements outlined; and codes of practice should ensure that guidance is provided in relation to specific issues that arise with each type of work relationship. Regulations, codes of practice and guidance material should also cover the OHS impact of restructuring and downsizing (see Quinlan 2004, 129). Regulators also need to warn firms that changes to work arrangements can undermine the

effectiveness of existing regulations and codes of practice, by changing the types of hazards, or the level of risk, faced by workers. For example, if restructuring requires some workers to work longer hours in noisy conditions, or in situations where they are exposed to hazardous substances, they may exceed the standard eight hour basic limit upon which exposure levels in regulations and codes of practice are based (for further details, see Quinlan 2004, 128-130).

Finally, user-friendly guidance material should be developed to assist duty holders to identify the major OHS problems associated with each type of working relationship, and to be guided through a systematic approach to managing those issues.

However finely crafted the general duties, regulations, codes and guidance material may be, the very nature of flexible work arrangements militates against compliance. The literature suggests that contractors, temporary workers and those engaging them have inadequate knowledge of OHS regulatory requirements, and that precarious and contingent workers are less likely than regular employees to raise OHS issues (Walters 2001, Aronsson 1999 and Johnstone, Mayhew and Quinlan 2001). Quinlan's recent study of regulatory responses to changing work organisation and organisational arrangements (see Quinlan 2004, especially 127-128) suggests that many firms believed that by outsourcing work to contractors or labour hire firms they reduced their statutory responsibilities for OHS, and that the short term nature of some working relationships reduced employer commitment to providing OHS training and induction.

Regulating Networked Organisations: Inter-Organisational Relationships and the OHS Statutes

The discussion in the previous section shows how the regulatory reach of at least some of the Australian OHS statutes can encompass a number of organisations networked through contractual arrangements. Most of the statutes impose duties on employers in relation to contractors, and in some jurisdictions the duties will extend down a contracting chain – both in the sense of affording parties lower in the chain protection, and in imposing duties on them to protect those further down the chain. In Victoria, New South Wales and Queensland a franchisor is responsible for the OHS of the franchisee, its employees and contractors. Apart from these provisions, the OHS statutes, with the exception discussed below, do not address organisational structures which influence a firm's approach to OHS management.

The recently enacted OHSA(Vic) recasts the duties placed on corporate officers in a way that pushes responsibility for OHS up the corporate structure. The OHSA(Vic) 2004 picks up the definition of 'officer' in the Corporations Act, as including:

a person

- (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
- (ii) who has the capacity to affect significantly the corporation's financial standing; or
- (iii) in accordance with whose instructions or wishes directors of the corporation are accustomed to act ...

These definitions would appear to include officers in holding companies, and in franchisors, within the definition of ‘officer’. In the instance of the third limb of the definition, case law suggests that officers in holding companies and franchisors will come within the definition of an ‘officer’ provided that the directors of the firm influenced by the holding company or franchisor, in their capacity as directors (that is, fulfilling their roles and functions as directors) did, as a body, act and were accustomed to act, in accordance with the directions or instructions of the officer, without exercising their independent discretion; the officer did exercise their will in the form of giving instructions or directions; and that there was a causal link, in terms of compliance or obedience, between the giving of instructions and directions and the conduct of the directors (Schulte 2004, 24-25, and *Standard Chartered Bank of Australia v Antico* (1995) 38 NSWLR 290, especially 327-328, per Hodgson J). The *Standard Charter* case also suggests that this definition of ‘officer’ in the third limb can include corporations – such as holding companies and franchisors.

Section 144 imposes liability on an ‘officer’ where a body corporate contravenes the Act and ‘the contravention is attributable to an officer of the body corporate failing to take reasonable care’ to prevent the organisation from contravening the Act. Thus members of a holding company can be liable for a contravention committed by a subsidiary company, and it would appear that officers in a franchisor can be liable for contraventions by the franchisee.

This Victorian provision, incorporating the ‘shadow officer’ provisions in the Corporations legislation, is an important development in OHS regulation, as it provides a way of ensuring that corporate structures negatively influencing a firm’s approach to complying with its OHS obligations can be brought to account.

Workplace Arrangements, Networked Organisations and Workers Who Are Not Employees

At the level of the workplace, the primary participatory mechanisms provided for under the Australian OHS statutes are employee health and safety representatives (HSRs) and health and safety committees (HSCs). The powers and functions of HSRs vary from jurisdiction to jurisdiction, but generally include the right to inspect the whole or part of the workplace, the right to be consulted on workplace changes affecting OHS, the right to accompany an inspector visiting the workplace, the right to access certain OHS information, the right to attend interviews between the employer and inspectors and (with the employee’s consent) employees. In some jurisdictions, most notably Victoria, South Australia, the Commonwealth and Australian Capital Territory to issue provisional improvement notices and to direct that work causing an immediate threat to OHS cease. In New South Wales unions have the right to initiate prosecutions under section 106(1)(d) of the OHSA(NSW) (see also Part 5 Division 3). The OHSA(Vic) makes provision, in Part 8, for authorised representatives of registered employee organisations (trade unions) to enter workplaces where the representative reasonably suspects that a contravention of the Act or regulations has occurred or is occurring, and the suspected

contravention affects work done by union members, persons subject to a certified agreement to which the union is a party, or persons who are eligible to be members of the union. The authorised representative may enter the workplace for the purpose only of enquiring into the suspected contravention.

As workers bear the brunt of failure to manage OHS, and because they are likely to have first hand knowledge of hazards, and ways of abating them, there are ethical and practical reasons to ensure that workers are engaged in participatory mechanisms. A growing body of evidence demonstrates the positive benefits of worker participation in OHS (for a summary see Walters and Frick 2000, and Nichols, Walters etc 2004), including a relationship between objective indicators of OHS performance (such as injury rates or hazard exposures) in workplaces where structures of worker representation are in place (union presence, joint safety committees or worker/union safety representatives).. This evidence comes from many countries, including those where participatory mechanisms are not mandated by legislation. Further, evidence suggests participatory mechanisms with higher levels of worker involvement are superior to those where involvement is more circumscribed.

Nevertheless, in the context of a labour market in which networked organisations and contingent and precarious workers are more prevalent there are clear limitations in the current regulatory structures for HSRs and HSCs. A major constraint lies in the way in which the Australian OHS statutes craft participatory arrangements around the traditional labour law paradigm and tend to limit participation to ‘employees’ ‘at the workplace’ in relation to their employer, and many are built around ‘designated work groups’ where only employees’ of the employer can constitute the work group, and be eligible to stand for election as a HSR and to vote for the HSR (Johnstone 2004, 488-500). For example, 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, even if the contractor works with the employer on a long term basis. A labour hire worker technically is not ‘engaged’ directly by the host employer, and would appear not to be eligible to vote for a HSR. ‘Outworkers’ engaged to work at home would not be ‘at’ the workplace with co-workers, and therefore would also not be represented.

There are some exceptions to this pattern of employee representation. The OHSA(ACT) (section 39) enables principal contractors in the construction industry to request the commissioner to declare that provisions pertaining to the negotiation of work groups, the selection and powers of HSRs (except directions to cease work), and HSCs apply to them in relation to subcontractors’ employees — enabling the site to be treated as one workplace under one employer. This purpose of this provision is to streamline workplace arrangements for principal contractors. 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, including workers employed by subcontractors who are deemed employees of the principal contractor where they undertake work in the course of the principal contractor’s business or trade. Section 44(1)(e) of the OHSA(Vic) specifies that in negotiating designated work groups the

parties can negotiate whether a HSR is authorised to represent independent contractors and their employees.

The OHS statutes or supporting codes and regulations in jurisdictions apart from New South Wales generally do not require employers to consult part-time employees, temporary employees or those working at home on a full-time or regular basis. Clause 23(2) of the *Occupational Health and Safety Regulation 2001* (NSW) specifies a series of factors to be taken into account in setting up a workgroup. In addition to hours of work; number and groupings of employees; worker characteristics (such as gender, age and ethnicity); the types of work performed; and the nature of OHS hazards consideration must be given to the pattern of work of employees, including the representation of part-time, seasonal or short term employees; the geographic location where employees work, including the representation of employees in dispersed locations such as transport work or working from home; and the interaction of the employees with the employees of other employers (including contractors, labour hire etc). The New South Wales *OHS Consultation Code of Practice 2001* (see 2.4.2, Duty to Consult, under the heading *Facilitation of Consultation*), outlines ways a host employer/principal contractor can facilitate consultation in an array of different scenarios where workers are provided by a labour hire firm, contractors or multiple subcontractors.

A second constraint in the operation of the provisions for HSRs and HSCs is that some only operate if there is a threshold number of employees in the workplace. For example, the WHSA(Tas) sections 26 and 32 respectively require there to be 20 employees before a HSC must be established and more than 10 for an HSR to be elected. The OHSA(ACT) imposes a threshold of 10 employees for the HSR provisions to operate (see section 36). As firms substitute contractors or labour hire workers for employees, or downsize, they might fall below these threshold requirements and the remaining employees may be unable to trigger the HSR or HSC provisions. Smaller and non-unionised workplaces, in any event, are less likely to use the HSR and HSR provisions (Johnstone, Quinlan and Walters 2005, 104). Contingent and precarious workers are generally less likely to exercise participatory rights (Saksvik 1996, Daykin 1997, Aronsson 1999, Montruill and Lippel 2002, Consultative Arrangements Working Party 2001, 21, and Johnstone, Quinlan and Walters 2005, 104-5), particularly when, as is the case with homeworkers and teleworkers, they work in locations away from the employer's workplace. Contingent and precarious workers may also be reluctant to exercise participatory rights for fear of losing their jobs if they raise OHS issues. Labour hire workers particularly may be reluctant to raise OHS issues when host firms can request their removal without having to give the labour hire agency reasons for the request (Johnstone, Quinlan and Walters 2005, 105-106).

A further problem with workplace arrangements generally is that, as noted earlier, trade unions largely provide training and logistical support for HSRs. Trade union membership has declined significantly over the past 20 years, in part due to increases in the use of contingent and precarious workers, and most pronounced where work is precarious and/or contingent.

It is clear from this discussion that regulators need to rethink the structure and operation of OHS workplace arrangements in the face of changing work arrangements. Reform is required to ensure that arrangements (i) are effective to begin with, and (ii) cover *all types* of workers.

In relation to the first point, deficiencies in the way in which the HSR and HSC provisions operate generally need to be addressed – so that workers have full rights to access workers and inspect workplaces; to be consulted on workplace changes affecting OHS; to accompany, and be consulted by, an inspector visiting the workplace; to be involved in risk management processes and in planning measures affecting work environments; to access relevant OHS information; to technical OHS assistance; and, most important, to high quality training (see Walters et al 2001). All HSRs should have the right to issue provisional improvement notices and to direct that work causing an immediate threat to OHS cease, and OHS inspectors should inspect and enforce the operation of workplace arrangements.

With respect to the second point, statutory provisions for workplace arrangements need to ensure that participants include ‘all members of the workforce’, regardless of whether they are an employee of the employer, another employer, or a contractor, and regardless of whether they actually work at the firm’s premises. This might require provisions for the election of HSRs and the constitution of HSCs to be more flexible (so that requirements for designated work groups and a threshold number of employees should be removed). This flexibility might be reinforced with some of the provisions discussed earlier in this section, in relation to ‘deeming’ workers to be employees of the employer, or requiring consultation with all kinds of workers, including contingent and precarious workers.

In essence, effective regulation of workplace arrangements requires a careful mix of measures that are enabling and constitutive (covering a wide and dynamic set of contexts) alongside more prescriptive provisions that ensure things like participation, information and training rights, but avoid over-zealous prescription.

A particular issue that needs to be addressed is the representation of workers in small enterprises, and here much can be learnt from Swedish, Norwegian and Italian legislative measures for roving or regional health and safety representatives that are organised by trade unions (Frick and Walters 1998; and Walters 2002).

For example, in Sweden legislative provisions for regional health and safety representatives (RSRs) apply across all economic sectors and 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 to those held by ordinary HSRs in Sweden. The mandated RSRs tasks are threefold:

- to act as itinerant representatives who inspect and investigate OHS conditions in small enterprises, and request changes they consider necessary to achieve improvements in the working environment;

- to promote employee participation in OHS, including the recruitment, training and support of in-house HSRs; and
- to activate local OHS 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 a shortfall has been met by trade unions. The scheme has been generally regarded as a success, attracting considerable international interest and serving as a model for policy initiatives in other countries. The essential legislative requirement is to give workers in small enterprises rights to representation and access to HSRs from outside their workplaces.

Part 8 of the OHSA(Vic), empowering authorised union representatives to enter workplaces where there are reasonable suspicions that a contravention is occurring, can be seen as a weak version of the RSR provisions.

Enforcement Strategies

The changing labour market and the rising incidence of networked organisations also pose major challenges for OHS inspectorates. Because these developments introduce third parties (i.e. parties other than the simple employer-employee relationship) into work arrangements, and often parties in locations far from the employer's or self-employed person's workplace, it is difficult for OHS inspectors to identify all workplaces where outsourced workers work, and to monitor the implementation of systematic OHS management, particularly where employers have engaged sub-contractors or home-based workers (Quinlan 2004, 132). These difficulties in enforcing OHS obligations, particularly in relation to small businesses, multi-employer sites, workers working away from the employer's main work premises (for example home-based workers and mobile workers such as truck drivers and travelling salespeople) or workers working at temporary workplaces (for example a telecall centre established for a marketing campaign that is in operation for only a few months) make it difficult for inspectors to ensure that OHS management initiatives are more than just 'paper systems' (Quinlan 2004, 127). In the absence of workplace registration requirements in all jurisdictions apart from Queensland (Quinlan 2004, 137), OHS inspectorates will need to develop new approaches, such as more sophisticated record keeping requirements so that the locations of all workers can be ascertained and their conditions monitored. Even then, the resource constraints of the inspectorates will undermine their enforcement efforts, particularly where they experience logistical difficulties attempting to visit work sites which are remote and transient.

Inspectors will need to be trained to identify accurately the employer or principal and all the relevant parties at principal and remote worksites, and to determine the relationships between these parties. Further, inspectors will need to be competent in OHS law, particularly the operation of the general duty provisions, to ensure that inspectors are able to identify the appropriate parties against which to take enforcement action. Even in their purely advisory roles, inspectors will need to have a sophisticated understanding of the legal rules, so that they are able to correct common misconceptions amongst duty holders

that the engagement of contractors or labour hire workers reduces their legal responsibilities to these workers (see Quinlan 2004, 127).

Inspectors will also have to pay greater attention to the way in which firms implement workplace arrangements, particularly where legislation enables greater participation by workers who are not employees.

Finally, it is clear that strategic and well-publicised prosecutions of labour hire agencies and employers using contractors and sub-contractors have done much to publicise the obligations of those parties (see Johnstone, Mayhew and Quinlan, 2001), and OHS agencies should consider greater use of such strategies. Persistence is required in these strategies, because the high turnover of small labour hire firms and contractors in some industries weakens the educational impact of these prosecutions.

Conclusion

In this paper I have suggested that the concern that contemporary OHS statutes have had with protecting public health and safety has provided a framework for the regulation of the different types of work relationships emerging in the modern labour market. I have also shown that legislators are increasingly using ‘deeming’ provisions to ensure that independent contractors and their employees are protected under the employer’s general duty to employees, and that the Western Australian government has expanded this approach to all work arrangements, notwithstanding the absence of contractual relationships between the employer and the deemed ‘employee’. In some industries, most notably the clothing and long-haul trucking industries, these developments have been reinforced by regulatory approaches that integrate OHS regulation with wages and workers’ compensation regulation to ensure that low wages and lack of workers’ compensation coverage do not undermine the protective measures afforded by the OHS statutes. Nevertheless, the OHS regulatory framework is patchy: in particular, the duty to ‘others’ – the principal provision protecting workers who are not employees in the technical sense – varies across jurisdictions in its scope and reach, and, apart from Victoria and Queensland, and particularly in New South Wales, Tasmania, the Australian Capital Territory and the Commonwealth’s jurisdiction, inadequately protects workers who are not ‘employees’ and who work remotely from a firm’s principal workplace.

Much less developed is the regulatory framework to ensure that the organisational and corporate structures within which a firm operates (for examples holding companies and franchise arrangements) are brought to account for their influence on the firm’s ability to manage OHS systematically and effectively, but, as the paper shows, there have been some developments in Victoria which enable regulators to sheet home responsibility to ‘shadow directors’ such as corporate officers in holding companies or franchisors.

With some notable exceptions, OHS regulatory provisions for worker participation in OHS, centring on OHS representatives and committees, are limited to ‘employees’, and the paper suggests various possible reforms to ensure that all kinds of workers can benefit for worker participation in OHS.

To date the debate about the regulation of OHS to ensure protection for workers who are not 'employees' has focused on ensuring that all kinds of workers – employees, workers in dependent or semi-dependent work relationships who are not 'employees', workers engaged in the activities of independent business, and volunteers – come within the protection of statutory OHS standards (the general duties, obligations in regulations and the provisions of codes of practice). In the past year or so, the debate has turned to the reform of the OHS statutes to ensure that all workers can take part in workplace arrangements to enable worker participation on OHS management. Yet even while the regulatory legal structure is being reformed to accommodate and protect all kinds of workers, it is becoming clear that this is not enough, and that the fragmentation of organisational structures into loosely linked networks and widely dispersed working arrangements itself poses major difficulties for compliance and regulatory enforcement. These are the issues that will need to be addressed in the next decade.

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