

STUDY ON EMPLOYMENT SITUATIONS AND WORKER PROTECTION IN AUSTRALIA

A Report to the International Labour Office

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A.INTRODUCTION

This paper provides a survey of the broad issues relating to the operation of worker protection measures in Australia. It is both trite and important to observe that such measures do not exist in some hermetically sealed legal vacuum. They have been both moulded by economic and social developments and, in turn, constitute a significant factor themselves in determining the form and structure of subsequent developments. That is, the form, content, and timing of worker protection measures have been influenced by a wide range of factors, extending from global commercial and technological change to debates concerning the parameters of the welfare state, but, reciprocally, the extent and cost of these measures have been an important ingredient in the unfolding change in workplace structures and relations.

Central to the issue of worker protection is the question of its reach of coverage in terms of which workers come within the protective envelope and those that fall outside. Notwithstanding some important exceptions, the most striking feature concerning the coverage of worker protection measures has been the strong symbiotic relationship that exists between such protection and the existence or otherwise of an employer-employee relationship legally embodied in a contract of employment. In some ways there is a parallel with the

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observations of labour market economists concerning the tendency for such markets to be segmented into 'primary' and 'secondary' components. That is, workers with limited education and low skills tend to be trapped by these factors into a secondary labour market, one that is both less well-paid and more dangerous¹

By analogy, worker protection measures can, generally, be characterised somewhat similarly. That is, there is a two-tier structure of employee entitlements (and concomitant employer obligations) that is closely correlated as to whether there is an employer-employee relationship or whether some other work relationship is involved. Moreover, the situation is further nuanced by differential protection according to the *type* of employment relationship involved. That is, the extent (and sometimes the existence) of protective coverage varies according to whether a person falls within the standard model of employment (full-time, 'permanent') as against some variant ('atypical') form of such employment such as casual or (to a lesser degree) ongoing part-time employment.

Consequently, in determining the general terms in which the problem of worker protection should be set, the issue of the dichotomy between work relationships founded upon the contract of employment and other work arrangements provides a core focus. However, whatever cogency existed of aligning worker protection with standard employment status in the immediate post-war period and the 1950s, the rationale has become increasingly problematic in a labour market characterised by ever more diffuse and complex work relationships. As some commentators have observed, it is quite false and misleading to conceive and expound upon the nature of work relationships in terms of two monoliths, employees and independent contractors, both of which are represented in undifferentiated terms² Rather there should be a recognition that 'work relationships lie along a very broad spectrum of integration or dependency, and that there is no sound basis for confining the contract of employment to one precise part of that spectrum'³ nor any really satisfactory criteria for so doing even if there were good reason to do so:³

The conceptual distinction between employment and non-employment work relationships is of such importance that two leading Australian commentators have described the individual employment relationship as constituting 'in legal terms the pivot of the entire structure of labour law'⁴ It may seem surprising, therefore, that this position is a comparatively recent phenomenon. The formerly received wisdom was that the contract of employment had essentially crystallised into its modern form by the early nineteenth century⁵ However, more

1 J E King, *Labour Economics*, 2nd ed, Macmillan, Basingstoke, 1990.

2 E.g. see M Freedland, 'The Role of the Contract of Employment in Modern Law', in L Betten (ed), *The Employment Contract in Transforming Labour Law*, Kluwer Law International, The Hague, 1995, pp 17-28. See also J Howe and R Mitchell, 'The Evolution of the Contract of Employment in Australia: A Discussion' (1999) 12 *Australian Journal of Labour Law*, 113.

3 Freedland, above n 2, at p 22.

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

5 In particular, Otto Kahn-Freund's seminal article on the origin of the contract of employment in Britain laid the foundations for this view; O Kahn-Freund, 'Blackstone's Neglected Child: The Contract of Employment' (1977) 93 *Law Quarterly Review*, 508.

recent scholarship in both Britain⁶ and Australia⁷ has strongly challenged this view and established that a clear-cut differentiation between employment and other work relations may not have finally emerged until perhaps the second decade of the twentieth century or even later.

In terms of actual workplace practice, therefore, the claim of what has been called 'standard' or 'typical' employment - namely full-time, 'permanent', (and characteristically male) employment - to represent the traditional norm in industrial relations may, in fact, be reflective of workforce reality for little more than half a century. Nevertheless, during its period of hegemony, this norm has proved to be extremely powerful in determining the criterion for the existence of a whole range of employee entitlements and employer obligations.

Feminist legal scholars have pointed out that, in Australia, the centrality of typical employment has been buttressed by the notion of the worker as 'breadwinner'.⁸ This idea is traced back to the rationale given by Higgins J in the 1907 Harvester judgment for the concept of a 'fair and reasonable' (basic) wage that is able to meet 'the normal needs of the average employee regarded as a human being in a civilized community'.⁹ The striking of this wage at a level allowing an unskilled worker to support himself, his wife and three children in a condition of frugal comfort came to give expression to what was seen as the norm for the male worker, with consequential effects such as awards historically not providing for forms of 'atypical' work that fell outside that norm.¹⁰

Over the last two decades, the 'standard' employment relationship has increasingly been losing its claim to represent an industrial relations norm. In this period the huge growth in the 'atypical' workforce has been one of the major features of labour market developments in most industrialised societies.¹¹ This development has been fostered and underpinned by a range of economic, technological and intellectual factors including globalisation, trade liberalisation, the enormous development of computer-based operations and the increasing dominance of neo-liberal political and economic precepts. Principles of labour flexibility were welcomed by many, even on the left of politics, as providing workers with greater skills and increased control over their work.¹² Others observed

⁶ S Deakin, 'The Evolution of the Contract of Employment, 1900-1950' in N Whiteside and R Salais (eds) *Governance, Industry and Labour Markets in Britain and France*, Routledge, London, 1998, 212.

⁷ Howe and Mitchell, above n 2.

⁸ R J Owens, 'Women, "Atypical" Work Relationships and the Law', (1993) 19 *Melbourne University Law Review*, 399 at 406. For other gendered consequences, see R Hunter, 'Representing Gender in Legal Analysis: A Case/Book Study in Labour Law' (1991) 18 *Melbourne University Law Review*, 305.

⁹ *Ex Parte H V McKay* (1907) 2 CAR 1,3.

¹⁰ Owens, above n 8, at p 407.

¹¹ E Cordova, 'From Full-Time Wage Employment to Atypical Employment: A Major Shift in the Evolution of Labour Relations?' (1986) 125 *International Labour Review*, 641.

¹² For instance, J Mathews, *Tools of Change: New Technology and the Democratisation of Work*, Pluto Press, Sydney 1989.

that the growing resort to forms of 'atypical' labour allowed the 'vertical disintegration' of industry in a process under which many of the risks and costs of production were shifted from industry to the worker¹³

These developments pose great challenges to any system of worker protection that professes to be based upon considerations of equity and providing security to those workers with limited ability to bargain reasonable elements of protection through market arrangements. That is, in terms of Freedland's continuum of dependency, while many of these relationships may be formally configured in terms of self-employment, functionally such workers may be little different from direct employees. Although it may be argued that the common law tests do look beyond the formal relationship in distinguishing between employees and independent contractors, the results have often been far from satisfactory¹⁴

As well, there is often a considerable gulf, between 'law in the books' and 'law in action'. People may be unaware of their rights or, where there is awareness, the cost of legal action or the fear of marketplace retribution may deter taking action to assert these rights. Trade unions have often provided support but union influence has been diminishing and much dependent self-employment takes place in largely unorganised sectors of the economy. There is consequently a need to fashion an approach that can apply the security of worker protection measures to workers who are in situations of 'fake' or dependent self-employment, while distinguishing highly autonomous and self-reliant expressions of self-employment and possibly providing a degree of exemption to members of this group from at least some of the minimum protection measures.

In proceeding to examine various issues concerning worker protection arrangements in Australia, this paper proceeds in the following fashion. First, it provides a background section that contextualises the issues through a summary overview of the nature and divisions of the Australian labour market, together with briefly charting changes to industrial relations and allied areas over the last decade (Section B). Secondly, it reviews the nature of work relationships through a closer examination of the bases for distinguishing between employment relations and other relationships, as well as surveying some of the features and dimensions of atypical employment arrangements and self-employment (Section C). Thirdly, it examines the entitlement to, and obligations for, a range of worker protection and other obligations and benefits (Section D). It deals with these issues within a

¹³H Collins, 'Independent Contractors and the Challenge of Vertical Disintegration in Employment Protection Laws' (1990) 10 *Oxford Journal of Legal Studies*, 353.

¹⁴For instance in the case of child-care workers; see L Bennett, 'Women, Exploitation and the Australian Child-Care Industry: Breaking the Vicious Circle' (1991) 33 *Journal of Industrial Relations*, 20.

framework that considers a continuum from essentially employment-based entitlements and obligations to those that are basically generic in nature. Fourthly, it looks at the situation of three industry sectors through case studies of clothing industry outworkers, owner-drivers in the transport industry and building industry sub-contractors (Section E). The final section attempts to briefly draw together some of the lessons from the preceding analysis and case studies and offer some suggestions for alternative approaches to the problems identified in this report (Section F).

b. background

SUMMARY PROFILE OF THE AUSTRALIAN LABOUR FORCE

The estimated resident population of Australia, at 31 December 1998, was 18,871,800 person ¹⁵with a labor force of around 9.3 million persons ¹⁶ The labour force, according to the criteria used by the Australian Bureau of Statistics (ABS), constitutes those persons aged 15 and over who are either employed or unemployed, and thus represents the official measure of the total supply of labour available to the labour market. The latest ABS breakdown of the Australian labour force is given in Table 1 below ¹⁷

Table 1: Australia B Labour Force Status

CIVILIAN POPULATION AGED 15 AND OVER, Labour Force Status, Annual Average

	Unit	1992-93	1993-94	1994-95	1995-96	1996-97	1997-98
MALES							
Employed	000	4,396.9	4,472.3	4,630.1	4,721.5	4,765.2	4,824.6
Unemployed							
Looking for full-time work	000	531.3	500.0	415.1	401.9	403.8	389.0
Looking for part-time work	000	50.2	49.0	51.1	53.4	58.5	59.2
Total unemployed	000	581.5	549.0	466.2	455.3	462.3	448.3

¹⁵ Australian Bureau of Statistics, *Australian Demographic Statistics* (3101.0)

¹⁶ Australian Bureau of Statistics, Unpublished data, Labour Force Survey.

¹⁷ The Australian Bureau of Statistics has brought together various labour force and employment information drawn from the Labour Force Survey in *Australia Now B A Statistical Portrait: Labour Employment*, Canberra, 1999 from which the following account is largely drawn.

Labour force	’000	4,978.4	5,021.3	5,096.3	5,176.8	5,227.5	5,272.9
Not in the labour force	’000	1,760.0	1,797.0	1,810.4	1,832.2	1,891.5	1,948.1
Civilian population	’000	6,738.3	6,818.3	6,906.7	7,009.0	7,119.0	7,221.0
Unemployment rate	%	11.7	10.9	9.2	8.8	8.8	8.5
Participation rate	%	73.9	73.6	73.8	73.9	73.4	73.0

FEMALES

Employed	’000	3,237.0	3,308.3	3,463.0	3,578.2	3,623.9	3,676.8
Unemployed							
Looking for full-time work	’000	259.8	262.3	225.0	211.4	225.1	216.4
Looking for part-time work	’000	99.3	104.2	103.4	100.0	109.2	103.4
Total unemployed	’000	359.0	366.4	328.4	311.4	334.3	319.8
Labour force	’000	3,596.0	3,674.7	3,791.4	3,889.6	3,958.1	3,996.7
Not in the labour force	’000	3,356.7	3,360.5	3,333.1	3,337.7	3,387.6	3,452.0
Civilian population	’000	6,952.7	7,035.3	7,124.5	7,227.3	7,345.7	7,448.7
Unemployment rate	%	10.0	10.0	8.7	8.0	8.4	8.0
Participation rate	%	51.7	52.2	53.2	53.8	53.9	53.7

Turning to the employed labour force, defined in terms of persons doing any form of paid work, the relationship of persons in employment to the total population aged 15 years and above (employment/population ratio) can be adduced both generally and for particular age cohorts. The overall employment/population ratio was 58 percent in 1997-98 with the highest male ratio in the 35-44 age group (86.8 percent) and for females in the 20-24 age group (68.1 percent).

More significant for a study of worker protection coverage is the breakdown of the employed labour force in terms of employment status. The ABS provides a four-part segmentation of this feature in terms of employers, own account workers (ie self-employed or independent contractors), employees, and contributing family workers. The breakdown of the annual average (based on quarterly data) of persons falling into each of these categories for the period 1992-93 to 1997-98 is shown in Table 2

Table 2: Australia B Employment Status

EMPLOYED PERSONS, Status in Employment, Annual Average - 1997-98

	1992-93	1993-94	1994-95	1995-96	1996-97	1997-98
	>000	>000	>000	>000	>000	>000
Employers	339.3	348.3	355.6	363.9	339.6	358.0

Own-account workers	816.8	829.0	822.9	849.1	821.3	857.4
Employees	6,363.1	6,500.3	6,802.1	6,998.9	7,126.1	7,185.4
Contributing family workers	81.9	77.8	77.3	75.4	75.9	65.9
Total	7,601.1	7,755.3	8,057.9	8,287.2	8,362.9	8,466.7

Source: Unpublished data, Labour Force Survey

In terms of the division between full-time workers and part-time workers, the ABS defines full-time workers as those who worked 35 hours or more a week and part-time workers as those who usually worked less than 35 hours a week. The breakdown between full-time and part-time workers is presented in Table 3 18 The 4,246,100 males who were employed full-time represented 88.0 percent of male employment, compared with the 2,084,700 full-time female employees who represented 56.7 percent of female employment. The highest incidence of male part-time work is found in two distinct age groups, namely younger (15-24 years of age) and older (55 years and over) workers, whereas part-time work is more evenly spread across age groups in the case of female workers.

Table 3: Australia B Full-time and Part-time Workers

EMPLOYED PERSONS, Full-time and Part-time Workers by Age, Annual Average - 1997-98

Age group (years)									
	15-19	20-24	25-34	35-44	45-54	55-59	60-64	Over 64	Total
	>000	>000	>000	>000	>000	>000	>000	>000	>000
MALES									
Full-time workers	145.8	420.6	1,136.1	1,157.5	943.5	261.1	123.6	57.7	4,246.1
Part-time workers	156.5	96.0	85.7	68.9	63.9	33.7	32.3	41.8	578.6
Total	302.0	516.6	1,221.9	1,226.4	1,007.5	294.8	155.9	99.5	4,824.6
FEMALES									
		307.7	608.2	506.1	453.0	92.9	27.4	12.2	2,084.7

18 These, along with the other latest ABS figures on labour market structure and characteristics, are derived from the Labour Force Survey and the figures for full-time workers relate to those who worked 35 hours a week during the reference week of the survey or who usually worked 35 hours or more a week. For part-time workers the criterion was for those workers who usually work less than 35 hours a week and did so during the reference week.

Full-time workers	77.2								
Part-time workers	218.6	150.0	315.9	436.0	328.8	78.0	39.8	24.9	1,592.1
Total	295.8	457.7	924.1	942.2	781.8	170.9	67.2	37.1	3,676.8

Source: Unpublished data, Labour Force Survey

The Labour Force Survey also provides information on the distribution of employment on both an industry and occupational basis. Industry classification is according to the Australian and New Zealand Standard Industry Classification (ANZSIC), an instrument that has also been increasingly utilised by Australian workers' compensation systems for determining risk classes for premium rating purposes. Occupational classification is made according to the second edition of the Australian Standard Classification of Occupations (ASCO). Both instruments are derived from standard international measures. Tables 4 and 5 set out the employment distribution by industry and occupation respectively.

Table 4: Australia: Distribution of Employment by Industry

EMPLOYED PERSONS BY INDUSTRY, Annual Average - 1997-98

Industry	Males		Females		Persons	
	No.	Proportion employed	No.	Proportion employed	No.	Proportion employed
	>000	%	>000	%	>000	%
Agriculture, forestry and fishing	304.1	6.3	132.4	3.6	436.5	5.2
Mining	74.9	1.6	8.3	0.2	83.2	1.0
Manufacturing	823.1	17.1	298.6	8.2	1,121.7	13.3
Electricity, gas and water supply	55.3	1.2	9.3	0.3	64.6	0.8
Construction	518.4	10.8	79.0	2.2	597.4	7.1
Wholesale trade	349.5	7.3	149.5	4.1	498.9	5.9
Retail trade	607.8	12.7	637.6	17.4	1,245.4	14.7
Accommodation, cafes and restaurants	183.0	3.8	220.6	6.0	403.6	4.8
Transport and storage	303.1	6.3	90.5	2.5	393.6	4.6
Communication services	99.8	2.1	48.7	1.3	148.5	1.8
Finance and insurance	136.9	2.9	175.3	4.8	312.3	3.7
Property and business services	503.8	10.5	391.2	10.7	895.1	10.6
Government administration and defence	185.9	3.9	154.6	4.2	340.5	4.0

Education	194.2	4.0	389.2	10.6	583.5	6.9
Health and community services	181.0	3.8	618.6	16.9	799.6	9.4
Cultural and recreational services	107.3	2.2	95.6	2.6	202.9	2.4
Personal and other services	175.3	3.6	164.2	4.5	339.5	4.0
All industries	4,803.5	100.0	3,663.1	100.0	8,466.7	100.0

Source: Unpublished data, Labour Force Survey

Table 5: Australia: Distribution of Employment by Occupation

EMPLOYED PERSONS BY OCCUPATION, Annual Average - 1997-98

Occupation	Males		Females		Persons	
	No. >000	Proportion employed %	No. >000	Proportion employed %	No. >000	Proportion employed %
Managers and administrators	484.6	10.1	150.9	4.1	635.5	7.5
Professionals	761.9	15.9	721.6	19.7	1,483.6	17.5
Associate professionals	558.5	11.6	324.8	8.9	883.3	10.4
Tradespersons and related workers	1,036.8	21.6	111.3	3.0	1,148.1	13.6
Advanced clerical and service workers	43.9	0.9	346.9	9.5	390.8	4.6
Intermediate clerical, sales and service workers	407.5	8.5	1,023.0	27.9	1,430.5	16.9
Intermediate production and transport workers	664.0	13.8	104.1	2.8	768.2	9.1
Elementary clerical, sales and service workers	302.7	6.3	567.7	15.5	870.4	10.3
Labourers and related workers	543.6	11.3	312.8	8.5	856.5	10.1
All occupations	4,803.5	100.0	3,663.1	100.0	8,466.7	100.0

Source: Unpublished data, Labour Force Survey

Focusing upon industry, in 1997-98, the largest overall employment sectors, were the retail trade (14.7 percent of total employment) and manufacturing (13.3 percent of the total). In terms of

gender differentiation, manufacturing was the most important sector for male employment (17.1 percent of total male employment) followed by the retail trade (12.7 percent of such employment. For females, the retail trade was the area of greatest female concentration (17.9 percent of total female employment) but closely followed by health and community services (16.9 percent), the latter reflecting the dominant female role in nursing and ancillary health care.

One of the features of the second edition of ASCO is the strong element of ranking according to seniority and task complexity, expressed through the utilisation of the terms 'advanced', 'intermediate' and 'elementary'. As well, there is broad aggregation of occupational categories (especially those of 'clerical, sales and service workers'), a feature that militates against the usefulness of such data for comparative purposes. However, bearing this in mind, professionals constituted the major category of overall employment (17.5 percent of the total), followed by intermediate clerical, sales and service workers (16.9 percent). For males the occupational category was that of tradespersons and related workers (21.6 percent of total male employment) while for females the dominant category was that intermediate clerical, sales and service workers (27.9 percent of total female employment).

CHANGES IN AUSTRALIA OVER THE PAST DECADE

Structural Change

Paralleling changes in other nations, there have been enormous changes in the structure of Australian industry and the nature of the Australian labour market over recent decades. A recent review by the Productivity Commission found that, in a survey of 15 OECD countries, Australia fell into a group of seven countries that experienced *above average* rates of structural change over the last two decades¹⁹ Australia, in common with other industrialised countries, has experienced a decline in the share of output accounted for by the manufacturing and agricultural sectors with corresponding strong growth in the services sector.

In 1970, Australia had relatively large agricultural and mining sectors, but a small manufacturing sector compared with most industrialised OECD countries. This is still the case in the 1990s, although in line with general OECD experience the Australian agricultural sector has continued to decline in relative importance. Australian manufacturing, in terms of share of GDP, declined relatively rapidly between 1970 and 1992, increased slightly between 1992 and 1996 and has fallen slightly since 1996²⁰ There has been very significant pressure on some sections of Australian manufacturing, particularly the textiles, clothing and footwear (TCF) and the whitegoods

¹⁹ Productivity Commission, *Aspects of Structural Change in Australia*, Australian Government Publishing Service, Canberra, December 1998, p 18.

²⁰ *Ibid*, p 6.

groups, as imports have captured a growing share of domestic sales. This has also been the case in other OECD countries, particularly in the TCF area, with the global shift in the production of textiles and clothing to developing countries (mainly in Asia) which now supply more than half the world's exports of clothing and a third of global textile exports.

The composition of the Australian manufacturing sector reflects the country's strengths as a natural resource-based economy. Between 1970 and 1990 industries such as food, beverages and tobacco; paper, paper products and printing; chemicals, petroleum, rubber and plastics; and basic metal products increased in size relative to other manufacturing industries. Fabricated metal products, whilst still the dominant single sector in terms of value-added production (29 percent of the total in 1990), declined in relative importance ²¹

The major area of growth has been in the services sector, although this has varied considerably between individual industry groups. Thus the finance, insurance and business services areas have shown rapid growth, especially since financial deregulation in the early 1980s, increasing their share of the services sector by a little over eight percentage points between 1970 and 1990. Community and public services also grew more rapidly compared to other service industries, a growth largely related to increased private sector activity, while public administration declined compared to other service industries ²²

Labour Market Changes

The various drivers of structural change in the Australian economy, including new technology, microeconomic reform and the internationalisation of product markets, have left their mark upon the demand for labour and the occupational and industrial composition of the workforce ²³ The most dramatic area of growth has been in the service sector, which accounted for almost two-thirds of total employment in 1995, compared with just under half in 1972. By comparison, the manufacturing share of total employment declined from 25 percent in 1970 to just 14 percent in 1995 ²⁴

²¹ *Ibid*, p 10.

²² *Ibid*, p 12.

²³ This is placed in international perspective in M Quinlan, 'Labour Market Restructuring in Industrialised Countries: An Overview' (1998) 9 *Economic and Labour Relations Review* 1.

²⁴ K Norris and M Wooden, 'The Changing Australian Labour Market: An Overview' in K Norris and M Wooden (eds), *The Changing Australian Labour Market*, Australian Government Publishing Service, Canberra, 1996, p 6.

Equally dramatic has been the change in the form of employment and other work relations. In a recent survey of the changing nature of employment arrangements, Mark Wooden has noted:

During the 25-year period following World War II, most persons in employment had jobs that provided a steady wage or salary and involved regular weekly hours, typically averaging somewhere close to 40. Moreover, there was every expectation that, subject to meeting some minimal performance standard, such workers could remain with a single employer for their entire working life if they so chose. Today, the situation appears to be very different. Many jobs involve either part-time hours or irregular hours that vary from week to week (or both). Further, employment contracts are much more likely to specify arrangements that impinge on continuity of job tenure. This includes casual employment arrangements specifying employment of some pre-determined fixed duration. Finally, it is widely believed that many firms are reducing their reliance on direct employment, and instead are increasingly choosing to outsource some of their labour requirements.²⁵

The growth of non-permanent or casual employment has been widely seen as constituting one of the most significant labour market developments of the last two decades.²⁶ As a proportion of all employees, casual employment has grown from 15.8 percent of the total in 1984 to 25.8 percent of this total in 1997. In the period between 1982 and 1995, it is estimated that some 60 percent of employment growth in Australia was accounted for by casual employment.²⁷

²⁵ M Wooden, *The Changing Nature of Employment Arrangements*, National Institute of Labour Studies Inc, Adelaide, December 1998, Discussion Paper Series, no 5, at p 1.

²⁶ For example, I Campbell, 'The Growth of Casual Employment in Australia: Towards an Explanation', in Julian Teicher (ed), *Non-Standard Employment in Australia and New Zealand*, National Key Centre in Industrial Relations, Monash University, Clayton, Monograph No 8, 1996; J Burgess and I Campbell, 'Casual Employment in Australia: Growth Characteristics, A Bridge or a Trap?' (1998) 9 *Economic and Labour Relations Review*, 31.

²⁷ J Burgess and I Campbell, 'The Nature and Dimensions of Precarious Employment in Australia' (1998) 8 *Labour and Industry*, 5 at p 9.

Mark Wooden's recent analysis, based on the AWIRS data, suggests that the growth in casual employment has been due to four principal reasons²⁸ First, changes in the industrial composition of employment have favoured industries where casual employment is widespread. Secondly, a reduction in levels of unionisation has weakened the ability of unions to resist the introduction by employers of casual employment. Thirdly, the gradual privatisation of many areas of employment formerly dominated by the public sector has facilitated casualisation where casual employment previously was traditionally avoided. Fourthly, there has been a marked growth in the incidence of casual employment at new workplaces and firms.

This growth in casual employment is paralleled and intertwined with an equally dramatic growth in part-time employment from 11.4 percent of total employment in 1983 to 24.8 percent in 1995. Almost 80 percent of part-time workers are women with much of the part-time employment growth (5.5 percent per annum between 1966 and 1994) being in the service sector, particularly the retail and hospitality areas²⁹ Other forms of 'atypical' work relations have also been growing very rapidly over this period. For instance, the changes between the first and second Australian Workplace Industrial Relations (AWIRS) surveys (that is between 1990 and 1995) revealed a growth in the number of agency workers, contractors, outworkers and volunteers of almost 40 percent³⁰

Table 6: Distribution of Own Account Workers and Employees in Selected Industries

Industry	Own Account Workers		Employees	
	1985	1997	1985	1997
Agriculture, Forestry and Fishing	217.0	185.5	170.8	150.0
Manufacturing	24.5	62.0	1,042.2	1,044.1
Construction	170.7	171.0	210.4	240.2
Wholesale Trade	27.2	25.2	276.0	420.2
Retail Trade	110.4	104.7	676.8	986.5
Accommodation, Cafes & Restaurants	10.2	19.1	195.2	244.4
Transport and Storage	53.5	56.8	208.1	218.0
Finance and Insurance	9.2	0.9	271.0	208.2
Property and Business Services	40.6	117.0	251.1	712.0

²⁸ Wooden, above n 25, at p 25.

²⁹ Australian Centre for Industrial Relations Research and Training (ACIRRT), *Australia at Work: Just Managing*, Prentice Hall, Sydney, 1999, at p 136.

³⁰ A Moorehead, M Steele, M Alexander, S Kerry and L Duffin, *Changes at Work: The Second Australian Workplace Industrial Survey*, Longman, Melbourne, 1997.

Education	9.6	17.0	116.0	565.0
Health and Community Services	10.4	30.6	511.0	730.0
Cultural and Recreational Services	14.2	28.0	100.5	160.7
Personal and Other Services	31.1	50.6	169.0	264.3
All Industries	713.5	878.3	5702.3	6364.6

Source: The Australian Bureau of Statistics, *The Labour Force Australia*, Cat No. 6204.0 and 6203.0

Much of this activity has been linked to the rapid move to more flexible labour market arrangements. Thus the second AWIRS survey found that a third of private firms surveyed engaged contractors to perform services such as cleaning, maintenance and production work, and over 50 per cent of public sector organisations outsourced some of their operations.³¹ As the figures in Table 6 show, there has been a marked increase in the number and relative proportion of 'own account' or self-employed workers in the construction industry and a number of service industries in the period between 1985 and 1997. However, a significant proportion of such 'own account' workers are operating in situations of highly dependent or 'fake' self-employment, often only being engaged by a single entity.³²

There have also been a number of significant changes to the pattern of labour supply in Australia over the last two decades.³³ The first is the substantial increase in the proportion of married females participating in the labour market, a phenomenon that has been described as 'one of the most significant labour developments in the last 25 years, and certainly one with profound economic and social effects'.³⁴ This participation level is now in excess of 55 percent, compared to that of around 35 percent in 1970. Secondly, there have been major changes in the youth labour market. These include a marked increase in participation in education (with retention rates to year 12 of secondary school increasing from less than 35 percent in the early 1970s to around 75 percent today), a significant expansion in enrolments in higher education (almost doubling from 7.7 percent to 14.9 percent) and a substantial decline in the full-time labour force participation of young people (with less than 25 percent of 15 to 19 year olds currently employed in or actively seeking full-time work, compared with a figure of about 48 percent in 1980). However, part-time work appears to be complementary with education with more than 65 percent of students being in the part-time youth labour force.

The third major change is the increase in the educational attainment of the labour force with the proportion of the labour force with post-school qualifications increasing from 37 percent in 1980 to 51 percent by 1993. The fourth change of note is the increase in the proportion of full-time workers who report that they work long hours with the proportion of full-time workers working more than 49 hours rising from around 16 percent in 1970 to around 20 percent in 1995.

The Australian Debate on Workplace Change

³¹ *Ibid*, at p 142.

³² See A Vandenheuvel and M Wooden, 'Self-employed Contractors in Australia: How Many and Who Are They?' (1995) 37 *Journal of Industrial Relations*, 263.

³³ Norris and Wooden, above n 24.

³⁴ *Ibid*, p 2.

Since the mid-1980s, workplace relations have become an increasingly important focus of attention for industrial relations policy and practice³⁵. An opening salvo came from the proceedings of the inaugural meeting of the neo-liberal H R Nicholls Society³⁶ which focused upon what were seen as restrictive work practices. The debate was joined by both the peak labour and business organisations. A joint Australian Council of Trade Unions /federal government group developed its own blueprint for the revitalisation of Australian manufacturing, following a visit to Europe in 1986. The group was very favourably impressed by arrangements in Germany and Sweden, in particular, and these perspectives informed both their report³⁷ and were to achieve some eventual fruition through the two-tier award restructuring National Wage decisions and some elements of the Labor Government's microeconomic reform agenda in the mid-to-late 1980s. The Business Council of Australia, a body representing larger corporate interests, in 1989, launched its own program for change with a report³⁸ arguing that, for Australian business to become economically competitive in world markets, a system of enterprise-based bargaining would need to progressively become an alternative to the existing, more centralised, model.

These developments took place within the context of an debate about the nature of changing labour relations in response to global economic change. One of the catalysts for this debate was the publication of *The Second Industrial Divide* by Michael Piore and Charles Sabel, in which it was argued that industrialised nations were in the course of a fundamental shift from the 'Fordist' mass production model to a system of more flexible forms of work organisation. In Australia, this debate divided around what has been called the 'two sides of flexibility'³⁹. On the one hand, was the more optimistic interpretation (sometimes described as 'post-Fordist') represented by Piore and Sabel,

35 R Lansbury and D Macdonald, 'Issues in workplace industrial relations' in R Lansbury and D Macdonald (eds), *Workplace Industrial Relations: Australian Case Studies*. Oxford University Press, Melbourne, (Australian Studies in Labour Relations series), 1992, pp 2-29.

36 *Arbitration in Contempt*, 1986. For an analysis and critique, see Dabscheck, 1987

37 Australian Council of Trade Unions/ Trade Development Council, *Australia Reconstructed*. Australian Government Publishing Service, Canberra, 1987.

38 Business Council of Australia, 1989. *Enterprise-Based Bargaining Units: A Better Way of Working*. Report to the Business Council of Australia by the Industrial Relations Study Commission, Business Council of Australia, Melbourne, 1989

39 M Bray and V Taylor, 'Introduction: Flexibility, Marginal Workers and Unions' in M Bray and V Taylor (eds), *The Other Side of Flexibility: Unions and Marginal Workers in Australia*,. ACIRRT, University of Sydney, Sydney, March 1993 (ACIRRT Monograph No 3) pp 1-13, especially pp 2-6.

and principally articulated in Australia by John Mathew 40 that saw these developments as empowering workers with greater skills and increased control over their work. Contrasted with this was what has been described as a 'neo-Fordist' perspective that characterises these changes as that of management taking advantage of an increased ability to attain higher profits through greater work intensity and poorer working conditions for a large proportion of the workforce 41

Legislative Measures

The great changes in the regulatory framework of the industrial relations system in Australia during the 1990s were marked by legislation in most jurisdictions introducing a more decentralised regulatory structure in place of the traditional model of conciliation and arbitration 42. At the federal level this was heralded by the *Industrial Relations Reform Act 1993* (Cth). In a concurrent fashion there has been similar activity at the state level with measures such as the *Industrial Relations Act 1991* (NSW), the *Employee Relations Act 1992* (Vic), the *Industrial Relations Amendment (Enterprise Agreements and Workplace Freedom) Act 1992* (Tas), the *Industrial Relations (Miscellaneous Provisions) Amendment Act 1992* (SA), the *Industrial Relations (Amendment) Act 1992* (Qld), the *Industrial Relations (Amendment) Act 1993* (WA), the *Minimum Conditions of Employment Act 1993* (WA), and the *Workplace Agreements Act 1993* (WA).

At the Federal level the Howard Liberal Government, since coming to power, has pursued a policy aimed at reshaping the nature of industrial relations in Australia, based largely on dismantling the

40 Mathews, above n 12; R Badham and J Mathews, 'The New Production Systems Debate' (1989) 2 *Labour and Industry*, 199, 194-246.

41 T Bramble, 'Award Restructuring and the Australian Trade Union Movement: A Critique' (1989) 2 *Labour and Industry*, 1989, 372-398; T Bramble and D Fieldes, 'A Post-Fordism?: Utopian Fantasy or Historical Break?', *Working Paper No 75*, School of Industrial Relations and Organisational Behaviour, University of New South Wales, 1990.

42 For some precursors to these changes, see R Mitchell and M Wilson, 'Legislative Change in Industrial Relations: Australia and New Zealand in the 1980s' in M Bray and N Haworth (eds), *Economic Restructuring & Industrial Relations in Australia & New Zealand*. ACIRRT, University of Sydney, Sydney, March 1993 (ACIRRT Monograph No 8), 38.

collective structure of industrial regulation. The legislative centrepiece of this programme was the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) (Workplace Relations Act). This Commonwealth legislation follows the Australian precedent of the *Employee Relations Act 1992* (Vic) that comprised part of a range of sweeping statutory changes enacted by the radical conservative Kennett Government in Victoria following its election in late 1992. Both the Victorian and Commonwealth statutes follow the model of the New Zealand *Employment Contracts Act 1991*, although some of the impact of the original Commonwealth Bill was lessened as the result of negotiations with the political party (the Democrats) holding the balance of power in the Upper House (the Senate) of the Commonwealth Parliament. This resulted in changes that were necessary to secure its passage through that chamber.

The industrial relations ethos of the Howard Government is, in many respects, encapsulated in some of the objects outlined in the *Workplace Relations Act 1996* such as that of A[e]nsuring that primary responsibility for determining matters affecting the relations between employers and employees rests with the employer and employees at the workplace or enterprise level⁴³ and of Aenabling employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by this Act⁴⁴ In pursuance of these objects, the Act pared back the role of the Australian Industrial Relations Commission (AIRC) and abolished the Industrial Relations Court of Australia, a body that had been established under the *Industrial Relations Reform Act 1993* (Cth). The jurisdiction of the Industrial Relations Court has been absorbed by the Federal Court of Australia. As well, the Act introduced a new institution, the Office of the Employment Advocate. This body is charged with a number of roles including the provision of advice and assistance to employers and employees in respect to their obligations under the Act, the approval of Australian Workplace Agreements, the investigation of complaints and contraventions of such provisions as those dealing with freedom of association⁴⁵

Perhaps the major product of the shift from collective to individual labour relations, as represented in the *Workplace Relations Act*, is the system of Australian Workplace Agreements (AWA). These are individual contracts that individual employees or a group of employees may enter into

⁴³ *Workplace Relations Act 1996* (Cth.), section 3(b).

⁴⁴ *Workplace Relations Act*, section 3(c).

⁴⁵ *Workplace Relations Act*, section 83BC.

with an employer but which must be signed individually by employees. The role of trade unions and the Industrial Relations Commission in respect of the negotiation of AWAs is expressly restricted. Some collective arrangements remain through the mechanism of certified agreements. Various forms of certified agreements can be made under the *Workplace Relations Act*, although the favoured type is single-business agreement⁴⁶ due to the fact that a multi-business agreement can only be certified by a full bench of the AIRC and that body can only so ratify if it is in the public interest to do so.

Under the *Workplace Relations Act*, the AIRC is restricted in its ability to make and vary awards to certain specified allowable award matters⁴⁷ and its power in relation to these allowable matters is limited to making minimum rates awards⁴⁸. The AIRC is also precluded from setting limits on the proportion of employees in certain forms of employment or on the maximum or minimum hours to be worked for regular part-time employment. The excision of AIRC oversight in these areas represents further deregulation of part-time and casual employment and an impetus to ongoing casualisation of the workforce. The only offsetting regulatory feature is the creation of a category of regular part-time employment⁴⁹ in respect of which the AIRC can establish award provisions for the minimum number of consecutive hours that can be worked in regular part-time employment.

C. NATURE OF WORK RELATIONSHIPS

Introduction

The central juridical divide, in terms of classifying and recognising work relationships, is that between employment and non-employment and particularly the distinction between persons working under a contract of service (employee) (i.e. those engaged under a contract of employment strictly so-called) and those working under a contract for services (independent contractor). While there are problems associated with work relations being considered in contractual terms⁴⁸ and calls for the abandonment of the employee/independent contractor distinction altogether in favour of the notion of contracts for the performance of work⁴⁹ this

⁴⁶ *Workplace Relations Act*, sections 170L and 170LC(3)

⁴⁷ *Workplace Relations Act*, section 89A(3).

⁴⁸ I T Smith, 'Is Employment Properly Analysed in Terms of a Contract?' (1975) 6 *New Zealand Universities Law Review*, 341.

⁴⁹ A Brooks, 'Myth and Muddle B An Examination of Contracts for the Performance of Work' (1988) 11 *University of New South Wales Law Journal*, 48.

classificatory approach cannot be ignored since it constitutes the essential touchstone for the determination of a whole host of workforce rights and obligations.

Employment

The degree of antiquity of the distinction between employment contracts and independent contracts in employment law is a matter of some debate⁵⁰ and the principal test for making the distinction⁵¹ that of control⁵² has proved difficult to apply to many of the myriad of work relationships in modern industrial societies. The original 'control' test, in terms of which a servant was seen as being 'a person subject to the control of his master as to the manner in which he shall do his work'⁵³ provided a relatively crude instrument to determine the nature of many of the more complex and highly nuanced work relationships which have come to characterise economic and social life in the course of this century, particularly in advanced industrial societies. As well, the importance of distinguishing between employment contracts and independent contracts became more critical as increasingly rights and obligations flowing from a range of financial and social statutes hinged upon this distinction. Thus, in *Humberstone v Northern Timber Mills*⁵² Dixon J recognised that '[t]he regulation of industrial conditions and other laws have in many respects made the classical tests difficult of application and it may be that ultimately they will be restated in some modified form'⁵³

The problem for the control test, in cases where a worker was possessed of special skills which made direction by another standing in a position of authority to that worker inappropriate or impossible, was presented for the attention of the High Court in *Zuijs v Wirth Bros Pty Ltd*⁵⁴ a case involving a circus trapeze artist who was injured as a result of a fall while performing. The trapeze artist's entitlement to workers' compensation benefits depended upon whether or not he was determined to be an employee. The High Court dismissed as a 'false criterion' the position that, where the work to be done involved the exercise of a particular art or special skill or individual judgment that the other party could not control, it followed that the relationship must involve an independent contract rather than a contract of service. In articulating what has come to be called the 'modified control test', it stated that '[w]hat matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters'⁵⁵

⁵⁰ *Ibid*, at pp 56-57.

⁵¹ *Yewens v Noakes* (1880) 6 QB 530 at 532 per Bramwell L J.

⁵² (1949) 79 CLR 389

⁵³ *Ibid* at 404

⁵⁴ (1955) 93 CLR 561

⁵⁵ *Ibid* at 571.

In recognising the difficulties of the control test, the courts have, from time to time, explored other avenues or bases upon which the control test can be modified (usually by way of augmentation) and even, occasionally, flirted with the enunciation of an alternative formula or test for distinguishing between employment and other work relationships. These approaches have often embodied a greater focus upon the organisational aspects of the relationship. One such example can be seen in the observations by Lord Wright, in *Montreal v Montreal Locomotive Works* 56 that:

In the more complex conditions of modern industry, more complicated tests have often to be applied. It has been suggested that a fourfold test would in some cases be more appropriate ie a complex involving: (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss.

After further consideration of the problems confronting the notion of control as a conclusive test, Lord Wright stated:

In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business it is, or in other words by asking whether the parties carrying on the business, in the sense of carrying it one for himself or on his own behalf and not merely for a superior 57

While Lord Wright's 'complex' test at least maintained the element of control, albeit in a diluted form, as a criterion for determining the nature of the relationship, there has been one attempt, associated with Lord Justice Denning (as he then was), essentially to dethrone it from this role in favour of a different approach. This alternative approach, usually called the 'organisation' or 'integration' test, was first articulated in *Stevenson Jordan and Harrison Ltd v MacDonald and Evans* 58 whereby Denning LJ noted, in the course of a discussion of earlier cases, that:

One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work although done for the business, is not integrated into it but is only accessory to it 59

Soon after, in *Bank voor Handel en Scheepvaart NV v Slatford* 60 Denning LJ reiterated this view by setting the question to be answered in terms of 'whether the person is part and parcel of the organisation' 61 However, the

56 (1947) 1 DLR 161, a decision of the Privy Council.

57 *Ibid* at 169

58 [1952] 1 TLR 101.

59 *Ibid* at 111

60 [1953] 1 QB 248

61 *Ibid* at 295

Denning test has been effectively rejected in both England⁶² and Australia⁶³ and, when occasionally called into service, it has been advanced as further buttressing support to a conclusion based on an extended control test basis⁶⁴

The essential problem with the organisation test is that it that it really replaces one difficulty with another. As Wilson and Dawson JJ observed in *Stevens v Brodribb Sawmilling Co*:

The advantage of the organization test . . . is that it avoids the complications associated with the employee/independent contractor test. But at what price? The test does no more than shift the focus of attention to the equally difficult question of determining when a person is part of an organization . . .⁶⁵

This 'equally difficult question' lies at the heart of the contemporary problem of juridical determination of worker status, whether the divining rod test is that of 'control' (in whatever variant that is expressed) or some other formulation. The challenges for the divination exercise are increasing as work arrangements become diffuse and corporate organisational practice adjust themselves to the advantages offered by the greater degree of labour flexibility that has progressively emerged over the last two decades. In particular, the increasing resort to outsourcing of production and ancillary activities has led, in some sectors (eg the mining industry), to the emergence of what has been termed the 'virtual company' with a small managerial core with contracted operational services. In some cases, and in some areas of activity, there has been little change to the workforce with former employees being re-engaged to perform what essentially amount to their earlier duties as contracted workers.

⁶² In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, MacKenna J stated, in relation to the integration test, 'This raises more questions than I know how to answer. What is meant by being a part and parcel of the organisation? Are all persons who answer this description servants? If only some are servants, what distinguishes them from the others if it is not their submission to orders?' (at p 524). However, Cooke J in *Market Investigations Ltd v Minister of Social Security* [1969] 2 WLR 1, essentially reformulated the Denning question to one of 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' (at p 9).

⁶³ In *Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16, Wilson and Dawson JJ opined of the 'part and parcel of the organisation' test that '[a]s a restatement of the problem, this observation may place a different emphasis upon the tests to be applied but of itself offers no new test for the solution of the problem. . . .'

⁶⁴ For example, in *Australian Timber Workers Union v Monaro Sawmills Pty. Ltd.* (1980) 29 ALR 322 at 329.

⁶⁵ (1986) 160 CLR 16 at p 28.

One area in which some of the issues as to whether a person whose work-life is closely entwined with one organisation could still be regarded as an independent contractor has been the subject of judicial consideration over a considerable period. This concerns many typical arrangements in the transport or carriage industries. These encapsulate many of the difficulties of determining work status in situations where the person undertaking the work may supply equipment, may have some (usually highly circumscribed) degree of flexibility in terms of hours of work and alternative staffing in case of illness and holidays, but nevertheless is firmly tied in his or her work arrangements to one economic entity, often displaying such attachment to the outside world though wearing the uniform of that body and having its corporate logo prominently displayed on their equipment.

Accordingly, it is perhaps not surprising that courts have grafted upon, or incorporated into, the control test an extended gloss as to whether on balance the range of features or indicia of the working relationship are more in the nature of an employer/employee relationship or otherwise. This is sometimes referred to as the extended control test. Such an approach was taken by MacKenna J, as a single judge in the English Queen's Bench Division, in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*, in which he set out the following criteria for determining that an employment relationship existed:

- (i) the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.
- (ii) he agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in sufficient manner to make that other master.
- (iii) the other provisions of the contract are consistent with its being a contract of service.

The balancing of the relative weight of the indicia of the working relationship of owner-drivers is often one of fine judgment⁶⁶ although the courts have tended to uphold the statement of the nature of the working relationship (ie principal and independent contractor) contained in the formal agreement entered into between the parties.⁶⁷ Some of the issues concerning this balance are further considered in the case example of transport drivers later in this report.

The contemporary Australian locus classicus in respect of distinguishing the relationships of employee and independent contractor is the decision of the High Court in *Stevens v Brodribb Sawmilling Company Pty Ltd*⁶⁸ in which the Court essentially blended the modified and extended control tests.⁶⁹ In many respects the

⁶⁶ Deane J in *Stevens* opened his judgment by referring to '[t]he equal division of opinion between four members of the Victorian Supreme Court in the present case' as demonstrating 'how finely balanced is the question' of whether the injured worker was an employee or an independent contractor.

⁶⁷ Two notable exceptions, based on a closer examination of the economic reality of the relationship, are the Australian Federal Court decisions in *Re Porter*; *Re Transport Workers Union of Australia*, (1989) 34 IR 179, and *Transport Workers Union of Australia v Glynburn*, (1990) 34 IR 138.

⁶⁸ (1986) 160 CLR 16

⁶⁹ *Stevens* was a decision of five judges of the High Court (Mason, Wilson, Brennan, Deane and Dawson JJ.). There were four judgments delivered (Wilson and Dawson JJ combining in a joint

decision represents an attempt to preserve, yet adapt, the control test to meet the complexities of modern conditions. This reformulation can best be seen in a central passage in Mason J's judgment in which he stated:

The traditional formulation, though attended with some complications in its application to a diverse range of factual circumstances, . . . nevertheless has had a long history of judicial acceptance. True it is that criticisms have been made of it. It is said that a test which places emphasis on control is more suited to the social conditions of earlier times in which a person engaging another to perform work could and did exercise closer and more direct supervision than is possible today. And it is said that in modern post-industrial society, technological developments have meant that a person so engaged often exercises a degree of skill and expertise inconsistent with the retention of effective control by the person who engages him. All this may be readily acknowledged, but the common law has been sufficiently flexible to adapt to changing social conditions by shifting the emphasis in the control test from the actual exercise of control to the right to exercise it, 'so far as there is scope for it', even if it be 'only in incidental or collateral matters' (*Zuijs v. Wirth Brothers Pty Ltd*, at p 571).

Furthermore, control is not now regarded as the only relevant factor. Rather it is the totality of the relationship between the parties which must be considered.

Earlier in his judgment, Mason J had dealt with the place and role of the control test in the following terms:

But the existence of control, whilst significant, is not the sole criterion by which to gauge whether a relationship is one of employment. The approach of this Court has been to regard it merely as one of a number of indicia which must be considered in the determination of that question . . . [citations omitted] . . . Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee⁷⁰

The upshot of the Australian situation, post-*Stevens*, is that the element of control maintains an uneasy position as *primus inter pares* of the matters that will be considered in an examination of the 'totality of the relationship' between the parties for determining whether an employment relationship exists. The effect is a situation in which indicia pluralism largely rules so that ultimately the result of any examination may rest on a 'matter of impression' since, in the absence of a 'prescribed list of factors . . . any circumstance which may shed light on the nature of the contract will be taken into account'.⁷¹ It is difficult to see that the situation can be significantly different within a juridical context in which it is necessary to make a 'yes/no' decision about relationships that are capable of displaying an almost infinite range of permutations.

judgment). While Deane J was in dissent on the overall decision, he expressly endorsed Mason J's position in respect of the issue of work relationship. Brennan J's judgment expressed general agreement with the position taken by Mason J and went on to make some further observations on the issue of negligence. Overall, then, Mason J's position was endorsed by two of his brethren while the stance taken by Wilson and Dawson JJ was not greatly dissimilar to that of Mason J.

70 (1986) 160 CLR 16 at 24

71 Gray J in *Re Porter; Re Transport Workers Union of Australia*, (1989) 34 IR 179 at 184.

Triangular Arrangements

Multiple Employers

The question of discerning the nature of the employment relationship can take on an added piquancy where there are more than two parties to the relationship. These 'triangular relationships' can take a number of forms, including the situation of the 'lent worker', those involving sub-contracting arrangements and the operation of labour placement agencies. In these situations, the matter at issue is usually not one as to whether a contract of employment is involved, but, rather, determining the competing claims as to who is the actual employer, although on occasion the worker may be found not to have entered into a contract of employment with either of the putative employers.⁷² Whereas the sub-contracting and labour hire contexts have often involved issues of employer obligations or responsibility for worker protection issues (eg workers' compensation coverage), the 'lent worker' issue has primarily arisen in the context of vicarious liability for the tortious actions of that worker.

The question, in relation to 'lent workers', has been that of whether the worker remained an employee of the 'general employer' or whether the mantle of employer shifted to person for whom the work was being performed. Initially, the major context for this question arising was the practice of plant hire firms of sending one of their own employees with expensive and complicated machinery and equipment to guard against misuse and damage. The general rule for determining this issue was laid down by the House of Lords in *Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Limited*⁷³ a case involving the hire of a crane and a lent driver. It was enunciated in terms of the control test so that the worker's employer was the person in whom was vested the authority 'to direct, or to delegate to, the workman the manner in which the vehicle is driven'⁷⁴ or 'who is entitled to give the orders as to how the work should be done.'⁷⁵

The distinction has been recognised between cases such as *Mersey Docks* in which a complicated piece of machinery and a driver are lent and those in which transfer involves an unskilled or semi-skilled worker. In the former case, it is easier to infer that control, and consequently vicarious responsibility, remains with the general employer, whereas, in the latter instance, the readier inference is that hirer exercises control in terms of what the worker should do and how he or she should do it.⁷⁶

Labour Hire Agencies

⁷² See *Building Workers' Industrial Union of Australia v Odco* (1991) 29 FCR 104, discussed below.

⁷³ [1947] AC 1.

⁷⁴ *Ibid*, per Lord Simon at 12.

⁷⁵ *Ibid*, per Lord Porter at 17.

⁷⁶ *Garrard v Southey & Co* [1952] 1 All E R 597, especially at 598.

The various developments over the last two decades in terms of labour flexibility has brought with it new organisational arrangements. One of the most prominent of these has been an enormous growth in labour hire arrangements, something that has closely paralleled the growing resort to outsourcing of business functions. The 1997 AWIRS study found that, between 1990 and 1995, 35 percent of workplaces with 20 or more employees outsourced some functions during this period. Much of this outsourced activity went to labour hire firms with the percentage of these workplaces using such firms rising from 14 percent in 1990 to 21 percent in 1995⁷⁷

However, such arrangements can take many forms. First, there is the more traditional form of placement agency, which, arguably, should be considered in quite different terms to labour hire. This involves a brokering process whereby an agent brings together an employer with particular staffing needs and persons who possess the requisite skills and experience for the relevant position. The agent receives a fee from the putative employer for this service and often an additional amount if the person is engaged by the employer.

Secondly, there has emerged specialist labour hire companies that maintain a pool of workers with particular skills. The labour hire company contracts with business entities for the supply of workers to do work needed by that entity. This can be either one-off jobs or involve an ongoing arrangement, as is generally the case in areas such as contract cleaning. The workers are, however, paid by the labour hire company which invoices the business entity an amount that incorporates these wages together with the labour hire company's administrative overheads and profit charge. One prominent labour hire company of this type, Skilled Engineering, maintains a labour pool of more than seven thousand tradesmen. This form of labour hire arrangement is customarily structured so that the labour hire company continues as the employer, notwithstanding the fact that the actual work is being done for another body.

Thirdly, however, more complex arrangements have been forged, often with the intent of relieving the labour hire company of the legal responsibility and cost imposts associated with being the employer of the workers in its labour pool. The difficulties that such artificial arrangements have caused, in respect of a range of employer responsibilities, came to a head in the construction industry (particularly in Victoria) during the late 1980s and early 1990s⁷⁸. It culminated in litigation involving a labour hire company (that went by the name of Troubleshooters Available) and various Victorian building industry trade unions.

Troubleshooters had created a pool of 15 different categories of worker ranging from labourers to project managers. There was an elaborate induction process, structured to create the impression that the workers in the pool were employees rather than independent contractors, in order to minimise conflict with building industry unions⁷⁹. On the other hand, the formal agreement between the pool members and Troubleshooters explicitly declared that there was no employer-employee relationship and these members had the choice as to whether or not they were available for work on any particular day. The building industry unions were determined to protect favourable employment conditions, won after considerable struggle, contained in the Victorian Building

⁷⁷ Moorehead *et al*, above n 30.

⁷⁸ See C Fenwick, 'Shooting for Trouble? Contract Labour-hire in the Victorian Building Industry' (1992) 5 *Australian Journal of Labour Law*, 237.

⁷⁹ This included the pool members taking out membership with various industry schemes such as the Construction Industry Long Service Leave Registration scheme and the Building Industry Superannuation Scheme.

Industry Agreement. It saw the operations of Troubleshooters as threatening these conditions and attempted to enforce these conditions on sites upon which members of the Troubleshooter pool were engaged on the basis that they were employees. The company took action against the unions under the *Trade Practices Act 1974* (Cth) and in tort for interference with contractual relations.

Among the matters at issue in this litigation⁸⁰ was the status of the workers despatched by Troubleshooters Available to various employers in the building industry. Woodward J, at first instance, was inclined to give particular weight to what he discerned as the intention of the parties⁸¹ while the Full Court placed greater weight on the presence or absence of control. In both decisions, it was held that the members of the pool were independent contractors and not the employees of either Troubleshooters or the businesses to which they were hired.

The upshot is that the determination of worker status in the labour hire area is fraught with uncertainty and may be highly dependent upon the nature in which the particular arrangements between the agency and its pool of workers are constructed⁸². As well, it may be dependent upon the particular context in which the arrangements are examined and proceedings brought. For instance, Troubleshooters was involved in essentially contemporaneous separate proceedings to those already considered, concerning its liability for the payment of workers' compensation premiums and in which the Accident Compensation Commission was invoking anti-avoidance provisions in the *Accident Compensation Act 1985* (Vic)⁸³. At first instance, in the Victorian Supreme Court, Gray J found that Troubleshooters was caught by these provisions and liable as an employee⁸⁴ to make the relevant payments⁸⁵. On appeal the Full Court (Murphy, Marks and Beach JJ) held that none of the contracts in issue were caught by these provisions⁸⁵. However, in turn, the High

⁸⁰ *Odco Pty Ltd v Building Workers' Industrial Union of Australia*, Federal Court of Australia, No VG 151 of 1988, Woodward J, 24 August 1989, and on appeal to the Full Federal Court as *Building Workers' Industrial Union of Australia v Odco* (1991) 29 FCR 104.

⁸¹ Their intentions will then tend to influence the details of their agreement, and any apparently contrary indicia would need to be closely examined against the background of the parties' intention⁸¹; *Odco Pty Ltd*, above n 79, para 136 of the judgment.

⁸² For instance as exemplified by the difference between the nature of the Troubleshooters Available arrangements and those adopted by firms such as Skilled Engineering. See also, for instance, *Drake Personnel Ltd and Others v The Commissioner of State Revenue of the State of Victoria*, unreported, Supreme Court of Victoria (Balmford J), 23 June 1998.

⁸³ *Accident Compensation Act 1985* (Vic), ss 8 and 9.

⁸⁴ *Odco Pty Ltd trading as Troubleshooters Available v Accident Compensation Commission*, unreported, Supreme Court of Victoria, VTA No 3 of 1988, Gray J, 9 September 1988.

⁸⁵ *Odco Pty Ltd v Accident Compensation Commission* [1990] VR 178.

Court (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ in a joint judgment)⁸⁶ overturned this decision and restored the orders made by Gray J.

Self-Employment

The self-employed represent a highly disparate group, ranging from those engaged in the traditional professions (eg law and medicine), farmers, shop owners and merchants, artisans and artists to self-employed contractors. The latter category, that of self-employed contractors, encompasses persons who operate as independent contractors in every sense of that term as well as those who are dependent upon a single entity for their work. The proportion of the self-employed who fall into this category varies markedly between industry sectors, with construction and road transport being two areas in which self-employed contractors constitute a dominant presence.

Self-employment as a form of participation in the labour market has been growing since the late 1960s. In the non-farm sector the number of self-employed workers increased by around 60 percent between the late 1960s and the early 1980s, but the earnings of these workers showed a significant decrease⁸⁷ From the early 1980s, self-employment has represented the fastest growing sector of employment, registering a 22 percent increase between 1981 and 1992. On ABS figures, self-employed workers rose from 922,700 in 1988 to 1,218,600 in 1994, or an increase from 15.36 percent to 15.46 percent of the workforce. However, these figures appear to be an underestimate with an analysis of the 1991 census figures suggesting the number of self-employed at 1,249,400 or 17.57 percent of the workforce⁸⁸

There are distinct gender and industry characteristics to self-employment. The 1991 census figures showed 843,600 male workers (or 20.74 percent of the male workforce) compared to 405,800 females (or 13.33 per cent of the total female workforce) as self-employed. As well, self-employment is most dominant in primary industry and construction constituting 61.3 percent of total employment in the former and 40.08 percent in the latter. There is then a considerable gap to three industry groups with self-employment representing around a fifth of total employment, namely,

⁸⁶ *Accident Compensation Commission v Odco Pty Ltd* (1990) 95 ALR 641.

⁸⁷ O Covick, 'Self-employment Growth in Australia' in R Blandy and O Covick (eds), *Understanding Labour Markets in Australia*, George Allen and Unwin, Sydney, 1984.

⁸⁸ A Le, 'Self-Employment in the Australian Labour Market' (1995) 7 *Labour Economics and Productivity*, 127.

recreation (21.25 per cent, trade (21.15 per cent), transport (19.27 per cent). There is then another gap to manufacturing (10.51 per cent), community services (5.23 per cent) and mining (4.52 per cent) 89

As mentioned before, self-employment is an extremely heterogeneous category. This is true also among sub-groups of the self-employed. One of the most important of these is self-employed contractors. A study by Vandenheuval and Woode 90 attempted to review the characteristics of this group. Contractors were defined in terms of persons operating their own enterprise or engaged independently in a profession or trade that were engaged by a firm or organisation for some predetermined >all-inclusive< fee to provide a defined service for a specified period. That is, the salient difference between contractors and other forms of self-employment was considered to lie in the fact that contractors are primarily engaged in the provision of services to other entities.

Vandenheuval and Wooden found that, in 1994, there were some 553,900 self-employed contractors in the Australian non-farm workforce, representing 7.5 percent of non-farm employment and dividing, in gender terms, between 360,900 male and 193,000 female contractors. The study also tried to distinguish between independent and dependent contractors with dependent contractors being persons dependent upon a single hiring organisation. In terms of this division, the study found that 61.7 percent of the group of self-employed contractors (341,600 persons and 4.7 percent of the total non-farm workforce) could be described as independent contractors, leaving 38.3 percent of the group (212,400 persons and 2.9 percent of the total non-farm workforce) as being dependent contractors. Whereas men were more highly represented among independent contractors (5.8 percent of male workers, compared to 3.0 percent of female workers), the gender proportions were more evenly distributed among the ranks of dependent contractors (3.1 percent of male workers compared with 2.8 percent of female workers). In terms of total employment, there is a much higher proportion of self-employed contractors among men than women, with 8.6 percent of all employed men being self-employed contractors, compared to 6.1 percent of all employed women.

Self-employed contractors are characterised by a higher level of part-time working compared to other forms of employment. Thus 22.7 percent of male and 69.4 percent of female self-employed contractors were part-time workers, compared to 12.1 percent and 40.3 percent of male and

89 *Ibid.*

90 Vandenheuvel and Wooden, above, n 32.

female PAYE wage and salary earners. More than 40 percent of all self-employed contractors were represented in two industry sectors, namely construction (21.3 percent of the total) and property and business services (19.4 percent). Indeed 21.1 percent of all workers in the construction industry and 20.8 percent of those in property and business services were estimated to be self-employed contractors. While self-employed contractors represented only 2.4 percent of total employment in government services industries, it is striking that 80.9 percent of all contractors working in this area were dependent contractors. The industry groupings with the lowest incidence of dependent contractors were the wholesale and retail trade industries and the construction industry with a level of 25.5 percent and 26.7 percent respectively.

D. THE FRAMEWORK OF WORKER PROTECTION AND EMPLOYER IMPOSTS

Introduction

As mentioned in the introduction to this paper, the fulcrum around which a whole range of work-related rights and obligations revolve is that of the contract of employment and, in particular, that of the standard model of employment (full-time, permanent) as against atypical work relationships. However, while employment status serves as the most important touchstone for worker entitlements and employer obligations, this is not universally the case. Indeed, such entitlements can be best understood as existing upon a continuum at which the important group of rights and obligations that attach to or are conditional upon the existence of an employment relationship stand at one end. At the other end of the continuum are protections, having a workplace connection, that either apply generally to persons regardless of the characterisation of the nature of their working relationship, or do so with limited or highly circumscribed exceptions. Examples of protections at this end of the continuum are a range of anti-discrimination measures, occupational health and safety legislation and statutory protection of freedom of association. It may be significant that the underpinning for some of these measures comes from international conventions.

In between these ends of the continuum are protections that are generally based upon the existence of a contract of employment but that have accreted so many modifications (particularly by way of addition) that they essentially constitute a hybrid category. The archetypical example of this hybrid category is workers' compensation legislation. This is perhaps not surprising given the historical evolution of workers' compensation as, in Beveridge's phrase, the pioneer system of social security. If the emergence of workers' compensation had been delayed for one or two decades it may well have been configured on the basis of more generic coverage of work status akin to the principles underpinning social security entitlements.

This section of the paper will adopt the three-fold schema of employment-based entitlements and obligations, entitlements of a fundamentally generic nature, and the hybrid situation of workers' compensation, in briefly examining the application of a range of worker protection measures in Australia. Under the employment-based heading, the statutory protection of annual leave entitlements represents an essentially typical example of an employment-based right, while payroll tax is perhaps the archetypical impost upon employment. In terms of an impetus for the movement towards atypical employment and other aspects of labour market flexibility, both employee entitlements and taxation aspects of employment have been important. As well, payroll tax legislation has had to grapple with the issue, given the incentives for avoidance, of sharply delineating employment from other work relationships. Within the compass of essentially generic protections three highly disparate measures

are briefly traversed. These involve protections against discrimination in employment, occupational injury and disease and protection of freedom of association.

Employment-based Obligations and Entitlements

Annual Leave

Under various state labour legislation and the federal *Workplace Relations Act 1996*, there is provided a minimum annual leave entitlement for every employee in that jurisdiction⁹¹ although where the employee has a more generous entitlement under his or her contract of employment or under an award or enterprise agreement, the more generous entitlement applies. In 1996 Victoria referred some of its industrial relations powers to the Commonwealth with the enactment of the *Commonwealth Powers (Industrial Relations) Act 1996* (Vic). Accordingly, the minimum annual leave entitlement for Victorian employees is governed by the *Workplace Relations Act 1996* (Cth). There is no legislation in Queensland or Tasmania that gives employees the right to annual leave, although, again, an employee may have an entitlement under an award, an agreement or under his or her contract of employment.

The general threshold test for entitlement under these statutory regimes is that of employee status, a matter generally determined by the common law test(s) discussed earlier in this report. However, some jurisdictions have provisions clarifying (and arguably, sometimes modifying) the operation of the common law touchstone. While the definition of 'employee' is usually rendered in terms of a 'contract of service' or remuneration by wages or salary, in common with many workers' compensation statutes, this is often expressed to extend to a contract of apprenticeship⁹² to outworker⁹³ and (with echoes of an earlier era) members of a buttygang⁹⁴

Thus, in the New South Wales legislation, specific reference is made to the fact that a worker is not disentitled to coverage as an employee, and hence to annual holidays, simply by virtue of the fact that he or she is being paid at piecework rate, or wholly or partly on commission, leases or hires

91 *Workplace Relations Act 1996* (Cth), *Annual Holidays Act 1944* (NSW), *Industrial and Employee Relations Act 1994* (SA), *Minimum Conditions of Employment Act 1993* (WA), *Annual Leave Act 1973* (ACT), *Annual Leave Act 1981* (NT).

92 For example Australian Capital Territory (apprentices and trainees), Northern Territory (apprentices).

93 For example New South Wales, Northern Territory.

94 For example New South Wales, Northern Territory.

their tools or other machinery, or is an outworker 95 The Western Australian legislation makes a similar reference in respect of owning or leasing a vehicle for the delivery of goods, or leasing tools or equipment 96 As well as expressly including outworkers, the South Australian statute contains some additional areas of coverage not specified under the legislation of other jurisdictions, although the rationale for such extension is not clear. These involve a person who is engaged personally to clean premises and a person (other than a taxi driver) who is engaged to drive a vehicle which is not registered in the employee's name to provide a public passenger service.

As well as inclusionary provisions, many of the annual leave statutes exclude some employees from coverage. The most generally excluded groups are part-time⁹⁷ and casual⁹⁸ workers. The federal *Workplace Relations Act* 1996 excludes persons undertaking certain types of vocational placement, while the Northern Territory statute does not cover an employee who is covered by an award or Act that provides for an annual holiday. The most extensive list of exclusions is contained in the Western Australian legislation. This is a fairly eclectic group of exclusions that also do not appear to accord to any readily identifiable principle. These exclusions involve:

casual employees who are told before starting work that they are being engaged as casual workers and that they will not be entitled to paid leave 99

people who are paid wholly by commission or by a percentage, or at piece rates 100

people who receive a federal disability support pension and who are in supported employment;
101

95 New South Wales, s 2.

96 Western Australia, s 7.

97 Australian Capital Territory, (employees working, on average, less than 22.8 hours in a week).

98 South Australia, Northern Territory,

99 Western Australia, s 3.

100 Minimum Conditions of Employment Regulations 1993 (WA), r 3.

101 Minimum Conditions of Employment Regulations 1993 (WA), r 3.

volunteers who are not entitled to pay for their work, even if they are given some other benefit or entitlement 102

people providing domestic service in a private home, unless their employer is not the owner or occupier of the home, or unless 6 or more boarders pay to live in the private home 103

Payroll Tax

All State and Territory jurisdictions levy payroll tax upon employers who pay wages in excess of a prescribed tax free threshold 104. Payments are made monthly and the concept of 'wages' is widely defined to include salary, commissions, bonuses, directors' fees, superannuation contributions, fringe benefits and meals and accommodation allowances. There is variation between jurisdictions on matters such as the rate of payroll tax (ranging from 5 percent in Queensland to 6.85 percent in the Australian Capital Territory) and the annual payroll threshold before tax is payable (ranging from \$456,000 in South Australia to \$850,000 in Queensland). In most jurisdictions some charities, hospitals, local councils and educational institutions are exempt from payroll tax with additional exemptions in particular schemes. These additional exemptions are usually focused upon employment creation initiatives and include wages paid to apprentices and probationary employees, wages paid to trainees under a training agreement and wages paid to an employee who was previously long-term unemployed.

In Queensland, Western Australia and the Northern Territory the tax liability upon the employer is essentially upon wages paid to 'employees' as that term is understood under the common law tests.

Although the various pay-roll tax statutes contain penalties for arrangements entered into to avoid payment of this tax, the significance of the financial impost is such to invite classification of work arrangements as other than that of involving an employment contract. Other jurisdictions have, accordingly, stated the employer liability to exist in respect of wages paid to employees or what are variously described as 'relevant' (NSW, Tasmania, Victoria) or 'service' (South Australia, ACT)

102 Minimum Conditions of Employment Regulations 1993 (WA), r 3.

103 *Industrial Relations Act* 1979 (WA), s 7.

104 *Pay-Roll Tax Act* 1971 (NSW), *Pay-Roll Tax Act* 1971 (Qld), *Pay-Roll Tax Act* 1971 (SA), *Pay-Roll Tax Act* 1971 (Tas), *Pay-Roll Tax Act* 1971 (Vic), *Pay-Roll Tax Assessment Act* 1971 (WA), *Pay-Roll Tax Act* 1987 (ACT), *Pay-Roll Tax Act* 1978 (NT).

contracts. This extension of liability is aimed at bringing within the pay-roll tax net areas of disguised employment or dependent self-employment, although the reach of these measures varies significantly among the six jurisdictions that have made recourse to them. In the character of anti-avoidance provisions, the provisions are often both very lengthy and highly technical in nature¹⁰⁵ While extending pay-roll tax liability beyond the contract of employment, these provisions also state exceptions to their reach. Thus the definition of 'relevant' or 'service' contracts commonly provide that contractual arrangements with owner/driver¹⁰⁶, insurance agent¹⁰⁷ and door-to-door salespeople¹⁰⁸ are not encompassed within that term unless the relevant arrangement was made with the intention of avoiding pay-roll tax.

The treatment of the triangular relationship between employment agencies, supplied workers and the placement client has created difficulties in this as in other areas. In Victoria, the legislation provides for employer liability for pay-roll tax in respect of wages made under 'employment agency contracts'. Thus, where an employment agency provides a client with the services of a worker and the only payment to which the agent is entitled is a lump sum (which does not represent payment for the worker's services) then (subject to some exceptions) any wages paid are leviable for pay-roll tax purposes. Similarly so if there is a contract of employment between the client and the worker¹⁰⁹ In New South Wales, the situation in which an employment agency supplies a worker for a client, and where the worker does not become an employee of the client, is excluded from the definition of a 'relevant contract'. However, the employment agency is taken to be the worker's employer and must (with some exceptions) pay payroll tax on payments made, or benefits given, to the worker in connection with the employment agency contract¹¹⁰ In South Australia, the

¹⁰⁵ See, for example, section 3C of the *Pay-Roll Tax Act 1971* (Vic) for a demonstration of these attributes.

¹⁰⁶ New South Wales, South Australia, Victoria, Australian Capital Territory.

¹⁰⁷ New South Wales, South Australia, Victoria.

¹⁰⁸ New South Wales, South Australia, Victoria.

¹⁰⁹ Victoria, s 3D.

¹¹⁰ New South Wales, s 3C.

employment agent is liable for pay-roll tax for leviable payments made to a worker under an employment agency contract even if the worker is not an employee of the agent or the agent's client
111

Generic Protection

Anti-Discrimination Legislation

Each of the States and Territories has some form of anti-discrimination legislation either constituted on a general basis or addressed to particular forms of discrimination¹¹² As well, there are three specific anti-discrimination statutes at the federal level, namely the *Racial Discrimination Act* 1975 (RDA), the *Sex Discrimination Act* 1984 (SDA) and the *Disability Discrimination Act* 1992 (DDA). The Commonwealth legislation applies to most corporations throughout Australia and in addition to, or concurrently with, the State and Territory statutes. The Commonwealth legislation is based upon relevant international conventions and has withstood constitutional challenge on the grounds of falling within the competency of the federal legislature under the external affairs power in the Constitution; thus the High Court has upheld the constitutionality of the *Racial Discrimination Act* through its reliance upon the International Convention on the Elimination of All Forms of Racial Discrimination which, in fact, is scheduled to the Act¹¹³

Under the three federal anti-discrimination statutes the coverage, in respect of employment-related matters, extends to employment relationships as understood at common law (including full-time, part-time, permanent, temporary or casual employment) and to persons working under a contract for services¹¹⁴ Further, sub-contractors are also covered, under the rubric of 'contract workers', in two of these measures¹¹⁵ There is similarly broad coverage under the State and Territory anti-discrimination legislation. All adopt the expansive view of employment relationships as under the federal legislation as well as coverage of persons working under a contract for services. As well, a number of the State and Territory jurisdictions extend coverage to persons

111 South Australia, s 4A.

112 *Anti-Discrimination Act* 1977 (NSW), *Anti-Discrimination Act* 1991 (Qld), *Equal Opportunity Act* 1984 (SA), *Sex Discrimination Act* 1994 (Tas), *Equal Opportunity Act* 1995 (Vic), *Equal Opportunity Act* 1984 (WA), *Discrimination Act* 1994 (ACT), *Anti-Discrimination Act* 1992 (NT).

113 *Viskauskas v Niland* (1983) 153 CLR 280, *University of Wollongong v Metwally* (1984) 158 CLR 447.

114 Interpretation provisions of these three statutes, namely RDA, s 3(1), SDA, s 4(1), DDA, s 4(1).

115 SDA, s 4(1); DDA, s 4(1).

paid in whole or in part on a commission basis 116 and to voluntary or unpaid workers 117. However, the Victorian *Equal Opportunity Act* 1995 explicitly excludes unpaid or voluntary workers from coverage. Under the Northern Territory *Anti-Discrimination Act* 1992 coverage is extended to persons working under a guidance program, vocational training program or other occupational training or retraining program, while the Tasmanian *Sex Discrimination Act* 1994 also provides coverage to a partner, or person wishing to become a partner in a partnership, to a commission agent or person applying to become a commission agent, and to a person wanting to be registered with an employment agency or placed in employment by an employment agency.

Occupational Health and Safety

Over the past two decades the primary occupational health and safety statutes operating in the Australian States and Territories have been recast in a 'post-Robens' form. Two federal statutes are similarly configured. The reference is to the landmark 1972 English report of a committee of enquiry, chaired by Lord Robens, that has resulted in a radical restructuring of the legislative framework for the regulation of occupational health and safety in the United Kingdom, Australia and elsewhere. In place of specific statutes dealing with particular industrial activities and processes 118 framed in terms of detailed, technical specification or prescriptive standards, there is a primary occupational health and safety statute 119 embodying a range of general duties and supplemented by various standards and requirements rendered in regulations and codes of practice.

The new framework for occupational health and safety regulation is similar to anti-discrimination legislation in that the protective coverage reach of the statute extends to both employees and to persons other than employees 120. Under this framework, there are a series of stipulated duties. First, there is the employer's general duty to his or her employees. In the language of the Victorian statute, this duty is to 'provide and

116 Queensland, Victoria and the Northern Territory.

117 Queensland, South Australia, Tasmania and the Australian Capital Territory.

118 Eg Factories and Shops, Lifts and Cranes, Boilers and Pressure Vessels

119 There is usually separate legislation dealing with dangerous goods. The major Australian occupational health and safety statutes are: *Occupational Health and Safety (Commonwealth Employment) Act* 1991 (Cth); *Occupational Health and Safety Act* 1983 (NSW); *Workplace Health and Safety Act* 1995 (Qld); *Occupational Health and Safety and Welfare Act* 1986 (SA); *Workplace Health and Safety Act* 1995 (Tas); *Occupational Health and Safety Act* 1985 (Vic); *Occupational Safety and Health Act* 1984 (WA); *Occupational Health and Safety Act* 1989 (ACT); *Work Health Act* 1986 (NT).

120 See R Johnstone, 'Paradigm Crossed? The Statutory Occupational Health and Safety Obligations of the Business Undertaking' (1999) 12 *Australian Journal of Labour Law* for a recent extensive review of these issues.

maintain so far as is practicable for employees a working environment that is safe and without risks to health.¹²¹ In all the Australian legislation, apart from that in the Northern Territory, the employer's duty to employees is based upon the common law employment relationship. However, unlike, for instance the statutes dealing with annual leave, considered in the previous section, the definition of 'employee' is of general application and does not operate to exclude casual or part-time employees. As well, in all the Australian statutes, other provisions operate to provide that the employer's duty in fact extends to non-employees. This is achieved through deeming provisions that operate to extend the notion of employee to include contractors and their employees and through a separate stipulated employer duty that is framed in terms of non-employees.

Under the Northern Territory *Work Health Act* 1986¹²² the object of the employer's duty to provide and maintain a safe working environment is stated in terms of 'workers', a term that is defined as a natural person who, under any form of agreement, performs work or a service of any kind for another person.¹²³ This clearly extends the duty to independent contractors. A similar result is reached, by the deeming route, in other jurisdictions. For instance, section 21(3) of the Victorian statute 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 relation to all matters over which the employer has control. The Commonwealth and Western Australian legislation have provisions in similar form¹²⁴ and the South Australian and Tasmanian statutes achieve similar results in a somewhat different fashion.¹²⁵

¹²¹ Victoria, s 21(1). The statement of the employer's duty to employees is in roughly similar form in the other Australian OHS statutes, except for the New South Wales and Queensland Acts where the duty is stated in absolute terms. However, in New South Wales, a later provision (s 53) sets out defences of reasonable practicability and that the commission of the offence was due to factors over which a person had no control. In Queensland, the situation is slightly more complex with the statute mandating certain actions, depending upon the existence or not of regulations and advisory standards covering the risk in question. The duty holder can plead a defence that, on the balance of probabilities, he or she complied with these stipulations or, where they did not exist, acted in a reasonable fashion with proper diligence to prevent the contravention.

¹²² Northern Territory, s 29.

¹²³ Northern Territory, s 3(1).

¹²⁴ Commonwealth, s 16(4); Western Australia, s 19(4) and (5). The Commonwealth measure does not refer to the contractor's employees however.

¹²⁵ South Australia, s 4(2); Tasmania, s 9(4). Like the Commonwealth statute, the South Australian provisions do not extend cover to the employees of an independent contractor, while, under the Tasmanian measure, the duty is limited to work done at 'any workplace under the control or management' of the employer who is also the principal.

The wider canvass of occupational health and safety protection stems from a recommendation in the Robens Report concerning the protection of the general public from hazards arising directly from industrial and commercial activities. This has been taken up in the Australian OHS legislation through a separate provision concerning the duty of employers in relation to non-employees. In this context an 'employer' is defined as a person or an organisation that employs at least one 'employee'. Furthermore, apart from the Commonwealth and Northern Territory statutes, this duty is also affixed to self-employed persons. There are, however, some differences among the Australian jurisdictions as to how widely this duty extends. Some statutes have broadly unrestricted statements of the duty while others impose some restrictions and qualifications, usually in terms of limiting the scope to the employer's workplace.

Among the broad statements of the duty is section 22 of the Victorian statute which 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'. The Queensland provisions are in similar form¹²⁶ While adopting language that is not unlike that of the Victorian and Queensland measures, the analogous federal, New South Wales and Australian Capital Territory provisions have a more circumscribed operation due to geographical limitations upon the expressed duty. Thus the duty to non-employees is stated to apply 'while they are at the employer or self-employed person's place of work' ¹²⁷ or 'at or near a workplace under the employer's control' ¹²⁸

The other Australian statutes eschew the concept of the employer or self-employed person's undertaking for a different approach. Thus the South Australian and Western Australian measures express the duty in terms of 'reasonable care' to 'avoid adversely affecting' the health and safety of others 'by an act or omission at work' ¹²⁹ or to 'ensure that the health and safety' of another is 'not adversely affected wholly or in part as a result of work in which [the employer] of his employees is engaged' ¹³⁰ Finally, the Tasmanian statute states the employer's duty as being to ensure so far as is reasonably practicable that the health and safety of others is not adversely affected by 'work carried on at a workplace' ¹³¹

¹²⁶ Queensland, ss 28(2) and 29.

¹²⁷ New South Wales, s 16.

¹²⁸ Commonwealth, s 17, with the additional requirement that such persons are not employees or contractors of the employer. Section 29 of the Australian Capital Territory statute replicates the Commonwealth wording but also imposes the duty on self-employed persons as well as employers.

¹²⁹ South Australia, s 22.

¹³⁰ Western Australia, s 21. The Northern Territory provision is in similar form; s 29(1)(b).

¹³¹ Tasmania s 9(3), excluding for this purpose an employee, a contractor or employee of a contractor employed or engaged by the employer. As well, the measure is expressed in terms of 'a workplace' without any requirement that it be the employer's workplace. The duty of self-employed persons, in s 13 of the Act, is stated to be to ensure as far as is reasonably practicable that persons not in the self-

Freedom of Association

At a federal level, provisions protecting freedom of association are contained in a new Part XA of the *Workplace Relations Act* 1996 (WRA). The coverage of these provisions extends to employers, employees and independent contractors. The primary expressed object is that of ensuring that employers, employees and independent contractors are free to join or not to join industrial association¹³² and are not discriminated against or victimised because they are, or are not, members of such associations¹³³. Part XA is not intended to exclude or limit the concurrent operation of State or Territory laws¹³⁴. However, there are provisions that prevent a person or an association from being simultaneously held liable under the federal law and a State or Territory statute¹³⁵.

The application of the protections under Part XA is stipulated to be in respect of specified conduct that:
is taken by an organisation registered under the WRA¹³⁶ or its officers¹³⁷ or
relates to a person's membership or non-membership of an organisation¹³⁸ or
relates to a person's participation or non-participation in industrial action¹³⁹ or
relates to matters, proceedings and activities covered by, and arising from, the WRA¹⁴⁰ or
is taken by or affects a constitutional corporation¹⁴¹ or

employed persons employment are not exposed to risks to their health and safety arising from work carried on at the self-employed persons workplace.

¹³² *Workplace Relations Act*, s 298A(a).

¹³³ *Workplace Relations Act*, s 298A(b).

¹³⁴ *Workplace Relations Act*, s 298J.

¹³⁵ *Workplace Relations Act*, s 298W.

¹³⁶ *Workplace Relations Act*, s 298D(a).

¹³⁷ *Workplace Relations Act*, s 298D(b).

¹³⁸ *Workplace Relations Act*, s 298D(c).

¹³⁹ *Workplace Relations Act*, s 298E.

¹⁴⁰ *Workplace Relations Act*, s 298F.

occurs in a Territory 142

In separate Divisions, Part XA deals with conduct by employers, by employees and by industrial associations 143 For the purposes of this paper, the provisions in Division 3, dealing with particular discriminatory or coercive conduct on the part of employers and persons who engage independent contractors, are the most relevant. An employer, or a person engaging an independent contractor, must not take certain actions for one or other

of 13 specified prohibited reasons: 144 This proscribed action relates to:
the dismissal of employees;
the termination of the contract of an independent contractor;
injuring an employee in respect of his or her employment or injuring an independent contractor in relation to the terms and conditions of their contract for services;
altering the position of employees or contractors to their prejudice;
the refusal to employ someone or engage them as an independent contractor;
discrimination against someone in the terms upon which they are offered employment or are engaged as an independent contractor.

As well, an employer or the person who has engaged an independent contractor must not, by threats, promises or other means, induce an employee or the independent contractor to cease being an officer or member of a federally registered industrial association 145 Where the employer or the principal of a contractor is a corporation, or where the conduct takes place in a Territory, this proscribed conduct operates whether or not the industrial association is federally registered or not.

In addition to these measures relating to actions by employers, Division 5 of Part XA provides protection to employees against certain coercive action by a federally registered association, or an officer or member of such a body, that would directly or indirectly prejudice their employment. The proscribed activity relates to action taken to coerce a person to join in industrial action or to dissuade a person from making an application for an order to hold a secret ballot 146 There are also provisions prohibiting industrial associations taking a variety of

141 *Workplace Relations Act*, s 298G. A 'constitutional corporation' is defined in section 4(1) and essentially refers to trading, financial and foreign corporations (as understood in the corporations power of the Constitution), a body corporate incorporated in a Territory and a Commonwealth authority.

142 *Workplace Relations Act*, section 298H.

143 Divisions 3, 4 and 5 respectively.

144 These reasons are elaborated in section 298L(1) and essentially revolve around membership (including present, past or proposed) or non-membership of an industrial association and action or refusal to take action in relation to the activities of an industrial association.

145 *Workplace Relations Act*, s 298M.

146 *Workplace Relations Act*, s 298Q.

actions against independent contractors in order to coerce them to join such an association 147 This includes advising, inciting or encouraging discriminatory action against a contractor in the form of not engaging the services of that contractor or refusing to supply goods or services to the contractor 148 In addition, taking or threatening to take industrial action against the independent contractor directly, or against another party to coerce that party to take discriminatory action against the contractor, for not joining an industrial association, is proscribed 149

Hybrid Arrangements

Workers' compensation systems provide a variety of payments for losses sustained as the result of an injury or disease that arises out of or in the course of a worker's employment. These payments include amounts for income loss, costs of medical and allied treatment and some table of maims payments for the loss or loss of use of limbs and digits. In Australia there are ten such systems, one for each of the States and Territories and two operative at the federal level, catering for federal public sector employment and for seafarers respectively 150

In common with other protective legislation, entitlement to workers' compensation benefits is aligned to employee status, as determined by the common law tests, together with specified exceptions (both in terms of addition to and subtractions from) to the 'employee' criterion for coverage. However, workers' compensation is distinctive in terms of the extent to which derogation from, and augmentation of, this criterion test occurs. As there are significant differences among the ten Australian jurisdictions, the result is a mosaic of often bewildering complexity.

147 *Workplace Relations Act*, s 298S.

148 *Workplace Relations Act*, s 298S(1).

149 *Workplace Relations Act*, s 298S(2).

150 *Safety, Rehabilitation and Compensation Act 1988* (Cth) [Comcare], *Seafarers Rehabilitation and Compensation Act 1992* (Cth) [Seacare], *Workers Compensation Act 1987* (NSW), *WorkCover Queensland Act 1996* (Qld), *Workers Rehabilitation and Compensation Act 1986* (SA), *Workers Rehabilitation and Compensation Act 1988* (Tas), *Accident Compensation Act 1985* (Vic), *Workers Compensation and Rehabilitation Act 1981* (WA), *Workers' Compensation Act 1951* (ACT), *Work Health Act 1986* (NT).

In most statutes the definition of 'worker' is aligned with the common law contract of employment, often using the terminology of 'a contract of service or apprenticeship'.¹⁵¹ In the two federal statutes, which utilise the term 'employee' rather than 'worker', the definition of that term reflects the specialised nature of their coverage.¹⁵² The most radical departure is the approach taken in the Northern Territory in which the definition of 'worker' is based on the payment of PAYE tax.¹⁵³

The workers' compensation legislation in the various jurisdictions operates to supplement or modify the primary definition of 'worker' or 'employee' in a number of ways. First, there are provisions which attempt to clarify the classes of person who come within the definition of 'worker', in particular to achieve a clearer delineation of the boundary between a 'worker' and an 'independent contractor'. Secondly, the legislation may expressly exclude nominated categories of workers from workers' compensation coverage, even though such workers may work under a contract of employment.. Thirdly, a disparate range of occupations and activities are accorded coverage under the workers' compensation legislation through the mechanism of being accorded 'deemed worker' status.

Attempts at Clarification

At a minor level, attempts at achieving clarity of the definition of 'worker' can be seen in provisions directed to emphasising coverage of classes of employment which were previously excluded under earlier workers' compensation legislation.¹⁵⁴ However, the major area where there is some form of legislative clarification concerns the interface between 'workers' and 'independent contractors'. As already discussed in this paper, it has long been recognised that this division involves a penumbral grey area and that there are situations where a person, while exhibiting many of the characteristics of an independent contractor, should be given coverage as a worker under the Act. One longstanding provision, which exists in roughly similar terms in a number of jurisdictions,¹⁵⁵ states that a contractor who contracts to perform work (not being incidental to a trade or business regularly carried on by the contractor in his or her own name or by means of a partnership or business or firm name) and who neither sublets the contract nor employs workers (or although employing workers actually performs some part of the work personally) is deemed to be a worker employed by the person who made the contract with the contractor. Apart from this general deeming of certain contractors to be workers for the

¹⁵¹ New South Wales, South Australia, Tasmania, Victoria, Western Australia, Australian Capital Territory.

¹⁵² Comcare, s5; Seacare, s4(1).

¹⁵³ Northern Territory, s 3(1) (definition of 'worker', para (b)(i), and definition of 'PAYE taxpayer'). This is currently also the situation in Queensland, ss 12(1) and 13 with certain relationships (eg working directors) who could qualify as PAYE also excluded. However, from 1 July 2000, Queensland will revert to the general Australian standard of alignment with the common law contract of employment.

¹⁵⁴ For example, Victoria, s 5(1) where the 'worker' is defined as 'including a domestic servant or an outworker'.

¹⁵⁵ New South Wales, Sch 1, cl 2(1)(a); Victoria, s 8; Australian Capital Territory, s 6(3).

purpose of the Act, the legislation in various jurisdictions also contains more specific deeming provisions pertaining to contractors in specified (largely rural) occupations or pursuits.

As discussed earlier in this paper, as working arrangements become more diffuse, particularly in the contemporary environment of increasing resort by companies and organisations to outsourcing of activities and functions, there is the danger that relationships which are formally characterised in terms of principal and contractor are, in reality, a species of disguised employment. It becomes a challenge for modern and equitable workers' compensation systems to provide measures which can protect the interests of persons who are essentially workers but through inequality of bargaining power and the perceived taxation benefits of self-employment are formally classified as independent contractors. Accordingly, more significant clarifying provisions are those which attempt more clearly to delimit the boundaries between 'workers' and 'independent contractors'.¹⁵⁶

Exclusions to Coverage

Early Australian workers' compensation statutes, based on English legislation, contained a large number of excluded categories of employment. Over time most of these exclusions have been removed in most jurisdictions. The remaining exclusions fall into six main categories. First, there is the overhang of the early history of workers' compensation. This can be seen in the Tasmanian exclusion of an outworker¹⁵⁷ and of a domestic servant in a private family who, at the time of injury, has not completed 48 hours employment with this employer.¹⁵⁸ The exclusion (in the Australian Capital Territory, New South Wales, Tasmania and Western Australia) of a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business also falls within this category.¹⁵⁹

Secondly, there are exclusions that appear motivated by fears of moral hazard for the insurer in situations involving members of the employer's family and company directors employed by the company. However, such exclusions can usually be displaced through disclosure of the person's name, nature of employment and remuneration to the relevant insurer. This class of exclusion operates in relation to a member of the employer's immediate family in the Northern Territory¹⁶⁰ to a member of the employer's family living in the employer's

¹⁵⁶ By far the most extensive measure of this type can be seen in section 9 of the Victorian legislation, a measure that has its origins in an anti-avoidance provision in the Victorian payroll tax legislation.

¹⁵⁷ Tasmania, s 4(5)(b).

¹⁵⁸ Tasmania, s 4(5)(c).

¹⁵⁹ New South Wales, s 3(1) (definition of 'worker', para (b)); Tasmania, s 4(5)(a); Western Australia, s 5(1) (definition of 'worker'); Australian Capital Territory, s 6(1): (definition of 'worker', para (a)).

¹⁶⁰ Northern Territory, s 3(1) (definition of 'worker', para (b)(iv)).

home in the Australian Capital Territory and Western Australia 161 and to company directors in the Northern Territory, Queensland and Western Australia 162

A third category of exclusion relates to areas of employment which are covered for workers' compensation, or for disability benefits which are equivalent or superior to those provided by workers' compensation schemes, by other measures. This category of exclusion is particularly important in the federal statutes and those of the two Territories 163

Fourthly, there is the exclusion of a member of the crew of a fishing vessel where the remuneration is in the form of a share in the profits or gross earnings from working of the vessel in the Northern Territory, South Australia, Tasmania and Western Australia 164 The historical rationale for this exclusion is that the form of remuneration means that such crew are essentially co-venturers rather than employees. However, this is probably only the case in respect of the Western Australian provisions, where there is the requirement of contributing to the cost of working the vessel 165

While most of the areas of exclusion date back to the origins or early years of workers' compensation, the fifth category, that relating to sports persons is of more recent origin 166 It appears to represent a reaction to protect sporting clubs and associations and their officials following the decision of the New South Wales Court of Appeal in *Peckham v Moor* 167 and of the Full Court of the Victorian Supreme Court in *Bailey v Victorian*

161 Western Australia, s 5(1) (definition of 'worker'). Australian Capital Territory, s 6(2).

162 Northern Territory, s 3(1) (definition of 'worker', para (b)(v)); Western Australia, s 10A.

163 There are a number of such provisions in the Comcare legislation (eg s 5(8)(a)-(d)); Australian Capital Territory, s 6(1) (definition of 'worker', paras (b) and (c)); Northern Territory, s 3(1) (definition of 'worker', para (b)(iii)).

164 Northern Territory, s 3(1) (definition of 'worker', para (b) (vii)); South Australia, s 3(3); Tasmania, s 4(5)(d); Western Australia, s 17.

165 The Seamen's Compensation Review drew attention to the traditional exclusion of the fishing industry from workers' compensation coverage and recommended the eventual inclusion of this industry within a comprehensive single maritime workers' compensation system; *Report of the Seamen's Compensation Review*, Australian Government Publishing Service, Canberra, 1988, pp 86, 88.

166 In England it had long been accepted that a professional footballer was an employee for workers' compensation purposes: *Walker v Crystal Palace Football Club Ltd* [1910] 1 KB 87

167 [1975] 1 NSWLR 353

Soccer Federation 168 This general exclusion, albeit with qualifications, of persons who are employed to engage in sporting activities operates, in one form or another, in all State and Territory jurisdictions 169 However, persons employed in some specific areas of sporting activity (chiefly jockeys, boxers and wrestlers) are, under other provisions, deemed to be workers 170

Deemed Extension of Coverage

The workers' compensation legislation in the various jurisdictions also operates to extend coverage to a range of employment categories or arrangements through the device of deeming such arrangements to be contracts of service or by deeming the person represented by the particular employment category to be a worker. This extension of coverage has proceeded in an incremental and largely ad hoc manner with the result that the present legislative arrangements across Australia in this area present a confusing mosaic of covered activities with considerable variation between jurisdictions in the range of arrangements covered in this manner.

However, despite the disparate nature of the arrangements encompassed by this process of statutory extension, they can be seen to fall into a number of groups. First, situations where the occupational category or work arrangement does not fit easily within the bounds of a traditional contract of employment. This includes the situation of a taxi driver (contract of bailment 171, a minister of religion 172 a tributor and sub-tributor 173 a share farmer 174 and a salesperson, canvasser, collector or person paid by commission 175

168 [1976] VR 13.

169 New South Wales, s 3(1) (definition of 'worker', para (d)); Queensland, s 12(3); South Australia, s 3(7); Tasmania, s 3(7); Victoria, s 16(1); Western Australia, s 11; Australian Capital Territory, s 6(4A); Northern Territory, s 3(10);

170 See fn 179-180, below.

171 New South Wales, Sch 1, cl 10; South Australia, s3(1) (definitions of 'worker' para (a) and 'contract of service', para (b)); Tasmania, s 3(2); Victoria, s 7; Northern Territory, s 3(1) (definition of 'worker', para (b)(ii)).

172 New South Wales, Sch 1, cl 17; South Australia, (definitions of 'worker' para (a) and 'contract of service', para (b)); Tasmania, s 3(4); Victoria, s 12; Western Australia, ss 8-10.

173 New South Wales, Sch 1, cl 6; Victoria, s 5(6); Western Australia, s 7.

174 Victoria, s 11.

175 New South Wales, Sch 1, cl 5; Australian Capital Territory, s 6(4).

Secondly, and sometimes overlapping with this first category, is a range of employments or contracting activities within the agricultural, forestry and pastoral sectors, where the legislation deems someone falling within a particular category to be a worker¹⁷⁶

Thirdly, the coverage of workers attending at a place of pick up was in recognition of the nature of hiring arrangements in certain industries and the fact that if an injury was sustained at such a place (or travel to and from this venue) there may not be an employer upon whom a claim could be lodged; hence the deeming of the worker to be employed by the employer who last employed the employer in his or her customary employment¹⁷⁷

Fourthly, certain classes of sportspersons. While there was a movement during the 1970s generally to exclude sportspersons from workers' compensation coverage¹⁷⁸ there have been prominent exceptions to this policy, facilitated by deeming particular classes of sportspersons to be workers for the purpose of the Act or specifying that the general exclusion should not apply to such persons. This practice has been especially widespread with respect to various occupational categories within the horseracing industr¹⁷⁹ and, to a lesser degree, boxers and wrestlers¹⁸⁰ referee¹⁸¹ and caddies and like casuals¹⁸²

¹⁷⁶ New South Wales, Sch 1 cl 3 (rural work), cl 4 (timbergetters), cl 8 (mines rescue personnel), and cl 12 (shearers' cooks and like workers); Victoria, s 6 (timber contractors).

¹⁷⁷ Comcare, s 5(4); New South Wales, Sch 1, cl 14; South Australia, s 3(1) (definition of 'employment', para (d)); Tasmania, s 25(4); Victoria, s 15.

¹⁷⁸ See above

¹⁷⁹ New South Wales, Sch 1, cl 9; South Australia, s 52(2)(a); Victoria, s 16(4); Western Australia, s 11A; Australian Capital Territory, s 6(4B) and (4C); Northern Territory, s3(1) (definition of 'worker', para (b)(i)).

¹⁸⁰ New South Wales, Sch 1, cl 15; South Australia, s 58(2)(b), Australian Capital Territory, s 6(4D) and (4E).

¹⁸¹ New South Wales, Sch 1, cl 15; South Australia, s 58(2)(b), Australian Capital Territory, s 6(4AA) and (4E).

¹⁸² New South Wales, Sch 1, cl 11.

The final general area of statutory extension relates to persons who are engaged in what are regarded as socially desirable, voluntary (or nominally remunerated) activities such as volunteer fire fighters 183 volunteer ambulance officers 184 state emergency service personnel 185 juror 186 and volunteers assisting police 187 In two jurisdictions there is a general provision allowing persons of a prescribed class who voluntarily perform work of a prescribed class which is of benefit to the State to be deemed to be workers employed by the Crown (Tasmania) or by the person or organisation prescribed (Northern Territory) 188 Whereas, in respect of the other categories described above, the extension of coverage is to provide protection (and particularly loss of earnings indemnity) in relation to the person's primary occupational activity, the protection here is primarily or exclusively in regard to other earnings which have been lost as the result of participation in the relevant voluntary activity.

E. CASE EXAMPLES

Owner-Drivers in the Transport Industry

Introduction

The relative importance of road transport, compared with sea and rail, has steadily increased since World War II 189 Ship losses, poor maintenance programmes in the railways and major industrial disputes reduced the viability of these transport forms and gave road transport operators a head start in developing the area of long distance road transport. Advances in technology brought a wider range of specialised vehicles (such as tankers, refrigerated units and pantechinons), while the war experience of driving road transport saw many ex-servicemen investing their deferred pay into the purchase of ex-army trucks and becoming owner-drivers. These

183 South Australia, s 103A; Tasmania, s 5; *Country Fire Authority Act* 1958 (Vic) s 63; Northern Territory, s 3(8).

184 Tasmania, s 6.

185 Northern Territory, s 3(7); *Victoria State Emergency Service Act* 1987 (Vic), s 22; Northern Territory, s 3(7).

186 *Juries Act* 1967 (Vic), s 59; Northern Territory, s 3(1) (definition of 'worker', para (b)(ii)).

187 Tasmania, s 6A; *Police Assistance Compensation Act* 1968 (Vic), 2.

188 Tasmania, s 6B, NT, s 3(9).

189 See M Bray, *A Precarious Victory: The Regulation of Self-Employed Owner-Drivers in New South Wales Road Transport, 1940-1988*. Industrial Relations Research Centre, University of New South Wales, Sydney, 1990, especially pp 15-21 for the historical development.

developments were also fostered by greatly increased expenditure on road construction while legal action by road transport operators succeeded in the removal of restrictions on the operation of interstate road transport

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The 1950s saw the emergence of large freight forwarding companies that continued to expand during the 1960s. These companies contracted directly with suppliers for the door to door transport of goods at an all-inclusive rate, with a single invoice, regardless of the mode or combination of modes of transport. This has allowed freight forwarders enormous control with the ability to switch consignments between competing carriage options. This has both increased inter-modal competition and competition among road transport companies for the freight that they control. This has had considerable consequences for the role of self-employed owner-drivers both in terms of remuneration and work practices.

Alongside these developments in long distance transport, short distance road transport services also enjoyed rapid expansion. Its success was contributed to by the changing location of industry within cities, improvement in road and vehicle technologies and a large element of natural protection from inter-modal competition.

Structure and Economics

The Australian road transport industry contributes approximately five percent annually to Australia's Gross Domestic Product. It is, however, a highly fragmented industry. There are three major identified sectors: short distance (or local), long-distance intrastate and long distance interstate transport. These sectors have different cost and rate structures and are subject to different market pressures. In addition, they tend to have different regulatory regimes with interstate transport being largely an area of federal regulation while short distance and intrastate long distance transport are more exclusively areas of state control.

The industry is also fragmented by the nature of goods transported, with a basic division between 'general freight' and 'specialist freight' sectors involving, on the one hand, the carriage of 'dry' goods and, on the other, goods that cannot easily be mixed together such as gases, liquids and perishables. Different vehicles are involved in each sector with general freight being carried in all-purpose vehicles while the specialist sector utilises specialist vehicles such as tankers and refrigerated vans.

Additional complexity arises according to whether full truckload or less-than-full truckload freight is involved. In respect of the former, the process involves loading, line-haul and unloading, whereas

190 In particular the Privy Council decision in *Hughes and Vale Pty Ltd v State of New South Wales* (1954) 93 CLR 1.

with less-than-full truckload operations there are additional stages of 'consolidation' and 'deconsolidation' of loads in terminals or warehouses. The effect, in the long distance sector, is a seven stage process, namely, loading, short distance line-haul to the terminal, load consolidation, long distance line-haul, load deconsolidation, short distance line-haul and unloading of goods at their destination. This segmentation of process lies at the heart of the subcontracting system within the road transport industry, and its extreme competitiveness, as transport companies and freight forwarders are able to introduce competition between drivers for separate components of this carriage chain.

Another basis of differentiation within the industry is the bifurcated division between ancillary carriers and professional carriers. In the case of ancillary carriers, the vehicles operated by the enterprise carry the goods owned by the enterprise whereas professional carriers transport goods owned by others for a fee or cartage rate. Historically, ancillary carriers (a category that has included many farmers) have owned the greater number of vehicles¹⁹¹ but constitute a relatively small proportion of freight transported (calculated in terms of total tonne-kilometres carried)¹⁹² The range of carriage arrangements operating in the road transport industry are set out in Table 7.

Transport companies and freight forwarders have great flexibility in their choice of carriage options. Ancillary carriers also can consider the option of outsourcing some of the sections of the carriage chain to other carriage arrangements. Owner-drivers provide a useful means for transport companies to deal with changing demand. It allows expansion with limited capital investment by the company and contraction without the redundancy and other costs associated with direct employment. For freight forwarders, owner-drivers can be pitted against each other and against employee drivers of transport companies as a means of keeping rates low.

Table 7: Nature of Carriage Arrangements in the Road Transport Industry

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¹⁹¹ In 1956 it was estimated that such carriers owned around 80 percent of all trucks, falling to around 70 percent by 1982. (Figures from L Schumer, 'Road Transport' in J Wilkes (ed), *Australia's Transport Crisis*, Angus and Robertson, Sydney, 1956 and the National Road Freight Industry Inquiry, *Report*, AGPS, Canberra, 1984; both works cited in Bray, chapter 4).

¹⁹² The 1984 National Road Freight Industry Inquiry estimated that ancillary carriers represented less than twenty percent of the national freight load transported on this measure.

Carriage Arrangement	Description
Ancillary carriers	Company goods are transported in company owned vehicles. Drivers directly employed by the ancillary carrier.
Company contracting	Owner of goods engages services of specialist road transport company. Transport company owns the vehicles that are driven by company employees.
Owner-driver contracting	Owner of goods engages services of a self-employed individual who both owns and drives the transporting vehicle.
Company Subcontracting	Owner of goods engages services of specialist transport company which in turn engages another specialist transport company for actual carriage of goods.
Owner-driver Subcontracting	Owner of goods engages services of specialist transport company which in turn engages a self-employed owner-driver for actual carriage of goods.

Source: adapted from Mark Bray, *A Precarious Victory: The Regulation of Self-Employed Owner-Drivers in New South Wales Transport, 1940-1988* (1990), p 47

Entry into the industry for owner-drivers is relatively easy with the capital costs of entry being facilitated by the ready availability of finance options. The high level of debt that this often entails further contributes to asymmetrical bargaining power that individual owner-drivers experience in dealing with transport operators and freight forwarders. One factor contributing to the oversupply of drivers has been described as the 'Burt Reynolds syndrome' in which the attraction of the image of driving trucks and being their own boss overrode a more considered and rational assessment of the economic viability of the proposed venture 193

Owner-drivers, consequently, are central to the subcontracting system that characterises the road transport industry. However, while owner-drivers share the feature of being self-employed workers engaged in the transport of goods through driving a truck that they in fact own, there are considerable differences between the situations of individual owner-drivers. As Mark Bray has observed:

While comprising a single category for most purposes . . . owner-drivers can differ from each other according to their personal capital holdings, their role and their independence. Some owner-drivers, for example, own their own rigs outright, some have secured small loans from banks, while others have 'purchased' their vehicles with very little capital through either hire-purchase arrangements with financial institutions or sometimes even on loans from the company for which they work. Some owner-drivers who own more than one truck are also employers of employee-drivers, but most will only employ drivers for short periods when they themselves are sick or on holidays. The independence of owner-drivers derives mainly from the range of clients for whom they

193 Bray, above n 189.

work. Some (referred to as 'tied' or 'painted' owner-drivers) work exclusively for one company to the extent that they have their trucks painted in that company's colours, some work for a small number of companies, while others (called 'itinerants' or 'independents') gain their loads on an irregular basis from varied sources 194

Problems Faced by Owner-Drivers

The system of subcontracting that lies at the heart of the operations of the road transport industry has the effect of a solvent that undermines the conditions of both employee drivers and owner-drivers within the industry. The results can be seen in a number of areas including fierce rate-cutting and other forms of cost reduction, enormously long hours of work, overloading of vehicles, and inadequate maintenance of vehicles. These features, in turn, have significant effects upon the health and safety of drivers, their economic security and their marriages and family life 195 Furthermore, they can present a significant danger to other members of the driving public 196

The 1984 National Road Freight Industry Inquiry identified the main problems facing long distance truck drivers as arising from competitive pressures and the weak bargaining power of these drivers 197 In this weakened bargaining position, unreasonable conditions can be imposed by transport companies and freight forwarders. For instance, one study found that express drivers were given a deadline of 24 hours to make the journey between Adelaide and Perth, an undertaking that required an average speed of 112 km/hour 198 Other studies

194 M Bray, 'Unions and Owner-Divers in New South Wales Road Transport' in Bray and Taylor, above n 39.

195 In particular, the health and safety aspects have been documented in two studies conducted for Worksafe Australia; A Feyer, A Williamson, R Fiswell and D Leslie, 'Strategies to Combat Fatigue in the Road Transport Industry, Worksafe Australia, *Research Update*, Issue 94024, 1994; D Arblaster, A Woodward and J Moller, *Occupational Health and Safety: Strategies for Change in the Long Distance Trucking Industry*, Worksafe Australia, Canberra, 1995

196 For a vivid example, see the Findings of Inquest of a recent South Australian coronial inquiry; text at n 204 below.

197 Cited in C Mayhew, M Quinlan, L Bennett, *The Effects of Subcontracting/ Outsourcing on Occupational Health and Safety*, Industrial Relations Research Centre, University of New South Wales, Sydney, 1996, at p 27.

198 Arblaster *et al*, above n 195, at p 2.

show that most long-distance drivers worked at least 55 hours a week 199 with the longest hours apparently worked by owner-drivers engaged by large companies, with an average of 75.4 hours a week, almost twenty hours more per week than that for employed drivers working for large firms 200

Apart from the hours spent behind the wheel, driver fatigue is compounded by non-driving duties, especially loading and unloading of vehicles and the conduct of routine maintenance. Poor diet and difficulties sleeping during rest-periods are exacerbating features 201 The taking of stimulant drugs is rife as drivers seek assistance to combat fatigue. There is considerable evidence that such drugs are often supplied by the management of transport companies. It is perhaps not unsurprising that a number of studies have shown that heavy trucks are heavily over-represented in fatal injury accidents 202 The risk exposure is further compounded by a range of other dangerous practices, particularly the endemic overloading of vehicles. In 1990-91 the New South Wales Roads and Traffic Authority, alone, instituted more than 20,000 prosecutions for heavy vehicle overloading 203

A recent coronial inquiry in South Australia into a collision between a fully laden semi-trailer and two motor cars, resulting in the deaths of six people, vividly illustrates some of the features mentioned above 204 The collision

199 Feyer, above n 195.

200 A Williamson, A-M Feyer, C Courmarelos and A Jenkins, *Strategies to Combat Fatigue in the Long Distance Road Transport Industry, Stage 1: The Industry Perspective*, National Occupational Health and Safety Commission, Canberra, 1992, at p 81.

201 *Ibid.*

202 Mayhew, Quinlan and Bennett, above n 197, at p 26.

203 *Ibid.*

204 Finding of Inquest into the deaths of Susan Margaret Duffy, Walter Edward Duffy, Vida May Claxton, Christopher Verdun Claxton, Nita Claire Hastwell and Ivy Nell Hastwell, 17 March 1999. We thank the South Australian Coroner, Mr Wayne Chivell, for supplying a copy of his decision.

occurred as the result of the semi-trailer veering across the road into the path of the oncoming cars. The driver of the semi-trailer had been observed driving in an erratic fashion for some time and had narrowly missed earlier colliding with at least three other vehicles. The coroner found that the collision resulted from semi-trailer driver's extreme fatigue resulting in him undergoing what are known as micro-sleeps. This condition was exacerbated by the ingestion of stimulant drugs, ephedrine and phentermine, that had allowed him to continue driving through the night but causing even greater fatigue when the effects wore off (the rebound effect). These drugs were given to him by his employer and by a co-employee. The driving of heavy commercial vehicles for long periods, far in excess of maximum prescribed in the governing statute²⁰⁵ was part of a regular work practice at this transport company.

There are differences in the method of remuneration between employee drivers and owner-drivers. Employee drivers generally are paid on an hourly, weekly or distance/ tonnage trip rate, whereas, overwhelmingly, owner-drivers are remunerated on a trip rate or flat rate per load. Competitive pressures have resulted in payments for owner-drivers, and also some employee drivers, falling below the level represented by industry awards. A study of 960 long-distance truck drivers conducted for Worksafe showed that around half of independent owner-drivers were remunerated at levels below award rates²⁰⁶. The levels of below-award remuneration, both for (largely dependent) owner-drivers and employee drivers differed according to firm size. For small companies, 40.5 percent of owner-drivers and 19.2 percent of employee drivers were remunerated at rates below this level. For medium sized firms such underpayment affected 12.8 percent of owner-drivers and 18.3 percent of employee drivers, while for large companies the figures were 24.6 percent for owner-drivers and 5.3 percent for employee drivers. Another study, three years later, showed even greater levels of deviation from award rates. For owner-drivers, it appeared that only 11.1 percent were receiving award rates, 66.7 percent were receiving below-award rates, with 22.2 percent uncertain as to their entitlements²⁰⁷.

²⁰⁵ *Commercial Motor Vehicles (Hours of Driving) Act 1973* (SA).

²⁰⁶ Williamson *et al*, above n 200.

²⁰⁷ Arblaster *et al*, above n 195, at p 38.

Remedial Action

National uniform legislation to regulate driving hours in the trucking and bus passenger industries has been developed under the auspices of the National Road Transport Commission (NRTC). This legislation provides for a maximum of 12 hours driving or 14 hours working (that is including unloading and associated duties) per day and a maximum of 72 hours driving and working in any 7 day period including one 24 hour period of rest. The legislation provides for fines of \$1,500 for drivers and \$7,500 for trucking and bus companies for each driving hours offence. This legislation was introduced in Victoria, Queensland and New South Wales in late 1998, by South Australia in early 1999, with Tasmania proposing to follow suit later this year. However, Western Australia and the Northern Territory have chosen not to join this scheme, thus stymieing the prospect of a national approach. These jurisdictions have chosen, instead, to proceed through Codes of Practice for fatigue management under their occupational health and safety legislation

There has been some resort to technology as an aid to monitoring such as the ASafe T Cam® in use in New South Wales to monitor heavy commercial traffic on some freeways. The adoption of this system is also under consideration in South Australia for the South-Eastern Freeway. A pilot system is being undertaken in Tasmania whereby the movement of heavy motor vehicles is monitored by a global positioning system that can establish the position, speed and direction of a truck at any time and also maintain a record of these details including hours of driving and periods that the vehicle has been stationary.

Outworkers in the Clothing Industry

Introduction

Outwork as a feature of the clothing industry, in countries such as Australia, is generally associated with the past and particularly with nineteenth century images of sweatshop garment-making. Indeed the earliest factory regulation in Australia, beginning with the 1873 *Supervision of Workrooms and Factories Statute* in Victoria, was impelled by the harsh conditions (sweated labour) endured by female garment workers. However, over the course of the last decade and a half, outworking has re-emerged as a dominant form of work relations in the garment section of the Australian textile, clothing and footwear (TCF) industry.

In the last 15 years there has been a dramatic shift in the nature of garment-making in Australia from factory activity to outwork employment. It is estimated that only between 1 in 14 and 1 in 20 TCF workers in Australia are now employed in factories 208 This change has resulted from a combination of factors involving global

208 Worksafe Australia, *Occupational Health and Safety Performance Overviews, Selected Industries, Issue No 5: Clothing and Footwear Industry*, Australian Government Publishing Service, Canberra, 1995.

economic developments, compounded by reduction of tariff protection, and exacerbated by increasing concentration within the retail clothing trade 209 At a global level, there has been a profound shift in the worldwide distribution of clothing production. International Labour Organisation figures show that, between 1980 and 1993, the employment in TCF industries in first world countries has dropped dramatically (eg by around 72 percent in Finland, 42 percent in the United Kingdom and 35 percent in Australia) with an even more dramatic increase in a number of third world countries (eg 345 percent in Mauritius, 177 percent in Indonesia and 57 percent in China) 210

Following a report by the then Australian Industries Assistance Commission, the Australian federal Labor government, in 1986, promulgated a Textiles, Clothing and Footwear plan (the Button plan). This involved staged tariff reductions, the effect of which it was believed would result in moving high volume low-price production offshore while keeping low volume, high quality, value added production in Australia. However, the tariff reductions resulted in intense external competition for local manufacturers who responded by dramatically outsourcing their production in order to lower production costs, increase production flexibility and reduce union influence.

In addition to these developments, Australia experienced greatly increased concentration of ownership and control in apparel retailing, a fact reflected in Australia having one of the highest levels of per capita retail concentration in the world. This resulted in these retailers gaining enormous bargaining power with suppliers of apparel. One of the major risks faced by large fashion stores is that of finding themselves left with a large stock of out-of-fashion goods. Accordingly, they favour short-run production orders. Notwithstanding the production cost advantage of overseas suppliers, the delivery time constraints involved with importing clothes from these sources in fact militates against them being used for such goods and, accordingly, local suppliers are favoured for quick turn-around of such short-run production orders.

Reliable figures as to the number of outworkers are difficult to obtain, in large part because of the semi-underground nature of this area of activity and its often problematical relationship with government officials, particularly those involved with taxation and social security. At a time when there were less than 300 outworkers registered with the New South Wales Government, the Clothing Makers' Association of NSW estimated that there were around 60,000 outworkers

209 C Mayhew and M Quinlan, *Outsourcing and Occupational Health and Safety: A Comparative Study of Factory-based and Outworkers in the Australian TCF Industry*, University of New South Wales Industrial Relations Research Centre, Sydney, 1998.

210 International Labour Organisation, 'Globalization Changes the Face of TCF Industries', *World of Work*, No 18, 22-25, December 1996.

operating in New South Wales and Victoria 211 More recent figures vary widely. The estimate of the Australian Taxation Office is of around 50,000, whereas a survey by the Textile, Clothing, Footwear Union of Australia suggested that there were around 329,000 clothing outworkers in Australia. Claire Mayhew and Michael Quinlan, in reviewing the various statistical estimates in the course of their study of the occupational health and safety consequences of outworking, used what they described as a 'very conservative figure' of 100,000 outworkers 212

Structure and Economics

Work relations in the production and distribution process sectors of the clothing industry fall into five general categories 213:

- retailers, some of whom are also importers
- apparel agents, wholesalers, importers (intermediaries)
- manufacturers, some of whom are also importers
- makers-up (intermediaries)
- outworkers

For retailers and manufacturers, outworkers provide almost the ultimate benefits of labour flexibility in that they constitute a low cost, compliant and easily disposable workforce. Manufacturers avoid the capital costs and overheads associated with factory production, the cost of machinery (sewing machines, overlockers etc) is usually met by the outworker herself, and seasonal variations in production can be readily accommodated without the problems of terminating or hiring factory workers. As already mentioned, retailers, particularly in the womens' wear and fashion sectors, can avoid the accumulation of a large stock of unfashionable apparel through quick-turnaround, small orders.

Furthermore, the increasing level of direct engagement of outworkers by retailers, apparel agents and wholesalers allows the ability to achieve higher margins by bypassing intermediary channels in

211 K Cummings, *Outworkers and Subcontractors: Non-standard Employment and Industrial Democracy*, Australian Government Publishing Service, Canberra, 1986, at p 32.

212 Mayhew and Quinlan, n 209 above.

213 Cummings, above n 211, at p 30.

the production chain. Functionally they are able to be manufacturers without the capital costs of establishing a factory or the overheads and on-costs associated with the employment of labour. The savings on direct labour costs, alone, can be very significant in that a factory-based TCF worker in Australia receives about \$380 for a 38 hour week while an outworker may get between \$250-\$300 for a 90 to 100 hour week. However, rates as low as \$0.75 an hour have been reported.

Central to the system of clothing industry outworking arrangements are the middlemen with whom the outworkers deal. Indeed a recent report has described the outwork system as one sustained by some large fashion houses, and serviced by a colonising network of ethnic middlemen who subjugate home-based NESB women workers.²¹⁴ Outworkers are usually more recently arrived women from East Asian countries, often with limited knowledge of English and little comprehension of legal and administrative arrangements associated with employment. The middlemen often act as mentors to new arrivals and provide assistance in dealings with Government Departments, particularly in relation to immigration, social security and taxation matters, and also assist with the provision of work.

The middlemen may provide financial assistance by way of loans, often for the purchase of industrial sewing machines that the middlemen have bought at liquidation sales of TCF factory equipment and then on-sell or lease to outworkers. There is a buoyant market in second-hand machines with 30 year old machine still fetching around \$1,200.²¹⁵ The outworker may thus remain financially bound to the middleman through debt as well as reliance for work orders. Attempts by the outworker to break free of this relationship may be met by verbal and physical violence and blackmail through the middleman's knowledge of any social security claims made by the outworker or her lack of taxation returns.

Problems Faced by Outworkers

Inequality of bargaining power is a feature of most work relationships. However, this exists to an extreme degree in the case of clothing industry outworkers who are largely at the mercy of their middlemen suppliers. Their working life has wide pendulum swings, alternating between long periods with little or no work to periods where outworkers have to complete a large volume of

²¹⁴ Mayhew and Quinlan, above n 209, at p 20.

²¹⁵ *Ibid*, p 8.

work at short notice and within highly compressed time schedules. Further, outworkers usually have extra tasks that do not fall to machinists in factories such as the unpacking and checking of material and the bundling and storage of finished garments. While it is usually the case that the supplier delivers and picks up the material and garments, in some instances this task falls to the outworker as well. These extra tasks take time to perform but as outworkers are paid on a piece rate basis, they represent an uncompensated activity.

The very long hours worked by outworkers, both to accommodate the demands of deadlines imposed by their suppliers and to achieve a subsistence remuneration on the low piece-rate system, bring with it endemic injury and health problems. A recent study comparing the situation of factory-based TCF workers and TCF outworkers established not only that the outworkers suffered an annual injury incidence of 27 percent (compared an annual incidence of 10 percent for factory-based workers) but also that a much higher proportion of outworkers continued working with an injury compared with factory-based workers. Not surprisingly, this study found an overwhelming correlation between piecework/bonus payment systems and the development of a short-term as well as a chronic injury.²¹⁶ Other findings of the study were that outworkers had been exposed to a high level of occupational violence with 49 percent of outworkers being verbally abused, 23 percent being the subject of threats and 7 percent having actually been assaulted. Most of this abuse came from their middleman supplier.

Remedial Action

It is only comparatively recently that outwork has moved from a position of deliberate exclusion from a whole raft of worker protection measures to one where outworkers are largely regarded as highly dependent workers and hence should be seen as employees or at least attract the protections accorded to employees. For instance, the Victorian workers' compensation legislation explicitly excluded outworkers from coverage until the reforms of 1985. Outwork was vigorously opposed by the trade union movement which saw it in simple terms as representing a threat to factory employment²¹⁷ Accordingly, in an endeavour to limit its incidence, clauses restricting its use were

²¹⁶ *Ibid* p 138.

²¹⁷ S Weller, 'Clothing Outwork: Union Strategy, Labour Regulation and Labour Market Restructuring' (1999) 41 *Journal of Industrial Relations*, 203. The following paragraphs are drawn from this article which traces the history of campaigns and other actions to secure rights for outworkers.

inserted into the federal Trades Clothing Award in 1939. In 1957 the reintroduction of a permit system for the registration of individual outworkers had the effect of driving outwork underground.

The Textiles Clothing and Footwear Union, from the mid-1980s changed its position on outworkers and campaigned on the exploitation of outworkers and the fact that they should be accorded the same protections as employees. The watershed came, in 1987, when the Australian Conciliation and Arbitration Commission (Riordan DP) held that outworkers were employees and amended the Clothing Trades Award to deem all outworkers to be employees, unless proved to the contrary, and set down wages and conditions for outworkers.

However, these award conditions were rarely enforced with the Commonwealth Department of Industrial Relations showing little regard for compliance action and the union hampered by restrictions on its right of entry to business premises. The union, accordingly, launched a public awareness campaign concerning the exploitation of migrant women workers, a campaign that self-consciously linked in with similar action by the global labour movement and feminist and community groups concerning exploitation in the clothing industry and, in particular, the practices of transnational corporations and their outsourced operations. This campaign culminated in a reported, titled *The Hidden Cost of Fashion*, released in March 1995, and subsequent distribution of lists of well-known fashion retailers that used outworkers.

In 1996 the Fair Wear Campaign was launched, under the auspices of the Uniting Church, and involving a coalition of church, union and community groups. This high profile campaign was successful in getting leading retailers (such as Coles-Myer and Sportsgirl) to sign union agreements on the use of outworkers. As well, the union pressured individual clothing firms to enter into ethical sourcing agreements concerning their use of outworkers and to endorse a Homeworker Code of Practice.

As a result of the *Hidden Cost of Fashion* report, the Keating Labor government had asked the Senate Economic References Committee, in September 1995, to investigate outwork. However, this inquiry was overtaken by events with the Howard Liberal government coming to power before its final report was tabled. The Committee's report gave a somewhat bland response, endorsing the Homeworker Code of Practice and some other issues and referring other matters to the Labour Ministers' Council.

During the course of the negotiations between the Government and the Australian Democrats (the minority party that held the balance of power in the Senate) over the provisions in the new *Workplace Relations Act 1996*, the pay and conditions for outworkers survived as one of the 'allowable matters' that could be contained in awards. The union was concerned that this would be interpreted in a restrictive fashion and not extend award coverage to compliance procedures such as the registration and recording of outworker activity. However, the full bench of the AIRC, in March 1999, provided an expansive reading and found that the clauses of the Clothing Trades Award dealing with the regulation of outwork were allowable in their entirety. As a result, the decision preserves the mechanisms that can enable the award to be enforced according to the industry's Homeworker Code of Practice.

Construction Industry Sub-contracting

Introduction

The Australian Bureau of Statistics (ABS) divides the construction industry, for statistical purposes, into the 'construction trade services' sector (e.g. bricklayers, plumbers, etc) and the 'general construction' sector. This latter sector is comprised of three sub-groups, namely residential construction, non-residential construction (eg city office blocks) and non-building construction (eg roads and bridges). The ABS, in January 1999, released the findings of the first detailed survey of the construction industry since 1990.²¹⁸ This found that, in 1996-97, there were an estimated 194,300 businesses operating in the construction industry with a total of 484,100 people employed in the industry. Divided by sector, construction trade services accounted for over 80 percent of the businesses and almost three-quarters of people working in the industry. However, the general construction sector represented 56 percent of the total income, 60 percent of operating expenses and over half the assets and liabilities of the industry.

Overall, 94 percent of all businesses in the construction industry employed less than five people with these firms accounting for just over two-thirds of all people working in the industry. By contrast less than one percent of businesses employed twenty people or more with 14 percent of total employment in the industry referable to these firms. Average employment in construction industry businesses Australia-wide varies from between 2.0 and 2.6 persons, with the lower average

²¹⁸ Australian Bureau of Statistics, *Private Sector Construction Industry, Australia* (Cat. No. 8772.0).

employment per business reported in the Australian Capital Territory and Tasmania and the higher average employment reported in Western Australia 219

Structure and Economics

There are sharp differences in industry segments. Leaving aside residential construction, the general construction sector is characterised by a few large construction companies who engage many subcontractors. By contrast, the housing sector is dominated by small-scale builders, either as single-person operations or businesses employing less than five people. However, in terms of the volume of housing construction, the sector has experienced increasing levels of concentration since World War II. In the late 1980s, it was estimated that 75 percent of housing construction was undertaken by 20 percent of builders and that, in 1984, the top eight Sydney builders constructed more houses than the next 110 220 This trend has continued with one percent of companies being responsible for a third of all housing construction²²¹ These large companies (eg A V Jennings, Australand) operate by outsourcing much of their work to contractors and subcontractors.

The highest level of self-employment outside of the primary production sector takes place in the building industry at around 40 percent 222 with an estimated 34 percent of construction workers falling within the category of 'contingent' or non-permanent labour²²³ The trend to increased self-employment is indicated by figures for the Queensland building industry in which, in 1990/91, 24.7 percent of the labour force was self-employed and 12 percent were employers. Three years later these proportions had shifted to 29.9 percent being self-employed and 13.7 percent as employers 224 Over the period 1985 to 1997, the rate of growth of employees in construction was below that of all industries and, conversely, the growth of own account employees exceeded that of the all industries average. In construction, own account employees as a proportion of industry

219 *Ibid.*

220 Cummings, above n 211.

221 G Maggs and A Greig, 'C Wright Mills and the Concept of 'Craftsmanship': Personal Troubles and Public Issues in the Housebuilding Industry' (1997) 7 *Labour and Industry*, 67.

222 A Le, 'Self-employment in the Australian Labour Market' (1995) 7 *Labour Economics and Productivity*, 127.

223 Unpublished research by Michael Quinlan cited in C Mayhew, C Young, R Ferris and C Hartnett, *An Evaluation of the Impact of Targeted Interventions on the OHS Behaviours of Small Business Building Industry Owners/Managers/Contractors*, Australian Government Publishing Service, Canberra, 1997.

224 *Ibid.*

employment increased from 28 percent in 1985 to 33 percent in 1997. Thus while one in four workers in the construction industry was employed on their own account in 1985, this increased to one in three in 1997 225

The comparatively high levels of sub-contracting, coupled with significant informal (black economy) practices, in the Australian construction industry have meant that it has been characterised by high levels of tax avoidance and evasion. In response to this situation, the federal Government, in the 1980s, introduced the Prescribed Payments System (PPS). This system, which has now been extended to nine specific industry groups and in other industries by 'voluntary agreement', involves tax contributions being deducted by the person engaging the contractor on a regular basis. While only payments to independent contractors for the performance of work may be subject to PPS, there is little scrutiny as to the genuineness of the characterisation of this status. The taxation advantages of being a contractor (PPS) compared to that of an employee (pay as-you-earn) are very significant and has provided a major further impetus for the growth of contracting arrangements in the construction industry.

A review, by Patricia Apps, of the ABS Income Distribution Survey data revealed that, on average, contractors in the construction industry pay \$6,217.22 less tax a year than their PAYE equivalents. This tax contribution represents only 42 percent of the tax that would have been paid by these contractors if assessed as PAYE employees²²⁶ In aggregate terms, if PPS workers in 1996/97 had paid tax at the same rates as PAYE employees, an additional \$2.2 billion in taxation revenue would have been raised. What has occurred is that a system that was designed to counter high levels of tax evasion, in fact, is resulting in further substantial erosion of the tax base.

These developments parallel those in the United Kingdom where, by the mid-1990s, some 45 percent of the construction workforce was constituted by contractors compared to 29 percent of this workforce a decade earlier. The effects of this trend upon taxation revenue, industry training and work quality were so profound that employers and the Conservative Government in the UK took action to redress this balance 227

Problems Faced by Construction Industry Sub-contractors

As with other areas of activity that have been looked at in these summary case studies, the highly competitive and unregulated nature of the construction industry has a number of deleterious effects upon the working conditions, remuneration and health and safety of subcontractors within the

225 J Buchanan and C Allan, 'The Growth of Contractors in the Construction Industry: Implications for Tax Revenue' in J Buchanan (ed), *Taxation and the Labour Market*, Australian Centre for Industrial Relations Research and Training, University of Sydney, Working Paper 55, 1998.

226 P Apps, 'Contractors as a Source of Tax Avoidance (with Special Reference to the Construction Industry): Preliminary Findings', mimeo, University of Sydney Law School, 1998; cited by Buchanan and Allan, above, note 225.

227 M Harvey, *Towards the Insecure Society: The Tax Trap of Self-employment*, The Institute of Employment Rights, London, 1995.

industry. Karen Cummings has described a system of self-exploitation, manifested directly in pressure to work long hours, to use family labour, to work under dangerous conditions and to take shortcuts resulting in inferior work. Alongside this is a more disguised form of exploitation as large increases in productivity, achieved through specialisation and intensification, is not reflected in contract rates 228

Technological change has resulted in increased work intensification and a general deskilling of work within the industry. Increasing resort to prefabricated sections and other off-site work and the use of specialised equipment on-site has resulted in a considerable narrowing of nature of work activity that is reflected not simply in sub-contracting but in sectional subcontracting. This has led to an increase in general productivity, largely through breaking down of skilled tasks to simplified, repetitive, procedures, but at the expense of the overall skill levels of the workforce. For instance, in place of general carpentry skills, there are now specialist wallframers, roofers, cladders, floorworkers, fixers and fencers. This narrowing of task specialisation, together with the need to purchase and maintain often expensive specialised equipment, largely confines workers to specific trade tasks. In times of changing economic conditions, such workers are vulnerable to downturns in their area of specialty and less adaptable to take on engagements in allied areas of activity 229

As work is generally awarded to the contractor submitting the lowest tender, everything is subordinated to cost. One of the most important consequences of this cost imperative is neglect of, or shortcuts taken with, basic health and safety procedures. This is especially the case in the areas in which subcontracting is most prevalent, particularly housing construction and the small commercial building sector. These are also the least unionised areas of the construction industry and therefore not subject to the element of countervailing power that a union presence (including health and safety representatives) can bring. As a result, in these areas of activity, it is not uncommon for dangerous practices to flourish, such as unreinforced trenching, lack of safety guards and rails, and a failure to provide or use protective equipment such as fall protection devices 230

228 Cummings, above n 211, at p 48.

229 *Ibid*, p 44.

230 Mayhew, Quinlan and Bennett, above n 197.

Furthermore, under a system of pyramid subcontracting, there is often a deliberate resort to small contractors, using subcontractors and self-employed workers, to undertake particularly hazardous and unpleasant tasks. This is particularly the case in areas such as demolition, sandstone excavation, and illegal forms of hazardous waste or asbestos removal from building sites 231

Construction industry fatality and injury statistics, based on workers' compensation data, show a totally different profile in the residential construction sector, compared with non-residential construction. In Victoria, during the course of 1999 to date, there have been 29 work-related traumatic fatalities, compared to 19 deaths last year. Of these, 10 have been in the construction industry and almost all in the residential construction or small commercial construction sectors. These are the areas in which subcontractors predominate. The spate of construction industry fatalities has caused the Victorian workers' compensation and occupational health and safety regulator, the Victorian WorkCover Authority, to spend an additional \$3 million to fund an extra 34 inspectors in the construction industry 232 Similarly, in Queensland, where there is a requirement for the submission of risk assessment plans in the construction industry, there is only a compliance rate of between 10 and 20 percent with this requirement in the residential construction sector, compared with around 90 percent compliance in the area of non-residential construction. As, in Victoria, an increase in fatalities in the construction industry has induced the Queensland government to institute a blitz on dangerous work practices 233

Remedial Action

There has been a shift in stance among construction industry unions from a position of opposition to subcontract labour to one of qualified acceptance of at least some forms of subcontracting. Thus the major union in the construction industry, the Construction, Mining, Forestry and Energy Union (CFMEU), now has a policy of recruiting subcontract workers and pressing for minimum rates. Their influence has been most marked in commercial construction with little headway being made in

231 Cummings, above n 211, at p 47.

232 Andrea Carson, 'WorkCover Vows New Safety Push', *The Age* (Melbourne), 28 July 1999, p A3.

233 Shelley Thomas, 'Builders Face Safety Clampdown', *Courier Mail* (Brisbane), 28 July 1999, p 13.

the housing sector, despite agreements with some large project builders. The union has, however, maintained a position seeking the banning of pyramid subcontracting but with almost no success²³⁴

The CFMEU in Victoria has joined together with the Victorian WorkCover Authority, the Housing Industry Association and the Master Builders' Association, in a body called 'Foundations of Safety', that is exploring initiatives to address the appalling safety record in sections of the construction industry. As well as funding an extra 34 safety inspector positions, primarily for the construction industry, the Victorian WorkCover has also foreshadowed a more vigorous compliance strategy involving mandatory prosecution of any construction industry employer who breaches occupational health and safety measures twice in a year²³⁵

It has been suggested, in the context of occupational health and safety compliance, that government tender arrangements should explicitly address subcontracting issues in the establishment of minimum standards to be observed on construction sites²³⁶. It is possible that this approach could be broadened to address minimum standards for subcontracting beyond occupational health and safety considerations.

F. CONCLUSIONS

The history of the evolution of worker protection measures has shown a tension between competing interests, whether this is expressed as that between equity and flexibility, between the norms of the welfare state and those of the market, or some other dualism. This process has not been one of lineal progression, in terms of ever expanding entitlements. As the earlier overview of developments during the last decade or so indicates, Australia has not been immune from the process of 'rolling-back' entitlements that has occurred in many other comparably industrialised countries under the rubric of neo-liberalism, sometimes with more particularised designations such as 'Reaganism' and

²³⁴ Mayhew, Quinlan and Bennett, above n 197, at p 39.

²³⁵ Carson, above n 232.

²³⁶ Mayhew, Quinlan and Bennett, above n 197, at p 147.

›Thatcherism‹. This has occurred as the result both of legislative intervention, such as changes embodied in the federal *Workplace Relations Act* 1996 and in State and Territory labour relations statutes, and through workforce changes with the increasing importance of various ›atypical‹ forms of employment.

Balancing Equity and Flexibility

It is, perhaps, time to step back and reassess the bases upon which worker protection measures are founded and structured. Taking the dichotomy between equity and flexibility as a framework for review, a number of observations may be made. First, the matter of equity, here regarded in terms of differential entitlement to worker protection measures, is a multi-layered issue. In descriptive terms, it operates at a number of levels, sometimes discriminating between standard employment and some other forms of employment, particularly casual employment and sometimes part-time employment. At a slightly wider level, there is the differential treatment between employment relationships, generally considered, and non-employment relationships. Further, in a federal system such as Australia, questions of equity may emerge in terms of access to particular protections being a matter of work status coupled with geography. This has been a concern, for instance, in respect of the sometimes widely differing entitlements under the ten Australian workers' compensation statutes.²³⁷ Finally, the question of equity operates at an even wider geographical level, in relation to the disparity of treatment of workers engaged in similar activities in different countries.

There is a philosophical or principled case for equity, grounded upon citizenship or principles ›inherent in the policy of a modern welfare state‹, namely that ›failure to include atypical work in the major legal systems of social protection has already established a dual standard of equity‹.²³⁸ This is coupled with a more historical consideration, namely that there has been statutory inertia in failing to recognise changing labour market conditions. That is, there may have been a justification

²³⁷ See Industry Commission, *Workers' Compensation in Australia*, Report No 36, Australian Government Publishing Service, Canberra, 1994; Heads of Workers' Compensation Authorities, *Promoting Excellence: National Consistency in Australian Workers' Compensation*, Final Report to Labour Ministers' Council, Heads of Workers' Compensation Authorities, Melbourne, 1997.

²³⁸ K-J Bieback, ›The Protection of Atypical Work in Australian and West German Labour Law, (1992) 5 *Australian Journal of Labour Law*, 17 at p 19.

for confining major elements of worker protection to conditions of standard employment at a time (for instance the 1950s) when such employment status was far and away the norm. Now, with conditions of atypical employment being the form of work relationship engaged upon by very large sections of the work population, it is unconscionable to fail to accord worker protection coverage to these workers on the same basis as applies to workers under standard employment arrangements.

Furthermore, the market principles underlying the individual contract of employment, that persons of full age and capacity are able to achieve bargained choices (including elements of worker protection) that suit their needs, do not apply to most workers. Leaving aside the matter that this picture ignores the role of collective labour law, such a view has always been, perhaps apart for some extremely marketable corporate executives, a largely mythological concept even in respect of standard employment. Its divergence from reality applies with far greater force with most areas of atypical employment. Consequently, resorting to the market framework, these areas represent areas of market failure that justify legislative action as a corrective response.

There is a further economic dimension based on the notion of a level playing field. The according of a lesser degree of protection to atypical employment relationships provides a strong incentive for employers to substitute such work arrangements for standard employment. The cost savings that can be achieved through action of this nature have constituted a major impetus for moves towards outsourcing of activities and other features of flexible labour practice. When coupled with conditions of increased global competition, abetted in the case of the clothing trades by reduced tariff protection, the attractiveness of resorting to forms of atypical employment, such as outwork, can have quite devastating effects upon the level of standard employment in particular industries. As well, the existence of an alternative and cheaper labour supply can be used by employers as a lever to pare back conditions relating to standard employment. This has, functionally, been one of the effects of the pool of subcontract owner-drivers in the trucking industry. The argument is that all forms of labour arrangement should, in the nature of a level playing field, have attached to them certain minimum obligations in respect of adherence to worker protection measures. Otherwise, certain forms of engagement are advantaged in the labour market place compared to others.

It should also be noted that taxation arrangements, similarly, can have a profound effect upon the nature of work arrangements within particular industries. In the context of building industry sub-contractors, it was seen how the attempt by the Australian Taxation Office to garner some taxation revenue from the large 'black economy' operating in the building industry has brought with it major distortions in the structure of work relations in that industry.

Finally, in respect of matters of equity in employment protection, there is a significant social and gender issue. That is, a significantly greater proportion of women are involved in atypical work relationships and, consequently, the relatively diminished protection of these relationships, compared to standard employment, has the consequence of entrenching an element of gender discrimination in labour market operations.

These powerful arguments for greater equity in worker protection measures, across the range of work relationships, have to be balanced against considerations of labour flexibility. The first observation that needs to be made is that it is almost inconceivable that there will be a reversal of the trend to greater flexibility in working relationships. The ongoing pressures from globalisation and trade liberalisation will ensure that the direction of change is unlikely to shift at least in the foreseeable future. Consequently, a Canute-like stance, or the devising of initiatives that does not take account of the entrenched and ongoing nature of these developments, is not a viable policy option.

Secondly, many forms of self-employment or contractor relations are a freely chosen path, taken by individuals for a variety of reasons, including autonomy and lifestyle. The traditional professions, such as law, medicine and accountancy, are generally of this nature. The ever-growing importance of computers and information technology is creating opportunities for remunerative self-employment, although often the work may be carried out solely or largely for one or two principals.

Again, the contractor category involves a wide continuum from the highly autonomous to the essentially dependent. Furthermore, even among employees, strictly defined, there are those (for instance, among managerial ranks) who are knowledgeable about alternatives and have negotiating clout in the structuring of their employment contracts. There is an argument that it is appropriate for highly independent individuals of this type, who are capable of making informed choices, or who are less economically at risk, to be exempt from basic minimum labour standards.

New Directions

Whatever concessions may be made in the direction of flexibility, it remains reasonable to assert that certain key protective measures should be of general application. It may be necessary, however, to reconsider which particular standards should be so regarded, and whether the force of the argument for labour protection might be strengthened by an emphasis on certain core protections rather than on blanket regulation which was, prior to 1996, a feature of the award system in Australian labour law.

Accepting nevertheless the desirability of general application in respect of key protective measures, it makes sense to adopt a generic nomenclature, or some other approach, that breaks free of the bog which is created in Australia labour law, and elsewhere, by the employee/independent contractor dichotomy.

Several proposals have emerged for consideration over the past 10-15 years or so. One approach emerged from Adrian Brooks' seminal contribution in 1988 that it was impossible 'to define the contract of employment so as to differentiate it from 'independent' contracts', and that it was preferable to abandon the distinction altogether, in favour of the notion of contracts *for the performance of work*.²³⁹ Such a transcending of concepts can be found in section 106 of the *Industrial Relations Act* 1996 of New South Wales. That provision confers power upon the New South Wales Industrial Relations Commission to deal with 'unfair contracts' concerning the *performance of work*.²⁴⁰ The use of this terminology has provided a means of recourse for independent contractors and many professional and managerial workers to remedies they would not normally have enjoyed due to a lack of employee status.²⁴¹ An approach with a similar objective is to substitute the term 'worker' for that of 'employee' ²⁴² thus reviving terminology typically applied in statutes of an earlier era ²⁴³

A third alternative, arguably more complex and less flexible is to adopt a 'deeming' provision or 'extended definition' of employee which will pick up all target groups at whom the legislation is directed. The recent

²³⁹ Brooks, above n 49. See also Freedland above n 2.

²⁴⁰ Where the Commission finds such a contract to be an 'unfair contract' it can make an order declaring the contract to be wholly or partly void or may vary the contract; s 106(1).

²⁴¹ ACIRRT, *Australia at Work*, above n 29, at p 167.

²⁴² See, for example, K Ewing (ed), *Working Life B A New Perspective on Labour Law*, Institute of Employment Rights, and Lawrence and Wishart, London, 1996, pp 47-48.

²⁴³ See Deakin, above n 6; Howe and Mitchell, above n 7.

Industrial Relations Act 1999 of Queensland adopts such an approach, including not only an extensive definition 244 but also bestowing upon the industrial authority in that State the power to 'declare' persons to be 'employees' even where they work under a contract of services (i.e. as independent contractors) 245 In

244 Section 5.(1) of the Act defines 'employee' in the following terms:

a person employed in a calling on wages or piecework rates; or

a person whose usual occupation is that of an employee in a calling; or

a person employed in a calling, even though^B

the person is working under a contract for labour only, or substantially for labour only; or

the person is a lessee of tools or other implements of production, or of a vehicle used to deliver goods;
or

the person owns, wholly or partly, a vehicle used to transport goods or passengers

a person who is a member of a class of persons declared to be employees under section 275; or

each person, being 1 of 4 or more persons who are, or claim to be, partners working in association in a calling or business; or

for proceedings for payment or recovery of amounts^B a former employee; or

an outworker; or

an apprentice or trainee.

A person who is undertaking an industry placement within the meaning of the *Vocational Education and Training (Industry Placement) Act 1992* is not an employee.

245 Section 275 of the Queensland Act is in the following terms:

The full bench may, on application by an organisation, a State peak council or the Minister, make an order declaring a class of persons who perform in an industry under a contract for services to be employees.

The full bench may make an order only if it considers the class of persons would be more appropriately regarded as employees.

In considering whether to make an order, the commission may consider^B

the relative bargaining power of the class of persons; or

the economic dependency of the class of persons on the contract; or

the particular circumstances and the needs of low-paid employees; or

whether contract is designed to, or does, avoid the provisions of an industrial instrument; or

the particular circumstances and needs of employees including women, persons from a non-English speaking background, young persons and outworkers; or

the consequences of not making an order for the class of persons

In this section^C

A contract[@] includes^C

determining whether to make such an order the authority may take into account *inter alia* the economic dependence of the class of workers under consideration. Obviously the disadvantage of the 'deeming' or 'extended definition' approach is that it might not be sufficiently flexible to pick up new forms of working arrangements as they emerge. This disadvantage may, however, be overcome by use of the declaration process mentioned above.

Of course use of alternative nomenclature does not resolve all problems. We assume that the intention is still to exempt arrangements which are genuine commercial transactions between entrepreneurs, even if work will be performed by at least one of the parties in fulfilling the terms of the contract. The question is when will such arrangements constitute a contract which is essentially or relevantly 'for the performance of work'? Some earlier suggestions for a conceptual approach on this issue were made by Hugh Collin²⁴⁶ and Andrew Stewart²⁴⁷. These were, however, essentially ideas about clarifying the notion of the 'contract of service' and perhaps lacked the reach of the approach offered in section 106 of the New South Wales *Industrial Relations Act* 1997. In decisions under that provision, contracts for work inherent in franchising arrangements, in the sale of a business, and in finance arrangements have been caught by the legislation²⁴⁸.

Effective worker protection measures require more than recognition in legislation. One important issue is to consider how marginal groups may access the system and test any right they might have. Until extended legal coverage becomes the established and accepted norm in employment relationships, there will be a need for a collective mechanism for conducting test cases. The decline of trade unions may be an obstacle in this context for many reasons to do with lack of resources and organisational strategies. A provision such as that in section 275 of the *Industrial Relations Act* 1999 of Queensland provides a way forward in such cases.

There is also a strong need for effective enforcement mechanisms to ensure basic compliance with the regulatory standards. This is especially the case in work environments that are highly fragmented and where bargaining power is grossly asymmetrical. The studies of owner-drivers in the long-distance transport industry, clothing outworkers and construction subcontractors are illustrative of such environments. There is a crisis of compliance, with regulatory inspectorates being cut back in

an arrangement or understanding; and

a collateral contact relating to a contract.

An industrial instrument²⁴⁹ includes an award or agreement made under the Commonwealth Act.

²⁴⁶ See above n 13

²⁴⁷ A. Stewart, 'Atypical Employment and the Failure of Labour Law' (1992) 18 *Australian Bulletin of Labour*, 217

²⁴⁸ See JJ Macken, P O'Grady and C Sappideen, *The Law of Employment*, 4th edn. LBC Information Services, Sydney, 1997, pp 508-514.

size and with increasing moves to self-regulation. In framing worker protection measures, then, it may be necessary not merely to specify the nature and extent of the protection, and to whom the protection applies, but also some minimum enforcement criteria. Perhaps in relation to the last, voluntary codes of conduct, their construction and surveillance needs to be given careful consideration given the nature of the regulatory problem.

Similarly, the situation of the construction industry indicates that attention needs to be paid to the nature of taxation measures as a factor influencing the adoption of artificially constructed self-employment arrangements. The corrosive effect of taxation regimes, such as the Prescribed Payments System in the construction and allied industries, is not simply upon the integrity of employment practices. The massive loss of taxation revenue that would otherwise have been collected upon a stricter and more transparent enforcement of taxation principles represents a resource which could have been deployed in a variety of socially desirable ways including the enforcement of worker protection standards among more marginal groups of workers.