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## **Working Paper 70**

# **Regulating Occupational Health and Safety for Contingent and Precarious Workers: The Proposed Australian 'Primary' Duty of Care**

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## **About the Centre**

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## **Abstract**

One of the key terms of reference of the recent Australian National Review into Model Occupational Health and Safety Laws was to take into account the changing nature of work and employment arrangements in proposing a model national occupational health and safety (OHS) Act. Chapter 2 of the Review Panel's *First Report* outlines at length the significant changes that have taken place in the Australian labour market and in the nature and organisation of work in the past 20 years, and in particular the growth in casual, part-time and temporary work, and the increased use of labour hire, outsourcing, franchising, migrant workers and home workers. The Report notes that there is now significant evidence showing that these new forms of work have an adverse impact on OHS, and that regulatory frameworks are having difficulty addressing these issues. Further, changes in work relationships and in industry structure will continually lead to changes in the kinds of hazards and risks at work.

In its First Report, the Review Panel recommended that a model Australian OHS Act include a 'primary' general duty, imposed upon a 'person conducting a business or an undertaking', owed to 'workers' broadly defined and 'others', to ensure that workers and others 'are not exposed to a risk to their health and safety arising from the conduct of the undertaking'.

This paper examines this proposed 'primary' duty of care. It begins by outlining the changing nature of work in Australia in the past few decades, and the general duties in the Australian OHS statutes which have sought to regulate the various types of precarious and contingent workers. The paper then carefully examines the proposed 'primary' duty of care and evaluates the extent to which it can address the kinds of OHS issues that have arisen from precarious and contingent work. It also examines the kinds of regulations and codes of practice that will need to be developed to ensure that the 'primary' duty of care protects contingent and precarious workers from the range of OHS hazards they encounter.

## 1. Introduction

For constitutional reasons, Australian occupational health and safety (OHS) regulation has traditionally been the domain of the six State and two Territory governments, with the Commonwealth government regulating OHS for its own employees and employees of employers licensed to self-insure under the *Safety, Rehabilitation and Compensation Act 1988* (Cth).<sup>1</sup> The Commonwealth, state and territory OHS statutes have been based on the Robens model, with broad general duties, supplemented by regulations and codes of practice, enforced by state inspectorates with broad inspection and enforcement powers, and with provisions for the representation and participation of workers. Closer scrutiny of the different Australian OHS statutes reveals significant differences in form, detail and substantive matters.<sup>2</sup>

Since the early 1980s there have been moves to develop uniform Australian OHS regulatory provisions.<sup>3</sup> An important initiative came in April 2008, when the Federal Labor government commissioned a major National Review into Model Occupational Health and Safety Laws. In 2008 and early 2009 the Panel conducting the Review examined the principal Commonwealth, State and Territory OHS statutes to identify areas of best practice, common practice and inconsistency and to make recommendations in two reports (October 2008 and February 2009) to the Workplace Relations Ministers Council (WRMC) on the optimal structure and content of a model OHS Act that would promote safe workplaces, increase certainty for duty holders, reduce compliance costs for business and provide greater clarity for regulators without compromising safety outcomes. In May 2009 the WRMC approved a modified set of recommendations for a model OHS Act, and Safe Work Australia is in the process of developing a draft of a model OHS Act, a model regulation, and model codes. Once approved by the WRMC, the model Act,

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<sup>1</sup> The general statutes are the *Occupational Health and Safety Act 1991* (Cth) (federal public sector employment and self-insurers under the Commonwealth workers' compensation legislation), the *Occupational Health and Safety Act 2000* (NSW), the *Occupational Health and Safety Act 2004*, the *Workplace Health and Safety Act 1995*, the *Occupational Health, Safety and Welfare Act 1986* (SA), the *Occupational Safety and Health Act 1984* (WA), *Workplace Health and Safety Act 1995* (Tas), the *Occupational Health and Safety Act 1989* (ACT), and the *Workplace Health and Safety Act 2007* (NT).

<sup>2</sup> For example, see the analyses of the Australian OHS regulatory provisions in R Johnstone, *Occupational Health and Safety Law and Policy*, 2 ed, Thompson Lawbook, 2004, especially chapters 3 to 8.

<sup>3</sup> For a fuller description of the history of attempts at national uniformity, see R Johnstone, 'Harmonising Occupational Health and Safety Regulation in Australia: The First Report of the National OHS Review' (2008) 1 *Journal of Applied Law and Policy* 35.

regulation and codes will adopted by each of the Australian States, Territories and the Commonwealth.<sup>4</sup>

During the past few decades there have also been major changes in the Australian labour market. In particular, there has been a marked shift away from full-time employment, to casual and part-time work, increased use of contracting, sub-contracting, supply chains and labour hire arrangements, and a dramatic increase in franchise arrangements. These are outlined further in the next section, but their significance prompted the Federal government to include as a key term of reference<sup>5</sup> of the Review Panel that the Panel ‘take into account the changing nature of work and employment arrangements’ in developing its recommendation for the model OHS Act.

This paper examines the ‘primary duty of care’ recommended in the First<sup>6</sup> and Second<sup>7</sup> Reports of the Review Panel. It begins by outlining the extent of the changes to the Australian labour market over the past 20 years or so, and then analyses the development of the general duty provisions in the state and territory OHS statutes insofar as they were able to address changing forms of work. The paper shows that the proposed primary duty of care is a highly significant development, but that it has emerged from developments in the general duty to ‘others’ that was a key feature of the Australian OHS Acts, and in particular the Victorian and Queensland Acts.

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<sup>4</sup> For further details, see *ibid.*

<sup>5</sup> The Hon Julia Gillard, Minister for Employment and Workplace Relations, Media Release 4 April 2008, available at <http://mediacentre.dewr.gov.au/mediacentre/allreleases/2008/april/gillardlaunchesnationaohsreview.htm>.

<sup>6</sup> National Review into Model Occupational Health and Safety Laws, *First Report to the Workplace Relations Ministers’ Council*, Commonwealth of Australia, October 2008 (‘First Report’).

<sup>7</sup> National Review into Model Occupational Health and Safety Laws, *Second Report to the Workplace Relations Ministers’ Council*, Commonwealth of Australia, February 2009 (‘Second Report’).

## 2. The Changing Nature and Organisation of Work in the Australian Labour Market

Many labour law scholars<sup>8</sup> have observed that, particularly from the mid-twentieth century, labour has assumed that its scope is the regulation of employment relationships and that an employer is a single (usually corporate) entity. This was largely true of OHS regulation until the Robens-inspired reforms from the 1970s.

Over the past 30 years, however, there has been a significant growth of patterns of work that fall outside this paradigm, driven by organisational restructuring, and greater resort to outsourcing, elaborate supply chains and management techniques such as labour hire and franchising.<sup>9</sup> These changes have largely resulted in more flexible or less secure forms of work.<sup>10</sup> Chapter 2 of the First Report outlines at length these significant changes in the Australian labour market and in the nature and organisation of work in the past 20 years, and in particular the growth in casual, part-time and temporary work, and the increased use of labour hire, outsourcing, franchising, migrant workers and home workers. It also notes that these changes have had an impact on the profile of OHS hazards in Australian workplaces.

The First Report notes that employment in the manufacturing industry declined from 14 per cent of all employed people to 10 per cent in the period 1996-7 to 2006-7.<sup>11</sup> At the same time there has been an increase in persons employed in construction (up from seven per cent to nine percent in the same period) and in the services sector: 14 per cent

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<sup>8</sup> See, particularly, H Collins, 'Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration' (1990) 53 *Modern Law Review* 731; L Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law*, Law Book Company, Sydney, 1994; J Howe and R Mitchell, 'The Evolution of the Contract of Employment in Australia: A Discussion' (1999) 12 *Australian Journal of Labour Law* 113; R Johnstone, 'Paradigm Crossed? The Statutory Occupational Health and Safety Obligations of the Business Undertaking' (1999) 12 *Australian Journal of Labour Law* 73-112; S Deakin, 'The Changing Concept of the 'Employer' in Labour Law' (2001) 30 *Industrial Law Journal* 72.

<sup>9</sup> M Quinlan, 'Flexible Work and Organisational Arrangements' in E Bluff, N Gunningham and R Johnstone (eds) *OHS Regulation for a Changing World of Work*, Federation Press, Sydney, 2004, 120.

<sup>10</sup> See J Burgess and A De Ruyter, 'Declining Job Quality in Australia: Another Hidden Cost of Unemployment' (2000) *Economic and Labour Relations Review* 246-249; Quinlan 2004 above n 9, 121-122; Johnstone, 2004, above n 2, 115-116; R Johnstone, 'Regulating Occupational Health and Safety in a Changing Labour Market' in Arup, C, Gahan P, Howe J, Johnstone, R, Mitchell, R. and O'Donnell A (eds), *Labour Law and Labour Market Regulation*, Federation Press, Sydney, 2006, 617, 618.

<sup>11</sup> First Report, Above n 6, 7.

of all persons employed now work in the retail sector, 12 per cent in the property and business services sector, and ten percent in the health and community services sector. The expansion of the services sector and the changing nature of work have shifted the pattern of work-related injury and illness towards psychosocial and musculoskeletal disorders.<sup>12</sup>

In 2006-7 almost three quarters of Australia's 10.3 million workforce were working full-time. Eighty-five percent of men were at that time working full-time, and 55 per cent of women. The incidence of part-time work has increased since the mid-1980s. In 1986-7 19 per cent of people worked part-time, compared with 28 per cent in 2006-7. The vast majority (71 per cent) of all part time workers are women. Sixty-seven per cent of younger workers (15-19 years) and 52 per cent of older workers (over 65) worked part-time.<sup>13</sup>

Twenty per cent of employees are casual employees – a figure that has remained constant over the past decade. Casual employees are likely to be female, young, employed part-time, and employed in the accommodation, cafe and restaurant industry, retail and cultural and recreational services. Forty-nine percent of employees in agriculture, forestry and fishing are casual.<sup>14</sup>

Since 2004 the percentage of the workforce engaged as independent contractors has been 8.2 per cent of total persons employed – a fall from 10.1 per cent in 1998.<sup>15</sup> The First Report notes that the most recent ABS data on labour hire suggests that 3.9 per cent of employees were on-hired through agencies in 2002 – four times the percentage in 1990.<sup>16</sup> Between 1995 and 2005 the percentage of people working at home, or mainly at home, doubled from four per cent to eight per cent of people at work.<sup>17</sup>

Franchising has increased significantly over the past decade: in 1998 there were 693 franchisors in 1998 compared with 1,100 franchisors, 71,400 franchisees and 413,500 persons employed (over 23 per cent permanent part time and nearly 40 per cent casually)

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<sup>12</sup> Ibid. 7-8

<sup>13</sup> Ibid, 10.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid, 10-11, and note the reservations about this data.

<sup>16</sup> Ibid, 11.

<sup>17</sup> Ibid.

in franchises in 2008.<sup>18</sup> The chapter also observes that nearly 96 per cent of private sector businesses were small businesses (with fewer than 20 employees). Only 0.3 per cent of Australian businesses employ more than 200 workers. Finally, trade union membership has been falling (to 19 percent in 2007, compared with 46 per cent in 1986).

Chapter 2 notes that there is now significant evidence showing that these new forms of work have an adverse impact on OHS, and that OHS regulatory frameworks are having difficulty addressing these issues. Further, changes in work relationships and in industry structure will continually lead to changes in the kinds of hazards and risks at work.

As chapter 2 of the First Report notes, there is now an extensive body of research showing the detrimental impact that contingent and precarious work has on the OHS and well being of workers engaged in those arrangements.<sup>19</sup> For example, the very same competitive pressures that induce firms to engage contingent or precarious work arrangements also encourage underbidding on contracts, cheaper or inadequately maintained equipment, reductions in staff levels, faster production, longer work hours and other forms of corner-cutting on OHS. These work arrangements, especially when they introduce third parties or create multi-employer worksites lead to fractured, complex and disorganised work processes, weaker chains of responsibility and ‘buck-passing’, and inadequate specific job knowledge (including knowledge about OHS) among workers moving from job to job.<sup>20</sup> As organizations outsource tasks, they diminish in size and increasingly become small or medium sized firms – with the attendant difficulties in complying with OHS requirements.<sup>21</sup> Further, as discussed above, OHS regulation has been slow to adjust to these changing work patterns, although, as the next section argues, there has been some progress in recent years – at least at the level of the general duties of care.

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<sup>18</sup> Ibid, 9.

<sup>19</sup> See also M Quinlan, C Mayhew and P Bohle, ‘The Global Expansion of Precarious Employment, Work Disorganisation, and Consequences for Occupational Health: A Review of Recent Research’ (2001) 31 *International Journal of Health Services* 335; M Quinlan, C Mayhew and P Bohle, ‘The Global Expansion of Precarious Employment, Work Disorganisation, and Occupational Health: Placing the Debate in a Comparative Historical Perspective’ (2001) 31 *International Journal of Health Services* 507; P Bohle, C Mayhew and M Quinlan, ‘The health and safety effects of job insecurity: an evaluation of the evidence’ (2001) 12 *Economic and Labour Relations Review* 32-60; Quinlan 2004, above n 9, 122-124.

<sup>20</sup> Ibid.

<sup>21</sup> See D Walters, *Health and Safety in Small Enterprises: European Strategies for Managing Improvement*, Peter Lang, Brussels, 2001.

### 3. The Broad Reach of the General Duty Provisions in the Australian OHS Statutes

The general duties imposed on employers and self-employed persons by the modern Australian OHS statutes have a broad reach, both in terms of the range of hazards covered, and the types of workers protected. It is now generally accepted that the general duty provisions address all kinds of known and emerging OHS hazards – including ergonomic and psychosocial hazards.<sup>22</sup> During the past ten years there has been a notable change in lawyers' and regulators' conceptions of the application of the general duty provisions in the OHS statutes to workers who are not employees.

First, while the post-Robens Australian OHS statutes were built around the employers' statutory duty of care to employees, as far back as the late 1970s these duties were broadly interpreted by the courts to have application to workers who were not employees. For example, the courts have held that in providing a working environment for employees that is safe and without risks to health, the employer must ensure that all workers, including contractors, sub-contractors, and labour hire workers, are as far as is reasonably practicable instructed, trained and supervised so that their work practices do not threaten the health and safety of the employer's *employees*.<sup>23</sup>

Second, most of the reformed OHS statutes include provisions which deem contractors and their employees to be 'employees' protected by the employer's general duty to employees. These deeming provisions, and particularly the term 'engaged', have generally been broadly interpreted by the courts: for example, in relation to the deeming provision in section 21(3) of the Victorian Act, in *The Queen v ACR Roofing Pty Ltd* [2004] VSCA 215 the Victorian Court of Appeal determined that the provisions even included contractors and subcontractors 'engaged' further down the contracting chain who were not in a direct contractual relationship with the employer. The Western Australian *Occupational Safety and Health Act* 1984, in sections 23D-23F goes further to 'deem' all labour hire workers to be 'employees' of the labour hire agency and host respectively,

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<sup>22</sup> R Johnstone, M Quinlan and M McNamara, 'OHS inspectors and psychosocial risk factors: Evidence from Australia', National Research Centre for Occupational Health and Safety Regulation Working Paper No 60, October 2008.

<sup>23</sup> See, for example, *R v Swan Hunter Shipbuilders* [1982] 1 All ER 264; and see also *WorkCover Authority of NSW v Crown in the Right of the State of NSW (Police Service of New South Wales)* (No 2) (2001) 104 IR 268 at para 24.

and 'labour arrangements in general' to be under an employment contract, for the purposes of the employer's general duty in relation to matters over which the agency, host or person has the capacity to exercise control over the work.

The most significant provisions, however, are the general duties on employers and self-employed persons in relation to persons other than employees. Introduced ostensibly to protect 'the public' from workplace hazards,<sup>24</sup> in fact these duties can be, and have been, interpreted to apply to workers other than employees.

Here the most far-reaching provisions are to be found in the *Occupational Health and Safety Act* 2004 (Vic) sections 23 and 24 and the *Workplace Health and Safety Act* 1995 (Qld) section 28. Although the wording of these provisions differ, in essence they provide that employers and self-employed persons in Victoria, and 'a person conducting a business or undertaking' in Queensland, must ensure that persons who are not employees ('workers' in Queensland) 'are not exposed' to risks to OHS arising from 'the conduct of the undertaking'. As I will discuss below, the courts have taken a broad approach to interpreting the key expressions 'exposed to risk'<sup>25</sup> and 'conduct of the undertaking'.<sup>26</sup> The application of the duty to contractors and sub-contractors was illustrated in *R v Associated Octel Co Ltd*<sup>27</sup> where the House of Lords held that if work conducted by a contractor falls within the conduct of an employer or self-employed person's undertaking, under section 3 of the British *Health and Safety etc at Work Act* 1974 (which is similar to sections 23 and 24 of the Victorian Act), the employer or self-employed person is under a duty to exercise control over the activity, and to ensure that it is done without exposing non-employees to risk.

Sections 8(2) and 9(1) of the *Occupational Health and Safety Act* 2000 (NSW) are similar to the Victorian and Queensland provisions, but specify that the duty only applies to non-employees while they are *at* the employer's or self-employed person's place of work.<sup>28</sup>

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<sup>24</sup> See Robens Lord A, *Report of the Committee on Safety and Health at Work*, 1970-1972, HMSO, London, Cmnd 5034, 1972 (Robens Report) paras 175, 176 and chapter 10, especially 290 and 294-7.

<sup>25</sup> See *R v Board of Trustees of the Science Museum* [1993] 1 WLR 1171.

<sup>26</sup> *Whittaker v Delmina Pty Ltd* (1998) 87 IR 268 at 280-281; *WorkCover Authority of New South Wales (Inspector Martin) v Edmund Hubert Kuipers and Civil Services Pty Ltd* [2004] NSWIRComm 303 para [55]; *R v Associated Octel Co Ltd* [1996] 4 All ER 846 at 851-852; *R v Mara* [1987] 1 WLR 87; and *Sterling-Winthrop Group Limited v Allen* (1987) SCCR 25.

<sup>27</sup> [1996] 4 All ER 846.

<sup>28</sup> See also the corresponding provisions in the Commonwealth and ACT OHS statutes.

Consequently, these provisions would not protect workers who were not employees who were engaged in work away from the employer's workplace – such as owner-drivers and outworkers who were independent contractors. The other OHS statutes do not build the duty to others around concepts of exposure to risk from the conduct of the undertaking, and are more limited in their application to workers who are not employees.

The importance of the wording of sections 21(3), 23 and 24 of the Victorian Act and section 28 of the Queensland Act becomes most apparent in relation to multi-tiered or pyramidal sub-contracting found in industries like clothing,<sup>29</sup> long-haul transport,<sup>30</sup> construction and franchise arrangements. These provisions impose a hierarchy of overlapping and complementary responsibilities on the different levels of self-employed persons, contractors and sub-contractors. For example, employers, contractors and subcontractors at each level owe duties to all parties below them in the contractual chain or affected by the conduct of their undertaking. Further, it is difficult to see how a franchisor in Queensland or Victoria could argue that contractual arrangements in which the franchisor licenses its business system for use by the franchisee is not part of the way in which the franchisor conducts its undertaking. Therefore a franchisor most likely owes a duty to a franchisee and the employees and contractors of the franchisee to ensure, as far as is reasonably practicable, that the system of work to be carried out by franchisees is safe and without risks to health. In short, these provisions in the Victorian and Queensland Acts have a very broad reach, and ensure that a firm's OHS responsibilities extend not only to 'employees', but to dependent and semi-dependent workers, independent businesses and volunteers who are engaged by the firm in the conduct of the firm's undertaking.

#### **4. The Primary Duty of Care**

##### ***Background***

At the heart of the National OHS Review Panel's First Report to the Workplace Relations Ministers Council at the end of October 2008 was a set of recommendations

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<sup>29</sup> I Nossar, R Johnstone and M Quinlan, 'Regulating Supply-Chains to Address the Occupational Health and Safety Problems Associated With Precarious Employment: The Case of Home-Based Clothing Workers in Australia' (2004) 17 *Australian Journal of Labour Law* 1-24.

<sup>30</sup> M Quinlan, *Report of Inquiry into Safety in the Long Haul Trucking Industry*, Motor Accidents Authority of New South Wales, Sydney, 2001.

that there be a primary duty of care imposed upon a ‘person conducting a business or an undertaking’.<sup>31</sup> The Panel’s Second Report<sup>32</sup> in February 2009 outlined key definitions and some further details to flesh out the primary duty recommendations. These recommendations built on the Queensland general duty discussed in the previous section, but elevated the duty to a ‘primary’, overarching duty, to be supplemented by a series of specific duties. This section examines this primary duty.

It is clear that the proposed primary duty recommendations have been strongly motivated by the need to ensure that the duty covers all kinds of working relationships, and addresses the wide range of known, and emerging, hazards. For example, in the First Report, the Panel stressed that the ‘Model Act should be designed so that it is capable of accommodating such new and evolving circumstances, without requiring amendments as these changes occur’.<sup>33</sup> The Panel also stated that:

In making our recommendations, we are concerned that the model Act provides for:

- as broad a coverage as possible, to ensure that the duties of care deal with emerging and future hazards and risks and changes to work and work arrangements;
- clarity of expression, to ensure certainty in the identification of the duty holders and that they can understand the obligations placed on them; and
- the interpretation and application of the duties of care consistent with the protection of health and safety.<sup>34</sup>

One of the Panel’s overarching recommendations is that the duty of care provisions in the model Act ‘together impose duties on all persons who by their conduct may cause, or contribute in a specified way, to risks to the health and safety of any person from the conduct of a business or undertaking’.<sup>35</sup> Another is that the duties of care are to be ‘focused on the undertaking of work and activities that contribute to its being done, and are not limited to the workplace’.<sup>36</sup> These two recommendations are operationalised by the proposals that the model Act impose a ‘primary’ general duty of care, and that beneath this primary duty there be a series of specific general duties.

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<sup>31</sup> First Report, above n 6.

<sup>32</sup> Second Report, above n 7.

<sup>33</sup> First Report, above n, 6.

<sup>34</sup> Ibid, 18. See also xiii.

<sup>35</sup> Ibid, recommendation 3.

<sup>36</sup> Ibid, recommendation 3.

## *The Primary Duty*

The First Report proposes that the model Act impose a ‘primary’ general duty upon a ‘person conducting a business or an undertaking’ and owed to ‘workers’ broadly defined and ‘others’. Beneath this primary duty would sit a series of specific classes of duty holders with more detailed duties which ‘flesh out’ the primary duty of care, without excluding or limiting the primary duty.<sup>37</sup> The primary and specific duties are all qualified by the ‘reasonable practicability’ of measures to eliminate or reduce hazards and risks.<sup>38</sup> Following the approach taken in all of the current Australian OHS statutes apart from New South Wales and Queensland, reasonable practicability is to be included in each duty of care, with the onus of proving reasonable practicability in a prosecution falling on the prosecutor.<sup>39</sup> Workers (apart from those who are ‘self-employed persons’<sup>40</sup>) and corporate officers are not subject to the primary duty of care, but have other specific duties imposed upon them.<sup>41</sup> To avoid the limitation or exclusion of the primary duty of care, the Panel recommended that the Model Act ‘specifically provide that the duty should apply without limitation’, and in particular should not be limited or restricted by the specific duties.<sup>42</sup>

The Panel’s recommendations in relation to the general duty provisions in the model Act explicitly institutionalise key principles to be found in the current OHS statutes: that the general duties (including the primary duty) are non-delegable; that a person can have more than one duty; that more than one person can concurrently owe the same duty; that no duty restricts another; and that each duty holder must comply with an applicable duty to the required standard (reasonably practicable, reasonable care or due diligence) even though another duty holder may have the same duty.<sup>43</sup> The Panel recommended that ‘each duty holder must consult, and co-operate and co-ordinate activities with all persons having a duty in relation to the same matter.’<sup>44</sup> It further recommended that the model Act will contain a provision to the effect that: ‘(e) Each duty holder must comply with an

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<sup>37</sup> Ibid, recommendations 3-6, 10-21.

<sup>38</sup> Ibid, recommendation 4.

<sup>39</sup> Ibid, recommendations 5-8. For a detailed discussion of recommendations in relation to offences against the general duties, see Johnstone above n 3.

<sup>40</sup> See the definition of ‘worker’ below, and see *WRMC Response to Recommendations of the National Review into Model OHS Laws*, WRMC, 18 May 2009, 6.

<sup>41</sup> First Report, above n 6, chapters 8 and 9.

<sup>42</sup> Ibid, recommendation 18. For a detailed discussion of the relationship between offences against the primary and specific duties, see Johnstone above n 3.

<sup>43</sup> Ibid, recommendations 2(a), (b), (c) and (d).

<sup>44</sup> Ibid, recommendation 2(f).

applicable duty to the extent to which the duty holder has control over relevant matters, or would have control if not for an agreement or arrangement purporting to limit or remove that control.’<sup>45</sup> It is not clear exactly what this means, and the Report elsewhere makes it clear that ‘control’ not be used in the model Act other than in the duty of care placed on a person with management and control of a workplace etc’.<sup>46</sup> Further, in the Second Report the Panel recommended that the model Act should not include a definition of ‘control’.<sup>47</sup> Hopefully the recommendation simply means that duty holders cannot contract out of their OHS obligations. In my view this provision should not be adopted in the model Act because its meaning is unclear and it potentially conflicts with the principles in recommendations 2(a) to (d). If it is included, the drafters of the model OHS should draft the provision to ensure that duty holders cannot contract out of their OHS obligations, should co-ordinate their compliance measures with other duty holders, and should discharge their duties so far as is reasonably practicable.

Earlier in this paper I noted that the Panel emphasised that the duties of care should apply to all hazards and risks arising from the conduct of work and that the duties of care deal with emerging and future hazards and risks. To provide certainty that the model Act operates in relation to all aspects of health, the Second Report<sup>48</sup> recommended that the term ‘health’ be broadly defined so that it included:

- (i) both physical and psychological health;
- (ii) immediate and long-term health; and
- (iii) freedom from disease or illness or incapacity.

Further, the Panel recommended that the objects of the Model Act should specify that an object of the Act is to eliminate or minimise so far as is reasonably practicable risks to physical or psychological health.<sup>49</sup>

As noted above, the Panel recommended that the primary general duty in the model Act be owed by a ‘person conducting a business or an undertaking’,<sup>50</sup> but should not be owed by workers and officers to the extent that they were not conducting a business or

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<sup>45</sup> Ibid, recommendation 2(e).

<sup>46</sup> Ibid, 64.

<sup>47</sup> Second Report, above n 7, recommendation 84.

<sup>48</sup> Ibid, recommendation 85.

<sup>49</sup> Ibid.

<sup>50</sup> First Report, above n 6, recommendation 13.

undertaking in their own right.<sup>51</sup> The Workplace Relations Ministers Council stated that self-employed persons, who technically might fall within the broad definition of ‘worker’ (see below) ‘should not be excluded and should be considered to be a person conducting a business or undertaking.’ This is a fair point, because the definition of worker, while appropriately broad to ensure the protection of the wide range of workpeople likely to be found in workplaces, also includes persons who are controlling and managing small businesses. These persons should be subject to the primary duty. But the drafters of the model Act should also recognise that some of these self-employed persons may be genuinely dependent workers, without the capacity to influence operations sufficiently to hold the primary duty.

This recommendation that the primary general duty be owed by a ‘person conducting a business or an undertaking’ builds on the general duty provision in section 28 of the *Queensland Workplace Health and Safety Act 1995* discussed above (similar provisions are to be found in the new *Work Safety Act 2008* (ACT) and the new *Workplace Health and Safety Act 2007* (NT)), but goes further to recommend that this duty be an overarching or umbrella duty, purporting to impose OHS obligations on all persons who are in a position to eliminate or control all work-related hazards and risks.

The Panel rejected the current approach in most of the OHS statutes (apart from Queensland, and the two territories) of imposing the duty upon an employer and upon a self-employed person, arguing that this approach ‘is too limited, as it maintains the link to the employment relationship as a determinant of the duty of care’ and ‘the changing nature of work arrangements and relationships make this link no longer sufficient to protect all persons engaged in work activities.’<sup>52</sup> There may, for example, be circumstances where a person with active control or influence over the way work is conducted might be neither an employer nor a self-employed person.<sup>53</sup> Further, the person carrying out the work might be doing so under the effective direction or influence of a person who is not a person engaging them under a contract of employment. For example, the worker may be a contractor, or may be share farming or share fishing.<sup>54</sup> Not only did the Panel recommend in the First Report that the primary duty holder’s

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<sup>51</sup> Ibid, recommendations 10, 11, 12 and 13.

<sup>52</sup> Ibid, 46.

<sup>53</sup> Ibid, 46.

<sup>54</sup> Ibid, 47. See the other examples at the bottom of page 47.

obligations not be limited to the employment relationship;<sup>55</sup> it went further to argue that those obligations should not be limited to *any particular* relationships.<sup>56</sup> Nevertheless, in the Second Report the Panel was careful to argue that the primary duty covers ‘employment like’ relationships and arrangements where a person is able to direct or influence the way in which work is done, as well as specific classes of duty holders.<sup>57</sup> It did ‘not intend that the primary duty extend duties of care currently owed under the OHS legislation, other than to capture “employment like” arrangements and relationships that to date have not been subject to a duty of care, because of the link to employment or self-employment.’<sup>58</sup> This would appear to be clarified by the following passages in the First Report:<sup>59</sup>

Arrangements for the provision of labour that are not ‘employment-like’ such as bartering, share fishing and share farming, would also be subject to the duty of care, either because the person carrying out the work will fall within the broad definition of ‘worker’ or would fall into the residual class of ‘others’.

Some arrangements may not be directly for the provision of labour, but may be related to the conduct of a business or undertaking in which persons work. An example is franchising arrangements. The franchisor will often impose a high level of detailed requirements on the franchisee, that will affect many of the elements of work (e.g. the payout of premises and equipment to be used in fast food franchises). The franchisor may therefore affect the health and safety of the employees of the franchisee and the public – each of whom would owe the duty of care to ‘others’.

The only limiter in the duty should be that labour is provided for the purposes of, or in the course of, the conduct of a business or undertaking. All arrangements of whatever nature that meet that description should be the subject of the duty of care.

It would appear that the Panel had in mind that the primary duty would cover a wide range of working arrangements, including franchising, share fishing and farming and bailment relationships in taxi arrangements.

### ***Interpreting the Primary Duty: ‘Business or undertaking’, ‘workers’ and ‘others’***

The Panel defined ‘a business or undertaking’ in the Second Report. This is a crucial definition, because it determines both the primary duty holder, and scope of the duty.<sup>60</sup>

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<sup>55</sup> Ibid, recommendation 11.

<sup>56</sup> Ibid, 48. My emphasis.

<sup>57</sup> Second Report, above n 7, paras 23.41-23.44.

<sup>58</sup> Ibid, para 23.44.

<sup>59</sup> First Report, above n 6, paras 6.67- 6.69.

<sup>60</sup> Second Report, above n 7, at para 23.31.

The Panel noted<sup>61</sup> that it intended ‘the primary duty ... to apply to those able to direct or influence the way in which work is done and the things associated with it’.<sup>62</sup> In defining a ‘business or undertaking’ the Panel examined dictionary definitions,<sup>63</sup> case law,<sup>64</sup> the other relevant recommendations in the First and Second Reports, provisions in the existing OHS Acts,<sup>65</sup> and the definitions of the expressions in the Queensland, ACT and Northern Territory Acts.

The expression ‘conduct of the undertaking’ has been very broadly interpreted by the courts, and includes ancillary matters such as cleaning, repairing and maintaining plant, obtaining supplies and making deliveries.<sup>66</sup> The courts have also made it clear that more than one person can be conducting an undertaking in any one situation. While there are suggestions in the leading British case, *R v Associated Octel*,<sup>67</sup> that the conduct of an undertaking may be confined to the employer’s workplace, it is clear that this is not the Australian interpretation. In *Whittaker v Delmina* (1998) IR 268 Hansen J stated that:

The expression is broad in its meaning ... deliberately to ensure that the section is effective to impose the duty it states. ... It means the business or enterprise of the employer ... and the word ‘conduct’ refers to the activity or what is done in the course of carrying on the business or enterprise. A business ... may be seen to be conducting its operation, performing work or providing services at one or more places, permanent or temporary and whether or not possessing a defined physical boundary. The circumstances may be as infinite as they are variable. ...

In any event, as noted above the Panel recommended that the primary duty of care should not be limited to the workplace (in contrast to section 8(2) and 9 of the *Occupational Health and Safety Act 2000* (NSW)), but ‘should apply to any work activity and work consequences, wherever they may occur, resulting from the conduct of the business or undertaking’.<sup>68</sup> It also noted that the primary duty is not restricted to the time during which work is being done. In its response to the recommendations, the Workplace

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<sup>61</sup> Ibid, at paras 23.40 and 23.42.

<sup>62</sup> Ibid, para 23.40.

<sup>63</sup> Ibid, paras 23.13 and 23.14.

<sup>64</sup> Ibid, paras 23.15-23.23.

<sup>65</sup> Ibid, paras 23.33-23.38.

<sup>66</sup> *R v Associated Octel Co Ltd* [1996] 4 All ER 846 at 851-852; *R v Mara* [1987] 1 WLR 87; and *Sterling-Winthrop Group Limited v Allen* (1987) SCCR 25; *WorkCover Authority of New South Wales (Inspector Martin) v Edmund Hubert Kuipers and Civil Services Pty Ltd* [2004] NSWIRComm 303 para [55].

<sup>67</sup> [1996] 4 All ER 846.

<sup>68</sup> First Report, above n 6, recommendation 17. For a good example, see *Whittaker v Delmina Pty Ltd* (1998) 87 IR 268.

relations Ministers Council stated that the model Act 'should provide for its extra-territorial operation for activities conducted overseas eg Australian embassies.'<sup>69</sup>

The definitions of 'conduct of a business or undertaking' in the OHS statutes also take a broad approach. For example, section 28(3) of the Queensland Act provides that the general duty imposed on a person who conducts a business or undertaking applies --

- (a) whether or not the relevant person conducts the business or undertaking as an employer, self-employed person or otherwise; and
- (b) whether or not the business or undertaking is conducted for gain or reward; and
- (c) whether or not a person works on a voluntary basis.

The Panel preferred<sup>70</sup> section 4 of the Northern Territory Act, which defines 'business' as '(a) an industrial or commercial undertaking or activity (whether carried on for profit or on a not-for-profit basis); or (b) an undertaking or activity of government or local government'.

In the First Report the Panel stated that

the primary duty of care should clearly provide, directly or through defined terms, that it applies to any person conducting a business or undertaking, whether as:

- (a) an employer; or
- (b) a self-employed person; or
- (c) the Crown in any capacity; or
- (d) a person in any other capacity

and whether or not the business or undertaking is conducted for gain or reward.<sup>71</sup>

In order to avoid uncertainty, assist duty holders, ensure that the scope of the duty not too broad, and ensure that the duty is consistently interpreted and applied, the Panel noted in the Second Report that it was important that the expression be defined in broad terms, with exemptions of specific organisations or activities in a Schedule to the Act or regulations.<sup>72</sup> The Workplace Relations Ministers Council responded that the 'definition should be robust enough so that exemptions are not required, or in very limited circumstances such as matters relating to national security, Australia's defence and certain police operations.'<sup>73</sup> The Second Report suggested that the definition should include

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<sup>69</sup> WRMC, above n 40, response to recommendation 17.

<sup>70</sup> See First Report above n 6, para 6.55.

<sup>71</sup> Ibid, recommendation 12.

<sup>72</sup> Second Report, above n 7, para 23.46 and recommendation 82.

<sup>73</sup> WRMC, above n 40, response to recommendation 82.

clubs, but not ‘purely social, private or domestic activities’.<sup>74</sup> It should also include those engaging contractors and sub-contractors, franchisors, labour hire organisations, those engaging home-based workers, and those arranging for the practical placement of students.<sup>75</sup>

The Second Report recommended that a ‘business or undertaking’ be defined as

activities carried out by, or under the control of, a person (including a corporation other legal entity or the Crown in any capacity)

- a) whether alone or in concert
- b) of an industrial or commercial nature or in government or local government;
- c) whether or not for profit or gain; and
- d) in which:
  - (i) workers are engaged, or caused to be engaged, to carry out work; or
  - (ii) the activities of workers at work are directed or influenced; or
  - (iii) things that are provided for use in the conduct or work (e.g. a workplace, plant, substance, OHS services);by the person conducting the business or undertaking.<sup>76</sup>

The definition of ‘a business or undertaking’ should not include the engagement of workers solely for private or domestic purposes.<sup>77</sup>

I note that the definition uses the word ‘control’, despite, as noted above, the Panel’s view that ‘control’ not be used in the model Act other than in the duty of care placed on a person with management and control of a workplace etc’.<sup>78</sup> It would make more sense for the word ‘control’ in the above definition be replaced with the words ‘direction or influence’.

Further, the Workplace Relations Ministers’ Council was concerned that paragraph (b) of the proposed definition, which refers to ‘industrial, commercial and government’ may unintentionally exclude welfare organisations.<sup>79</sup> As noted above, it was also concerned that the definition did not include self-employed persons.<sup>80</sup>

The primary duty is to be owed to ‘workers’ very broadly defined, and to ‘others’. In the Second Report, the Panel proposed that the model Act adopt, with appropriate

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<sup>74</sup> Second Report, above n 7, para 23.46

<sup>75</sup> Ibid, para 23.47.

<sup>76</sup> Ibid, recommendation 83.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid, 64. See also WRMC, above n 40, response to recommendation 83.

<sup>79</sup> WRMC, above n 40, response to recommendation 83.

<sup>80</sup> Ibid, response to recommendation 13.

modification, the definition of ‘worker’ in the Northern Territory Act (section 4),<sup>81</sup> which includes ‘any person who works in a person’s business or undertaking as an employee, apprentice, contractor or sub-contractor (or their employee), employee of a labour hire company, volunteer or in any other capacity’. The Workplace Relations Ministers Council sought to qualify this definition so that it did not include ‘certain volunteers eg referees at children’s sporting activities, assistants at school tuckshops’, and sought to extend the definition to ensure outworkers, long distance truck drivers, independent contractors, students ‘in a work situation’ and Australian defence force personnel are included.<sup>82</sup>

In addition to protecting ‘workers’, the primary duty is owed to ‘others’- that is, persons who are not ‘workers’. The Robens Report noted that it was important to integrate provisions regulating the working environment with those for the control of the general environment (for example, environmental regulation, general public safety regulation etc), and the Report proposed that OHS legislation protect the internal (shoppers in shopping centres, students in schools and universities) and external public (people walking past workplaces). As this paper has already described, these concerns were addressed in the duty on the employer and self-employed person to persons who are not employees.

A complex issue still to be fully resolved is the extent to which the primary duty, to the extent that it is owed to ‘others’, will apply to ‘public’ health and safety. The Workplace Relations Ministers Council, in its response to the recommendations in relation to the primary duty, stated that drafting of the primary duty ‘will need to ensure that coverage of the model Act is confined to occupational health and safety and does not extend into areas more appropriately classified as public safety.’<sup>83</sup>

The issue is relatively straightforward when it comes to protecting students in universities, or shoppers in shopping centres, and even spectators at an activity (such as a fireworks display) which forms part of the business. In my view, these should clearly fall within the scope of the primary duty. But the issues becomes more complex when examining the extent to which protection should be afforded to members of the public actively participating in a high risk activity which is organised by a business, either using

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<sup>81</sup> See also the definition in section 9 of the *Work Safety Act 2008* (ACT).

<sup>82</sup> WRMC, above n 40, response to recommendation 93, 22.

<sup>83</sup> Ibid, response to recommendations 11, 12, and 21.

equipment provided by the business, or using own the member of the public's own equipment. Particularly in the latter case, the business owner has little control over level of risk. While it might reasonably be argued that as these are all risks to persons arising from the conduct of the undertaking and thus should be properly regulated, there is a concern that resources not be diverted from regulating core OHS issues to regulating public safety, particularly where there is a significant degree of self-exposure to risks for recreational purposes.

In the Second Report the National OHS Review Panel suggests that there is no simple formula as to where the line should be drawn.<sup>84</sup> The Report reiterates that the primary purpose of OHS regulation is to protect persons from work-related harm, regardless of status of the person - but it should not protect public in circumstances that are not related to work. The Panel was clear that the primary duty should not have a geographical limitation – for example it should not limit protection to activities or persons at a workplace.<sup>85</sup> It recommended that protection be limited to exposure to hazards and risks inherent in or emanating from (a) the performance of work; (b) anything provided or used (or so intended) in or for the performance of work; or (c) a workplace in its capacity as a workplace.<sup>86</sup> This should be reflected in the drafting of the model Act, particularly its objects and principles.<sup>87</sup> Further, regulators should provide guidance and advice as to how OHS law applies to public safety.<sup>88</sup>

### ***The Model Clause***

The Panel illustrated how the primary duty could be drawn together in a model clause, as follows:<sup>89</sup>

1. A person conducting a business or undertaking (other than in the capacity of a worker<sup>90</sup> or officer) must ensure so far as is reasonably practicable that workers engaged in work as part of the business or undertaking, and any other persons, are not exposed to a risk to their health and safety from the conduct of the business or undertaking.

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<sup>84</sup> Second Report, above n 7, 19.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid 19 (para 20.117).

<sup>87</sup> Ibid recommendation 77.

<sup>88</sup> Ibid recommendation 78.

<sup>89</sup> First Report, above n 6, 59 and recommendation 21.

<sup>90</sup> Note again the WRMC's (above n 40) concern that self-employed persons not be excluded from the definition of a persons conducting a business or undertaking.

2. Without limiting sub-section (1), a person conducting a business or undertaking must so far as is reasonably practicable ensure:

- (a) the provision and maintenance of plant and systems of work as are necessary for the work to be performed without risk to the health and safety of any person;
- (b) the provision and maintenance of arrangements for the safe use, handling, storage and transport of plant and substances;
- (c) each workplace<sup>91</sup> under the control and management of the business operator is maintained in a condition that is safe and without risks to health;
- (d) the provision of adequate welfare facilities;
- (e) the provision of such information, training, instruction and supervision as necessary to protect all persons from risks to their health and safety from the conduct of the business or undertaking ...'

.....

- 4. In this section [provide definitions of worker, business or undertaking etc].
- 5. For the avoidance of doubt, the duties and obligations imposed by this section apply without limitation notwithstanding anything provided elsewhere in the Act.

Sub-section (3) provides for the extension of the primary duty of care to circumstances where the primary duty holder, 'a person who conducts a business or undertaking', provides accommodation to workers in remote locations to enable the worker to undertake the work.<sup>92</sup>

The expression in sub-section (1) of the model clause 'are not exposed to a risk to their health and safety' has been interpreted very broadly by the courts. The best known example is the English case of *R v Board of Trustees of the Science Museum* [1993] ICR 876, where the Court of Appeal stated that the ordinary meaning of 'the word "risks" conveys the idea of a possibility of danger, ... The word "exposed" simply makes it clear that the section is concerned with persons potentially affected by the risks.' In other words, for a contravention of the primary duty to occur the person owed the duty does not actually have to suffer injury or ill-health, but rather need only be exposed to a significant risk of injury or ill-health.

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<sup>91</sup> To be defined as any place at or in or upon which work is being undertaken (including recesses or breaks in a continuing course of work) or where a worker may be expected to be during the course of work, and includes a vehicle, ship, aircraft and other mobile structures when used for work: Second Report, above n 7, recommendation 94. Note that the WRMC, above n 40, in its response to recommendation 28, specified that workers who work in private homes should be subject to OHS protections.

<sup>92</sup> First Report, above n 6, recommendation 20.

As noted above, the First Report recommended that ‘each duty holder must consult, and co-operate and co-ordinate activities with all persons having a duty in relation to the same matter.’<sup>93</sup> This is an important obligation for persons conducting a business or undertaking, and presumably will be one of the obligations upon a holder of the primary duty. Further, the Second Report outlined additional obligations on the person conducting a business or undertaking:

- where reasonably practicable, to employ or engage a suitably qualified person to provide advice on OHS matters; and recommended WHSO provisions as in Queensland (to be extended to non-traditional work arrangements).<sup>94</sup>
- to ensure, so far as is reasonably practicable, the health of workers engaged by them or under their direction, is monitored for the purpose of preventing fatalities, illness or injury arising from the conduct of the undertaking;<sup>95</sup> and
- to ensure that the regulator is notified immediately (and by written record within 48 hours) of a fatality, serious injury, serious illness or serious incident arising out of the business or undertaking.<sup>96</sup>

Unfortunately, the recommendation that the person running a business or undertaking employ or engage a suitably qualified person to provide advice on OHS matters; and the recommendation in relation to the WHSO provisions were opposed by the Workplace Relations Ministers Council on the basis that ‘an unintended consequence could be that persons conducting a business or undertaking would be encouraged to delegate their responsibilities.’ This objection could easily be addressed in the drafting of the provisions. It would be extremely disappointing if such an important aspect of PHS compliance – the duty holder acquiring expertise to learn how to comply – was not included in the model Act.

Sub-section (2) in the model clause expressly provides that it does not limit subsection (1), and places the particular duties on any person conducting a business or

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<sup>93</sup> Ibid, recommendation 2(f).

<sup>94</sup> Second Report, above n 7, recommendation 139.

<sup>95</sup> Ibid, recommendation 137. The WRMC’s response (above n 40) to this recommendation (at 36) limited the obligation to health issues arising out of work activity, and queried whether this obligation was not already covered by the general duty. Note also that recommendation 138 recommended an obligation ‘for persons *with management and control* of a workplace to ensure, so far as is reasonably practicable, that condition at that workplace are monitored for the purposes of preventing fatalities, illness or injury.’

<sup>96</sup> Second Report above n 7, recommendation 140.

undertaking.<sup>97</sup> It is clear, however, that it is largely a cut and paste of the specific obligations to be found under the employer's general duty in the current OHS statutes,<sup>98</sup> so that these particular duties are an elaboration of the duties of persons in 'employment-like' situations. In other words, they outline obligations that are framed for the employment relationship, and not for other work relationships or for other types of relationship, and which are less clearly the primary issues that should be emphasised in other situations – for example, where the protection of members of the public (such as shoppers in a shopping centre, students in a school or university, or passers by) is of concern. In other words, they highlight plant, substances, workplace conditions, accommodation and first aid at the expense of other types of risk (which, of course, are generically covered by sub-section (1)) and fail to address core processes in a systematic (but not systems) approach to managing OHS. This is, arguably, a retrograde step and misses an ideal opportunity to reinforce in duty holders' minds the notion that there are proactive steps they should take to pursue positive OHS outcomes. These include appointment of competent persons, consultation with workers, searching for and eliminating or minimising risks, developing and implementing safe systems of work, providing instruction and training, monitoring injuries and adverse health effects, reporting and investigating incidents and taking preventive action, arranging and providing first aid, emergency response and documenting action taken. These are core activities in any proactive approach to OHS and are uncontroversial. As noted above, the First and Second Reports do recommend additional duties in relation to health monitoring, incident reporting and consultation, co-operation and co-ordination of activities 'with all persons having a duty in relation to the same matter,'<sup>99</sup> and if these are properly integrated into the primary duty these criticisms will be partially addressed.

The above discussion begs the question as to whether there should be a specific duty owed by a person conducting a business or an undertaking to workers, which includes the matters outlined in the second half of the previous paragraph.

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<sup>97</sup> First Report, above n 6, 57. It deals with a particular situation that has been highlighted by experience in remote areas in Western Australia.

<sup>98</sup> Ibid, recommendation 19 and see p 57.

<sup>99</sup> Ibid, recommendation 2(f).

### ***The Role of Regulations, Codes and Guidance Material***

An alternative approach would be to use regulations, codes of practice and guidance material to provide this detail. Indeed, the Panel noted<sup>100</sup> that reliance on the ‘conduct of the undertaking’ duty of care may not produce the desired OHS protection because of ambiguity and inconsistency in interpretation. It considered that these sorts of detailed obligations are not appropriate for inclusion in the model Act and recommended that ‘the primary duty of care should be supported by codes of practice or guidance material to explain the scope of its operation and what is needed to comply with the duty.’<sup>101</sup> Presumably this recommendation should also include regulations, as the text which supports it refers to the use of regulations as well as codes of practice and guidance material.

The First Report notes that in some industries regulations or statutes unrelated to the general OHS statute impose OHS obligations on business operators in that industry.<sup>102</sup> The most notable examples are in the mining industry, the road transport industry, and also in relation to clothing outworkers.

This raises the issue as to how current industry specific legislation should be addressed. In the Second Report, the Panel recommended<sup>103</sup> that in developing and periodically reviewing the model OHS Act, there should be a presumption that separate and specific OHS laws for particular hazards or high risk industries should only continue where they have been objectively justified. If not justified, they should be replaced by the model Act within an agreed time frame – specific provisions should normally be provided for by regulations under the model Act. As far as possible, the separate legislation should be consistent with the nationally harmonised laws.

I would argue that the model OHS Act include, in the part of the Act dealing with the primary duty of care, examples of the type of work arrangements that the duty address – all kinds of labour hire arrangements, franchise arrangements, contracting and sub-contracting, share farming and fishing, and so on.<sup>104</sup> Further, the first round of new

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<sup>100</sup> Ibid, 25.

<sup>101</sup> Ibid, recommendation 22.

<sup>102</sup> Ibid, 60.

<sup>103</sup> Second Report, above n 7, recommendation 76.

<sup>104</sup> Note that there are specific references to labour hire and franchising at p 50 of the First Report, above n 6.

regulations, codes and guidance material made under the model OHS Act should also clearly outline how the primary duty applies to these various working arrangements.

### **Reasonably Practicable**

As noted earlier in this article, all of the duties discussed so far in this section are to be qualified by reasonable practicability. The Panel recommends that this expression be defined in the model Act,<sup>105</sup> in a way ‘which allows a duty holder to understand what is required to meet the standard.’<sup>106</sup> In particular, the First Report makes the important point that the definition should specify that the duty holder must not just *have regard to*, but also *weigh up* the various elements of the calculus.<sup>107</sup> The Panel outlined an example definition as follows:

Reasonably practicable means (except in relation to obligations for consultation) that which is, or was, at a particular time reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters, including:

- a) the likelihood of the hazard or risk eventuating;
- b) the degree of harm that may result if the hazard or risk eventuated;
- c) what the duty holder knows, or a person in their position ought reasonably to know, about:
  - (i) the hazard, the potential harm and the risk;
  - (ii) ways of eliminating or reducing the hazard, the harm or the risk;
- d) the availability and suitability of ways to eliminate or reduce the hazard, the harm and the risk; and
- e) the costs associated with the available ways of eliminating or reducing the hazard, the harm or the risk, including whether the cost is grossly disproportionate to the degree of harm and the risk.

The Panel also recommended that the meaning and application of the standard of reasonably practicable should be explained in a code of practice or guidance material.<sup>108</sup>

This ‘example definition’ is based upon, and improves, the best definition of ‘reasonably practicable’ in the current OHS statutes, namely section 20 of the *Occupational Health and Safety Act 2004* (Vic).<sup>109</sup>

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<sup>105</sup> First Report, above n 6, recommendation 5.

<sup>106</sup> Ibid, recommendation 6.

<sup>107</sup> Ibid, 34. See in particular, the example of the wording provided by the Panel on pages 34-35.

<sup>108</sup> Ibid, recommendation 7. The Panel gave as an example of guidance material the excellent publication, WorkSafe Victoria, *How WorkSafe Applies the Law in Relation to Reasonably Practicable*, WorkSafe Position, Edition No. 1, WorkSafe Victoria, Melbourne, 2007

<sup>109</sup> See my critique of the definition in Johnstone above n 3.

The Panel recommended that the concept of control not be included in the definition of reasonable practicability<sup>110</sup> because ‘control is an inherent element in determining what can reasonably be done in the circumstances. Making express reference to control in the definition of reasonably practicable may lead to a focus on that issue, ahead of other factors noted in the definition.’<sup>111</sup>

### ***Risk Management Principles***

The Panel also addressed the issue of whether reasonably practicable should explicitly refer to risk management principles. Both the reasonably practicable and risk management principles appear to require duty holders to identify and weigh up risks and possible control measures, but it is far from clear from a simple reading of the OHS statutes exactly what the relationship between these two processes is.<sup>112</sup> It should be noted at this point that the cases interpreting the employer’s general duty indicate that the employer should not just be responding to demonstrated risks but should have a system of searching for and identifying all possible risks, and instituting reasonable and appropriate measures.<sup>113</sup>

While acknowledging that risk management is essential to achieving a safe and healthy working environment, and that risk management is implicit in the definition of ‘reasonably practicable’, the National OHS Review Panel questioned whether the risk management process

is applicable in every case; if adherence to the process in and of itself satisfies the duty of care; and, further, if failure to adhere to the risk management process should constitute a breach of the duty of care.<sup>114</sup>

The Panel argued that the risk management process, by itself, will not satisfy the duty of care, and that failure to apply the process should not constitute a breach of the primary duty of care.<sup>115</sup> It recommended that the principles of risk management should be identified in the part of the model Act setting out the fundamental principles, but that risk management should not expressly be required to be applied as part of the qualifier

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<sup>110</sup> First Report, above n 6, recommendation 8.

<sup>111</sup> Ibid, 36.

<sup>112</sup> E Bluff and R Johnstone, ‘The relationship between “reasonably practicable” and risk management regulation’ (2005) 18 *Australian Journal of Labour Law* 197.

<sup>113</sup> Ibid, 212-219.

<sup>114</sup> Second Report, above n 7, para 30.20.

<sup>115</sup> Ibid para 30.22.

reasonably practicable, or to comply with the duties of care.<sup>116</sup> The Panel explained that it considered that:

The definition of reasonably practicable should be simple and easy to understand, setting out principles rather than processes. Reasonably practicable should be a standard to be met, rather than a process. If it is appropriate for risk management process requirements to be included in the model Act, they can be provided in separate provisions as specific obligations. This is consistent with the principles in our terms of reference.<sup>117</sup>

Further, the regulation-making power in the model Act should allow for the process to be established via regulation, with further guidance provided in a code of practice.<sup>118</sup>

If risk management is not expressly required to comply with the general duties of care, or to determine what preventive action is reasonably practicable, duty holders will be left in the curious position of being required by *case law* to assess the risks without this being explicitly required by the model Act.

Further, the First Report seems to take different approaches to the risk management requirement. As noted above, it proposes that risk management should be included in fundamental principles to support interpretation and implementation and not as part of reasonably practicable, and then proposes that the upstream duties should include risk management. In the Second Report the Panel decided that as a process, requirements for risk management should be placed in the model regulations. There is no justification for these different approaches. If risk management is not integrated in all of the duties, replacing reasonably practicable, then it should be dealt with consistently in fundamental principles that apply to all duties. Different approaches simply cause confusion and there is no basis for expecting that upstream duty holders will be any better at risk assessment than other duty holders.

#### **4. Conclusion**

The Review Panel's cluster of recommendations that there be a primary duty of care is unquestionably one of the most important, and innovative, set of recommendations in the First and Second Reports. Yet, as this paper makes clear, the primary duty draws largely on the current Queensland general duty provision (which has been echoed in the

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<sup>116</sup> First Report, above n 6, recommendation 9. See also Second Report, above n 7, recommendation 136.

<sup>117</sup> First Report, above n 6, 36.

<sup>118</sup> Second Report above n 7, recommendation 136.

new statutes in the two Territories), although the Review Panel has developed the duty by elevating it to an overarching primary duty, and broadening the definition of workers. As argued in the paper, one reason that the Panel may have been willing to make this significant proposal was the emphasis in its Terms of Reference on taking into account the changing nature of work and employment arrangements.

How effective the primary duty is in protecting the wide range of workpeople, and non-workpeople affected by working conditions, will depend on the specific drafting in the model OHS Act. Crucial issues include the definitions of ‘person conducting a business and undertaking’ and of ‘workers’, the extent to which the duty applies to all self-employed persons regardless of their economic dependency on other organisations, the scope of protection of members of the public, and the precise nature of the relationship between the primary and specific duties. Important principles in the model Act’s framework will be the non-delegability of the primary and specific duties of care, and the requirement on all duty holders to co-ordinate their compliance processes and measures.

However these issues play out in the model Act, the primary duty will afford all workers significant protection, regardless of their place in organisational networks and supply chains. As the Review Panel noted in its First Report:<sup>119</sup>

Each of the persons conducting a business or undertaking involved in the various levels of contracting ‘chains’ (found in construction, transport and clothing) would owe duties of care in relation to their activities in the conduct of their business or undertaking, to those who are affected by what they do.

Further, workers engaged in franchises and other complex legal relationships such as bailment (for example, in the case of taxi drivers) will be protected.

The proposed primary duty is a very important development in OHS regulation internationally, and will provide a clear template for other countries seeking to address OHS issues arising from changing organisational forms and work relationships.

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<sup>119</sup> First Report, above n 6, para 6.65.