



# Take Me to Your Employer: The Organisational Reach of Occupational Health and Safety Regulation

Richard Johnstone\* and Therese Wilson†

*'Employers' in the OHS statutes tend to be defined contractually: an employer is a person who employs another person under a contract of employment. The OHS statutes appear to assume a single employer with considerable freedom to determine the limits of their boundaries, and responsible only under the principles of agency and vicarious liability. This article examines the way in which the general duties in the OHS statutes operate when the employer (or self-employed person) is not a sole proprietor or a single corporate entity: for example where various business organisations are linked in a contractual chain or network; where operations are run by a partnership, unincorporated association or joint venture; where the ostensible employer is an entity within a larger corporate or organisational structure; or in situations where the person or entity responsible for engaging or employing workers is different from the person or entity with control over assets and decision-making concerning OHS. In addressing the application of the OHS statutes to these different configurations of 'the employer', the article examines provisions in the OHS statutes that extend the reach of an employer's duty beyond the employer's employees (for example, provisions that deem contractors and their employees to be employees of the principal contractor; and the duty to persons who are not employees). It also shows how the new Victorian 'shadow officer' provisions can be applied to remove difficulties and doubt as to the liability of partners in a partnership, officers of unincorporated associations, joint venturers, and holding and subsidiary companies within corporate groups.*

## Introduction

Twentieth century labour law focused principally on the regulation of the employment relationship,<sup>1</sup> and assumed 'the employer' to be a single (usually

\* Socio-Legal Research Centre, Griffith Law School, Griffith University and National Research Centre for Occupational Health and Safety Regulation, Regulatory Institutions Network, Research School of Social Sciences, Australian National University.

† Socio-Legal Research Centre, Griffith Law School, Griffith University.

<sup>1</sup> See, particularly, H Collins, 'Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration' (1990) 53 *Mod LR* 731; H Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 *OJLS* 353; L Bennett, *Making Labour Law in Australia Industrial Relations, Politics and Law*, Law Book Company, Sydney, 1994, pp 171–83; J Howe and R Mitchell, 'The Evolution of the Contract of Employment in Australia: A Discussion' (1999) 12 *AJLL* 113; R Johnstone, 'Paradigm Crossed? The Statutory Occupational Health and Safety Obligations of the Business Undertaking' (1999) 12 *AJLL* 73.

corporate) entity with considerable freedom to determine the limits of its boundaries, and responsible only under the principles of agency and vicarious liability.<sup>2</sup>

This assumption of a single employer has also underpinned traditional occupational health and safety (OHS) regulation. Based on the British Factories Acts which were first enacted early in the nineteenth century,<sup>3</sup> and in force until the Robens-inspired statutes of the late 1970s to early 1990s, Australian OHS legislation primarily regulated 'hardware' (such as machinery) in factories, and relied on detailed, technical specification standards to mandate the safeguards employers and factory occupiers were required to provide for employees.<sup>4</sup>

From the late 1970s Australian OHS legislation was significantly reformed.<sup>5</sup> For present purposes, the most important changes were the introduction of general duty provisions (the content of which was based largely on the common law negligence standard of care),<sup>6</sup> including duties on employers and self-employed persons to ensure the OHS of employees and persons other than employees; and provisions creating criminal offences for corporate officers with particular responsibility for OHS offences committed by a corporation. It is now accepted that the general duty provisions in the OHS statutes impose strict or absolute duties, which are qualified by the notion of 'reasonably practicable' or its equivalent.<sup>7</sup> This means that in most Australian jurisdictions (that is, except for New South Wales and Queensland, where 'reasonably practicable' or its equivalents are couched as defences) the general duties effectively codify the common law negligence duty and standard of care.

'Employers' in the OHS statutes tend to be defined contractually: as 'the other party to a contract of employment'<sup>8</sup> and in some instances other types of contracts focused on training. Thus, as Deakin points out, the legal definition of employer is not coterminous with the economic or sociological notion of the 'enterprise' or 'organisation', nor with the physical site (the workplace) where work is carried out.<sup>9</sup> At the heart of the employer-employee relationship is the right to control the manner in which work is carried out.<sup>10</sup>

2 See Collins, 'Ascription of Legal Responsibility', above n 1; S Deakin, 'The Changing Concept of the "Employer" in Labour Law' (2001) 30 *ILJ* 72.

3 See N Gunningham, *Safeguarding the Worker*, Law Book Company, Sydney, 1994, Ch 2; W B Creighton, *Working Women and the Law*, Mansell, London, 1979, pp 19–26; and R Johnstone, *Occupational Health and Safety Law and Policy: Text and Materials*, 2nd ed, LBC Information Services, Sydney, 2004, pp 34–45.

4 See, eg, Factories, Shops and Industries Act 1962 (NSW) and the Construction Safety Act 1912 (NSW); Labour and Industry Act 1958 (Vic); Factories and Shops Act 1960 (Qld), Inspection of Machinery Act 1951 (Qld) and Factories and Shops Act Rules; Factories and Shops Act 1963 (WA) and regulations, Machinery Safety Act 1974 (WA); and Industrial Code Act 1967 (SA) and Industrial Safety Code Regulations (SA).

5 For details, see Johnstone, above n 3, pp 63–87.

6 See E Bluff and R Johnstone, 'The Relationship Between "Reasonably Practicable" and Risk Management Regulation' (2005) 18 *AJLL* 197.

7 See Johnstone, above n 3, Ch 4; Bluff and Johnstone, above n 6.

8 Deakin, above n 2, at 73.

9 *Ibid.*

10 See *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; 63 ALR 513; and B Creighton and A Stewart, *Labour Law*, 4th ed, Federation Press, Sydney, 2005, pp 284–8.

Thus an ‘employer’ is defined in the OHS statutes<sup>11</sup> variously as a person who employs another person under a contract of service;<sup>12</sup> as a person who ‘conducts a business or undertaking for gain or reward’ and ‘in the conduct of the business or undertaking engages another person to do work, other than under a contract of services, for or at the direction of the person’;<sup>13</sup> as ‘a person who employs persons under contracts of employment or apprenticeship’;<sup>14</sup> as ‘a person who employs one or more other persons under contracts of employment’ or under contracts of training;<sup>15</sup> or as ‘a person by or for whom a worker is engaged or works’<sup>16</sup> — thereby including principals engaging independent contractors.

Although the definitions differ, essentially they define an employer as a person who employs another person under a contract of employment. In some statutes, contracts of apprenticeship or training are included, and in the Northern Territory an employer includes principals engaging contractors. In other words, there must be ‘a contractual nexus between employer and employee’.<sup>17</sup> One consequence of the contractual focus is that it ‘can have the effect of completely dis-embedding the employment relationship from the organisational context within which the work is performed’.<sup>18</sup> In a labour hire arrangement, for example, the services provided by the employee of the labour hire agency will be directed at the client or host firm, who will generally not have a contractual relationship with the employee but with the agency (although, of course, the agency benefits from the employee’s efforts because it will be remunerated by the host).

As we noted above, the OHS statutes place duties on self-employed persons who, like employers, must ensure the health and safety of persons who are not employees (see below). A ‘self-employed person’ is defined negatively in relation to the contract of employment: a ‘self-employed person’ is someone who works for gain or reward otherwise than under a contract of employment or apprenticeship, whether or not employing others;<sup>19</sup> or as a person who (a) conducts a business or undertaking for gain or reward; and (b) in the conduct of the business or undertaking is not an employer or worker.<sup>20</sup> Note that all but one of the statutes refer to the self-employed ‘person’, suggesting

11 See Johnstone, above n 3, pp 109–10.

12 See Occupational Health, Safety and Welfare Act 1986 (SA) (OHSWA (SA)) s 4(1) (and see also the provisions deeming contractors to be ‘employees’ in s 4(2)), and the Occupational Health and Safety Act 1989 (ACT) (OHS (ACT)) s 5(1).

13 Workplace Health and Safety Act 1995 (Qld) (WHS (Qld)) s 10.

14 Occupational Health and Safety Act 2000 (NSW) (OHS (NSW)) s 4; see also Occupational Safety and Health Act 1984 (WA) (OSHA (WA)) s 3(1), and note the provisions deeming other kinds of workers to be ‘employees’ in ss 23D–23F, discussed below.

15 Occupational Health and Safety Act 2004 (Vic) (OHS (Vic)) s 5 and note the provisions deeming contractors, sub-contractors and their employees to be ‘employees’ in s 21(3), discussed below; see also Workplace Health and Safety Act 1995 (Tas) (WHS (Tas)) s 3(1).

16 Work Health Act (NT) (WHA (NT)) s 3.

17 Deakin, above n 2, at 73.

18 Ibid.

19 OHS (NSW) s 4. See also OHS (Vic) s 5; OSHA (WA) s 3(1); WHS (Tas) s 3(1) and OHS (ACT) s 5(1).

20 WHS (Qld) s 12. Note that the WHS (Qld) s 28 does not impose general duties upon the ‘employer’ or ‘self-employed person’, but rather on ‘a person who conducts a business or undertaking’.

that the self-employed person can be a natural person or corporation (see below). The OHSA (ACT) refers to a self-employed person as being an 'individual', indicating that self-employed persons in that jurisdiction must be natural persons.

Prima facie these definitions appear to envisage a single entity employer or self-employed person. This begs the question as to exactly how the general duties in the OHS statutes operate when the employer or self-employed person is not a sole proprietor or a single corporate entity: for example, where various business organisations are linked in a contractual chain or network; where operations are run by a partnership, unincorporated association or joint venture; where the ostensible employer is an entity within a larger corporate or organisational structure; or in situations where the person or entity responsible for engaging or employing workers is different from the person or entity with control over assets and decision-making concerning OHS.

There has been a worldwide trend, from the 1980s, for corporations, particularly large corporations which organised and directed their productive resources within the firm using bureaucratic controls, to decompose into 'separate corporate entities in an endeavour to replicate efficient capital markets'.<sup>21</sup> The notion of an employer responsible for the OHS of its workers has become more challenging with the growing complexity of organisational structures themselves. For example, corporations may disintegrate, or purchase a majority shareholding in other corporations, so that companies form a group in which the holding company and subsidiaries have an independent corporate existence within the larger corporate group structure.<sup>22</sup> There may be over a hundred subsidiaries, and some entities may be subsidiaries of a subsidiary. The group is bound together through the holding company's ownership of shares in the subsidiaries.<sup>23</sup>

Secondly, corporations can outsource tasks and functions to smaller organisations, so that:

As the initiative holders they are positioned at the top of enormous network pyramids of supplier contracts. In this position they have the power to contract smaller suppliers. . . .

A characteristic 'network' structure develops among the large firms which are in a position to exert remote control over large groups of smaller suppliers.<sup>24</sup>

A third way in which capital units, or firms, can be linked together within an 'economically integrated group'<sup>25</sup> occurs when one entity exercises authority over other units, even though the controlling unit does not have a majority shareholding, or a contractual link, with the controlled units. Such authority can arise from partial ownership, where a minority shareholding, while not providing legal control through majority voting power, is nevertheless

21 Collins, 'Independent Contractors and the Challenge of Vertical Disintegration', above n 1, at 353.

22 T Larson, 'The Diffusion of Employer Responsibility' in K Frick, P L Jensen, M Quinlan and T Wiltshagen (Eds), *Systematic Occupational Health and Safety Management*, Pergamon, Amsterdam, 2000.

23 Collins, 'Ascription of Legal Responsibility', above n 1, at 733.

24 Larson, above n 22, pp 219–20.

25 Collins, 'Ascription of Legal Responsibility', above n 1, at 733.

sufficient to provide the controlling firm with managerial control; or may accrue to a creditor, or the holder of a floating charge.<sup>26</sup>

The key point in all of these situations is that 'the provider of capital investment retains the separate identity from the productive organisation, while at the same time playing a governing role in the organisation'.<sup>27</sup> Each of these developments raise difficult issues for labour regulation, as Collins explains:

These complex economic organisations bound together by ties of ownership, contract and authority may in reality comprise some form of team effort, which could easily be integrated within one capital unit, and may therefore be analysed from the point of view of institutional economics as quasi firms. Yet since in fact these groups comprise distinct legal entities which in law are regarded as independent persons, members of the group cannot be held responsible for the acts or omissions of other members without contradicting the basic principles of legal responsibility. Thus one company can only be liable for its own torts or breach its own contracts, not those of other companies or independent contractors with which it has close economic ties. This engenders a serious problem for the application of the principle of group responsibility.<sup>28</sup>

In short, the group does not hold obligations to workers, but rather obligations are held by each capital unit within the group (a corporation or an individual sole trader), and each is civilly and criminally liable for its own acts or omissions (including vicarious liability for those of its employees or agents), but not those of the other capital units. The firm can manipulate its boundaries (by turning divisions into subsidiary companies, or by outsourcing work to another firm) to determine its size, and to limit or reduce its legal responsibilities.

Where, for example, a holding company owns shares in and controls a number of separate but subordinate companies (subsidiaries) within a group, the law regards each subsidiary corporation as a separate legal entity, and the 'group' has no distinct legal personality, and cannot be held to account for contraventions of legal obligations. As we discuss below, in contractual chains or organisational networks, the large organisation at the peak or centre of arrangements is a legal entity distinct from all the other parties in the chain or network, and even though it may exercise considerable power over the other parties generally it is not legally accountable for contraventions of legal obligations by the other parties.

Elsewhere one of us<sup>29</sup> has analysed the way in which the general duties imposed upon employers and self-employed persons in the reformed OHS statutes operate in relation to workers who are not employees (ie, contactors

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<sup>26</sup> Ibid.

<sup>27</sup> Ibid, at 734.

<sup>28</sup> Ibid.

<sup>29</sup> See Johnstone, above n 1; R Johnstone, 'Regulating Occupational Health and Safety in a Changing Labour Market', National Research Centre for Occupational Health and Safety Regulation Working Paper No 34, 2005. See also R Johnstone, C Mayhew and M Quinlan, 'Outsourcing Risk? The Regulation of Occupational Health and Safety Where Subcontractors are Employed' (2001) 22 *Comparative Labor Law and Policy Jnl* 351 and R Johnstone and M Quinlan, 'The OHS Regulatory Challenges Posed by Agency Workers: Evidence from Australia', National Research Centre for Occupational Health and Safety Regulation Working Paper No 26, 2005.

and subcontractors and labour hire workers). In this article we examine how the OHS statutes operate where 'the employer' is not a single entity, but:

- part of a contractual chain or business network;
- a partnership;
- an unincorporated association;
- a joint venture;
- part of a larger corporate group structure; or
- is in other ways separate from the person or entity with control over assets and decision-making concerning OHS.

In examining these fundamental legal issues, we highlight examples of situations in which duties are owed to a worker by more than one employer (or self-employed person). We also explore the extent to which the Australian OHS statutes impose liability on the 'group' or part of the group, rather than simply on single capital units: that is, we consider whether each firm is only responsible for its own contraventions of the OHS statutes, or whether it may, in certain circumstances, be responsible for the acts or omissions of other firms, such as subsidiaries, independent contractors, or franchisees. In considering these issues we show the far-reaching significance of the recently enacted 'corporate officer' provisions in ss 144 and 145 of the OHSA (Vic).

### **Attributing Liability to Individuals, to the Corporate Employer, and to Corporate Officers**

Before examining the way in which the notions of 'employer' and 'self-employed persons' are operationalised in the context of contractual chains, business networks and corporate group structures, we briefly outline the way in which criminal liability for contraventions of the obligations in the OHS statutes are attributed to the two 'units' around which these chains, networks and groups are built: individuals and corporations. We also remind readers that in any one situation, duties in the OHS statutes can be owed by more than one person, and briefly consider the relationship between corporate and individual liability in the OHS statutes.

The criminal law developed to hold natural persons accountable for what society determines to be crimes. The definitions of 'employer' and 'self-employed person' outlined above refer to 'persons', which include natural persons such as individual proprietors. The duties and obligations in the OHS statutes clearly apply to employers and self-employed persons who are natural persons.

A general principle of statutory interpretation is that, unless rebutted, it is presumed that where a statute refers to a 'person', this includes a corporation.<sup>30</sup> As we saw earlier in this article, all the definitions of the 'employer' in the OHS statutes, and all but one of the definitions of 'self-employed person', are couched in terms of 'persons', indicating that corporations can be 'employers' or 'self-employed persons'.

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<sup>30</sup> Acts Interpretation Act 1901 (Cth) s 22; Interpretation Act 1987 (NSW) s 21; Interpretation of Legislation Act 1984 (Vic) s 38; Acts Interpretation Act 1954 (Qld) s 36; Acts Interpretation Act 1915 (SA) s 4; Interpretation Act 1984 (WA) s 5; Acts Interpretation Act 1931 (Tas) s 41; Interpretation Act 1967 (ACT) s 14; and Interpretation Act (NT) s 19.

Where the employer or self-employed person is a corporation, the issue arises as to how liability can be attributed to the corporation. As noted above, criminal law has evolved around the central theme of individual liability,<sup>31</sup> which makes the question of attributing criminal liability to corporations a complex one. 'A corporation is an abstraction. It has no mind of its own any more than it has a body of its own.'<sup>32</sup> Corporations can only act through their human employees and agents; yet they are also legal 'fictions' created by company law to be distinct from their directors, workers and shareholders.<sup>33</sup>

Where criminal liability is based on requirements of intention or mens rea, the attribution of liability to the corporation is not a straightforward matter. For example, for manslaughter by gross negligence to be established, a narrow 'identification doctrine' has been used to attribute to a 'corporation' the requisite criminal fault, whereby the individual knowledge, intention or actions of particular employees was that of the corporation *itself*.<sup>34</sup> Particular officers of the corporation *are* the corporation. The law therefore developed to directly attach criminal liability to the corporation through requiring evidence of criminal fault in a senior officer of a corporation acting as a 'directing mind and will' of that corporation.<sup>35</sup>

In relation to absolute or strict liability OHS regulatory offences, the courts have held that specific duties are owed by the corporation itself, and are personal and non-delegable.<sup>36</sup> Crucially there is no need to try to attribute to the corporation another's criminal conduct. In the words of Tipping J in the NZ Court of Appeal:

This analysis does not depend . . . upon concepts of agency or vicarious liability. It relies simply upon the proposition that once there has been a failure to take a practicable step to ensure the employee's safety [hence breaching the duty], the employer is responsible for that failure.<sup>37</sup>

If the employer is a corporation, therefore, it will not be absolved from liability for breaching an OHS duty simply because at a top management level the organisation had taken all reasonable steps to ensure safety, if at an

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31 C Wells, *Corporations and Criminal Responsibility*, 2nd ed, Oxford University Press, Oxford, 2001, p 1; A Ashworth, *Principles of Criminal Law*, 4th ed, Oxford University Press, Oxford, 2003, p 114.

32 *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705.

33 See *Salomon v Salomon* [1897] AC 22.

34 Wells, above n 31, p 93; J Gobert and M Punch, *Rethinking Corporate Crime*, Butterworths, London, 2003, pp 59–69; G Slapper and S Tombs, *Corporate Crime*, Longman, Harlow, 1999, p 28.

35 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153; [1972] 2 WLR 1166; *H L Bolton (Engineering) Co Ltd v T J Graham & Son Ltd* [1957] 1 QB 159, especially at 172; [1956] 3 All ER 624; *A-G's Reference (No 2 of 1999)* [2000] QB 796; [2000] 3 All ER 182; *R v A C Hatrick Chemicals Pty Ltd* (unreported, Vic SC Crim Div, Hampel J, 8 December 1995); Gobert and Punch, above n 34, pp 59–69.

36 *Linework Ltd v Department of Labour* [2001] 2 NZLR 639, and the UK cases, *R v British Steel Plc* [1995] 1 WLR 1356; *R v Associated Octel Co Ltd* [1996] 4 All ER 846; *R v Gateway Foodmarkets Ltd* [1997] 3 All ER 78. See also *WorkCover Authority of New South Wales (Inspector Patton) v Fletcher Constructions Australia Ltd* (2002) 123 IR 121. See also W Thompson, *Understanding the New South Wales Occupational Health and Safety Legislation*, 3rd ed, CCH, Sydney, 2001, p 27.

37 *Linework Ltd v Department of Labour* [2001] 2 NZLR 639 at [45].

operational level it was the court's opinion that such steps as were 'reasonably practicable' had not been taken to implement effectively OHS policies and procedures.<sup>38</sup>

There may be considerable overlap in the operation of the general duties in the OHS statutes:<sup>39</sup> unless the statute provides otherwise, more than one general duty might be owed in any one situation, and more than one person can owe the same general duty. Thus, the OHS statutes envisage the possibility that, in any one situation, a worker might be owed duties by a number of employers and/or self-employed persons.<sup>40</sup>

If the corporate 'employer' commits an OHS offence, can individual directors or managers be held criminally culpable as well? Of course, managers are 'employees', and can contravene the duties in the OHS statutes imposed upon 'employees' in relation to their own health and safety and the health and safety of others. Further, most of the Australian OHS statutes make provision for individual directors, managers or officers of a corporation to be prosecuted in certain circumstances for offences committed by the corporation. For example, s 26 of the OHSA (NSW)<sup>41</sup> provides that:

- (1) If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each individual director of the corporation, and each person concerned in the management of the corporation, is taken to have contravened the same provision unless the director or manager satisfies the court that:
  - (a) he or she was not in a position to influence the conduct of the corporation in relation to its contravention of the provision; or
  - (b) he or she, being in such a position, used all due diligence to prevent the contravention by the corporation.

A second approach to corporate officer liability is found in s 55(1) of the OSHA (WA)<sup>42</sup> which provides that:

Where a body corporate is guilty of an offence under this Act and it is proved that the offence occurred with the consent or connivance of, or was attributable to any neglect on the part of, any director, manager, secretary or other officer of the body, or any person who was purporting to act in any such capacity he, as well as the body corporate, is guilty of that offence.

The recently enacted OHSA (Vic) provides a third model of liability. It is a particularly important provision in the context of this article because it recasts the duties placed on corporate officers in a way that pushes responsibility for OHS up the corporate structure. The OHSA (Vic) picks up the definition of 'officer' in the Corporations Act, as including 'a person':

- (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
- (ii) who has the capacity to affect significantly the corporation's financial standing; or

38 See *R v Gateway Foodmarkets Ltd* [1997] 3 All ER 78. See also *R v Associated Octel Co Ltd* [1996] 4 All ER 846.

39 See Johnstone, above n 3, p 301.

40 But see C Maxwell, *Occupational Health and Safety Act Review*, State of Victoria, Melbourne, 2004, Ch 11.

41 See also WHSA (Qld) s 167.

42 See also WHA (NT) s 180.



- (iii) in accordance with whose instructions or wishes directors of the corporation are accustomed to act . . .<sup>43</sup>

Section 144 imposes liability on a corporate ‘officer’ where a body corporate contravenes the Act and ‘the contravention is attributable to an officer of the body corporate failing to take reasonable care’ to prevent the organisation from contravening the Act. By virtue of s 145, this model of liability extends to ‘officers’ of partnerships and unincorporated associations, because the ‘Act is not concerned with the particular legal form through which the undertaking is conducted’.<sup>44</sup> Of significance in relation to the OHSA (Vic) definition of ‘officer’ is the fact that a corporation within such a group might be held liable as an ‘officer’ of another corporation within the group.

Before we explore the way in which these Victorian corporate officer provisions affect partnership, unincorporated association and corporate group liability, we build on previous work<sup>45</sup> to show how some of the issues of group liability are addressed by provisions in the OHS statutes that impose duties on employers and self-employed persons in relation to persons who are not employees.

## Contractual Chains and Networks

Many industries, particularly construction, road transport<sup>46</sup> and parts of manufacturing, have a high incidence of the use of contractual chains or networks. For example, the production of clothing often takes place via a long contractual chain, at the top of which are the major retailers, which enter into arrangements with principal manufacturers, which in turn give out orders for the production of clothing goods to small factory sweatshops, which then engage home-based outworkers.<sup>47</sup> Motor car manufacturers typically purchase parts from independent suppliers, and once the car is assembled it is sold via distributorships or franchises by independent companies. Organisations at the top end of contractual chains, or at the centre of these networks, can exercise significant power and control over the operations, and working conditions, of others party to the arrangements. As Collins points out:

the management of a large firm substitutes commercial contracts for employment relations. . . . Despite the form of contractual relation . . . however, in substance the workers frequently appear to be in an equivalent position of social subordination and economic dependence to that of ordinary employees, and so in need of those employment protection rights from which they are often excluded by virtue of having ceased to qualify as employees.<sup>48</sup>

43 OHSA (Vic) s 5, adopting the definition of ‘officer’ contained in the Corporations Act 2001 (Cth) s 9.

44 Maxwell, above n 40, p 173.

45 See Johnstone, above n 1 and Johnstone, above n 29.

46 See M Quinlan, ‘Report of Inquiry into Safety in the Long-Haul Trucking Industry’, Motor Accidents Authority of New South Wales, Sydney, 2001.

47 See 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 *AJLL* 1.

48 Collins, ‘Independent Contractors and the Challenge of Vertical Disintegration’, above n 1, at 354.

The OHS statutes contain provisions which might ensure that each 'employer', 'self-employed person', or each 'person who conducts a business or undertaking', in a contractual chain or an organisational network owe general duties to ensure the health and safety of other firms (themselves 'self-employed persons' or 'employers', or in Queensland a 'person who conducts a business or undertaking') in the contractual chain or organisational network. The application of these provisions develops the two other themes in this article: it demonstrates that these provisions impose some degree of 'group liability', principally through the wide reach of the duties (including through various 'deeming' provisions) and their non-delegability; and it provides examples of situations in which a worker can concurrently be owed duties by two — sometimes more — 'employers', or by a series of 'employers' and 'self-employed persons'.

First, all of the Australian OHS statutes impose a duty upon the 'employer' in broad terms to provide and maintain, so far as is reasonably practicable, for employees a working environment that is safe and without risks to health.<sup>49</sup> The duties have, however, been broadly interpreted so as to have a reach outside the employment relationship and to affect, *inter alia*, independent businesses engaged by the employer: in safeguarding the OHS of its employees, the employer will have to ensure that all workers, including contractors, sub-contractors, sub-sub-contractors and their employees 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>50</sup>

Occasionally the OHS statutes impose the employer's general duty to employees on two different employers in relation to the same employee. For example, under the OHSWA (SA) an 'employee' of a labour hire agency is owed the employer's duty of care to employees by both the agency and the host firm, because s 19(1) couches the employer's duty to apply 'in respect of each employee employed or engaged by the employer'. In *Moore v Fielders Steel Roofing Pty Ltd*,<sup>51</sup> the South Australian Industrial Court interpreted the expression 'engaged' very broadly to mean 'provide occupation (for a person)' so that a person employed under a contract of employment by a third party (in this case an 'employee' of a labour hire agency) and who works for 'the employer' pursuant to an agreement between the employer and labour hire agency is owed a duty because the 'employer' 'engages' the labour hire 'employee' even though there is no contract between them.

Second, most of the reformed OHS statutes include provisions that deem certain kinds of workers to be 'employees' protected by the employer's general duty to 'employees'. The most extensive 'deeming' provision is to be found in the OSHA (WA), which 'deems' contractors and 'any person employed or engaged by the contractor' to assist in carrying out work to be

49 See, eg, OHSA (Vic) s 21 and OHSA (NSW) ss 8(1) and 28. Note that the equivalent duty in the WHSA (Qld) (s 28) is imposed upon on 'a person who conducts a business or undertaking'.

50 See, eg, *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 [24].

51 [2003] SAIRC 75.

‘employees’ of the principal for the purposes of the employer’s general duty in relation to matters over which the principal has the capacity to exercise control.<sup>52</sup> Similar provisions deem labour hire workers, whether employees or independent contractors of the labour hire agency, to be ‘employees’ of both the agency and host firm (even though there may not be a contract with the latter), in relation to matters over which they respectively have the capacity to exercise control,<sup>53</sup> and ‘labour arrangements in general’ in which a worker carries out work for another person even in the absence of a contract.<sup>54</sup>

None of the other OHS statutes contain such wide ranging deeming provisions, although most deem contractors and their employees to be ‘employees’ of the employer who engages them for the purposes of the operation of the employer’s general duty. For example, the OHSA (Vic) deems, for the purposes of the employer’s duty to employees, independent contractors engaged by the employer, and the employees of the independent contractor, to be ‘employees’ of the ‘employer’ in matters over which the employer (i) has control, or (ii) would have control but for any agreement between the employer and the independent contractor to the contrary.<sup>55</sup> These deeming provisions have generally been broadly interpreted by the courts: for example, in relation to s 21(3) of the OHSA (Vic), in *R v ACR Roofing Pty Ltd*<sup>56</sup> the Victorian Court of Appeal interpreted the term ‘engaged’ very broadly to include any independent contractor in relation to matters over which the employer had control, even if the contractor was not in a direct contractual relationship with the employer, but instead was engaged as a sub-contractor, or even further down the contractual chain.<sup>57</sup> In other words, each contractor or sub-contractor in the contractual chain will owe duties to all contractors or sub-contractors, and their employees, below them in the contractual chain.

These deeming provisions in many cases result in an ‘employee’ being owed duties of care by two ‘employers’: for example, by the labour hire agency and host firm in Western Australia, or by the employer engaging a contractor and by the contractor which employs the employee in Victoria, the Commonwealth, South Australia, Western Australia and the Northern Territory. In the light of the decision in the *ACR Roofing* case, a worker may be owed duties by more than two ‘employers’.

Third, the most significant provisions affecting business networks and contractual chains are the employer and self-employed person’s duties to persons other than employees. Here the most far-reaching provisions are to be

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52 OSHA (WA) s 23D.

53 OSHA (WA) s 23E.

54 OSHA (WA) s 23F.

55 OHSA (Vic) s 21(3); see also Occupational Health and Safety (Commonwealth Employment) Act 1991 (Cth) (OHS(CE)A (Cth)) s 16(4); OHSWA (SA) s 4(2); WHA (NT) s 3(1); and Johnstone, above n 3, pp 187–8.

56 *R v ACR Roofing Pty Ltd* (2004) 11 VR 187.

57 See particularly Nettle J at [54]. See also *Stratton v Van Driel Ltd* (1998) 87 IR 151, discussed in Johnstone, above n 3, pp 188–9; *Complete Scaffold v Adelaide Brighton Cement* [2001] SASC 199 (unreported, 18 June 2001, BC200103252); *Moore v Adelaide Brighton Cement* [2003] SAIRC 69; *Fielders v Adelaide Brighton Cement Ltd* [2003] SAIRC 69; and *Fielders Steel Roofing Pty Ltd v Moore* [2004] SAIRC 62; but cf *Stevenson v The Broken Hill Proprietary Company Ltd* [1995] SAIRC 2.

found in the OHSA (Vic) ss 23 and 24 and the WHSA (Qld) s 28. In essence these provisions provide that employers and self employed persons in Victoria, and 'a person who conducts a business or undertaking' in Queensland, must ensure persons who are not employees 'are not exposed' to risks to OHS arising from 'the conduct of the undertaking'. Once again, the courts have taken a broad approach to interpreting the key expressions 'exposed to risk'<sup>58</sup> and 'conduct of the undertaking'.<sup>59</sup>

The courts' acceptance that the duty is a personal and non-delegable duty means a firm cannot delegate its duty by engaging an independent contractor to perform the work: the firm will be liable for contraventions of the OHS statutes resulting from the activities of the independent contractors. The principle of non-delegability enables responsibility for OHS to be sheeted home to the firms higher in the contractual chain, rather than those firms being responsible only for the acts or omissions of their own employees or agents.<sup>60</sup> Thus the firm can determine for itself what sorts of contractual arrangements it wants to enter to ensure that its undertaking is carried out, but it cannot delegate its obligations to comply with the OHS statute. 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 employees and non-employees to risk.<sup>61</sup> In sum, these provisions impose a hierarchy of overlapping and complementary responsibilities on the different levels of contractors and sub-contractors. For example, employers, contractors and subcontractors at each level owe duties to all parties below them in the contractual chain. As with some of the deeming provisions discussed above, in a long contractual chain this might mean that a sub-sub-contractor and its employees might be owed duties by two or more 'employers' or 'self-employed persons' higher in the contractual chain.

Sections 8(2) and 9(1) of the OHSA (NSW) are similar to the Victorian and Queensland provisions, but specify that the duty only applies to non-employees while they are *at* the employer's or self-employed person's place of work. The provisions in the OHSA (ACT) and in the OHS(CE)A (Cth) are similar to the New South Wales provisions, but the qualification extends to areas at or near the workplace. Although the expressions 'place of work' or 'workplace' have been very generously interpreted by the courts,<sup>62</sup> these geographical limitations (namely that the person protected by the duty must be at or near *the duty holder's* workplace) are significant, and may prevent the duties from extending to firms that do not carry out their work at (or near) the duty-holder's workplace: for example, home-based

<sup>58</sup> See *R v Board of Trustees of the Science Museum* [1993] 3 All ER 853; [1993] 1 WLR 1171.

<sup>59</sup> *Whittaker v Delmina Pty Ltd* (1998) 87 IR 268 at 280-1; *WorkCover Authority of New South Wales (Inspector Martin) v Edmund Hubert Kuipers and Civil Services Pty Ltd* [2004] NSWIRComm 303 at [55]; *R v Associated Ocel Co Ltd* [1996] 4 All ER 846 at 851-2; *R v Mara* [1987] 1 WLR 87; and *Sterling-Winthrop Group Ltd v Allen* (1987) SCCR 25.

<sup>60</sup> See further Collins, 'Ascription of Legal Responsibility', above n 1, at 735.

<sup>61</sup> *R v Associated Ocel Co Ltd* [1996] 4 All ER 846.

<sup>62</sup> See *WorkCover Authority of New South Wales (Inspector Keenan) v Technical and Further Education Commission* (1999) 92 IR 251 especially at 292; *WorkCover Authority of New South Wales (Inspector Campbell) v Hitchcock* (2004) 135 IR 377 especially at [314]; and *WorkCover Authority of New South Wales (Inspector Wilson) v Chubb Security Australia Pty Ltd* [2005] NSWIRComm 263.

sub-contractors and contractor truck drivers affected by consignment conditions, each of which will be working at *their own* workplaces, and not the workplace of the employer or self-employed person.

The other OHS statutes do not build the duty to others around concepts of exposure to risk from the conduct of the undertaking. The broadest of these other provisions is the OSHA (WA) which provides, in s 21, that an employer or a self-employed person must, as far as is reasonably practicable, ensure that the safety or health of a non-employee is not 'adversely affected wholly or in part as a result of' (a) work undertaken by an employer, employee of the employer or a self-employed person or (b) any hazard that arises from or is increased by such work, or by a system of work operated by the employer or self-employed person. This latter focus on systems of work appears not to require the hazard to be based at the employer or self-employed person's workplace, and probably covers firms and their employees below them in the contractual chain.

Section 22(2) of the OHSWA (SA) provides that an employer or self-employed person:

must ensure, so far as is reasonably practicable, that any other person (not being an employee employed or engaged by the employer or the self-employed person) is safe from injury and risks to health — (a) while the other person is at a workplace that is under the management and control of the employer or self-employed person; or (b) while the other person is in a situation where he or she could be adversely affected through an act or omission occurring in connection with the work of the employer or self-employed person.

Paragraph (a) appears to impose the same geographical restrictions to the application of the duty that limit the reach of the corresponding provisions in the OHSA (NSW) (see above), but para (b) appears only to require a causal connection between the person and the source of risk, and would appear to extend an employer or self-employed person's responsibilities to other firms and workers lower in the contractual chain.

Sections 29(1) and 30A(b) of the WHA (NT) require an employer and self-employed person, so far as is reasonably practicable, to ensure that the OHS of any other person is not adversely affected as a result of the work in which the employer or self-employed person is engaged. Although not as far-reaching a provision as the Victorian and Queensland duties, this would appear to have a relatively broad application, and arguably could cover firms and their employees further down the contractual chain.

The Tasmanian duty to persons other than employees appears to be the narrowest in scope and reach. The WHSA (Tas) requires an employer to ensure, so far as is reasonably practicable, the OHS of persons who are not employees, contractors or employees of contractors, 'is not adversely affected as a result of work carried on at the workplace'.<sup>63</sup> A self-employed person has a duty to ensure, so far as is reasonably practicable, that others 'are not exposed to risks' to their OHS arising from work carried out at the self-employed person's workplace. Like the NSW provision, these provisions are limited geographically in application to the workplace.

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<sup>63</sup> WHSA (Tas) s 9(3).

### Example: Franchise arrangements

A franchise is a contractual arrangement under which the franchisor, who owns a brand name, grants the franchisee the right to sell or produce the brand name product. Under a business format franchise the franchisor grants the franchisee a license to use an established business system as an ongoing business run by the franchisee in return for a licensing fee. Clearly franchisees would have obligations to their employees, contractors and members of the public under their general duties, as employers, to employees and to persons other than employees.

It would appear that the provisions outlined above in ss 23 and 24 of the OHSA (Vic) and s 28 of the WHSA (Qld) would apply to franchisors, as it is difficult to see how a franchisor in Queensland or Victoria could argue that contractual arrangements with a franchisee in which the franchisor licenses its business system for use by the franchisee is not part of the way in which the franchisor conducts its undertaking.<sup>64</sup> Therefore a franchisor most likely owes a duty to a franchisee and, importantly for this article, 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 OHSA (Vic) and WHSA (Qld) have a very broad reach, and ensure that a firm's OHS responsibilities extend to other firms and their employees who are engaged by the franchisee in the conduct of the franchisor's undertaking.

This reach is probably not achieved in the OHSA (NSW) where the duty is only owed to parties at the employer or self-employed person's workplace.<sup>65</sup> Neither is it achieved in jurisdictions which rely on provisions that 'deem' contractors and their employees to be employees. On the other hand, the OHSA (NSW) has a broadly framed duty imposed on persons in control of premises, which has been interpreted to cover certain kinds of franchise arrangements. Section 10(1) provides that 'a person who has control of premises used by people as a place of work must ensure that the premises are safe and without risks to health'. Section 10(2) requires a 'person who has control of any plant or substance used by people at work' to 'ensure that the plant or substance is safe and without risks to health when properly used'.<sup>66</sup> Franchisors who exercise control over the franchisee's operations owe duties to employees of franchisees, and thus franchisors or persons associated with franchisors who design, build or lease premises for use at work must properly consider safety aspects of those premises.<sup>67</sup> The duties imposed upon persons in relation to the control of premises are not as broadly expressed in other Australian jurisdictions, but some of these provisions may, in certain

<sup>64</sup> See further Johnstone, above n 1, pp 103–9.

<sup>65</sup> Although there may be circumstances in which it might be possible to argue that the franchisor has such control over the workplace the subject of the franchise arrangements that the workplace is the franchisor's workplace: see *WorkCover Authority of New South Wales (Inspector Wilson) v Chubb Security Australia Pty Ltd* [2005] NSWIRComm 263.

<sup>66</sup> See further OHSA (NSW) ss 10(3) and (4).

<sup>67</sup> See, eg, *WorkCover Authority of New South Wales v McDonald's Australia Ltd* (1999) 95 IR 383.

circumstances, apply to franchise arrangements.<sup>68</sup>

Later in this article we show that responsibility for OHS duties can be sheeted home to franchisors under the officer provisions in the OHSA (Vic). But first we explore the impact of those officer provisions on other organisational forms, including partnerships, unincorporated associations, joint ventures and corporate groups.

## Partnerships

Where a business conducted as a partnership is engaging or employing workers, it is unlikely that difficulties would arise in relation to imposing duties upon all partners. A partnership is not a structure that other individuals or entities (being the ‘true employers’ and decision makers in relation to OHS) can hide behind, for example to avoid liability for non-compliance with OHS legislation. This is because the State Partnership Acts render partners jointly liable for all debts and obligations of the firm,<sup>69</sup> make partners liable for one another’s acts and omissions,<sup>70</sup> and deem partners to be agents for the firm and one another, binding one another by their acts.<sup>71</sup> Indeed, in most jurisdictions when a partnership fails to comply with its OHS obligations, each partner is prosecuted for contravening the relevant general duty or provision in the OHS regulations.

To avoid any doubt, the OHSA (Vic) includes as part of its definition of ‘officer’ taken from the Corporations Act 2001 (Cth) as described above, ‘a partner in a partnership’.<sup>72</sup> Further, and as we noted above, under s 145 an officer of a partnership is guilty of an offence if the commission of the offence is attributable to an officer failing to take reasonable care.

Partners may seek to avoid liability by one of the partners forming a subsidiary company to act as employer in relation to the undertaking of the partnership. This is illustrated by the recent decision in *Inspector Alwyn Piggott v CSR Emoleum Services Pty Ltd*<sup>73</sup> where, for whatever reason, it suited the prosecution to pursue the subsidiary company as employer, rather than bring a prosecution against the partners in the partnership. In that case it was the defendant subsidiary company which argued, unsuccessfully, that the partnership itself should have been liable as employer for breaches of the Occupational Health and Safety Act 1983 (NSW). The ways in which such a decision might be used to prevent partners from facing liability will be discussed below in relation to corporate group structures. Aside from the use of a corporate group structure to avoid liability in this way, however, a business conducted as a partnership should not pose difficulties in relation to OHS compliance. The position is not as straightforward in relation to

68 See in particular, OSHA (WA) s 22(a) and WHSA (Tas) s 15(3).

69 See, eg, Partnership Act 1891 (Qld) s 12; Partnership Act 1892 (NSW) s 9; and Partnership Act 1958 (Vic) s 13. See also S Deakin and G Morris, *Labour Law*, 4th ed, Hart Publishing, Oxford, 2005, p 209.

70 See, eg, Partnership Act 1891 (Qld) s 13; Partnership Act 1892 (NSW) s 10; and Partnership Act 1958 (Vic) s 14.

71 See, eg, Partnership Act 1891 (Qld) s 8; Partnership Act 1892 (NSW) s 5; and Partnership Act 1958 (Vic) s 9.

72 See also Maxwell, above n 40, p 173.

73 [2003] NSWIRComm 282.

unincorporated associations, joint ventures and corporate groups in relation to the duties imposed on employers under OHS legislation. These are groups wherein difficulties might arise in determining who is the employer, or in imposing the duty of care on those with the ability to influence an employer's OHS compliance.

### Unincorporated Associations

Where an unincorporated association (such as a sporting club) employs or engages a worker, there are difficulties in determining the identity of the 'employer', the 'self-employed person' or in Queensland the 'person who conducts a business or undertaking' given that the association itself has no separate legal status. Courts have held that it is the committee members who will be deemed to have entered into contracts with employees,<sup>74</sup> and who would therefore be the 'employer' for the purpose of OHS legislation. Problems arise when committee membership changes between the date of appointment of the employee and the date, for example, of an OHS contravention. It may be difficult to characterise any set of committee members as the 'employer': firstly, on the basis that the committee members at the time of employing or engaging a worker cannot have intended to be legally bound once they were no longer committee members; and secondly, on the basis that successive committees cannot be said to have entered into the contract at all. The result is that there is no enforceable employment contract and presumably no contractual employment relationship.<sup>75</sup> The courts may deal with this by characterising the worker as making a fresh offer to work to each successive committee, each of which is deemed to accept that offer when placing the worker on the pay roll.<sup>76</sup> It would, however, be imprudent to rely on the common law, with its inherent uncertainties, in dealing with unincorporated associations for the purpose of OHS.

This can be demonstrated by the unsatisfactory nature of the decision in *Peckham v Moore*.<sup>77</sup> Peckham, a football player, sought to recover workers' compensation from his club for an injury sustained during training, and sued as his employers, the committee members at the time of his employment. Those committee members successfully appealed against a judgment that had been entered against them in the lower court on the basis that Peckham had sued the wrong committee members. The New South Wales Court of Appeal construed the employment contract as having been adopted by the current committee members as employers, and held that the committee members at the time of entry into the employment contract were no longer in an employment relationship with Peckham.

These difficulties might be resolved through the use of the duty to persons who are not employees, as discussed above. This duty would, presumably, fall on the current committee and arguably would be owed to any person who was not an employee of the current committee. If this is correct it would make it

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74 See *Bradley Egg Farm Ltd v Clifford* [1943] 2 All ER 378 and *Peckham v Moore* [1975] 1 NSWLR 353.

75 *Carlton Cricket and Football Social Club v Joseph* [1970] VR 487.

76 As was held in *Peckham v Moore* [1975] 1 NSWLR 353.

77 *Ibid.*



less likely that resources would be wasted in pursuing the wrong committee members, because the existence of an employment relationship between the person owing the duty and the person protected by the duty would be irrelevant.

If, however, the duty to persons other than employees does not apply, and there is uncertainty as to which committee (or committee member) to pursue as 'employer', considerable resources might be wasted on pursuing the wrong defendants or ascertaining who the appropriate defendants are. The OHSA (Vic), by adopting the definition of 'officer' outlined above, effectively removes uncertainty because that definition includes 'an office holder of the unincorporated association if the entity is an unincorporated association'.<sup>78</sup> Under s 145, an officer of an unincorporated association is guilty of an offence if the commission of the offence is attributable to the officer failing to take reasonable care. There is no need to establish that particular committee members can be construed as 'employers' under an employment contract.

## Joint Ventures

In a joint venture arrangement it may be unclear exactly who owes the 'employer's' or self employed person's general duty of care under the OHS statutes (see above), or it may not be easy to impose liability on one joint venturer who may have assets and decision-making power in relation to OHS, but who may not officially be 'the employer' in the sense of not being the one to engage or employ the workers. Whereas all partners in a partnership will be liable for one another's acts and omissions as discussed above, the same does not apply to a joint venture. The usual distinction between a joint venture and a partnership is that two or more persons are engaged in a single venture jointly, as opposed to a continuing business under a partnership. Even then, however, the relationship may be regarded as a partnership at law, for example pursuant to s 32(b) of the Partnership Act 1892 (NSW) which provides for a partnership 'entered into for a single adventure or undertaking'. In *Canny Gabriel Castle Jackson Advertising Pty Ltd and Fourth Media Management Pty Ltd v Volume Sales (Finance) Pty Ltd*,<sup>79</sup> the parties referred to their arrangement as a joint venture. It was held, however, to be a partnership because the parties had entered into an enterprise with a view to sharing profit, under which they had had to agree jointly on the policy of the business venture, and under which they were affected by and concerned with one another's financial stability. To avoid a finding that an arrangement is a partnership, the joint venture arrangement will need to involve sharing product not profit, and co-ownership (where each party owns a distinct share) not joint ownership of assets (where all parties own assets in their entirety, jointly).

Where a business structure is regarded at law as being a joint venture, it will often be clear which of the joint venture partners is responsible for the joint venture project in terms of employing workers and managing day-to-day operations. There will therefore be little doubt as to which joint venturer is the

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<sup>78</sup> See Maxwell, above n 40, pp 174–5.

<sup>79</sup> (1974) 131 CLR 321; 3 ALR 409.

appropriate defendant to an OHS prosecution.<sup>80</sup> Consider, however, the position where one joint venturer might be responsible for employing workers, while another controls assets to an extent which might impact upon OHS compliance. It may be difficult to impose the duty of care under the OHS statutes on a party to the venture that does not officially engage or employ workers, unless it can be argued that the work being undertaken under the joint venture agreement is part of that joint venturer's 'undertaking' in those Australian jurisdictions where the duty to persons other than employees hinges on the notion of the 'conduct of the undertaking', as discussed above.

By adopting its current definition of 'officer', the OHSA (Vic) attempts to overcome such difficulties. This is because that definition of officer, in relation to entities that are neither corporations nor individuals, includes a person 'who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the entity; or who has the capacity to affect significantly the entity's financial standing.' An 'officer' of a joint venture would be liable for an offence under the OHSA (Vic) as an 'officer of an unincorporated body or association' under s 145, on the basis that a joint venture is an unincorporated association of persons. Take, for example, a case where joint venturers contribute different products to a venture, for example a circus tour, where one party conducts the circus and the other undertakes promotional activities.<sup>81</sup> Should the circus promoter fail to take reasonable care under s 145, by insisting that the circus undertake an excessive number of shows per day, resulting in acrobats becoming fatigued and at risk of sustaining injuries, the promoter might face liability under s 145.

## Corporate Groups

Of particular interest is the possibility that companies within a group structure might avoid the imposition of a statutory duty of care with respect to OHS. The avoidance of various types of legal liabilities by the use of corporate group structures has been well recognised in corporate law and has been the impetus for calls for corporate law reform:<sup>82</sup>

more or less complex group structures may be used to avoid the impact of regulatory measures on a wide range of matters, such as monopolies and mergers legislation, health and safety provisions, employee participation and planning requirements.<sup>83</sup>

The High Court has defined a 'corporate group' as follows:

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<sup>80</sup> See, eg, the decision in *Morrison v North Mining Ltd* [2003] NSWIRComm 84, where there were three companies engaged in a joint venture, however the company sued for breaches of OHS held an 80% share in the joint venture, managed the project and was responsible for day to day operations.

<sup>81</sup> See, eg, *Television Broadcasters v Ashton Nominees Pty Ltd* (1978) 22 SASR 552.

<sup>82</sup> See, eg, Companies and Securities Advisory Committee, *Corporate Groups Final Report*, May 2000; and *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation*, September 2004, available at <[http://www.cabinet.nsw.gov.au/hardie/Part A.pdf](http://www.cabinet.nsw.gov.au/hardie/Part%20A.pdf)> (accessed 6 July 2005).

<sup>83</sup> T Hadden, 'The Regulation of Corporate Groups in Australia' (1992) 15 *UNSW LJ* 61.

The word 'group' is generally applied to a number of companies which are associated by common or interlocking shareholdings, allied to unified control or capacity to control.<sup>84</sup>

The first part of this article has outlined in some detail problems which corporate group structures might present for labour regulation, particularly where there has been a separation of capital assets from employer obligations. One recognised reason for adopting a corporate group structure is that it makes it possible for a 'holding company', that is, a company which effectively controls another company, 'the subsidiary', either through shareholdings or control of the subsidiary's board,<sup>85</sup> to avoid liabilities incurred by a subsidiary, by virtue of the principle of limited liability.<sup>86</sup> Examples of avoidance of liability in relation to industrial relations liabilities and tortious liabilities can be found in the *Patrick Stevedores* cases<sup>87</sup> and in *Briggs v James Hardie & Co Pty Ltd*<sup>88</sup> respectively. The *Patrick Stevedores* cases concerned the restructure of that group so that there was a division in the group between the company which held assets, and those companies in the group which employed workers. This effectively enabled the company with assets to terminate labour supply contracts with the employer companies following industrial action, causing the employer companies to be placed into administration and the workers to be dismissed.

*Briggs v James Hardie* concerned the liability of James Hardie & Co Pty Ltd for negligence when an Indigenous man contracted asbestosis while employed by a subsidiary of James Hardie & Co Pty Ltd — Asbestos Pty Ltd. It became apparent that James Hardie & Co Pty Ltd could only face liability if the 'corporate veil' could be lifted, a concept which will be discussed below. More recently, the *Special Commission of Inquiry into the Medical Research and Compensation Foundation* investigated the restructure of the James Hardie group of companies to avoid liabilities in negligence to victims of asbestosis. This restructure involved moving those companies within the group with assets off-shore, and severing those companies from the asbestos liabilities, leaving a Medical Research and Compensation Foundation in Australia with limited funds with which to meet asbestos liabilities. This provides a clear illustration of the way in which corporate structures might be used to avoid liabilities, including responsibility for contraventions of OHS statutes.

The decision in *Inspector Alwyn Piggott v CSR Emoleum Services Pty Ltd*,<sup>89</sup> while on one level an example of a successful prosecution of a defendant employer, also demonstrates the way in which a holding company might avoid liability in relation to OHS contraventions, by forming a subsidiary company to act as 'employer'. In that case, two companies, CSR Ltd and Vacuum Oil Co Pty Ltd, had formed a 'bituminous road surfacing

84 *Walker v Wimborne* (1976) 137 CLR 1 at 6; 3 ACLR 529 at 532.

85 See the definition of 'subsidiary' in the Corporations Act 2001 (Cth) s 46.

86 See also Deakin and Morris, above n 69, pp 209–10.

87 *Maritime Union of Australia v Patrick Stevedores No 1 Pty Ltd* (1998) 77 FCR 456; 27 ACSR 497; *Patrick Stevedores Operation No 2 Pty Ltd v Maritime Union of Australia* (1998) 77 FCR 478; 27 ACSR 521; 195 CLR 1; 27 ACSR 535.

88 *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549; 7 ACLC 841.

89 [2003] NSWIRComm 282.

partnership' trading under the registered business name CSR Emoleum Road Services (CSRERS). A company, which was a wholly owned subsidiary of CSR Ltd, was formed to carry out the work of the partnership and to employ workers. That company, CSR Emoleum Services Pty Ltd (CSRES), was the defendant in these proceedings. The partnership trading as CSRERS entered into a contract with JCS Engineering to upgrade a batching plant, and a labour hire firm, Advantage Personnel, provided the labour to JCS Engineering to enable it to undertake that work. One of the workers supplied by Advantage Personnel was fatally injured in the course of the work, and it was found on the facts that this was due to a contravention of OHS requirements by the project manager, Kevin Johnson, an employee of the defendant subsidiary company, CSRES.

CSRES argued that the partnership, not it, had the agreement with JCS for the work to be done and selected the defendant's employees, and that it was the partnership, not the defendant subsidiary company, which was conducting the undertaking. This argument failed, the court seeking to give effect to the contractual arrangements in place, under which the defendant was formed to carry out the work of the partnership and employ workers for that purpose. As stated, this enabled the prosecution to proceed successfully against the defendant subsidiary company. Consider, however, a situation where it is sought to make a holding company liable for OHS breaches, and where such a prosecution fails because that company is able to point to contractual arrangements whereby a subsidiary had been formed to act as employer, notwithstanding that for some reason, that subsidiary can no longer be pursued.

The regulatory response to the avoidance of liability by the use of corporate groups has been described as 'piecemeal'.<sup>90</sup> One possibility is to argue under the common law that the corporate veil should be lifted, thus making holding companies liable for the actions of subsidiaries. The grounds on which the veil can be lifted are, however, uncertain, particularly following comments made by Rogers CJ in *Briggs v James Hardie & Co Pty Ltd* in relation to the traditionally recognised grounds of control and dominion.<sup>91</sup> Rogers CJ said that:

in my view the proposition advanced by the plaintiff that the corporate veil may be pierced where one company exercises complete dominion and control over another is entirely too simplistic. The law pays scant regard to the commercial reality that

90 I Ramsay and G Stapledon, 'Corporate Groups in Australia', Centre for Corporate Law and Securities Regulation, The University of Melbourne, 1998, p vii.

91 See *Smith Stone & Knight Ltd v Birmingham Corporation* [1939] 4 All ER 116 at 121 where the court asked six questions to determine whether or not the corporate veil should be lifted: 1) Were the profits treated as the profits of the parent company?; 2) Were the persons conducting the business appointed by the parent company?; 3) Was the parent company the head and brain of the trading venture?; 4) Did the parent company govern the adventure, decide what should be done and what capital should be embarked on the venture?; 5) Did the parent company make the profits by its skill and direction?; 6) Was the parent company in effectual and constant control? It seems that these factors will be present in the case of most holding/subsidiary company relationships, and yet will no longer be enough to justify a lifting of the corporate veil.

every holding company has the potential and, more often than not, in fact, does, exercise complete control over a subsidiary.<sup>92</sup>

Certainly, the fact that a holding-subsidary company relationship exists, does not increase the likelihood that the corporate veil will be lifted in order to render a holding company liable for the subsidiary's breaches. It has been noted that:

courts have not displayed any greater willingness to lift the corporate veil merely because they are dealing with a corporate group.<sup>93</sup>

Another basis for imposing liability upon a holding company for breaches by a subsidiary is to impose duties upon the holding company as a 'shadow director'. 'Director' is defined in the Corporations Act to include 'a person who is not validly appointed as a director if . . . the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes'.<sup>94</sup> Under this definition, a holding company with effective control of a subsidiary might be liable as a 'shadow director' of the subsidiary.<sup>95</sup>

The Corporations Act definition of 'officer' adopted by the OHSA (Vic), might be regarded as including 'shadow officer' provisions, in the sense that an officer of a corporation is defined similarly to 'director' by including 'a person . . . in accordance with whose instructions or wishes directors of that corporation are accustomed to act . . .'.<sup>96</sup> Case law<sup>97</sup> suggests that officers in holding companies and franchisors will come within the definition of an 'officer' provided that:

- the directors of the firm are influenced by the holding company or franchisor;
- the directors did, in their capacity as directors (that is, fulfilling their roles and functions as directors) and as a body act, and were accustomed to act, in accordance with the directions or instructions of the officer, without exercising their independent discretion;
- the officer did exercise their will in the form of giving instructions or directions; and
- there was a causal link, in terms of compliance or obedience, between the giving of instructions and directions and the conduct of the directors.

Consistently with the *Standard Chartered Bank* case<sup>98</sup> which found that a holding company could be 'shadow director', the definition of 'officer' under the OHSA(Vic) could conceivably include a holding company or a franchisor. This would ensure that the holding company or franchisor would face liability

92 *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549 at 577; 7 ACLC 841 at 862.

93 Companies and Securities Advisory Committee, *Corporate Groups Final Report*, May 2000, p 18.

94 Corporations Act 2001 (Cth) s 9.

95 *Standard Chartered Bank of Australia Ltd v Antico* (1995) 38 NSWLR 290; 131 ALR 1 (*Standard Chartered Bank*).

96 OHSA (Vic) s 5.

97 *Standard Chartered Bank* (1995) 38 NSWLR 290, especially at 327–8 per Hodgson J; 131 ALR 1. See also R Schulte, 'Emerging from the Shadow', paper presented at Queensland Law Society Symposium, 2004, pp 24–5.

98 (1995) 38 NSWLR 290; 131 ALR 1.

under s 144 of that Act, whenever a contravention of the Act is attributable to that holding company, as an 'officer', failing to take reasonable care. In the absence of such a definition under other state OHS legislation, the problem of corporate group structures being used to avoid liability for occupational health and safety contraventions continues as a potential obstacle to effective regulation.

## Conclusion

The OHS statutes essentially define 'employers' as persons who employ others under a contract of employment. These definitions typically make no reference to the way in which 'the employer' is constituted. This article has examined the application of the OHS statutes to the various configurations of 'the employer', including partnerships, unincorporated associations, joint ventures, networks of firms, and complex organisational structures in which the 'employer' may be distinct from the asset-holding and decision-making entity. We have explored two dimensions of the Australian OHS statutes that enable statutory OHS duties to reach more than one employer or self-employed person within a corporate group or network.

First, most of the OHS statutes contain provisions extending the reach of the employer's duty beyond the employer's employees. One legislative technique is to deem contractors and their employees to be employees of the principal contractor. Another imposes duties on employers and self-employed persons to persons who are not employees, so that employers and self-employed persons can be responsible for the OHS of firms, and those they engage, lower in the contractual chain. These duties are non-delegable, meaning that the principal contractor cannot seek to delegate OHS duties to firms lower in the contractual chain.

Secondly, new Victorian 'shadow officer' provisions can be applied to remove difficulties and doubt as to the liability of partners in a partnership, officers of unincorporated associations, joint venturers, and holding and subsidiary companies within corporate groups. While it can be argued that the provisions simply confirm that a partner who fails to take reasonable care in relation to OHS will be guilty of an offence, we demonstrate that there are very real benefits to having 'shadow officer' provisions which remove uncertainties about the liability of unincorporated associations, joint ventures and corporate groups. Perhaps most significantly, the Victorian corporate officer provisions have the potential to extend liability to individuals and other entities within organisational structures, where those individuals and entities make or participate in making decisions that affect the whole or a substantial part of the organisation's business, and are responsible for an OHS offence having been committed, due to their failure to take reasonable care. We suggest that similar provisions should be included in all OHS statutes, to overcome at least some of the barriers limiting group responsibility for OHS statutory duties.