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The Legal Concept of Work-Related Injury and Disease in Australian OHS and Workers' Compensation Systems[π]

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1. Introduction

This paper analyses the concept of 'work-relatedness' in Australian workers' compensation and occupational health and safety (OHS) systems. The concept of work-relatedness is important because it is a crucial element circumscribing the limits of the protection afforded to workers under the preventative OHS statutes, and is a threshold element which has to be satisfied before an injured or ill worker can recover statutory compensation. While the preventive and compensatory regimes do draw on some similar concepts of work-relatedness, as this paper will illustrate, there are significant differences both between, and within, these regimes.

Pursuant to the federal division of power, both preventive OHS and workers' compensation schemes operate primarily at the level of the States and Territories with a smaller role reserved for the Commonwealth. Although there is a broad consistency in the general approaches to workers' compensation and OHS in all ten jurisdictions, there can be significant variations between jurisdictions in the manner in which elements of these general approaches are operationalised. Some of these, such as eligibility criteria for workers' compensation coverage, coverage or non-coverage of journey injuries and reporting requirements (including the effect of employer excess periods), can make attempts to gauge properly the nature and extent of work-related injury and disease in Australia, and efforts to make meaningful comparisons between jurisdictions, a difficult task. A number of these difficulties have been faced in the endeavours of the Workplace Relations Ministers' Council in its three (to date) Comparative Performance Monitoring reports.[1]

This paper offers a comparative survey of the statutory legal concept of work-related injury and disease across all ten workers' compensation and OHS jurisdictions.[2] The notion of 'work-relatedness' is central to the boundary-setting task of workers' compensation systems in particular, but also has some importance in OHS schemes.

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1 The latest is Workplace Relations Ministers' Council, *Comparative Performance Monitoring: Australian and New Zealand Occupational Health and Safety and Workers' Compensation Schemes*, 3rd Report, August 2001

2 We do not examine the notion of "work-relatedness" in common law compensation claims, because there is no legal requirement of work-relatedness for a common law claim for compensation for personal injury to be launched.

However, as will be explored in the next section, the notion of work-relatedness, and in particular the manner in which this concept has been utilised – either explicitly or implicitly – as a control device in setting system boundaries and mandating threshold requirements for entitlement or system coverage, is one that varies according to context and time. Particularly in the workers' compensation context, this variation represents the playing out of political and economic struggles and their reflection in the balance between the broadening of entitlement (both in terms of access to, and level of, compensation benefits) on the one hand and scheme affordability (in terms of the level of employer premiums) on the other. In the OHS statutes, there has been a significant expansion in regulatory reach, but the precise scope of these developments, and the concepts upon which they have been built, have varied from jurisdiction to jurisdiction.

The paper begins with an overview of the evolution of the different conceptions of work-relatedness in the Australian workers' compensation context, and is followed by a more detailed analysis of the different dimensions of work-relatedness in current Australian workers' compensation statutes. Many of these dimensions are also present in the evolution of the notion of work-relatedness in the OHS statutes, as will be explored in the latter part of this paper. Throughout the paper the analysis of the notion work-relatedness in the workers' compensation and OHS statutes will be located within seven conceptions of work-relatedness which are outlined in the following section.

2. The Protean Nature of the 'Work-relatedness' Concept in Workers' Compensation Systems

The notion of work-relatedness is (and indeed always has been) either overtly or implicitly central to the issue of the coverage of workers' compensation systems. However, 'work-relatedness' is an extremely protean concept and its use as a control device takes a number of forms and operates on a number of levels. The nature of its invocation is often more reflective of political expedience and pragmatism rather than of principle. Indeed its operation in this area is strongly emblematic of the aphorism of the American jurist Oliver Wendell Holmes that the life of the law is not logic but experience.

The experience of the operation of workers' compensation schemes in the Anglo-Australian context, over a period of little over a century, suggests at least seven dimensions in which work-relatedness is an issue. The context in which this operates can be either that of external boundary setting or that of an internal control mechanism. External boundary setting is quintessentially one of political and economic concerns that become articulated through the legislative process. This is often more of a cyclical than a linear process. For instance, the 1940s and the late 1980s were generally characterised by expansion of coverage, including the recognition of journey claims in the former period and the removal of some coverage restrictions (for example, to outworkers) in the latter. Much of the 1990s, on the other hand, has seen a more restrictive approach to the nature and extent of coverage with, for instance, the removal of journey claims from coverage in a number of jurisdictions.

The swing between expansion and contraction of entitlements in part reflects the relative strength of the contending parties. However, the increasing globalisation of world trade has provided downward pressure on a range of worker entitlements, both in terms of a response to business competitiveness on a global stage and, sometimes, as repugnant to the new rules of engagement of international trade as being viewed as 'disguised protection'. This process is further complicated by the federal nature of workers' compensation in both Australia and North America, with the result that workers' compensation has long been part of the process of political gamesmanship between jurisdictions in the quest to attract and retain business investment. Consequently, there have been pressures to cut back on entitlements, in order to secure lower premiums, in the attempt to achieve a 'business friendly' environment. The countervailing pressure comes from groups, particularly the trade union movement, with a social justice perspective.

This is, however, a terrain that is not without ambiguity. On the one hand, the different jurisdictions provide the opportunity for business groups to attempt to arbitrage more favourable conditions (in whole range of areas relating to taxes and charges as well as work-related imposts such as workers' compensation) by playing off one State or Territory against another as the potential source for new or continuing investment. On the other hand, in a world of national and international markets, the need to comply with a substantial number of differing requirements in the various jurisdictions in which an enterprise carries on business brings with it significant administrative costs. Accordingly, there are recurrent pressures for greater harmonisation and consistency in scheme arrangements across Australia. A push in this direction came from the then Labour Ministers' Council (now Workplace Relations Ministers' Council) in mid 1994 and produced a response from the State and Territory schemes in its publication, *Promoting Excellence*.[3] However it was an initiative that petered out with little more than rhetorical compliance. Recently, this push has been revived by the current Federal Government with its proposed referral of the issue to the Productivity Commission for review.[4]

In this ongoing tale of action and reaction that has been played out over the last century, there can be discerned at least seven different notions of work-relatedness. These fall into two major areas. First, the external boundary setting process in which the statute defines the parameters of the system and hence its general interface with other systems such as motor accident compensation schemes and social security. Secondly, the process of internal boundary setting whereby the statute – and judicial gloss upon the statutory provisions – provides a shepherding exercise distinguishing between events and activities that fall within scheme coverage and those that do not. For instance, disentitling provisions, under which a certain indicium or certain indicia pertaining to the events in which the injury occurred, which act to remove from coverage an injury which is not tainted by these features.

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[3] Heads of Workers' Compensation Authorities, *Promoting Excellence: National Consistency in Australian Workers' Compensation, Interim Report to Labour Ministers' Council*, May 1996.

[4] See the joint press release, dated 24 July 2002, titled 'Government to Consider Workers Compensation Reform', issued by the Minister for Employment and Workplace Relations and the Parliamentary Secretary to the Treasurer.

External Boundary Setting

In terms of external boundary setting, the first form that work-relatedness takes is that of the **qualitative nature of the work or employment**. This is exemplified in the form of the initial Anglo-Australian workers' compensation statutes – for instance the English Workmen's Compensation Act of 1897 and the 1900 South Australian statute – in which coverage was restricted to a specified areas of employment in which it was assumed that there were special risks associated with the employment. These areas of activity included being on, or in, or about a railway, factory, mine, quarry or engineering work and being on, or in, or about any building exceeding 30 feet in height.

This somewhat restricted framing of the issue of work-relatedness and scheme coverage gave way, with the 1906 English Act and the Australian measures such as the 1914 Victorian Workers Compensation Act that essentially copied it, to a more generalised basis for coverage control through resort to the notion of the **form of the work relationship**. It takes as a starting point the common law distinction between persons working under a contract of service (workers, employees) and those working under a contract for services (independent contractors) with (under this test) coverage extending to persons in the first of these two categories.

However, as with much else in respect of workers' compensation coverage and practice, this is not a neat divide, nor a seamless transition from one control concept or formula to another. Thus, elements of the former qualitative nature of the work criterion for coverage still intruded into this more general framing of the issue. For instance, there was a strong blue collar stamp to the new formulation through the provision of a general exclusion of a worker whose income exceeded £250 a year unless that person was employed by way of manual labour. This aspect of an income threshold was not removed in Victorian workers' compensation until 1972. Other more specific occupational exclusions also applied, for instance with respect to fishermen remunerated by a share or proceeds of the catch. As can be seen later in this paper, a number of these older historical exclusions, together with some of more recent vintage, are still present in current Australian statutes. A prime basis for many of these more specific exclusions is still the old element of the qualitative nature of the work.

However, in some cases, a supplementary element, that of the **degree of employer control of the work**, provides a buttressing justification for exclusion. This third element is integrally related to the second, the form of the work relationship. For a long period, the essential touchstone for distinguishing between contracts of service from contracts for services was the control test. Even in the modern articulation of the basis for making such a distinction, the element of control is still central.[5] The resort to the test of the degree of employer control of the work as a basis for excluding coverage of, for instance, outworkers is somewhat problematical since a range of other largely unsupervised activities (for example, gardeners, commercial travellers etc) were not so excluded. It is likely that the formal and overt justification for exclusion cloaks the real basis, namely a subterranean fear by insurers and policy makers of a situation of moral hazard, a feature that is probably also operative in the

[5] *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 and see below. See also *Hollis v Vabu Pty Ltd* (2001) 75 ALJR 1356; 106 IR 80.

historic exclusion of claims from members of the employer's family residing in the employer's home.

However, particularly in more recent times, the notion of the degree of employer control of the work has taken on a new life and dimension in establishing the boundaries of workers' compensation schemes. Thus the concept of 'employer controllable risk' was utilised by the (then) Industry Commission, in its 1994 report on Workers' Compensation in Australia, as the basis upon which journey claims should be removed from workers' compensation coverage and that consideration should also be given to exclude recess claims, in the form of free-time breaks outside the workplace, from such coverage as well.[6]

A fourth dimension of work-relatedness that intrudes into aspects of workers' compensation coverage is that of requiring an element of **employer benefit** in the activities being undertaken at the time that an injury was sustained in order for such an injury to be compensable. This particular element of work-relatedness can sit somewhat uneasily with that of the employer's control of the work. During the 1940's the Australian jurisdictions embraced the extension of coverage to journey injuries on the basis that such journeys were simply an antecedent activity undertaken for the benefit of the employer: that is, a physical relocation from the worker's home to the place of work to undertake activities for the benefit of the employer. The notion of employer benefit was reinforced by exclusion from coverage of injuries sustained during an unreasonable deviation (whether in terms of time or distance) from such a journey because such a deviation bespoke more of an activity characterised by private benefit. However, as has been noted, viewed through the prism of employer controllable risk, the Industry Commission and others reached the opposite conclusion that even a direct journey between home and work should be outside scheme coverage.

Internal Boundary Setting

In terms of internal boundary setting, the principal control device for workers' compensation schemes is the primary expression of entitlement, one that denotes work-relatedness in causal and temporal elements. The original expression referred to an injury 'arising out of *and* in the course of employment', requiring the satisfaction of both these elements. In Australia, beginning from the 1920s, jurisdictions moved to a disjunctive formulation of this primary entitlement expression so that eligibility to compensation rested upon demonstrating an injury 'arising out of *or* in the course of employment'. Only Tasmania has resisted this trend. In the United States, however, the original expression is still the test in 43 states and under the Longshore and Harbor Workers' Compensation Act, with only Utah moving to the disjunctive form of this expression.

Arising Out of the Employment

The fifth dimension of work-relatedness, then, is one that is expressed in terms of a **causal relationship between the injury and the employment**. As with the other control measures governing the bounds of workers' compensation coverage and

[6] Industry Commission, *Workers' Compensation in Australia*, Report No 36, Canberra: Australian Government Publishing Service, February 1994.

entitlement, this is a dynamic rather than static notion. Over the course of the last hundred years the courts in the United Kingdom, Australia and the United States have developed at least four different tests for determining this connection. The earliest of these was the *peculiar-risk test*, one that required that the source of harm in terms of its nature (as distinct from its quantity) be peculiar to the injured person's occupation. It is perhaps best illustrated by one celebrated early US case in which a labourer, whose foot froze while working all night during an extremely cold period, was denied compensation on the grounds that he was not exposed to any greater risk of freezing his foot than the ordinary person engaged in outdoor work in cold weather.[7] However, the essential point is that the ordinary person is not engaged in outdoor work during very cold weather and this flaw in the test has meant that it is now essentially obsolete in workers' compensation jurisprudence.

The successor doctrine, the *increased-risk test*, is the current dominant test in the United States, where, as already noted, 44 jurisdictions retain the original British dual requirement of an injury 'arising out of and in the course of employment'. The increased-risk test differs from the peculiar-risk test in that the distinctiveness of the employment risk can be contributed by the increased quantity of a risk regardless of the fact that this may not be qualitatively peculiar to the employment.

In Australia, with the move towards the disjunctive formulation of the primary entitlement criterion, noted above, most cases could be dealt with on the basis of the 'in the course of employment' requirement. However, where a case did turn upon a finding that the injury arose out of the employment, the general test applied is what has been called the *actual risk test*. In terms of a plain reading of the statutory language of 'arising out of' the employment, this is the most defensible interpretation. It simply requires that the worker demonstrate that the employment subjected him or her to the actual risk that caused the injury. There is no additional requirement such as a peculiar or increased risk.

While the increased risk doctrine is still the dominant line of interpretation in the United States, an increasing number of courts have moved to embrace alternative positions. This includes a move to the actual risk test, but a number of other courts have moved further to adopt the *positional-risk test*. To a considerable degree this involves a conflation of the 'arising out of' requirement with the 'in the course of' condition. It regards an injury as being compensable where it would not have occurred but for the fact that the nature and requirements of the employment placed the worker in the position where he or she was injured. It thus allows compensability for an injury – for instance, as the result of being struck by a bullet fired by a fleeing bank robber - where the only connection with the employment is the fact of being in the place where the injury occurred by virtue of some employment duty (for example making a delivery).

In the Course of Employment

The move in Australia to the disjunctive form of the primary entitlement provision allowed an avenue for compensability, through the 'in the course of' employment limb, which required a different rendering of the work-relatedness requirement and

[7] *Robinson's Case*, 292 Mass. 543, 198 N.E. 760 (1935).

one that was, in most injury situations, more easily satisfied. The course of employment avenue brings into play a sixth form of work-relatedness, namely that of work-relatedness in terms of a **nexus of time, place and activity**. That is, a compensable injury must demonstrate a work connection in terms of having occurred within the time and space confines of the employment and also while engaged in an activity the purpose of which is related to the employment. In the OHS regulatory regulatory regimes, this nexus of time place and activity is also important (see below).

The legislative changes to the primary entitlement provision in the workers' compensation schemes began to take place in Australia from the 1920s. This left the courts the task of deciding the precise relationship between the two limbs of this entitlement provision, that is between the 'arising out of' and the 'in the course of employment' elements. In particular, the issue whether the 'in the course of employment' element was purely temporal in nature or had some residual causal component to it. This issue was not finally decided in a definitive manner until the High Court decision in *Kavanagh v The Commonwealth*[8], which clearly established that this element was purely temporal in nature and that the worker need only be engaged in an activity that was part of or incidental to his or her employment.

The fact that a worker could recover compensation through this route, one in which there need be no additional causal relationship to the employment than engagement in an activity incidental to that employment, did not become a matter of concern until the late 1980s and early 1990s. However, a number of factors, from the late 1980s, began to coalesce and create a climate for legislative intervention, particularly in the direction of tightening access to workers' compensation benefits and requiring greater obligations on the part of claimants. These factors centred on the costs of workers' compensation but involved a number of different strands of concern. They included a reactive circumspection to aspects of the expansion of statutory benefit arrangements in a number of schemes during the late 1980s, unease over the nature of rehabilitation and a perceived lack of return-to-work focus and the highlighting of the relatively small (but, in scheme financial terms, costly) group of long-term claimants, often with connotations of 'bludging' on the system. This occurred as the legacy of the welfare state was largely extinguished and a new zeitgeist prevailed in which economic rationalist solutions achieved orthodoxy.

This shift came with the election of the Kennett Government in Victoria, in late 1992, which, in one of its earliest legislative initiatives, acted to restructure the bases of the Victorian workers' compensation scheme in a move from the former WorkCare scheme to a new WorkCover system. Quite fundamental changes to long-established principles were made, such as the removal of journey claims for injuries sustained between home and work. As well, the WorkCover measures included the grafting of a new, additional, general test of work-relatedness upon the traditional 'arising out of or in the course of employment' requirement as a basis for eligibility for workers' compensation benefits. This change introduced a seventh form of work-relatedness into workers' compensation law and practice. This form of work-relatedness is in terms of **the degree of employment contribution**. The Victorian phraseology was that the employment must be a 'significant contributing factor' to the injury or

[8] (1960) 103 CLR 547

disease. In time, several other jurisdictions have followed suit in introducing such an additional requirement, although sometimes utilising different terminology.

During the 1990s a number of other developments contributed to a momentum of change and reassessment of the boundaries of workers' compensation coverage. In particular, a number of largely inchoate policy issues concerning the boundaries of an employer-financed workers' compensation scheme *vis-à-vis* the taxpayer-financed federal social security system crystallised as political issues for the Federal Government and those of the States and Territories. This wider question, typified in the 1996 report from the Heads of Workers' Compensation Authorities to the (then) Labour Ministers' Council as the 'workers' compensation conundrum',[9] merged with other issues raised in a number of reports and discussion papers concerning the limits of employer responsibility under the rubric of 'employer controllable risk'. Important in this latter debate was the (then) Industry Commission's workers compensation report which, as mentioned above, argued, on the basis of the doctrine of employer controllable risk, that journey claims should be removed from workers' compensation coverage and that consideration should similarly be given to excising certain recess claims from coverage.

Workers' compensation schemes in Australia have been in a process of continuing foment and change for more than two decades. There are no signs that this situation is about to change. As in the past, notions of work-relatedness will continue, either explicitly or implicitly, to be central to and often to inform this process of change. It is highly likely out of these developments new principles of work-relatedness will emerge.

With these shifting conceptions in mind, this paper next examines the current tests for work-relatedness in Australian workers' compensation systems.

3. The General Elements of Eligibility in Current Australian Workers' Compensation Legislation

The ten principal Australian worker's compensation schemes are governed by the following statutes:

- Commonwealth - *Safety, Rehabilitation and Compensation Act* 1988 (Cth) (henceforth 'Comcare') (public sector employment);
- Commonwealth - *Seafarers Rehabilitation and Compensation Act* 1992 (Cth) (henceforth 'Seacare') (overseas and interstate maritime employment);
- New South Wales: *Workers Compensation Act* 1987 (NSW) (henceforth 'NSW (WCA)') and *Workplace Injury Management and Workers Compensation Act* 1998 (NSW) (henceforth 'NSW (WIMWCA)');
- Victoria: *Accident Compensation Act* 1985 (henceforth 'Vic');
- Queensland: *WorkCover Queensland Act* 1996 (henceforth 'Qld');

[9] Heads of Workers' Compensation Authorities, *Promoting Excellence: National Consistency in Australian Workers' Compensation, Interim Report to Labour Ministers' Council*, May 1996.

- South Australia: *Workers Rehabilitation and Compensation Act* 1986 (henceforth 'SA');
- Western Australia: *Workers Compensation and Rehabilitation Act* 1981 (henceforth 'WA');
- Tasmania: *Workers Rehabilitation and Compensation Act 1988* (henceforth 'Tas');
- Northern Territory: *Work Health Act* 1986 (henceforth 'NT');
- Australian Capital Territory: *Workers Compensation Act* 1951 (henceforth 'ACT').

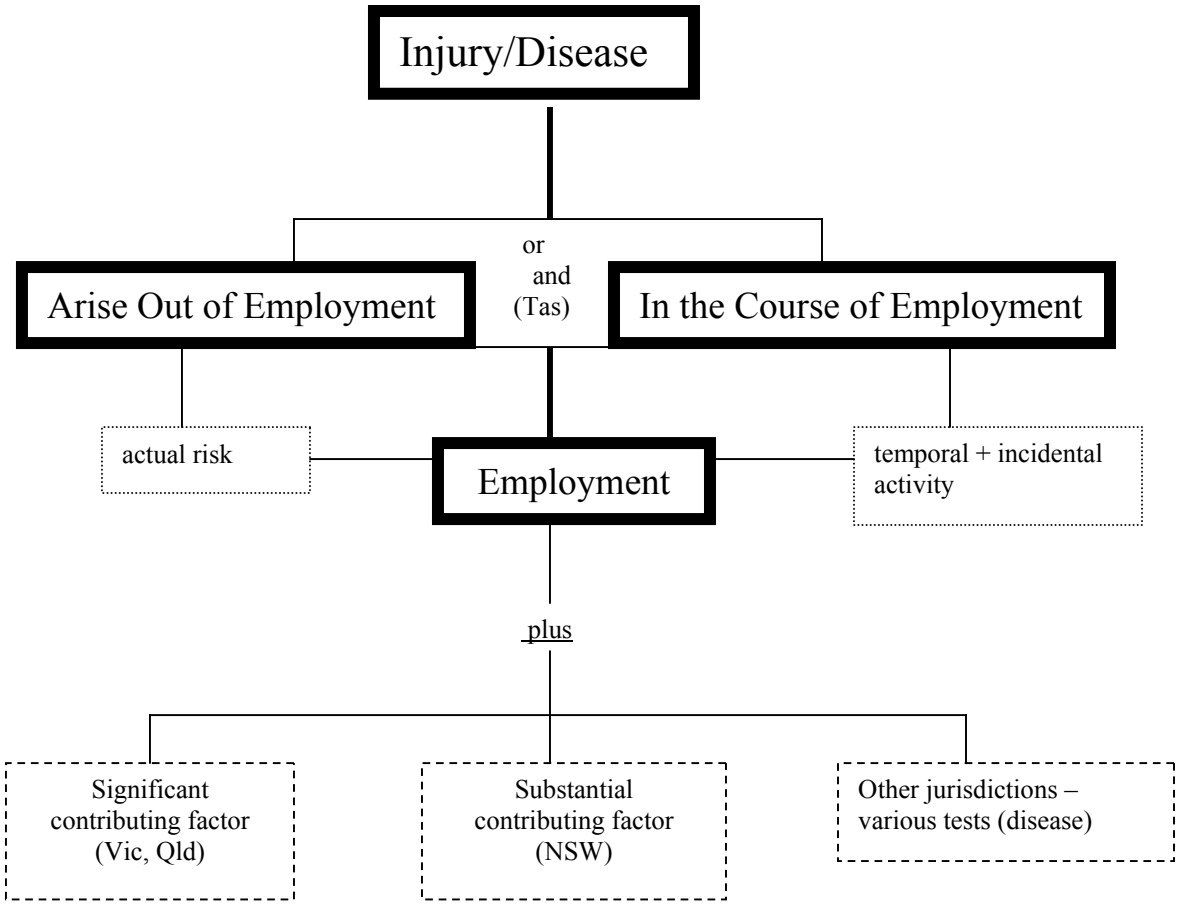
The form of Australian workers' compensation arrangements owes much to the founding English statutes, the Workmen's Compensation Acts of 1897 and 1906. This common heritage has meant a high degree of standardisation with respect to the core principles of workers' compensation in Australia. However, notwithstanding this broad congruency of themes, a century of policy and statutory adjustments has caused an increasingly complex array of features, peculiar to one or several jurisdictions, to be layered on top of this general approach. These divergences have been intensified in recent years by escalating amendments designed to address a range of pressures upon each of the workers' compensation systems in Australia.

Eligibility for workers' compensation hinges upon three core criteria. First, a claimant must fall within one of the categories of 'worker' to whom the relevant scheme applies. Second, the claimant must have suffered a type of injury or disease for which compensation is payable. Third, the requisite connection between the claimant's employment and the injury or disease must be proved. The combined operation of these three elements determines the coverage of any particular workers' compensation scheme. Divergences in relation to any aspect of these elements will impact on whether a particular injury or disease is compensable in a particular jurisdiction, and hence included in the reported statistics for work-related injury and disease. For example, while the nexus between a broken leg caused to an outworker while carrying piecework to a van for delivery to a retail outlet prima facie satisfies the requirement of an injury arising out of and in the course of employment, statutory exclusion of outworkers from the definition of 'worker' in Tasmania precludes a claim for workers' compensation.[10] The situation might be different if the same injury occurred in Victoria where the definition of 'worker' explicitly makes reference to the inclusion of outworkers.[11]

In simplified outline, the nature of the work-relatedness requirements in Australian schemes is encapsulated in Figure 1.

Figure 1:
The Requirement of Work-relatedness

[10] S 4(5)(b) Tas.
[11] S 5(1) Vic (definition of "worker")


Injury/Disease
or
and
(Tas)
Arise Out of Employment
In the Course of Employment
actual risk
Employment
temporal + incidental activity
plus
Significant contributing factor (Vic, Qld)
Substantial contributing factor (NSW)
Other jurisdictions – various tests (disease)

Australia's various workers' compensation schemes are therefore driven by the composite notion of a *worker who suffers an injury or disease that is work-related*. To understand the divergences in relation to the specific content of this notion, it is therefore necessary to compare the approach taken towards the three core criteria that inform this notion and hence determine eligibility for workers' compensation in the various jurisdictions.

Who is Entitled to Workers' Compensation? The Concept of 'Worker'

As the notion of workers' compensation suggests, eligibility for benefits is restricted to persons who satisfy the relevant definition of 'worker' or, in relation to Comcare and Seacare, 'employee'. Over time, the general law has developed a legal concept of 'employee' to function as the touchstone for the duties and protections afforded by employment law. This distinguishes between 'employees' supplying services pursuant to a contract *of* (general) service, and 'independent contractors' operating a business in their own right and supplying services to another party pursuant to a contract *for* (specific) services. The courts have developed a range of tests to distinguish employees from independent contractors and other non-employees. The approach currently favoured by the Australian courts considers a range of factors including the degree of control over the worker's activities, the level of the worker's integration into the primary business, whether the worker supplies his or her own tools and equipment, whether the worker bears the financial risks associated with the venture, whether the worker is free to perform work for other persons, and whether the worker receives wages or is paid according to invoice.[12]

Contract of Employment

Each of the workers' compensation statutes provides a primary definition of 'worker' that tacitly imports the general law distinction between an employee and an independent contractor. A typical definition is that occurring in the ACT legislation providing that a worker is 'any person who has entered into or works under a *contract of service* or apprenticeship…'[13] The relevant contract can be express or implied, oral or in writing. Subject to specific qualifications in relation to casuals in some jurisdictions, this general definition does not distinguish between full-time, part-time and casual workers.

The only significant departure from the primary definition of 'worker' being aligned with its general law meaning was that formerly taken in the Northern Territory and (for a lesser period of time) Queensland. The nature of this departure was based on a person's liability for payment of taxation as P.A.Y.E (Pay As You Earn) taxpayer. With the introduction of sweeping taxation arrangements by the Commonwealth, from 1 July 2000, both the Queensland and Northern Territory systems made changes to their definition of 'worker' to accommodate the Commonwealth changes. In

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12 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, and *Hollis v Vabu Pty Ltd* (2001) 75 ALJR 1356; 106 IR 80.

13 S 6(1) ACT. Emphasis added. Similar provisions in Comcare, Seacare, NSW, Vic, Qld, SA, WA and Tas. The additional words in the Victoria 'or otherwise' do not amount to an extension of coverage to persons who would not be regarded at general law as employees: *Bailey v Victorian Soccer Federation* (1976) VR 13.

Queensland there was a reversion to a traditional position of 'an individual who works under a contract of service',[14] while in the Northern Territory the organising principle has become the non-provision of an Australian Business Number (ABN).[15] From being the most restrictive in terms of coverage of workers, the current Northern Territory position, which involves 'a person who under an agreement or contract of any kind . . . performs work or a service of any kind for another person' and does not provide that other person with an ABN, is functionally similar to the other Australian jurisdictions and may potentially be even more liberal.

Extension to Include Independent Contractors at General Law

Notwithstanding the basic exclusion of independent contractors from workers' compensation entitlements, specific extensions to the definition of 'worker' in each jurisdiction have expanded the operation of workers' compensation schemes to encompass certain persons who at general law are characterised as independent contractors. This reflects specific policies to protect persons who perform contracts in certain types of circumstances or who work in certain industries, for example outworkers and rural workers, as well as a more general concern to counteract attempts by employers to evade workers' compensation obligations by falsely classifying as self-employed contractors, persons whose duties are in reality those of an employee.

Significant complexity is added by the varying scope and manner in which extensions are framed across the different schemes. One provision which has been applied consistently across a number of jurisdictions extends coverage to any contractor engaged to perform work (not being incidental to a trade or business regularly carried on by the contractor in his or her own name or by means of a partnership or business or firm name) who neither sublets the contract nor employs workers (or although employing workers, actually performs some part of the work personally). In New South Wales, Victoria, Tasmania, Queensland and the ACT, such persons are deemed to be workers employed by the person who made the contract with the contractor.[16] This provision has been judicially interpreted as applying to persons who work for the principal but have no independent business or trade and persons who, though carrying on an independent trade or business, undertake a contract outside the scope or course of that trade or business.[17] New South Wales, Tasmania and the ACT impose threshold values on the relevant contracts before a contractor will be deemed to be a worker under this provision.[18] Similarly, the Western Australian provision includes under the definition of 'worker' persons engaged under a contract of service to perform work for the purposes of another person's trade or business where remuneration is received 'in substance' for his or her manual labour or services,[19] has

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14 S 12(1) Qld

15 S 3(1) NT (para (b) of definition of "worker")

16 See for example s 4B(1) Tas. Similar provisions in NSW (WIMWCA), Vic, Qld and the ACT.

17 *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 at 401 per Dixon J.

18 Greater than $10 in NSW and ACT and more than $100 in Tasmania.

19 S 5(1) WA (definition of "worker", para (b)).

been interpreted narrowly as meaning that 'the something else is comparatively so insignificant that in reality . . . it is a return for the manual labour so bestowed'.[20]

Other provisions extending the coverage of workers' compensation schemes to encompass particular contracting arrangements are peculiar to specific jurisdictions (see below). The Victorian scheme is the most far-reaching in its adoption of a measure, based on the anti-avoidance provisions of payroll-tax legislation, which has the effect of deeming as workers a broad range of contracting arrangements in which work is performed for a principal on a captive or largely captive basis, subject to a range of exemptions.[21] Specific exclusions include those relating to contractors supplying labour that is ancillary to the supply of equipment or materials, contractors supplying services that are outside the mainstream scope of the principal's business and who supply these services to the public generally, contractors supplying services pursuant to a contract with an annual value exceeding $500,000, and contractors supplying services for less than ninety days in a year.[22]

Victoria, Tasmania, New South Wales, the Northern Territory and the ACT expressly provide for the liability of the principal for workers' compensation payments to sub-contractors in certain circumstances,[23] particularly in attaching liability to the principal in circumstances where a contractor is uninsured.[24]

Deemed Exclusions

Each of the workers' compensation statutes specifically excludes certain categories of persons from the definition of 'worker'. There is little in the way of rational principle for making such exclusion from coverage, apart from areas of employment that are covered by other measures for disability benefits which are usually equivalent or superior to those provided by the particular workers' compensation scheme.[25] Many such categories of exclusion (for example, outworkers in Tasmania) represent an overhang from the early history of workers' compensation or else a policy response to particular court decisions (for example, the moves to exclude sportspersons from coverage following the decisions of superior courts in New South Wales and Victoria).

Apart from the exclusion of outworkers in Tasmania,[26] there are a number of other examples of exclusions that represent instances of historical overhang. Among these is the exclusion that operates in Western Australia, Tasmania, New South Wales and the ACT of persons employed on a casual basis where the purpose of the employment

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20 *Marshall v Whittaker's Building Supply Co.* (1963) 109 CLR 210 at 212. For instance, a tradesman who provides the hand tools to do the manual work required under the contract or a person whose work in performing the contract is not wholly manual.

21 S 9 Vic.

22 Ss 9(1)(d)-(f) Vic.

23 See, for example, s 14(1) ACT. Similar provisions in Vic, Tas, NT and NSW (WCA).

24 S 10A Vic. Similarly s20 NSW (WCA) but does not operate for certain forms of agricultural work involving use of mechanical machinery: s20(3).

25 Eg s 5(8) Comcare.

26 S 4(5)(b) Tas.

is other than for the employer's trade or business,[27] of domestic servants employed for less than 48 hours by the same employer at the time of injury,[28] and that in Western Australia, Northern Territory and the ACT of members of an employer's family who dwell in employer's home, except where disclosure has been made to the relevant insurer.[29]

The treatment of sportspersons under the various schemes is often perplexing and contradictory. Following the decisions of the New South Wales Court of Appeal in *Peckham v Moore*[30] and of the Full Court of the Victorian Supreme Court in *Bailey* v *Victorian Soccer Federation*,[31] various jurisdictions moved to a general exclusion of professional sportspersons from coverage while engaged in training, competition or travel in respect of training and competition.[32] New South Wales is the only jurisdiction to have provided an alternative means of compensation for injured athletes.[33] However, a number of classes of professional sportspersons (for example, jockeys) have long been covered under workers' compensation legislation and this has continued, notwithstanding the general exclusion through specific coverage provisions Queensland provides for a general exclusion from coverage of company directors, trustees and partners,[34] while certain company are excluded in Western Australia except where insurance is taken out,[35] and in the Northern Territory except where particular conditions are met.[36] In Queensland, Tasmania and the Northern Territory, crewmembers of fishing vessels whose remuneration is based on a share of the catch or profits of the vessel are excluded.[37] A similar Western Australian provision only operates where the crewmember contributes to the cost of working the vessel.[38]

There is a potpourri of other miscellaneous exclusions such as foster parents and private providers of childcare services in the Northern Territory,[39] driving instructors in Queensland who supply their own vehicle,[40] certain delivery drivers in South Australia [41] and direct selling agents operating under a specific exemption in the Northern Territory. [42]

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27 See, for example, s 5(1) WA. Similar provisions in Tas, NSW (WIMWCA) and the ACT. The operation of the NSW provision is highly circumscribed in applying only to a single period of five or less working days: s 4(1)(b) NSW (WIMWCA).

28 S 4(5)(c) Tas.

29 See, for example, s 6(2) ACT. Similar provisions in WA and NT.

30 [1975] 1 NSWLR 353.

31 [1976] VR 13.

32 New South Wales so legislated in 1977 and Victoria in 1978. Also Qld, SA, WA, Tas. In the Northern Territory this exclusion does not operate where sportsperson is entitled to remuneration of not less than 65% of the annual equivalent of average weekly earnings.

33 *Sporting Injuries Insurance Act* 1978 (NSW).

34 Schl 2 Pt 2 cl 1(a), (b) and (c) Qld.

35 S 10A WA.

36 S 3(1) definition of "worker" para (b)(v) and s 3(3) NT.

37 See, for example, Schl 2, Pt 2, cl 3 Qld. Similar provisions in Tas and NT.

38 S 17 WA.

39 Regs 3A(2)(c) and (d) respectively, *Work Health Regulations* (NT).

40 Schl 2 Pt 2 cl 4 Qld, unless such persons are working under a contract of service.

41 Reg 5(13) *Workers' Rehabilitation and Compensation (Claims and Registration) Regulations 1999* (SA).

42 Reg 3A(2)(b) *Work Health Regulations* (NT).

Deemed Inclusions

In contrast to the deemed exclusions, each scheme has deemed that persons involved in certain activities or pursuits ***are*** 'workers' for the purposes of workers' compensation.

One significant area of deemed inclusion is in respect of persons who, although not employed under a 'contract of service' in the strict legal sense, are nonetheless considered appropriate beneficiaries of workers' compensation entitlements. Thus taxi drivers who operate under a contract of bailment (paying a fixed amount or proportion of their receipts as consideration for the use of the vehicle) are deemed to be workers in four jurisdictions.[43] Similarly, ministers of religion, who have uniquely ambiguous employment status, are given such coverage in most jurisdictions.[44] In like vein, coverage is extended in Western Australia, New South Wales and Victoria to tributors[45] and also to sub-tributors in Victoria,[46] as well as to share farmers in Victoria and Queensland[47] and to salespersons, canvassers, collectors or persons paid by commission in New South Wales, Queensland, Tasmania and the ACT.[48] Historically there were issues about the legal employment status of what were formerly called 'crown servants' including police officers.[49] This at least in part accounts for the deemed coverage of police under the Comcare, Northern Territory, Victorian and Tasmanian schemes.[50] Tasmania extends this coverage to police volunteers, as does Victoria where members of the retired police reserve are also covered.[51] Police in Western Australia are entitled to workers' compensation only where death ensues as a result of injury.[52]

A second area of deemed inclusion is in respect of persons engaged in voluntary yet socially important activities. All jurisdictions except Western Australia include volunteer fire fighters.[53] Volunteer ambulance officers are covered in New South Wales, Queensland (provided a contract has been concluded with WorkCover), Tasmania and the Northern Territory.[54] Comcare includes persons involved in search and rescue operations carried out by certain Commonwealth government departments.[55] Mine rescue personnel are covered in New South Wales.[56] The

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43 See, for example, s 7 Vic. Similar provisions in NSW (WIMWCA), SA, Tas and NT.

44 See, for example, s 6A ACT. Similar provisions in NSW (WIMWCA), Vic, SA, WA and Tas.

45 See, for example, s 7(1) WA. Similar provisions in NSW (WIMWCA) and Vic.

46 S 5(6) and (7) Vic.

47 See, for example, s 11 Vic. Similar provisions in Qld.

48 See, for example, Schl 2 Pt 1 cl 3 Qld. Similar provisions in NSW, Tasmania and the ACT.

49 See Peter Hogg, *Liability of the Crown in Australia, New Zealand and the United Kingdom*, Sydney: Law Book Company, 1971.

50 See, for example, ss 5(2)(a) Comcare. Similar provisions in NT, Vic and Tas.

51 See, for example, s 6A(1) Tas. Similar provisions in Vic. For police volunteers see s 2 *Police Assistance Compensation Act 1968* (Vic).

52 S 5(1) WA.

53 See, for example, s 5 Tas. Similar provisions in Comcare, NSW (WIMWCA), Qld (where a contract is concluded with WorkCover), SA and NT. Volunteer and casual fire fighters are covered in Victoria by s 63 of the *Country Fire Authorities Act 1958*.

54 See, for example, s 6(1) Tas. Similar provisions in NSW (WIMWCA), Qld, Tas and NT.

55 *Commonwealth Employees' Rehabilitation and Compensation Act 1998* - Notice of Declarations and Specifications - 1988 Notice. Note that *Commonwealth Employees' Rehabilitation and Compensation Act 1998* is the former name of the *Safety, Rehabilitation and Compensation Act 1998*.

56 Schl 1 cl 8 NSW (WIMWCA).

Northern Territory extends coverage to a range of state emergency personnel.[57] Queensland extends coverage generally to persons engaged in voluntary or community services and workers at non-profit organisations provided a contract is concluded with WorkCover.[58] Comcare covers volunteers at a range of museums and galleries and other organisations such as CSIRO and the Great Barrier Reef Marine Park Authority.[59] Jurors, who are covered by a special scheme in Victoria,[60] are expressly included under the general Northern Territory scheme.[61]

Thirdly, mention has already been made of deemed exceptions to the general exclusion of professional sportspersons. Jockeys are deemed to be workers in all jurisdictions except Tasmania.[62] The Northern Territory and ACT schemes include stable hands,[63] while New South Wales and South Australia extend coverage to harness racing drivers.[64] Boxers, wrestlers, referees or umpires are eligible for workers' compensation in New South Wales, South Australia and the ACT.[65]

A fourth area of deemed coverage is in regard to various work experience and training programmes. Thus, participants in certain school and TAFE work experience programs are covered in Victoria and Queensland,[66] while participants in certain work training programs are covered in New South Wales, Victoria, South Australia and Tasmania.[67] Contrarily, there is an explicit exclusion from coverage in relation to participants in approved programmes and certain work for unemployment schemes in both Queensland and Tasmania.[68]

Fifthly, there are areas of deemed coverage that reflect earlier historical concerns or, conversely (particularly with outworkers) the redressing of former explicit exclusions. One historical group, although with the sharp decline in rural employment not of great numerical significance, is the deemed inclusion of a range of rural workers. Timber contractors are deemed workers in New South Wales and Victoria as well as the ACT (provided the ACT is not the principal).[69] New South Wales, which has the most detailed provisions in relation to rural workers, also includes shearers' cooks and similar workers.[70] As well as the Victorian provision already noted of expressly including outworkers in the definition of 'worker', New South Wales deems

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57 Ss 3(7) NT.
58 Ss 20-1, 23 Qld.
59 These deeming provisions are to be found in a range of *Notices of Declarations and Specifications* declared under s 5(6) Comcare.
60 S 59 *Juries Act 1967* (Vic).
61 S 3A(1)(aa) *Work Health Regulations* (NT).
62 See, for example, s 11A(1) WA. Similar provisions in all jurisdictions except Tasmania.
63 Reg 3A(1)(b) *Work Health Regulations* (NT). Similar provisions in the ACT.
64 Schl 1 cl 9 NSW (WIMWCA). Similar provisions in SA.
65 Schl 1 cl 15 NSW (WIMWCA). Similar provisions in SA and the ACT.
66 See, for example, ss 5(1)(d)-(e) Vic. Similar provisions in Qld.
67 See, for example, s 4D Tas. Similar provisions in NSW, Vic and SA.
68 See, for example, Schl 2 Pt 2 cl 5 Qld, Similar provisions in Tas.
69 See, for example, Schl 1 cls 3 and 4, NSW (WIMWCA). Similar provisions in Vic and the ACT. The qualification in relation to the ACT scheme is found in s 6(3B) ACT.
70 Schl 1 cl 12, NSW (WIMWCA).

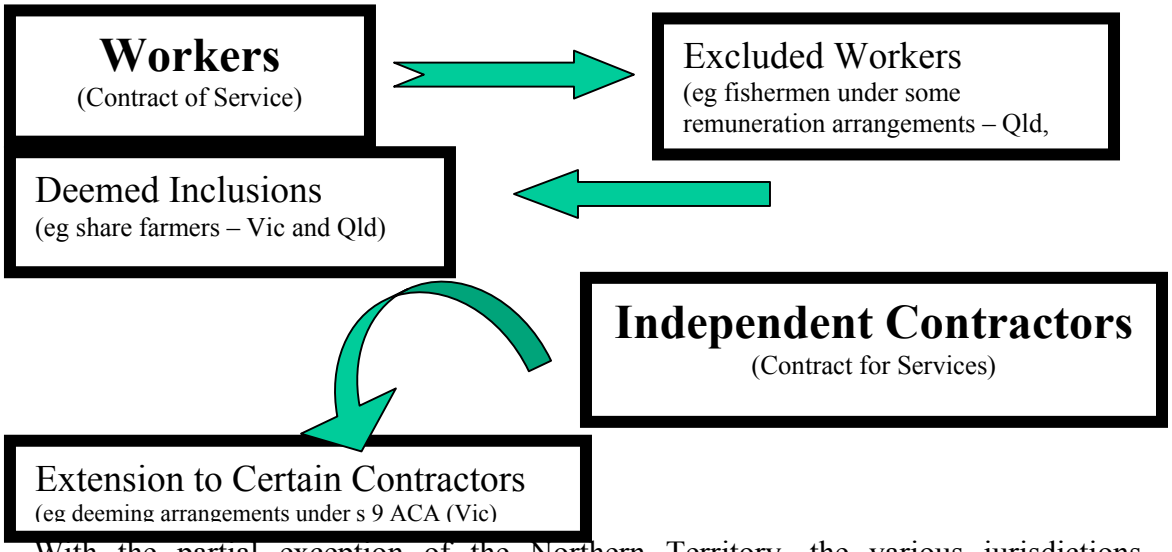
outworkers (as defined) to be workers[71] and South Australia does the same if any aspect of the work is governed by an award or agreement.[72]

Finally, there is a similar potpourri of examples of deemed inclusion paralleling the disparate and seemingly unrelated areas of exclusion listed at the end of the previous section. These include the coverage in Victoria of secretaries of cooperative societies earning more than $200 a year above expenses incurred,[73] coverage in Queensland of employees of corporations placed under administration[74] and coverage in both New South Wales and South Australia of entertainers employed at certain types of performance venues.[75]

Summary

The nature of the coverage of work relationships under workers' compensation arrangements can be summarised in the form of Figure 2 below.

Figure 2:
Nature of Coverage of Work Relationships



With the partial exception of the Northern Territory, the various jurisdictions essentially start from a common base in terms of coverage of work relationships, namely that of the common law contract of service or employment. From that starting point, variations emerge both in respect of exclusion of workers who would ordinarily be regarded as working under a contract of service and contrarily the deemed inclusion of other workers who would not be so regarded (for instance, taxi-drivers who operate under a contract of bailment). Many areas of exclusion (for instance domestic servants) represent the restrictive historical legacy of the early workers' compensation statutes; exclusions that cannot currently be justified on any grounds of

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71 Schl 1 cl 2(1)(b) NSW (WIMWCA).

72 Reg 4(1c) *Workers Rehabilitation and Compensation (Claims and Registration) Regulations 1999* (SA).

73 S 13, Vic.

74 Schl 2A cl 7 Qld.

75 See, for example, Schl 1 cl 15 NSW (WIMWCA). Similar provisions in SA.

principle, policy or scheme costs. They involve very few workers and extension of coverage to them would have an infinitesimal impact upon the costs of workers' compensation schemes.

The exclusion of crew-members of fishing vessels in four jurisdictions rests upon the notion that these workers are in fact co-venturers. However, in functional terms, except perhaps in Western Australia, this is a fiction and such workers should be regarded as being in an employment relationship and given coverage for workers' compensation. The exclusion of sportspersons from coverage dates from a time when sporting bodies were generally unincorporated associations and stemmed from a fear of the possible personal liability of club members for compensation payments and damages awards to injured players. Today such bodies, almost without exception, would be incorporated and consequently this rationale for exclusion has disappeared. In its place has come the fear of the premium impact of coverage. In the course of the last few decades there has been an astronomical increase in the remuneration of elite sportspersons and the current concern is on the impact upon a club's workers' compensation premiums of a serious injury to one or more star players. This concern is perhaps not so much with compensation payments (which are generally have caps on maximum weekly benefits) but more with the impact of common law awards or settlements. However such economic arguments do not justify exclusion of persons who are properly regarded as employees.

The deemed inclusion of a diverse range of workers represents a potpourri of examples without any single defining principle, apart from some inchoate notion that they represent socially desirable areas of coverage. In practice, they often represent the impact of political events over the years; for instance, the inclusion of share farmers in Victoria stems from the period when Victoria had a Country Party premier. The group of voluntary workers who are covered – particularly volunteer firefighters – is generally also testimony to political clout as one of the authors of this paper is aware of government resistance to the extension of this principle to other volunteer workers (for example, community visitors) whose work is arguably similarly socially meritorious.

The substantial changes in the nature of the labour market and the form of employment relationships in recent decades have made much more difficult the process of easily determining, in the case of more complex work relationships, whether such a relationship falls within the notion of a contract of service. Consequently the utility of recourse to this primary touchstone for determination of scheme coverage becomes increasingly problematic. As well, the process of deemed inclusion whereby coverage has been extended to a range of relationships that fall outside of the contract of service makes the situation of other similar relationships, that do not receive such recognition, quite invidious. In these respects the situation of workers' compensation, in respect of who is covered, becomes increasingly difficult to justify, compared to the more generalised coverage of most social insurance schemes and also occupational health and safety systems. There is, at the beginning of the twenty first century, a strong case for workers' compensation schemes providing coverage for all working relationships, including the self-employed, such as is the case in the comprehensive accident compensation arrangements in New Zealand and in many social insurance systems.

For what is Compensation Payable? The Concepts of 'Injury' and 'Disease'

Entitlement to workers' compensation benefits arises where a 'worker' (see above) suffers an 'injury' or 'disease' that can be sufficiently linked to employment (see below). The manner in which the terms 'injury' and 'disease' are defined differs between various jurisdictions. Most schemes employ a compendious notion of 'injury' incorporating injury simpliciter, disease and industrial deafness.[76] South Australia and Western Australia have both adopted an umbrella concept of 'disability' defined to include both injury and disease.[77] The ACT separately defines the concepts of injury and disease.[78] As well, regardless of definitional form, entitlement also extends variously to the acceleration, aggravation, deterioration, exacerbation or recurrence of a pre-existing injury or disease.[79]

The concept of 'injury' or 'personal injury' bears its everyday ordinary meaning. This involves any harm caused to a person's body as the result of any form of trauma. As such it has wide compass including harm or damage sustained externally and internally. Apart from the more usual cases of contusions, fractures, abrasions and sprains, examples of external harm from trauma include situations of sunstroke and frostbite. All jurisdictions except New South Wales, Queensland and Tasmania expressly provide that mental as well as physical injuries are covered.[80] The concept of 'disease' is generally defined to include any physical or mental ailment, disorder, defect or morbid condition, whether of sudden or gradual development.[81] There is considerable overlap between the definitional reach of 'injury' as against that of 'disease', particularly in respect of conditions of internal harm such as internal rupture of muscle or tissue and collapsed vertabrae. Where there have been different conditions respecting compensation recovery with respect to injury vis a vis disease, this overlap has been productive of extensive litigation.[82] It has been a traditional feature of Australian schemes for the need of some additional element of connection to the employment and the disease in order to found a compensation claim. However, in recent years, a number of jurisdictions also now require such an additional requirement in the case of injury claims as well.

Disease conditions present particular problems for compensation schemes, particularly with questions of causation and evidential issues for sustaining a claim. The response has sometimes been in terms of enacting separate statutory schemes or having special provisions relating to particular disease conditions within the primary workers' compensation statute. An example of a separate statutory scheme is that established in New South Wales by the Workers Compensation (Dust Diseases) Act

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76 See, for example, s 5(1) Vic.

77 See, for example, s 3(1) SA. Similar provisions in WA.

78 S 6(1) ACT.

79 See, for example, s 5(1) Vic.

80 See, for example, s 5(1) Vic. Similar provisions in Comcare, Seacare, the ACT, WA, SA and NT. However such coverage is implicit in the other three jurisdictions through the provisions to exclude compensation for mental injury resulting from particular circumstances, namely reasonable disciplinary action etc.

81 See, for instance, s 5(1) Vic. Also see SA, WA, Tas, ACT and NT.

82 See the summary of such litigation in respect of the NSW legislation in the judgment of Kirby J in *Zickar v MGH Plastic Industries Pty Ltd* (1996) 71 ALJR 32 at 46-55.

1942.[83] All jurisdictions have occupational disease schedules listing a series of occupational diseases together with particular occupational categories or work descriptions. The effect of such scheduling is that where a worker of the scheduled occupational class or engaged in the scheduled work description develops a scheduled occupational disease the onus of proof is reversed so that the disease is regarded as being of occupational origin unless it can be proven otherwise.[84] South Australia has a rebuttable presumption that employment has contributed to the aggravation etc. of a pre-existing heart disease that has arisen in the course of employment.[85]

As well, particular jurisdictions have special provisions dealing with particular conditions governing compensation entitlements in respect to particular diseases.[86]

Each jurisdiction has excluded certain stress-related conditions from the range of injuries and diseases for which compensation is payable. All jurisdictions have excluded psychological injuries stemming either from reasonable disciplinary action taken by an employer against a worker or decisions made with respect to promotion, demotion, retrenchment or dismissal etc.[87] New South Wales, Comcare and the ACT expressly extend the exclusion to cover proposed action of this nature,[88] while Victoria, Western Australia and Queensland exclude stress-related injuries caused by a worker's expectation of this action.[89] The Queensland scheme also excludes psychological injuries caused by action taken by WorkCover or a self-insurer in connection with a workers' compensation claim.[90]

The Nature of the Employment Connection

Provided a person can bring him- or herself within the definition of 'worker' and provided a compensable injury or disease has been suffered, entitlement to compensation will arise provided the requisite nexus between the injury or disease and the employment relationship can be proven. As was mentioned above, the early Australian workers' compensation statutes followed the original English legislation in positing a test for compensability of an injury 'arising out of and in the course of employment.' Although this formula has been retained in Tasmania,[91] all other Australian jurisdictions have replaced the conjunctive ('and') with a disjunctive ('or') making compensation available where injury arises either 'out of' *or* 'in the course of' employment.[92] In this disjunctive requirement, 'arising out of employment' denotes a causal connection with the employment relationship, while 'arising in the course of employment' a temporal connection.

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83 See also the *Workers' (Occupational Diseases) Relief Fund Act 1954*, Tas; *Waterfront Workers (Compensation for Asbestos Related Diseases) Act 1986*, WA

84 See, for example, Schedule 2, SA. Similar provisions in all other statutes or through declarations or proclamations made pursuant to a provision in such statute.

85 S 31(5) SA.

86 For instance ss 149-150 Qld dealing with miners contracting silicosis or anthraco-silicosis and s 25A Tas dealing with claims for certain diseases arising from mining operations.

87 See, for example, s 82(2A)(a) Vic.

88 See, for example, s 11A(1) NSW (WCA). Similar provisions in Comcare and the ACT.

89 See, for example, s 82(2A)(c) Vic. Similar provisions in WA and Qld.

90 S 34(5)(c) Qld.

91 S 25(1) Tas.

92 For example s 3(1) NT. Similar provisions in Comcare, Seacare, NSW (WIMWCA), Vic, the ACT, WA, SA and Qld.

Arising out of the employment

Some consideration has been made earlier in this paper of various tests that courts have utilised in determining whether a particular injury has arisen out of the employment. As discussed above, the essential Australian position has been that of the actual risk test. This was established by the early 1930s, by the decision of the Privy Council in *Brooker v Thomas Borthwick & Sons (Australasia) Limited*[93] and that of the High Court in *Smith v Australian Woollen Mills Limited*.[94] *Brooker* involved claims arising out of an earthquake in the Hawkes Bay district in New Zealand that led to a number of deaths and injuries, particularly as a result of a building collapse. The Privy Council rejected the argument (based on the peculiar risk test) that the deaths and injuries resulted from a natural disaster that affected the community generally and were therefore not connected to the employment. Instead it held that they did arise out of the employment since the immediate cause was associated with the employment by virtue of the fact that the employees were working inside the employer's premises when they were destroyed or were otherwise performing employment duties. This position was endorsed very soon after by the High Court in *Smith*, a case in which a worker fainted while engaged in his duties of working upon wool carding machines and fractured two ribs as he fell against some guard rails. The cause of the fainting spell was the worker's diabetes. The High Court held that while this diabetic condition was both the ultimate cause of the injury and one that was unrelated to his employment, the injury nevertheless arose out of the worker's employment since the nature and extent of the injury suffered was determined by the fact that he was at work and this work brought him into the proximity of the guard rails which were part of the employer's plant.

This is not to say that some court decisions that rest upon a view of the arising out of employment limb of the primary entitlement requirement may not have utilised a different test. For instance, that in *Davis v The Commonwealth*[95] in which an airman based in Thailand contracted a virus infection is essentially based upon the increased risk test. It was decided that the airman's incapacity arose out of his employment on the basis of evidence that demonstrated a greater risk of infection from that virus in Thailand. However, the general ruling test for the arising out of employment limb is that of the actual risk test.

In the course of the employment

With the move from the conjunctive to the disjunctive form of the primary entitlement provision that began to take place from the 1920s, most cases came to be determined under the in the course of employment limb of that formulation. As also mentioned above, it was not until the High Court decision in *Kavanagh v The Commonwealth*[96] in 1960 that it was definitively determined that this element was purely temporal in nature and that the worker need only be engaged in an activity that was part of or incidental to his or her employment.

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93 [1933] AC 669.
94 (1933) 50 CLR 504.
95 (1968) FLR 312
96 (1960) 103 CLR 547

This is not to say that the operation of the in the course of employment route to entitlement is without its own set of issues. In any formulation there will always be matters of dispute at the edges. In the case of the in the course of employment element these edges concern the time and space parameters of the employment and also what constitutes an activity that is part of or incidental to the employment. Occasionally there may be some legislative assistance as to what constitutes the time boundary of the employment; for instance, the South Australia provisions that recognise, as being in the course of employment, injuries sustained during attendance at work in preparation for work, prior to the actual commencement of work, and such attendance after work ends while the worker is preparing to leave or is in the process of leaving the workplace.[97]

As well, the time boundary of the employment may be affected by statutory provision regulating the coverage of travel to and from work. At common law an employee is not ordinarily regarded as being within the course of his or her employment whilst travelling to or from work. This is even the case where the employer provides the transport, except in the additional circumstance where the worker is obliged by the terms or his or her contract of employment to make use of this method of transport.[98] As has been already noted, from the 1940s, the various Australian jurisdictions moved to enact specific deeming provisions whereby journeys to and from work, together with some other recognised forms of travel (for instance, in respect of medical treatment), were recognised as being in the course of the worker's employment. Then, during the 1990s, a number of jurisdictions reversed or modified this aspect of deemed coverage. The current situation is considered in the discussion of travel injuries below.

The deemed recognition of an employee's commuting to and from work brings with it another set of questions as to where does such a journey begin and end. The particular issues concerning the starting point when going from home to work are examined below. As well, there needs to be a determination of the boundaries of the employer's premises. While in general terms, apart from the precise determination of boundary lines in particular cases, this does not usually present great problems, there may be situations where ascertaining what constitutes the place of employment may be problematical.[99] More complex issues of determining the parameters of the time and space of the employment present themselves in respect to the activities of certain types of employees, such as salesmen and commercial travellers, whose working arrangements are characterised by a high degree of fluidity. Such matters can take on additional complexity in the context of arrangements governing work in remote regions of Australia which may take a person away for periods of months at a time. The leading case of *Hatzimanolis v ANI Corporation Limited*[100] vividly illustrates some of these issues and broad scope given to the notion of the course of employment in contemporary Australian jurisprudence. In that case, an electrician was engaged for a three-month project in a remote part of Western Australia. The work involved

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97 S 30(3)(a) and (c) SA.

98 *St Helen's Colliery Ltd v Hewitson* (1924) AC 59 and *Weaver v Tredegar Iron and Coal Ltd* (1940) 955.

99 For instance, the New South Wales case of *Bull v Schweppes (Aust) Pty Ltd* [1960] WCR 67 where Wall J found that the place of a union picnic was a place of employment for those who attended it.

100 (1992) 173 CLR 473

working six days a week and occasional Sundays in return for which the company provided full board and accommodation and access to two company vehicles that could be used for company sanctioned sight-seeing on Sundays on which the worker was not required to be on duty. On the return journey from one such sight-seeing trip, Hatzimanolis was severely injured when the company vehicle overturned. The New South Wales Court of Appeal denied compensation on the grounds that the trip was not incidental to the worker's employment. However, the High Court overturned that decision. It took an expansive view of the nature of the employment and held that the entire time during which the worker was engaged constituted an overall period or episode of work. Although the worker's injuries were sustained in an interval between undertaking his ordinary duties, they occurred during a company-sanctioned activity and were consequently sustained in the course of his employment.

It may be that the expansive approach to this issue, exemplified by *Hatzimanolis*, and characteristic of the style of the Mason High Court, in part constituted a stimulus to the process of roll-back, in terms of a legislated requirement for a significant employment connection to found compensability of claims, that emerged during the 1990s. However, as already discussed, a combination of more generalised factors emerged to stamp upon the 1990s a radically different set of changes from those that emerged from the 1980s. Some of these are discussed in the succeeding sections of this paper.

General Test of Employment Connection

As previously mentioned Victoria, in 1992, legislated the requirement for a specific test of work-relatedness, in addition to the general 'arising out of or in the course of employment' condition. This was framed in terms of a condition that a worker's employment was 'a significant contributing factor' to the injury. [101] It was further provided that, in determining this issue, a number of issues must be taken into account. These are the duration of the worker's current employment, the nature of the work performed, the particular tasks of the employment, the probability of the injury occurring if that employment had not taken place, the existence of any hereditary risks, the lifestyle of the worker and the activities of the worker outside the workplace.[102]

Similarly, New South Wales adopted its own additional test in 1996 (commencing 12 January 1997) but adopted the terminology of 'a substantial contributing factor' to the injury.[103] However, this additional requirement is not operative in respect of journey or recess claims, or for certain claims made by trade union representatives.[104] Again, similar to Victoria, the New South Wales provisions outline a range of (non-exhaustive) relevant considerations to be taken into account in determining whether a worker's employment was a substantial contributing factor to an injury. These involve the time and place of injury, the nature of the work performed and the particular tasks of the work, the duration of the employment, the probability that the injury or a similar injury would have happened anyway but for the employment, the

101 S 82(1) Vic.
102 S 5(1B) Vic.
103 S 9A(1) NSW (WCA).
104 S 9A(4) NSW (WCA).

state of the worker's health before the injury and the existence of any hereditary risks, the worker's lifestyle and his or her activities outside the workplace.[105]

Then Queensland, in 1999, moved to legislate for the Victorian test of 'a significant contributing factor',[106] with the proviso, however, that this additional requirement does not apply with respect to recess[107] or journey injuries.[108]

The intention of the legislature with these moves was unambiguously in the direction of requiring a very clear degree of employment connection to the injury as a basis for compensability. The Victorian Minister in introducing the 1992 legislation made the point that the 'word "significant" has been included in the definition of injury and elsewhere in the Act to emphasise the point that workplace injuries will be compensable under WorkCover only if there is a strong connection between work and the injury.'[109] However, the judicial interpretation of what is meant by 'significant contributing factor' and 'substantial contributing factor' in the Victorian and New South Wales provisions, respectively, has been very opaque and unclear. Indeed Meagher JA in a recent New South Wales Court of Appeal decision observed:[110]

> Many judges have spent a great deal of time and difficulty analysing and pondering the meaning of the word 'substantial'. But this word is a plain English word which is understood by anyone who is not a judge. Nor have the endless judicial lucubrations on the word contributed to anyone's understanding of it. And nobody in their senses would regard a cause which could be correctly categorised as very 'minor' as 'substantial'.

In Victoria, Ashley J, in examining the interpretation of 'significant contributing factor', in *Popovski v Ericsson Australia Pty Limited*,[111] considered that it represented a less stringent requirement than that for the injury to 'arise out of the employment' in that it is possible to envisage situations where the injury might satisfy the former test but not the latter. As to the meaning of 'significant', Ashley J noted a spread of views in the County Court from that of 'more than de minimis but less than a major or dominant factor' to that 'of considerable amount of effect'. While inclining more to the second of these interpretative meanings, Ashley J, went on to observe that 'at a practical as distinct from conceptual level, the distinction between an employment contribution exceeding de minimis and an employment contribution of considerable amount or effect may be more apparent than real.'[112] In a later decision, Ashley J has queried whether, as a matter of statutory construction, the 'significant contributing factor' test even applies to injuries in the primary sense but rather simply to disease and aggravation of injury and disease claims.[113]

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105 S 9A(2) NSW (WCA).

106 S 34(1) Qld

107 S 36(2) Qld

108 S 37(2) Qld

109 *Hansard*, Legislative Council, 13 November 1992, p 608.

110 *Arnold Dayton v Coles Supermarkets Pty Limited* [2001] NSWCA 153.

111 [1998] VSC 61. While the decision in *Popovski* was overturned by the Court of Appeal this was on grounds unrelated and Ashley J's position on these matters was not discussed in the appeal.

112 *ibid* para 61.

113 *Hegedis v Carlton & United Breweries & Anor* [2000] VSC 380. At time of writing this decision is on appeal.

The New South Wales Court of Appeal has considered the 'substantial contributing factor' test in the New South Wales statute on two occasions. In *Mercer v ANZ Banking Group*[114] Mason P (with whom Meagher and Beazley JJA agreed without supporting arguments of their own) rejected the position of Bishop J of the Compensation Court that 'a substantial contributing factor' is as stringent a concept as that of 'arising out of' the employment, explicitly endorsing the contrary view of Ashley J in *Popovski* noted above. In remitting the proceedings for a further hearing in the Compensation Court, Mason P acknowledged that section 9A leaves a broad area within which the personal judgment of the individual judge as to what is 'substantial' may be determinative. However, he also found that section 9A applies to cases of both injury and disease and does not require that employment be 'the' substantial contributing factor. Further, and importantly, Mason P held that the absence of 'employment characteristics' in the precise activity that led to the injury should not be treated as determinative by the judge deciding the issue. Perhaps not surprisingly, an attempt was made to appeal the case to the High Court. However, Gaudron and McHugh JJ, while not being convinced that the Court of Appeal had 'correctly analysed the decision' of the judge at first instance, nevertheless did not consider it an appropriate case for the grant of special leave.

Almost exactly a year after its decision in *Mercer*, the Court of Appeal again considered the meaning of section 9A in *Dayton v Coles Supermarkets Pty Ltd*.[115] This time all three judges (Meagher and Giles JJA and Davies AJA) delivered opinions. Giles JA noted that *Mercer* was the 'only appellate decision involving the meaning to be given to 'substantial' in s 9A(1)' but found himself having 'some difficulty in gaining from the decision clear guidance as to the meaning of [this term].'[116] Surprisingly, neither of two other judges alluded to *Mercer*.[117] Apart from rejecting the proposition that a cause that could be categorised as minor could meet the test of substantial, Meagher JA did not offer any further elucidation as to what is meant by 'substantial', while Giles JA concluded that a contributing factor which is minor, in comparison with two other substantial factors, is not a substantially contributing factor. Only Davies AJA made some attempt at a definition, namely that the words 'substantial contributing factor' require that compensation only be paid when the employment contributed to the injury in 'a manner that is real and of substance.' However, this attempted definition suffers from its own opacity and it may be that the High Court will again, notwithstanding the refusal for special leave in *Mercer*, sometime be called to serve, in what has come to be a not uncommon role, as the arbiter on provisions in the New South Wales legislation.

The upshot is that there is currently considerable uncertainty as to the precise nature of the work relatedness concept, in terms of a general test of employment connection. This should be of some concern since this test is the ruling doctrine in Victoria, New South Wales and Queensland, jurisdictions which collectively provide workers'

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114 [2000] NSWCA 138

115 [2001] NSWCA 153.

116 *ibid*, para 24.

117 Meagher JA was a member of the court in both decisions.

compensation coverage for some 6.04 million workers.[118] The notion of what should be the proper nature of work-relatedness necessary to found a claim under the 'in the course of employment' limb of the primary entitlement provision has moved from the settled jurisprudence brought about by the decision of the High Court in *Kavanagh v The Commonwealth* (in terms of a purely temporal requirement with a worker simply having to be engaged in an activity that was part of or incidental to his or her employment) to the present uncertainty as to what is meant by the statutory requirement that a worker's employment must be a 'significant' (Victoria and Queensland) or 'substantial' (New South Wales) 'contributing factor' to the injury. The attempts, to date, by the courts to give meaning to these provisions has smacked of judicial sophistry and the intervention of the High Court may be needed for definitive guidance.

Test Relating to Disease

While the requirement of an element of work-relatedness, additional to that inherent in the primary entitlement provision, is a relatively new development with respect to injury claims, there has traditionally been some requirement of work-relatedness in respect to the compensability of disease claims. The test is often quite low. For instance, in the ACT employment must simply be a 'contributing factor' to the contraction of a disease or the suffering of an aggravation, acceleration or recurrence of a disease.[119] Similarly, in South Australia, the employment must have 'contributed' to the disability in the case of diseases and secondary disabilities.[120] Under Comcare the employment must have 'contributed to in a material degree' to the contraction of the disease,[121] a requirement that has been found to be no more than 'pertinent or likely to influence'.[122]

In Tasmania the test was that the employment contributed to the disease 'to a substantial degree'.[123] The meaning of this term was considered by the Full Court of the Supreme Court of Tasmania in *University of Tasmania v Mary-Anne Cane*.[124] In that case, Wright J considered that the word 'substantial' was used in a relative sense with a recognition that there may be other causes for the disease. Accordingly there may be a number of 'substantial' factors causing a particular condition. In particular he held that the provision does not require that employment be 'the' substantial cause of the disease. Similarly, Slicer J found that the provision did not attempt to fix a percentage of employment contribution or to exclude the operation of other contributory factors including predisposition or susceptibility to a particular condition. More particularly he found that the work component was one that was required to 'be more than trivial or inconsequential.'[125] In an effort to overcome the effect of this decision, amending legislation was enacted, taking effect from 1 July 2001, that

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118 Heads of Workplace Safety and Compensation Authorities, *Workers' Compensation Arrangements in Australia and New Zealand*, November 2001, pp10-11.

119 S 9(1) ACT.

120 S 30(2)(b) SA.

121 S 4(1) Comcare.

122 *Miers v Commonwealth* (1990) 20 ALD 483.

123 S 25(1)(b) and 3(2A) Tas.

124 (1994) 4 Tas R 156.

125 Cox J agreed with both Wright and Cox JJ.

stipulated that the term 'substantial degree' was to be regarded as meaning 'the major or most significant factor'.[126]

In Victoria, New South Wales and Queensland the legislative changes already referred to above require that the employment be a 'significant', 'substantial' or 'significant' contribution to the contraction of the disease or the aggravation etc of a pre-existing disease, respectively. In Western Australia, there is a requirement that, in respect of a disease or the recurrence, aggravation or acceleration of a pre-existing disease, the employment must be a contributing factor and contribute to a significant degree.[127] In determining the issue of employment contribution and that of contribution to a significant degree, a number of matters shall be taken into account. These are the duration of the employment; the nature of, and particular tasks involved in, the employment; the likelihood of the contraction, recurrence, etc of the disease occurring despite the employment; the existence of any hereditary factors in relation contraction, recurrence etc of the disease; matters affecting the worker's health generally; and activities of the worker not related to the employment.[128]

In summary, while the requirement for an element of employment connection, in addition to the 'arising out of or in the course of employment' condition, has been a traditional prerequisite for disease claims, the nature of this requirement has varied considerably between jurisdictions. As well, as illustrated by the Tasmanian experience, there has been a similar degree of sophistry and opacity in the judicial treatment of the additional requirement as has been exhibited more recently with respect to such additional requirements in relation to injuries, discussed above.

Legislative Modification of Commuting and other Travel Arrangements

One difference between workers' compensation arrangements in Australia and those, for instance, in the United States is in the extension of the course of employment coverage to commuting arrangements. Such coverage was never part of English workers' compensation arrangements and the position at common law is that compensation is not available for injuries sustained during journeys to and from work except in the narrow circumstance that the worker is travelling in transport provided by the employer and is obliged by the terms or his or her contract of employment to make use of this method of transport.[129] During the 1940s most Australian jurisdictions reversed this general exclusion by enacting specific deeming provisions in relation to journeys to or from work to recognise them as being in the course of employment. Then, almost equally as dramatically, during the 1990s, a number of jurisdictions either abrogated such coverage or continued its operation subject to particular restrictions.

However, apart from travel that is integral to employment duties, either generally (for example, transport drivers) or incidentally (such as undertaking employment-related errands), there exists a range of other situations where travel arrangements may be

126 S 3(2A) Tas.
127 S 5(1) WA
128 S 5(5) WA
129 *St Helen's Colliery Ltd v Hewitson* (1924) AC 59 and *Weaver v Tredegar Iron and Coal Ltd* (1940) 955.

accorded the status of workers' compensation coverage. These include travel to educational institutions for trade or technical training etc or for receiving medical or allied examination or treatment. The result of recent changes means that the coverage for commuting and other travel arrangements, between the various jurisdictions represents a complex mosaic of disparate arrangements. Similarly complex, is the alternative compensation arrangements that may be available if workers' compensation coverage does not exist. Three Australian jurisdictions – Victoria, Tasmania and the Northern Territory – have no-fault motor accident compensation schemes of varying levels of comprehensiveness. In other jurisdictions recourse will have to be made for tort-based compensation under compulsory third-party insurance arrangements, with the requisite need to demonstrate fault in another party to ground recovery, or other alternatives. Such alternatives may include the federal social security system, private disability insurance, occupational sick pay or drawing upon personal savings.

Commuting Arrangements

Journeys to and from home and the workplace generally still receive deemed coverage in all jurisdictions except for Victoria, Tasmania and Western Australia (where coverage has essentially been abrogated) and South Australia, where such coverage has been restricted. The South Australian journey provisions require that there be a 'real and substantial connection' between the employment and the accident out of which the disability arises, a connection that will not be satisfied by the mere fact that the journey is to or from work.[130] In the Northern Territory amending legislation, in 1991, transferred most commuting coverage involving motor vehicles from the Work Health scheme to the no fault motor accident scheme governed by the *Motor Accident (Compensation) Act* (MACA).[131]

In Queensland the coverage is for a journey between a person's home and place of employment. The term 'home' is not defined. By contrast, in New South Wales the terminology is 'place of abode' which is defined as including the place where a worker has spent the night preceding a journey and from which the worker is journeying and also the place to which the worker is journeying with the intention of spending the night there following a journey.[132] New South Wales recognises the widest or most highly nuanced range of commuting arrangements of any jurisdiction including a journey between any camp or similar temporary residence connected with their work and place of abode and between their place of abode and a place of pickup.[133] Similarly, Comcare's definition of a 'place of residence' includes the place where the employee normally resides, another place where an employee temporarily resides for the purpose of their employment and any other place where an employee stays or intends to stay overnight. However, in respect of this last formulation of 'place of residence', there is an additional requirement that the journey from work to that place does not substantially increase the risk of injury compared with a journey from work to their normal place of residence.[134]

130 S 30(5)(b)(i) and 30(6) SA.
131 S 4(2A)(b) NT, with some qualifications in s 4(2B).
132 S 10(6) NSW (WCA).
133 S 10(3)(e) and (f) NSW (WCA).
134 S 4(1) Comcare.

The recognition of coverage for journeys to and from work brings with it a requirement to specify where such journeys begin. Various jurisdictions have defined the boundary line of 'place of residence' in different ways. In New South Wales, the boundary of a worker's 'place of abode' is now defined as the boundary of the land on which the place of abode is situated.[135] Similar definitions exist in Queensland[136] and under Comcare, although the Comcare definition makes allowance for the fact that, where an employee owns or occupies a parcel of land contiguous with that upon which the employee's residence is situated, the relevant boundary is that of the contiguous parcels of land if treated as a single parcel.[137] The ACT legislation is silent upon this issue, but the Supreme Court of the ACT has upheld claims by workers who slipped on stairs leading from their flat[138] or to their garage[139] while on their way to work as being in the course of employment.

Other Journey Arrangements

Journeys between the workplace and places the worker is required by the employer to attend for education or training are explicitly covered in all jurisdictions except the ACT.[140] While in South Australia there is still the requirement that there be a 'real and substantial connection' between the employment and the accident at which the disability arises, the fact that this journey provision is framed in terms of attendance at an educational institution under the terms of an apprenticeship or other legal obligation or at the employer's request or with the employer's approval should mean that this requirement is essentially fulfilled without further requirement.[141]

Also, journeys between the workplace and places the worker is required to attend for the purposes of obtaining medical certificates or treatment etc or for picking up compensation payments are explicitly covered in all jurisdictions.[142] Comcare also extends coverage to members of the Australian Defence Force, Air Training corps, Australian Cadet corps and Naval Reserve Cadets who suffer injuries as an unintended consequence of medical treatment paid for by the Commonwealth.[143] The New South Wales scheme also covers journeys for consultation etc in relation to artificial aids.[144]

Limitations on Journey Claims

The extension of coverage to journey injuries by the Australian schemes from the 1940s was subject to certain coverage qualifications. The most important of these was the loss of coverage in the case of a substantial interruption of, or substantial deviation from, the purpose of the journey (for example, commuting, attending an

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135 S 10(4) NSW (WCA).
136 S 37(3) Qld.
137 S 6(1A) and 6(1B) Comcare.
138 *Evans v Marco Pty Ltd* 16 ACTR 11.
139 *Grace Bros Pty Ltd v Ubojcic* (1988) AWCCD ¶ 73-42
140 See for example s 4(1)(c) NT. Similar provisions in Comcare, NSW (WCA), Vic, Qld, SA, WA and Tas.
141 S 30(5)(b) SA.
142 See for example s 6(1)(b)(viii) Comcare.
143 S 6A Comcare.
144 Ss 10(3)(d) and 74(3) NSW (WCA).

educational institution etc) that materially added to the risk of injury.[145] These limitations have been maintained in the current schemes with a number of jurisdictions either refining such limitations or adding new grounds for coverage exclusion. Thus in New South Wales the traditional qualification is maintained in essentially the form just quoted,[146] but has been joined by an additional disqualifying element of serious and wilful misconduct in terms of being under the influence of alcohol or another drug unless this did not contribute to the injury or the substances were not consumed or taken voluntarily.[147] Additionally coverage is denied where the injury results from a medical or other condition that was not caused by or contributed to by the journey.[148]

The other jurisdictions, apart from Tasmania, reflect variants of this situation, for instance in terms of maintaining the traditional exclusion for a substantial interruption to or deviation from a work-related journey that materially increases the risk of injury, although there may be some finessing of the terminology. Comcare precludes compensation where a worker has chosen a route that substantially increases the risk of an accident when compared with a more direct route or for an interruption that similarly increases such risk.[149] The ACT and the Northern Territory similarly require the worker to have been travelling by the 'shortest convenient route,'[150] while South Australia requires that a worker must have taken a 'reasonably direct route.'[151] In Queensland the exclusion operates in respect of a substantial delay before the worker starts the journey or makes a substantial interruption of or deviation from the journey, except where the delay, interruption or deviation is connected with the worker's employment or arises from circumstances beyond the worker's control.[152]

Other Statutory Modifications – Coverage Exclusions and Inclusions

While workers' compensation is essentially a no-fault system of compensation, injuries that result from certain types of worker behaviour can be excluded from scheme coverage. On one level of analysis this can be seen as the introduction of some element of fault into the operation of the system. On another level, there may be mounted a justification for such exclusions that are explicitly tied to the notion of work-relatedness as a controlling element for scheme coverage (see above). On this level, there may be more than one notion of work-relatedness to which an appeal may be made. For instance, the justification for excluding an injury resulting from serious and wilful misconduct may be attempted, variously, on the basis that there was no employer benefit; that there was no causal relationship between the injury and the employment; that, while there may be a nexus with the employment in terms of time and space, there was no nexus with an activity of an employment-like character.

The various schemes have retained a feature from the original English statutes, namely the exclusion from receipt of benefits for injuries that are self-inflicted.[153]

145 See, for example, s 8(2)(b) *Workers Compensation Act 1958* (Vic)
146 S 10(2) NSW (WCA).
147 Ss 10(1A) and 10(1B) NSW (WCA).
148 S 10(1C) NSW (WCA).
149 S 6(2)(a) Comcare.
150 See, for example s 4(1)(b), (c) and (e) NT. Similar provision in the ACT.
151 S 30(7) SA.
152 Ss 38(2)(b) and 38(3) Qld.
153 For example, s 26(2) Seacare. Similar provision in all other jurisdictions.

Similarly with injuries that are caused by the serious and wilful misconduct of the worker unless the injury results in death or serious and permanent impairment or incapacity.[154] The only real difference in terminology is the use of 'long-term' in place of 'permanent' incapacity in the Northern Territory[155] and the attempt to quantify what is meant by permanent impairment in Queensland. This is specified to be where WorkCover considers that the injury could result in a work-related impairment (WRI) of 50 percent or more, except that compensation is still not payable for injuries that could result in a WRI of 50 percent or more where this arises from a psychiatric or psychological injury or combining such an injury with another injury.[156] Traditionally, what is meant by 'serious and wilful misconduct' has not been further defined or illustrated. However, in recent years, a number of jurisdictions have specifically included injuries attributable to being under the influence of alcohol or other drugs as being encompassed within the serious and wilful misconduct exclusion[157] and/or specified particular offences (especially in respect of the use of motor vehicles) as amounting to serious and wilful misconduct.[158] In Western Australia, serious and wilful misconduct extends to the failure by a worker, without reasonable excuse, to use protective equipment etc provided by the employer.[159]

In respect to disease claims, a number of jurisdictions preclude compensation in circumstances where a worker has made a wilful and false representation that he or she does not suffer from the disease.[160] As well, there are a range of other express exclusions from coverage in particular jurisdictions such as in respect of social or sporting activities except where the activity forms part of the worker's employment or is undertaken at the request or direction of the employer.[161]

Just as the governing statute may exclude coverage as the result of particular actions by a worker or in respect to particular activities, concomitantly, there may be specific provisions enabling such coverage. As already discussed, one important area of statutory extension has been in respect of journey injuries. Just as this extension includes travel to places of education or training and travel to a place of medical treatment and like activities, the actual engagement, involvement or participation in such duties and activities has generally been recognised as being in the course of employment. Thus there is general coverage in respect of an injury sustained while attending certain places or institutions for the purposes of work-related education[162] or at a place for receiving medical or hospital treatment or obtaining a medical certificate etc.[163] or for picking up compensation payments etc.[164] As well, New South Wales expressly covers injuries sustained by trade union representatives while undertaking these duties or on an associated journey.[165]

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154 For example, s 26(3) Seacare. Similar provision in all other jurisdictions.
155 S 57(1) NT.
156 Ss 157(1) and (2) Qld.
157 For example, s 82(4) Vic. Also SA, WA, NSW (journeys).
158 For example, 82(4A) Vic. Also Qld (journeys).
159 S 22 WA.
160 see for example s 7(7) Comcare. Similar provisions in the ACT, Vic and Tasmania.
161 See for example s 30(4) SA. Similar provision in Tasmania.
162 See for example s 4(1)(d) NT. Similar provisions in Comcare, Vic, Qld, WA, SA.
163 See for example s 19(1)(b) WA. Similar provisions in Comcare, Vic, Qld, SA, NT.
164 See for example, s 6(1)(viii) Comcare.
165 S 12 NSW (WCA).

Likewise, there is a general extension of coverage to provide that injuries sustained by a worker during temporary absences from work or ordinary recess are recognised as being in the course of employment, ordinarily subject to disentitlement where the worker has subjected himself or herself to an abnormal risk of injury during the recess.[166] Western Australia does not have any specific provisions in respect to recess injuries, while in Tasmania any temporary absence from the worker's place of employment has to be at request or direction of the employer or with the employer's authority in order to be compensable.[167] In the Northern Territory, the coverage of recess claims is qualified by excluding such claims from being regarded as being in the course of employment where they are sustained in an accident to which the *Motor Accidents (Compensation) Act* applies.[168]

The discussion, in the preceding paragraphs, of the manner in which workers' compensation schemes weave a complex web of exclusions and deemed inclusions from coverage, is emblematic of the general treatment of 'work-relatedness' in contemporary systems. What emerges is the fact that there is no unified principle of work-relatedness underpinning the statutory regulation of entitlement and exclusion from entitlement. Rather a number of different renderings of the work-relatedness concept are pressed into service to serve particular policy objectives. In this regard, the protean nature of work-relatedness concept provides a flexible instrument that can be invoked to justify changes in policy direction. As such it can be appealed to as a device to cloak political decisions with the mantle of principled authority.

4. Occupational Health and Safety Statutes

Alongside the ten Australian workers' compensation regimes there are ten OHS statutes. These are:

- Commonwealth - *Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cth) (henceforth 'OHS(CE)A Cth') (federal public sector employment);
- Commonwealth - *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth) (henceforth 'OHS(MI)A Cth') (overseas and interstate maritime employment);
- New South Wales: *Occupational Health and Safety Act 2000* (NSW) (henceforth 'OHSA NSW)');
- Victoria: *Occupational Health and Safety Act 1985* (henceforth 'OHSA Vic');
- Queensland: *Workplace Health and Safety Act 1995* (henceforth 'WHSA Qld');
- South Australia: *Occupational Health, Safety and Welfare Act 1986* (henceforth 'OHSWA SA');
- Western Australia: *Occupational Safety and Health Act 1984* (henceforth 'OSHA WA');
- Tasmania: *Workplace Health and Safety Act 1995* (henceforth 'WHSA Tas');
- Northern Territory: *Work Health Act* 1986 (henceforth 'WHA NT');
- Australian Capital Territory: *Occupational Health and Safety Act 1989* (henceforth 'OHSA ACT').

166 See for example s 6(1)(b)(i) Comcare. Similar provisions in NSW (WCA), Vic, Qld, NT.
167 S 25(6)(c) Tas
168 S 4(2A)(a) NT.

Reported Injuries and Disease

There is a requirement under each of the Australian OHS statutes for the reporting of particular types of work-related injuries, diseases and 'dangerous occurrences' to the relevant OHS inspectorate by the employer whose workplace was so affected.[169] These provisions are important components of the inspection and enforcement strategies of the Australian OHS inspectorates. Much of the work of the inspectorates is reactive, principally in relation to reported incidents and complaints about unsafe conditions from workers and others. Aggregated statistics from incident reports also provide OHS agencies with data to guide their inspection and enforcement programs. Hence these statutory reporting requirements are an important component of the 'discovery systems'[170] of the inspectorates. Most, if not all, of the Australian OHS inspectorates closely scrutinise reported fatalities, injuries, diseased and incidents and conduct investigations of those incidents considered to be the most serious. Such investigations can result in prosecutions, the issuing of improvement or prohibition notices, and other prevention activities. Reported incidents also have the potential to provide some measure of OHS performance within a jurisdiction, by measuring the incidence of injury, illness and 'near misses'. However the realisation of this potential is currently severely constrained by the shortcomings in the level of reporting of incidents, especially the gross under-reporting of 'near misses'.

Usually these statutory reporting requirements specify the maximum time in which a report must be made and the form that such report should take. Only work-related incidents, need to be reported, and the notion of 'work-relatedness' can be analysed using the same broad categories as those used above in relation to the work-relatedness of illness and injury under the workers' compensation statutes. Essentially the reporting requirements reflect a notion of 'work-relatedness' that is an amalgam of the fifth and sixth forms of this concept outlined (above) in respect of workers' compensation arrangements. That is, they are simply concerned with the reporting of injuries, diseases and 'dangerous occurrences' that are associated with work, although their reporting reach goes beyond that of workers' compensation statistics in that (as mentioned below) it covers both employees and non-employees, as well as events that do not result in an injury or illness. They are concerned both with matters (in practice, mainly injuries and dangerous occurrences) that are work-related in terms of the nexus of time, place and activity and with matters (in practice, mainly diseases) that do not fit into this first category but which have some causal relationship (by reference to the actual risk test) with work.

Whereas the workers' compensation provisions only apply to 'workers', the OHS statutory reporting requirements typically cover events involving both 'employees' and persons other than employees. This latter category will clearly include persons outside the expanded definitions of 'worker' in the workers' compensation statutes, as discussed earlier in this paper. Indeed, it will cover persons who are not in a contractual relationship with an employer. For example, the relevant New South Wales provision defines some of the incidents that must be reported in terms of incidents involving 'employees' (for example, illnesses to employees that are related

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169 See also Richard Johnstone, *Occupational Health and Safety Law and Policy*, Sydney: LBC, 1997, 335-38.

170 Keith Hawkins, *Environment and Enforcement*, Clarendon Press, Oxford, 1984, 90.

to work processes, [171] and incidences of workplace violence[172]). All of the other 'occurrences' listed as being reportable are expressed in terms of 'persons', or do not use the term employee, person or worker at all. The Victorian[173] and Tasmanian[174] provisions only make reference to 'persons.' Queensland, likewise, does not qualify the reporting requirements by reference to 'employees' or 'workers'.[175] Both Commonwealth provisions require fatalities and serious personal injuries involving 'any person' to be reported. Certain injuries to 'employees' must also be reported.[176] 'Dangerous occurrences' are defined in similar terms. The Northern Territory[177] and Australian Capital Territory[178] expressly require the reporting of injuries to persons who are not workers or employees, respectively. The South Australian provisions limit immediately notifiable work-related injuries to injuries and fatalities suffered by 'employees'. Notifiable 'dangerous occurrences', however, are not limited by reference to risks to 'employees'.[179] Western Australia only requires injuries or diseases suffered by 'employees' to be reported.[180] Thus, apart from the Western Australian requirements, which are narrower than the workers' compensation provisions, the Australian OHS statutes envisage that incidents to persons other than employees must be reported.

The particular events that must be reported are relatively similar across the various jurisdictions extend beyond the notion of injury and disease in the workers' compensation statutes, although there is considerable variation in the terminology used in respect of such events.

Unsurprisingly all jurisdictions require the reporting of accidents causing death.[181] Also cases of serious injury are required to be reported in all jurisdictions although what amounts to serious injury and/or the terminology used sometimes varies considerably. In the two Commonwealth schemes cases of serious personal injury must be reported[182] as well as any accident causing incapacity for a period of five or more successive working days or (where shiftwork is involved) five or more successive shifts.[183] Similarly, in Tasmania, cases of serious bodily injury or illness, defined in terms of an injury or illness whose disabling effects result in admission to hospital as an inpatient, must be reported.[184]

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171 Occupational Health and Safety Regulations 2001 NSW clause 341(b).

172 Occupational Health and Safety Regulations 2001 clause 341(i)). Note that clause (g) refers to "workers" exposed to lead risks.

173 Occupational Health and Safety (Incident Notification) Regulation 1997 Vic.

174 WHSA Tas s 47.

175 Workplace Health and Safety Regulation 1997 Qld s 52, and WHSA Schedule 3.

176 OHS(CE)A Cth s 68 and OHS(MI)A Cth s107.

177 For example reg 46(e) Work Health (Occupational Health and Safety) Regulations (NT).

178 OHSA ACT s 85(1)(d). Para (a) makes reportable "the death of person", and the risks in dangerous occurrences are defined in terms of risks to persons (Occupational Health and Safety Regulations 1991 ACT reg 2A.

179 Occupational Health, Safety and Welfare Regulations 1995 SA reg 6.6.2(1) and regs 6.6.1(3) and 6.6.3.

180 OSHA WA s 19(3). See, however, recommendation 25 of the *Review of the Occupational Safety and Health Act 1984, Consultation Draft*, 2002.

181 For example, s 68(1)(a) OHS(CE)A Cth. Similar provision in all other jurisdictions. Note that death is encompassed within the definition of 'serious bodily injury' in Qld.

182 For example, s 107 OHS(MI)A Cth. Similar provision in OHS(CE)A.

183 S 68(1)(a) OHS(CE)A Cth and Reg 36A Occupational Health and Safety (Commonwealth Employment) Regulations (Cth). Also mirrored in OHS(MI) Cth and regulations.

184 S 47 WHSA Tas (with definition in s 3).

In New South Wales injuries at work that result in the amputation of a limb or require a person to be placed on a life support system,[185] and any other injury or illness related to work processes (with a supporting medical certificate) that results in unfitness to attend a person's usual place of work or to perform their usual duties at work for a continuous period of at least seven days must be reported to WorkCover.[186]

In Victoria there are notification requirements in respect of a person requiring medical treatment within 48 hours of exposure to a substance or a person requiring immediate treatment as an in-patient in a hospital. Such notification also applies where a person requires immediate medical treatment for the amputation of any part of their body, a serious head injury, a serious eye injury, the separation of their skin from underlying tissue (for example, in degloving or scalping), electric shock, a spinal injury, the loss of a bodily function or serious lacerations.[187]

In Queensland notification is required in respect of a serious bodily injury[188] defined in terms of an injury that causes death or impairs a person to such an extent that as a consequence of the injury the person becomes an overnight or longer stay patient in a hospital.[189] Also requiring notification are cases of 'work caused illness'.[190] This is defined in terms closely following that of its meaning within the workers' compensation system – namely, an illness contracted in the course of doing work and to which work was a contributing factor and the recurrence, aggravation, acceleration, exacerbation or deterioration in a person of an existing illness in the course of doing such work. However, in this context, its application extends to employers, self-employed persons and workers.[191]

In South Australia there is a division into immediately notifiable work-related injuries and generally notifiable work-related injuries. As well as a work-related injury that causes death, immediately notifiable work-related injuries are those that have acute symptoms associated with exposure to a substance at work, those requiring treatment as an in-patient in a hospital immediately after the injury.[192] Generally notifiable injuries are other work-related injuries that incapacitates an employee for work for three or more consecutive days.

In Western Australia a range of injuries must be notified forthwith. These are a fracture of the skull, spine or pelvis, a fracture of any bone in the arm (other than in wrists or hand) or in the leg (other than a bone in the ankle or foot), an amputation of an arm, hand, finger, finger joint, leg, foot, toe or toe joint and the loss of sight of an eye. In addition, any other injury which, in the opinion of a medical practitioner, is likely to prevent an employee from being able to work within 10 days from the date of

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185 Ss 86 and 87 OHSA NSW, and clause 344 of Part 12.2 of the Occupational Health and Safety Regulations 2001.

186 S 86(1)(b) OHSA NSW and reg 341(a) and (b) Occupational Health and Safety Regulations 2001.

187 Reg 7 of the Occupational Health and Safety (Incident Notification) Regulations 1997 made pursuant to s 59 OHSA Vic.

188 Reg 52(1)(a) Workplace Health and Safety Regulation 1997.

189 Schedule 3 WHSA Qld.

190 Reg 52(1)(b) Workplace Health and Safety Regulation 1997.

191 Schedule 3 WHSA Qld.

192 For example, 6.6.1 Occupational Health, Safety and Welfare Regulations 1995 (SA).

injury must similarly be reported.[193] Such notification also applies in respect of four infectious diseases (tuberculosis, viral hepatitis, legionnaires' disease and HIV) resulting from work involving exposure to human blood products and similar material and four occupational zoonoses (Q fever, anthrax, leptospiroses and brucellosis) contracted from work involving the handling of or contact with animals, animal hides etc or animal waste products.[194]

In the Northern Territory all workplace accidents are required to be reported, whether or not they result in fatality or bodily injury.[195] In particular, however, other than fatalities, the reporting extends to any accident or occurrence where, on the basis of medical advice, it appears likely that a worker will be absent from work for five or more working days, where a worker receives an electric shock or where a worker is injured and admitted to hospital as an in-patient following exposure to a hazardous substance.[196] In the Australian Capital Territory an injury resulting in incapacity for work for a period of seven days must be reported.[197]

This survey of the types of injuries reportable under the OHS statutes shows that there may be injuries which are not reportable under the OHS statutes which are nevertheless compensable under the workers' compensation statutes. Workers' compensation schemes essentially provide generalised coverage for all traumatic injury and occupational disease, provided other threshold conditions of work-relatedness (such as being a 'worker' and having the requisite connection with employment) are met.[198] There is no threshold condition of the injury having to be of a particular degree of severity or result in absence from work for a specified period. Indeed 'medical only, no time lost claims represent a substantial proportion of all workers' compensation claims. On the other hand, all but one of the OHS statutes requires serious incidents which do not result in injury to be reported.

In the past decade or so, the OHS statutes and regulations (apart from those in Western Australia) have also required 'dangerous occurrences' to be reported, even if they do not result in injury or death. For example, both of the Commonwealth Acts require 'dangerous occurrences' to be reported, and define such occurrences as an occurrence arising from the undertaking which could have caused, but did not cause, the death or serious injury of any person, or incapacity of an employee for five or more working days or shifts.[199] In Queensland a 'dangerous event', defined as an event at a workplace involving imminent risk of explosion, fire or serious injury, must be

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193 Reg 2.4, Occupational Safety and Health Regulations 1996 (WA), made pursuant to s 19(3) OSHA WA. See, however, *Review of the Occupational Safety and Health Act 1984, Consultation Draft*, 2002 at 93 for discussion of a loophole in this provision which may permit long-term injuries to go unreported.

194 Reg 2.5, Occupational Safety and Health Regulations 1996 (WA), made pursuant to s 19(3) OSHA WA.

195 S 48A(a) WHA NT.

196 Reg 46 (b)-(d) Work Health (Occupational Health and Safety) Regulations (NT)

197 S 85(1)(c) OHSA ACT and reg 5 Occupational Health and Safety Regulations 1991 (ACT)

198 This statement needs qualification with respect to industrial deafness, where commonly threshold conditions operate, and psychological injuries and stress-related conditions, where compensability is denied in certain circumstances (for instance, reasonable disciplinary action carried out in a reasonable manner). Also, in some jurisdictions, there are additional requirements in respect to certain mining-related conditions such as silicosis.

199 OHS(CE)A Cth s 68 (and reg 3); OHS(MI)A Cth s 107 and reg 4. The OHS(CE) Regulations reg 3 provide examples of occurrences which are taken to be dangerous occurrences.

reported.[200] Tasmania required the reporting of a dangerous incident as a result of which a person could have been killed or could have suffered personal injury or illness.[201]

New South Wales, Victoria, South Australia and the two territories take a similar approach in listing events or incidents constituting dangerous occurrences. For example, in NSW events that must be reported include any major damage to plant, equipment, building or structure; an uncontrolled fire or explosion; an uncontrolled escape of gas, dangerous goods or steam; imminent risk of explosion or fire; and the collapse of an excavation.[202] Victoria requires the immediate reporting of an incident at a workplace which exposes a person in the immediate vicinity of the incident to an immediate risk to the persons health and safety through the collapse, malfunction etc of specified plant; the collapse or failure of an excavation, or any part of a building or structure; an explosion, implosion or fire, the escape or spillage of dangerous goods, or the fall from height of any plant, substance or object.[203] South Australia lists incidents and events that constitute dangerous occurrences, and includes 'any other unintended or uncontrolled incident or event arising from operations carried out at a workplace'.[204] The Australian Capital Territory includes 'any other occurrence involving imminent risk of … death or serious personal injury to any person, or substantial damage to property.'[205]

Finally, the statutory OHS reporting requirements mandate a connection between the incident and work. Once again, in most instances the required nexus with work is based on criteria that differ from the tests in the workers' compensation statutes. South Australia merely requires injuries and fatalities to be 'work-related'. To be notifiable, a dangerous occurrence must occur 'at a workplace', and the 'immediate and significant risk to any person' must be 'in, on or near the relevant place', or to a person who 'could have been in, on or near the relevant place.'[206] Western Australia, in addition to limiting the reporting requirements to injuries and disease to employees, also mandates that the injury or disease must be suffered 'at a workplace', although this does not appear to be confined to the employer's workplace. The New South Wales provisions require that the reportable occurrence occur 'at the place of work' in some instances, and 'at or in relation to the place of work' in others.[207] In Victoria the incident must be 'in the workplace', and in the Northern Territory the incident must be 'at a workplace'.[208] As discussed above, Queensland's requirements for work-related injury mimic the workers' compensation provisions. Serious bodily injury, a work-caused illness or a dangerous event must be reported if 'they happen at a workplace.'[209] Tasmania also requires the incident to take place 'at a workplace'.[210]

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200 Reg 52 Workplace Health and Safety Regulation 1997 (Qld).

201 WHA Tas s 47.

202 S 86(1)(a) OHSA NSW and clause 344 of Part 12.2 of the Occupational Health and Safety Regulations 2001.

203 Reg 8 of the Occupational Health and Safety (Incident Notification) Regulations 1997

204 Occupational Health, Safety and Welfare Regulations 1995 SA reg 6.6.1(3)(x).

205 Occupational Health and Safety Regulations 1991 ACT reg 2A(d).

206 Occupational Health, Safety and Welfare Regulations 1995 SA regs 6.6.1 and 6.6.3.

207 OHSA NSW s 86(1).

208 WHA s 48A, which appears to be narrowed by the opening words of Work Health (Occupational Health and Safety) Regulations s 46(1).

209 Workplace Health and Safety Regulation 1997 s 52(1).

210 WHSA Tas s 47.

The OHS statutes tend to define 'workplace' or 'place of work' as premises or a place where people work (see below).

In the Australian Capital Territory it must be 'at or near the workplace' and 'attributable to the employer's undertaking at the workplace'.[211] The OHS(CE)A Cth stipulates that the required nexus is that the incident must arise 'out of the conduct of the undertaking or out of work performed by an employee in conjunction with the undertaking.'[212] The OHS(MI)A Cth uses similar terminology, but specifies that the incident must also be 'at or near a workplace.'[213] The expression 'undertaking' will be discussed in the next section of this paper.

In summary, the notion of work-relatedness in the statutory OHS reporting requirements appear to be broader than those found in the workers' compensation statutes in some aspects, and narrower in others. Most of the OHS reporting requirements require reporting where injuries and fatalities are suffered by persons who are not employees, and also in relation to dangerous occurrences which do not result in injury, disease or death. On the other hand, most of the statutes limit reportable incidents to those occurring at the workplace. In this respect it is a narrower conception than that pertaining in workers' compensation schemes under the 'arising out of employment' limb where a compensable injury may be causally related to employment but occur away from the workplace (for instance, a worker in a highly stressful work environment who suffers a heart attack at home).

Once again, although a common pattern is discernible amongst most of the reporting requirements in the OHS jurisdictions, closer analysis of the precise wording of the provisions shows that there are significant differences in their wording, which undermine comparisons of reported incidents from jurisdiction to jurisdiction. It should also be noted that there is, no doubt, a significant under-reporting of reportable incidents under the OHS statutes, with some reports suggesting that only 20 per cent of reportable incidents are notified to the OHS authorities.[214]

General Duties and Regulations

The duties and obligations to be found in the general duties and regulations in each of the OHS statutes are notably different from the workers' compensation and OHS injury, illness and dangerous occurrence reporting provisions discussed so far in this paper. Whereas the workers' compensation and OHS reporting requirements are triggered by injuries and disease (or, in the case of OHS reporting requirements, 'dangerous occurrences' not resulting in injury or death), the standards in the OHS statutes are preventive, and require OHS duty holders (see below) to remove or reduce work risks arising from workplace hazards. One consequence of this is that data on the extent of contraventions of these provisions is very difficult to obtain. The ratio of OHS inspectors to workplaces in the Australian jurisdictions varies from between

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211 OHSA ACT s 85(1).

212 OHS(CE)A Cth s 68.

213 OHS(MI)A Cth s 107.

214 Western Australia, *Review of the Occupational Safety and Health Act 1984, Consultation Draft*, 2002, at 91-2. As noted above, Western Australia has the narrowest OHS reporting requirements.

1:1000 to 1:1500,[215] and suggests that workplace inspections, and the detection of contraventions, are likely to be infrequent. The majority of detected contraventions are dealt with informally (advice, persuasion and warnings), and are unlikely to be recorded as formal contraventions by the inspectorate. Even where Australian OHS inspectorates do respond to detected contraventions with formal enforcement action (improvement and prohibition notices, infringement notices in some jurisdictions, and prosecution),[216] not all of the Australian inspectorates keep detailed records of the details of these contraventions. Even if such data was available, for the reasons outlined earlier in this section, it would not be consistent with workers' compensation and OHS reporting data.

Historically the notion of work-relatedness in the OHS statutes was determined largely by the traditional OHS regulatory paradigm, which was based on a number of assumptions about how and where workers worked. The traditional approach to OHS regulation, which evolved in nineteenth century Britain, and was adopted by Australian jurisdictions from the 1880s,[i] developed around the factory system. Initially it was principally concerned with factories, but later also applied to construction workplaces and other specific types of workplaces. It focused on machinery and other physical artefacts, relied on detailed technical specification standards which told employers exactly what safeguards to adopt, and, at least in its twentieth century manifestations here in Australia, covered the employer and the factory occupier's duties to employees. This model of OHS regulation was the norm in all of the Australian States until the British Robens Report of 1972.

Since the 1980s all Australian OHS statutes have been reformed to take up the 'Robens' model. These statutes are built around 'general duty' requirements. General duties are imposed upon:

- employers (in relation to both employees and persons other than employees);
- self-employed persons;
- persons in control of premises (called occupiers in some OHS statutes);
- manufacturers, suppliers and importers of plant and substances; designers, erectors and installers of plant for use at work; and
- employees at work or in the workplace (in relation to their own safety and the safety of others).

These general duties are supplemented by regulations and codes of practice (advisory standards in Queensland), which adopt a combination of performance, process and specification standards.[217] 'Performance standards' define the duty holder's duty in terms of goals they must achieve, or problems they must solve, and leaves it to the initiative of the duty holder to work out the best and most efficient method for achieving the specified standard. 'Process requirements' prescribe a process, or series of steps, that must be followed by a duty holder in managing specific hazards, or OHS generally. A typical example of a process requirement is the hazard identification and risk assessment process incorporated into many OHS regulations and codes of practice. These regulations not only introduced process requirements, but they also

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215 Richard Johnstone, "Occupational Health and Safety Regulation in Australia: Overview and Reflections", WorkCongress 5 Conference, *Working Safely in a Changing World*, Adelaide, March 2001. See also Industry Commission, *Work, Health and Safety*, Industry Commission, Melbourne, 1995, Vol II, 423, Table M.5

216 See Johnstone, 2001, above, n 211.

impose duties on a wide range of parties – designers, suppliers, manufacturers, employers, employees and so on. Process-based standards have spawned greater reliance on 'documentation requirements'. Increasingly OHS statutes are requiring duty holders to document measures they have taken to comply with process-based standards, performance standards and principle-based standards.

What, then, is the notion of 'work-relatedness' required by these statutory OHS standards? It bears repeating that, unlike the workers' compensation legislation, these provisions are preventive, and the obligations laid down by these duties and obligations are not triggered by an actual injury or disease. In other words, the OHS statutes create 'inchoate offences', which do not require an actual injury or illness for an offence to be committed.[218] Thus the notion of 'work-relatedness' in the general duties and obligations OHS statutes and regulations differ from that to be found in the workers' compensation statutes in that the former simply require a risk to health and safety to be work-related. The risk does not have to translate into an actual injury or disease for the duty to apply. The New South Wales courts, at least, have been firm, however, in requiring that there be a causal nexus between a contravention of a duty or obligation in the OHS statute, and 'the detriment occasioned to the employee or person' to whom the duty is owed.[219]

It is also clear that the notion of 'work-relatedness' is not confined to the employment relationship, because duties are imposed upon employers in relation to persons other than employees, and duties are imposed upon persons other than employers. The pivotal provisions in the OHS statutes are the duties owed by employers and self-employed persons. For example, section 21(1) of the OHSA Vic provides that 'an employer shall provide and maintain so far as is practicable for employees a working environment that is safe and without risks to health.' Section 22 of the OHSA Vic provides that 'every employer and self-employed person shall ensure so far as is practicable that persons (other than the employees of the employer or self-employed persons) are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer or self-employed person.'

It is well established that both of these duties are strict or absolute duties, qualified by 'practicability', ('reasonable practicability' in some jurisdictions). A measure is not (reasonably) practicable if a reasonable duty holder, weighing the risk of an accident against the measures (including the technological feasibility and cost of those measures) necessary to eliminate the risk, considers that the risk of injury or disease is insignificantly relevant to the burden of taking the requisite measures. In other words, the duty is breached 'if there were practical steps available to [the employer] which, although not taken, would have reduced the risk of foreseeable accident if they had been taken.'[220]

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217 See further Neil Gunningham and Richard Johnstone, *Regulating Workplace Safety: Systems and Sanctions*, OUP, Oxford, 1999, chapter 2.

218 *R v Australian Char Pty Ltd* (1996) 64 IR 387 at 400; and *Haynes v C I and D Manufacturing Pty Ltd* (1995) 60 IR 149 at 158.

219 *State Rail Authority v Dawson*(1990) 37 IR 110 at 120-121; *WorkCover Authority of NSW (Inspector Ankucic) v McDonald's Australia Ltd* (1999) 95 IR 383 at 439-40; *Drake v WorkCover Authority of NSW* (1999) 90 IR 432 at 448 and 452; *Haynes v CI&D Manufacturing Pty Ltd* (1995) 60 IR 149 at 158-9.

220 *Holmes v Spence* (1993) 5 VIR 119.

An analysis of section 21 of the OHSA Vic reveals that the threshold 'work-relatedness' issue in the employer's general duty is the employment relationship.[221] In other words, the duty is only owed by an employer to an employee (although some jurisdictions, notably Queensland and the Northern Territory refer to 'workers' rather than 'employees'). Generally the Australian OHS statutes adopt the common law definition of 'employee' and 'employer' (see above). In some of the Australian OHS statutes, for the purposes of this employer's general duty to employees the definition of an employee is extended beyond the common law definition to include independent contractors and their employees.[222]

The other elements of work-relatedness in the employer's general duty to employees vary across the jurisdictions. In section 21 of the OHSA Vic and section 19 of the OSHA WA the duty requires an employer to ensure that the 'working environment' is safe and without risks to health. The expression 'working environment' is not defined in either statute, and commentators agree that it is to be given a broad interpretation.[223] The remaining statutes also define work-relatedness in terms of a nexus of time, place and activity.[224] The WHA NT refers to 'working environment at a workplace' and requires the workers so protected to be working at the workplace. Section 19(1) of the OHSWA SA and section 9(1) of the WHSA Tas express the duty as being owed to employees 'while at work'. Section 16(1) of the OHS(CE) Cth, section 8(1) of the OHSA NSW, section 28(1) of the WHSA Qld and section 27(1) of the OHSA ACT specify that the employer must protect the health, safety and welfare 'at work' of employees. These statutes generally provide that an employee is 'at work' when she or he is at her or his workplace or, in Queensland, at another workplace at her or his employer's direction. Workplace is generally defined as a place where an employer or self-employed person works. The phrases 'at work' and 'place of work' (or 'workplace') have been expansively interpreted by the courts.[225]

The employer and self-employed person's duties to persons other than employees have different touchstones for work-relatedness.[226] Rather than defining work-relatedness by reference to the form of the work relationship (the contract of employment), the OHS statutes in the Eastern states, and in the Australian Capital

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221 See again the discussion of the form of the work relationship and the degree of employer control of the work, at pp 2-3 above, and the discussion of the contract of employment at pp 8-9 above.

222 See OHSA Vic s 21(3). See also s 16(4) of the OHS(CE)A Cth, ss 19(4) and (5) of the OSHA WA, s 4(2) of the OHSWA SA, s 3(1) of the WHA NT and s 9(4)-(7) of the WHSA Tas. These provisions are quite different in form and content from the provisions in the workers' compensation statutes which extend to the coverage of 'worker' to certain kinds of independent contractors. The workers' compensation extensions (see above) extend the definition of 'worker' in an *ad hoc* and piecemeal manner, whereas the OHS extensions refer to independent contractors generally, but are restricted by reference to criteria such as the control exercised by the employer.

223 Breen Creighton and Peter Rozen, *Occupational Health and Safety Law in Victoria*, 2nd ed, Federation Press, Sydney, 1997 65-6.

224 See the sixth form of work-relatedness discussed at p 5 above.

225 See Wendy Thompson, *Understanding New South Wales Occupational Health and Safety Legislation*, 3rd ed, Sydney: CCH, 2001 18-19; Richard Johnstone, *Occupational Health and Safety Law and Policy*, Sydney: LBC, 1997, 121-123; Michael Tooma, *Tooma's Annotated Occupational Health and Safety Act 2000*, LBC, Sydney, 2001, 29-32.

226 See Richard Johnstone, "Paradigm Crossed? The Statutory Occupational Health and Safety Obligations of the Business Undertaking" (1999) 12 *Australian Journal of Labour Law* 73-112.

Territory and Commonwealth, require employers and (in all but the Commonwealth) self-employed persons to protect others from risks arising from 'the conduct of the undertaking'. In some of these statutes there is a further requirement of a geographical nexus between the person to whom the duty is owed and the duty holder's workplace. The South Australian and Western Australian statutes take a different approach, and define 'work-relatedness' by reference to work undertaken by the duty holder. In Tasmania the nexus is 'work carried on at a workplace'.

Similar provisions to those in section 22 of the OHSA Vic are to be found in Queensland, New South Wales, the Commonwealth (where the duty is only imposed upon employers, and is not owed to contractors) and the ACT. One significant difference, however, is that sections 8(2) and 9 of the OHSA NSW specify that the duty only applies to non-employees 'while they are *at*' the employer or self-employed person's place of work, and sections 17 of the OHS(CE)A Cth and 28 of the OHSA ACT restrict the duty to persons 'at or near a workplace under the employer's control.' In the Victorian, Queensland, Commonwealth and ACT statutes, rather than being restricted to the employment relationship, the duties to non-employees are qualified by a nexus with the 'conduct of the undertaking'.

In *Whittaker v Delmina Pty Ltd*[227] Hansen J said that section 22 of the OHSA Vic (and, by implication, also sections 28(2) and 29 of the WHSA Qld) 'applies to potential risks to health or safety that arise from the conduct of an undertaking even if those risks may be present or operate outside the place at which the undertaking is conducted.' This is not the case in New South Wales, the Commonwealth or the ACT, because of the geographical restriction in sections 8(2) and 9 of the OHSA NSW, section 17 of the OHS(CE)A Cth and section 28 of the OHSA ACT discussed above.

The conduct of the employer's or self-employed person's undertaking is not limited to the operation of industrial processes, and includes ancillary matters, such as cleaning, repairing and maintaining the plant, obtaining supplies and making deliveries,[228] as well as trading, and supplying and selling to customers.[229] The courts have rejected the argument that an activity carried out by an independent contractor is not part of the conduct of the undertaking if the employer or self-employed person engaging the contractor does not have control over the activity.[230] Hansen J in *Delmina* said that the expression 'conduct of the undertaking':

> is broad in its meaning. … The word ['undertaking'] must take its meaning from the context in which it is used. In my view 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 or enterprise … may be seen to be conducting its operation, performing work or providing services at one or more places, permanent or temporary and whether or not possessing a defined physical boundary. The circumstances may be as infinite as

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227 (1998) 87 IR 268.

228 R v *Associated Octel Co Ltd* [1996] 4 All ER 846, at 851-852; *R v Mara* [1987] 1 WLR 87. See also Wendy Thompson, *Understanding New South Wales Occupational Health and Safety Legislation*, 3rd ed, Sydney: CCH, 2001, 35.

229 *Sterling-Winthrop Group Limited v Allen* (1987) SCCR 25.

230 See R v *Associated Octel Co Ltd* [1996] 4 All ER 846. See also *WorkCover Authority of NSW v Techniskil-Namutoni Pty Ltd* [1995] NSWIRC 127 at 8.

> they may be variable. Although such a place may be, and often will be, a workplace as defined it seems to me that the legislature has chosen not to use that word and, rather, to use an expression of breadth and possibly of wider application. I am of the view that this was deliberate and that the word 'undertaking' should not be read as synonymous with 'workplace'. It is neither helpful nor necessary to do so.

What is the nexus between the risks and the 'conduct of the undertaking'? In section 22 of the OHSA Vic, sections 8(2) and 9 of the OHSA(NSW), section 17 of the OHS(CE)A Cth and section 28 of the OHSA ACT the key expression is that the non-employees must not be 'exposed to risks'. This expression has been very broadly interpreted in the English case of *R v Board of Trustees of the Science Museum* [1993] ICR 876, where the Court of Appeal said 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 to occur the person owed the duty does not have to suffer actual injury or ill-health, but rather need only be exposed to a significant risk of injury or ill-health. In the *Science Museum* case, for example, the prosecutor was not required to show that members of the public within 450 metres of the museum actually inhaled the bacteria, or that there were bacteria were there to be inhaled. It was sufficient that there was a risk of the bacteria being in that 450 metre range. The WHSA Qld substitutes the expression 'workplace health and safety is not affected by' the way the undertaking is conducted. Section 22 of the WHSA Qld provides that workplace health and safety is ensured when persons are free from risk of death, injury or illness created by any workplace, workplace activities or high risk plant.

In summary, the Victorian and Queensland duties to persons other than employees are far-reaching, whereas the NSW, Commonwealth and ACT provisions are limited to persons at the workplace in NSW, and at or near the workplace in the ACT.

Rather than building the duty to others around the concept of 'the conduct of the undertaking', section 22 of the OHSWA SA and section 21 of the OSHA WA couch the duty in terms of 'reasonable care', to 'avoid adversely affecting' the health and safety of others 'through any act or omission at work' (OHSWA SA) and to 'ensure that the health and safety' of another person is 'not adversely affected wholly or in part as a result of work in which [the employer] or any of his employees is engaged' (OSHA WA). The Western Australian provision is particularly narrow in its operation, as it arguable that the duty only arises 'when "work" is actually being performed.'[231] Section 9(3) of the WHSA Tas provides that an employer 'must ensure so far as is reasonably practicable that the health and safety of any person, other than an employee of the employer or a contractor or any person employed or engaged by a contractor, is not adversely affected as a result of the work carried on at a workplace.'

The duties imposed upon persons in control of workplaces or occupiers generally requires the occupier, a person 'who has the management or control of the workplace', to ensure that the workplace, and the means of access to and egress from the workplace, are safe and without risks to health so far as is practicable. Section

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[231] *Review of the Occupational Safety and Health Act 1984, Consultation Draft*, 2002 at 67.

10(1) of the OHSA NSW, for example, 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) makes similar provision in relation to persons in control of plant and substances used by people at work. Here the work-relatedness is generally geographical with temporal elements.

The OHS statutes also place a general duty upon the designers of plant, and the manufacturers, importers and suppliers of plant and substances for use at work or at the workplace to ensure that, so far as is practicable, plant and substances are safe and without risks to health 'when properly used'; that they are adequately tested; and accompanied by adequate information to ensure that they can be used safely and without risks to health. Here the work-relatedness is that the plant and substances must be 'used at work' or at the workplace

The statutes also impose a duty on an employee to take reasonable care for her or his own health and safety, and the health and safety of other persons who may be affected by the employee's acts or omissions at work or at the workplace. Once again, these duties are usually limited to acts and omissions while the employee is at work or at the workplace.

As noted earlier in this section, similar principles govern the duties in the OHS regulations in the different Australian jurisdictions. Most duties in regulations are couched in terms of duties owed by employers to employees, although increasingly duties are also imposed upon manufacturers, suppliers, designers, occupiers and self-employed persons, and employers are often required to ensure the OHS of others.[232]

5. Conclusion and Implications

This paper has canvassed the concept of 'work-relatedness' in the Australian workers' compensation and OHS statutes. While the broad concepts to be found in the workers' compensation statutes have a common basis, there is much diversity in the minutiae. The same is true of the notion of work-relatedness in both the general duties and incident reporting requirements in the OHS statutes. These divergences, both across the categories and within each category, mean that attempts to compare claims, reporting or enforcement statistics will be significantly frustrated by an absence of conceptual uniformity.

Any attempt to identify a particular notion of 'work-relatedness' characteristic of workers' compensation regimes is an illusory hunt for an elusive quarry since there are many (at least seven) different notions of 'work-relatedness', the resort to which varies over time and in respect of context. There are similar difficulties in attempting to isolate the concept of work-relatedness in the OHS statutes. In part this is because the reach of such statutes is broader than that of workers' compensation statutes, in that they generally go beyond the employment relationship, and are generally not confined to the actual incidence of illness, injury or death. The nearest analogue to the workers' compensation approach is in respect of the reporting requirements provisions of the OHS statutes which essentially reflect a notion of 'work-relatedness' which is an amalgam of the two broadest forms of this concept in respect of the

[232] See the Plant Regulations, Manual Handling Regulations, and Hazardous Substances Regulations.

workers' compensation experience. It is far more difficult, if not impossible, to attempt an identification of a form of 'work-relatedness' that is inherent in the general duties and standards in OHS regulations that will fit within the schema of analysis of 'work-relatedness' that has been advanced in this article in respect of workers' compensation law and for the reporting requirements provisions in OHS statutes.

In tracing the various forms of 'work-relatedness' that have been exhibited in workers' compensation law over time, it was seen that some usages have fallen into disuse. Thus the initial form in Anglo-Australian jurisprudence, that of the qualitative nature of the work or employment, (limited number of specified dangerous activities) gave way to that of the form of the work relationship (focused on the contract of employment). In terms of workers' compensation system coverage, this latter form of 'work-relatedness' has survived as the base element for determining such coverage for nearly a century. However, this anchoring role has not been without its problems as can be seen in the commentary (above) concerning action by the various State and Territory legislatures to modify its operation with numerous provisions excluding coverage to various persons who would be employees at common law and in extending coverage to forms of work relationships that would not fall within the common law notion of the contract of employment. As the form of work-relationships becomes increasingly complex and diffuse in nature, even greater pressure is brought upon the use of the concept of the form of the employment (contract of employment) as the pivot for determination of workers' compensation coverage.

The challenges come from a number of directions. First, there have been attempts to structure relationships in order to avoid imposts associated with the employment relationship. A wide range of worker protection legislation revolves around the contract of employment - not simply workers' compensation, but also statutory leave entitlements, unfair dismissal and similar protective measures. There is thus an incentive, particularly in areas of more economically marginal activity, to attempt to structure what, in functional aspects, appears to be an employment relationship as in fact one of principal and independent contractor. A direct legislative response to the resort to 'fake self-employment' as a means of avoidance of workers' compensation responsibilities has only been taken in Victoria (see above). Secondly, there has been substantial change in the nature of the labour market and the form of employment relationships in recent decades. These include a decline in full-time employment and a concomitant increase in part-time, multiple-job holding and temporary employment. This growth in what has been called contingent work or precarious employment to a level of around 30 percent of the workforce in many industrialised countries has significant consequences for the administration of workers' compensation.[233] The rise to prominence of labour hire agencies is one feature of this new environment that has brought with it a number of new problems that has exercised the minds of regulators in a number of workers' compensation jurisdictions, both in terms of premium methodology and of claims administration. Quite basic issues, such as to who is the employer in such an arrangement (the labour hire agency or the body for whom the work is performed), have had to be resolved, together with the means of administering return to work and other 'employer' responsibilities.

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[233] For an exploration of some of these issues see Michael Quinlan and Claire Mayhew, "Precarious Employment and Workers' Compensation", (1999) 22 *International Journal of Law and Psychiatry*, 491-520.

The relevant changes to the notions of work-relatedness in the OHS statutes are of recent vintage. The current general duty provisions were introduced from the mid-1980s. The employer's duty to employees pivots around the common law employment relationship. The duty to 'others', spawned by the Robens Committee's concern that employers have responsibility for public safety, have, as we have shown, developed in some jurisdictions (most notably Victoria and Queensland) to cover labour hire, franchising, home-based work and other forms of work relationships.[234] The incident reporting requirements in most jurisdictions were extended in the 1990s to include dangerous occurrences and injuries, disease and death to persons other than employees. In most cases the fatality, injury or dangerous occurrence must take place at a workplace, and in some instances near a workplace.

As mentioned above, some of the concepts of 'work-relatedness' in workers' compensation regimes are at war with each other. Perhaps the most striking of these is the clashing implications of 'work-relatedness' viewed in terms of requiring an element of 'employer benefit' and of that concept in terms of the 'degree of employer control of the work'. As has been seen this conflict has been at the heart of the issue as to whether an injury sustained during an employee's journey to and from work should be compensable through the workers' compensation system. During the 1940s Australian schemes moved to extend such compensability on the grounds that these journeys were simply an antecedent activity undertaken for the benefit of the employer. Contrarily, during the 1990s a number of jurisdictions legislated to excise such coverage and compensability on the basis that such injuries fell outside the realm of employer controllable risk.

A similar tension exists in respect of the notion of 'work-relatedness' that is embodied in the 'in course of employment' limb of the primary entitlement provision underlying workers' compensation eligibility and the more recently legislated additional requirement of a stipulated 'degree of employment contribution'. The nature of the employment burden under the first of these notions has been recognised (for at least four decades) as being purely temporal in nature whilst the second explicitly mandates an employment contribution which amounts to either a 'significant' or 'substantial' contributing factor to the injury or disease. Providing substance to what is meant by 'significant' or 'substantial' in actual contested cases is a matter that the courts in at least two jurisdictions are currently grappling. The results to date of these judicial endeavours are both unclear and confusing.

Workers' compensation schemes have been, for at least the last two decades, in an almost constant process of foment and change. In this ongoing process of self-definition and grappling with the increasing pace of technological and labour market change, notions of 'work-relatedness' have often provided the spears for change or the shield for defending established positions. There is no indication that the process of change is likely to diminish in the future. In particular, the traditional rivalries between States and Territories in the ream of economic development, in an ongoing process of attempting to entice new business to the jurisdiction and fostering new investment by existing businesses in the jurisdiction, through the creation of a

[234] See Richard Johnstone, "Paradigm Crossed? The Statutory Occupational Health and Safety Obligations of the Business Undertaking" (1999) *12 Australian Journal of Labour Law* 73-112.

welcoming environment, has become increasingly overlaid by the process of globalisation. Where this inter-jurisdictional rivalry takes on some elements of the 'race to the bottom', there is pressure upon State and Territory governments to prove their 'business friendly' credentials through cutting through 'red tape' and minimising business 'on costs'. This will sometimes manifest itself through changes to workers' compensation entitlements. The justification for such a change will frequently be dressed up in principled language, often through recourse to the notion of 'work-relatedness'. Thus the removal of commuting language from scheme coverage will be given validation by invoking the principle of 'employer-controllable risk', one of the meanings of 'work-relatedness' discussed above.

However, in this highly nuanced and often contradictory and ambiguous political and economic tableau, the process in which business groups attempt to use the economic development aspirations of State and Territory governments to arbitrage more favourable operating conditions is balanced (though often not outweighed) by the administrative costs for enterprises with a national presence entailed by compliance with sometimes substantially differing requirements in the various jurisdictions in which the enterprise operates. Consequently, there are recurrent pressures for greater harmonisation and consistency in scheme arrangements across Australia. After the evaporation of such a push in the mid-1990s, the current federal Government has recently signalled its interest in further exploring this issue. In this highly contested terrain of workers' compensation system design, the likely prospect is of continual reliance upon one or another of the seven identified forms of 'work-relatedness' to justify further proposed changes. It is also possible that in this process further notions of 'work-relatedness' may emerge. Possible, but highly unlikely in the present climate, is that the touchstone of 'work-relatedness' may be essentially overthrown with a move to a comprehensive arrangement such as in New Zealand's accident compensation system.

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[i] See Neil Gunningham, *Safeguarding the Worker*, Law Book Company, Sydney, 1984: chapter 4; Richard Johnstone, *Occupational Health and Safety Law and Policy*, LBC, Sydney, 1997, chapter 2.