

**SafeWork SA OHS&W Small Grants Application submitted by
the Office of the Employee Ombudsman**

**“Hey Presto! – I’m a self-employed contractor!
What’s OHS?!”**

Literature Review

February 2009

INTRODUCTION

Since 8 August 1994, the Office of the Employee Ombudsman has provided advice and assistance to South Australian employees. It is an independent statutory body established under the South Australian *Fair Work Act 1994* and is not subject to control or direction by the Minister.

The general functions of the Employee Ombudsman are set out pursuant to s62 of the *Fair Work Act 1994*, the Office:

- advises employees on their rights and obligations under awards and enterprise agreements
- advises employees on available avenues of enforcing their rights under awards and enterprise agreements
- investigates claims by employees or associations representing employees of coercion in the negotiation of enterprise agreements; and
- scrutinises enterprise agreements lodged for approval under this Act and intervenes in the proceedings for approval if the Employee Ombudsman considers there is sufficient reason to do so
- represents employees in proceedings (other than proceedings for unfair dismissal) if the employee is not otherwise represented and it is in the interests of justice that such representation be provided
- advises individual home-based workers who are not covered by awards or enterprise agreements on the negotiation of individual contracts
- investigates the conditions under which work is carried out in the community under contractual arrangements with outworkers and other examinable arrangements
- provides an advisory service on the rights of employees in the workplace on occupational health and safety issues.

The Office carries out the general functions of inspectors in s65 of the *Fair Work Act 1994* as under s64 of the Act Employee Ombudsman is an inspector.

In this capacity, the Office can:

- investigate complaints of non-compliance with the Act, enterprise agreements and awards
- conduct audits and systematic inspections to monitor compliance with this Act and enterprise agreements and awards; and
- conduct promotional campaigns to improve the awareness of employers and people within the workforce of their rights and obligations under this Act, and under enterprise agreements and awards; and
- to do anything else that may be appropriate to encourage compliance and, if appropriate, take action to enforce compliance.

In recent years the Office of Employee Ombudsman has made significant contributions to major inquiries concerning South Australian workplaces, most notably the Work Choices Inquiry, the State Minimum Remuneration and the development of a Child Labour Act. The agency is also a participant in relation to the determination of state industrial legislative minimum standards. The Employee Ombudsman is a peak entity under the *Fair Work Act 1994*.

The decision of the Office of the Employee Ombudsman to undertake an examination of aspects of self-employed contracting extends from the capacity arising by virtue of the *Fair Work Act 1994* and the escalating number of concerns emerging from persons working under these arrangements.

In recent years an average of around 100 self-employed contractors have contacted the Office of the Employee Ombudsman for information and advice about problems associated with their employment arrangements. This represents around 4% of all those who contact our office for advice and assistance.

Our records also indicate that year-on-year more self-employed contractors are calling on our agency for in search of assistance.

Our interest in the issues of self-employed contractors was initially motivated by a concern that many of those who contacted our agency appeared to have a poor understanding of the employment arrangement into which they had entered.

The following case studies are examples of the issues that self-employed contractors have mentioned when they have contacted our office seeking guidance. The examples provide support to our view that self-employed contractors are often uncertain about their workforce status:

Client A

Client A had been working as a self-employed courier driver for about 6 months. He provided invoices to his employer when he completed his allocated work. He wanted to know what Industrial Award applies to the work he was doing. He also wanted to know how much leave he was entitled to.

Client B

Client B was working as a sub-contractor for more than 3 months. He believed that his employer was obliged to transfer his contract for service into a contract of service. He also had an issue about the amount he was paid and a concern that he did not receive leave loading.

Client C

Client C worked for Company A for 2.5 years as a consultant roofer. He submitted invoices and was paid on a commission arrangement. He was instructed to get himself an Australia Business Number after a couple of weeks working with the Company A. He received 100% of his income from Company A. He was required to wear a uniform. He sustained a serious head injury whilst on the job which meant he was off work for 3 to 4 months in early 2008. He said no safety equipment was provided. He was unsure if he could lodge a workers compensation claim. He worked five and half days each week. In an average week he would work for between 50 and 55 hours. He was unsure if he is owed any money. He wanted to know how he could obtain reimbursement for travel and accommodation on long trips. He was recently terminated, as he had not achieved his budget target. He was not particularly concerned as he has two job interviews pending!

Client D

Client D had his own Australia Business Number and is a sub-contractor. He did not receive superannuation or holiday pay. He regularly works 10-12hrs a day. Recently the Principal wanted him to work longer. After he had worked a 9hr day his phone rang again and they asked him to work more hours. When he declined he subsequently received a letter in the post warning him about his obligations. He now wanted to contest his termination of employment.

Client E

Client E had worked as an "independent contractor" delivering furniture for more than 20 years. The company for whom he exclusively worked recently decided to employ their own people to carry out the work he had previously undertaken. He believed he had been unfairly dismissed.

It seemed reasonable to assume that if self-employed contractors were unaware of the industrial implications of their working arrangement they may well have an unsatisfactory understanding of Occupational Health and Safety (OHS) obligations attached to their role.

Of those self-employed contractors who have contacted our office it is interesting to note that increasing numbers appear to be undertaking personal care work. Significant numbers of self-employed contractors working as courier drivers and cleaners have also contacted our service.

Our inquiry to date has identified a significant quantity of research, data and information on issues associated with self-employed contractors.

The research also identifies where there are information “black holes” most notably in respect to accident and injury statistics.

Many researchers have recognised the challenge posed by non-traditional employment arrangements and much has been written. Recommendations have been made but a satisfactory response remains elusive, indeed a one-size fit all remedy may not be achievable or appropriate. The move toward the harmonisation of Australian OHS legislation would seem to offer an opportunity to deliver an agreed national approach on this issue.

There appears to be merit in contributing a further body of evidence that provides insight into OHS knowledge of self-employed contractors. The practical application of existing OHS law and regulatory enforcement is also of considerable interest. This is particularly the case in respect to persons undertaking *home-based* personal care work where little research exists.

The research identified for this review regularly reinforces the observation that self-employed contractors are largely an invisible workforce. In such circumstances the application of regulation is known to be “notoriously difficult”.

In preparing this report issues have been considered to rest within several core categories. Although there is some overlap we consider the primary areas of research to be: Changing Work Arrangements, Economic Imperatives, Regulatory Framework and Enforcement Challenges and Emerging Issues and Emerging Responses.

Within Australian jurisdictions significant examination of existing Occupational Health and Safety (OHS) legislation has been undertaken in recent years. In particular Victoria¹, Tasmania², Western Australia,³ Queensland⁴ and the national OHS review have all contributed to a broad exploration of issues associated with occupational health and safety. The Productivity Commission has undertaken several significant investigations into issues of OHS and self-employed contractors.⁵ The parliament of the Commonwealth of Australia has also undertaken extensive study of the issues around self-employed contractors.⁶

¹Maxwell, C., (2004), *Occupational Health and Safety Review*, State of Victoria, Melbourne.

²Brown, D., and Hyam S., (2007), *Safe From Injury and Risks to Health, Review of Workplace Health and Safety in Tasmania Interim Report 2006*, Tasmanian Department of Justice, Hobart.

³Laing R. (2002) *Review of Occupational Safety and Health Act 1984: Final Report*, Perth.

⁴Queensland Government, (2008), *Submission to the National OHS Review, A National OHS System for the Modern World*, Queensland Government, Brisbane.

⁵Productivity Commission (2004), *National Workers' Compensation and Occupational Health and Safety Frameworks*, Report No. 27, Canberra, March.

⁶House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, (2005) *Making it Work: Inquiry into independent contracting and labour hire arrangements*, Commonwealth of Australia, Canberra.

CHANGING WORK ARRANGEMENTS

The Modern Workplace and Non-Traditional Work

All of the recent examinations of the current status of OHS have applied considerable attention to changing work arrangements. There appears to be a degree of consensus that the working environment is evolving quite quickly. The changing work arrangements are impacting on the debate on the current and future development of OHS in Australia.

Most reports recognise that there has been considerable movement in the global patterns of manufacturing and industrial production. In the Australian context this change is reflected in a considerable loss of manufacturing employment and the large industrial factory environment.⁷ South Australia has witnessed the closure of a major vehicle manufacturing plant and the shrinking of the allied sector of the workforce.⁸

Technology too is recognised as having a significant impact on the traditional workplace. In an article considering the overall state of manufacturing in Australia the Manufacturing Skills Australia make the following observation;

*"Some traditional jobs continue to change as a result. Although the fine artisan skills once expected in many trade jobs often remain in the specified skills lists, the use of integrated technologies is rapidly replacing them. The pace of these changes is accelerating and the diffusion applies across all aspects and facets of manufacturing and manufacturing occupations."*⁹

In concert with the decline of the traditional workplace other models of employment have emerged.

In considering issues associated with new patterns of work the 2007 Review of Workplace Health and Safety in Tasmania made the following statement;

*"the growth of service industries; proliferation of small business, particularly self-employed 'micro business'; new technologies; new work practices and employment arrangements may all involve new hazards and new challenges which could probably not have been anticipated."*¹⁰

⁷ According to data compiled by Department of Employment and Workplace Relations, Employment in Manufacturing (the third largest employing industry with 1,073,900 workers) fell by 84,200 (or 7.3 per cent) over the five years to May 2005.

⁸ Walker, J., (2008), "End of the line" in *The Australian*, (pp. 13), February 6th.

⁹ Manufacturing Industry Skills Council, (2008) *Manufacturing Skills Australia – Environmental Scan 2008*, (pp. 5), March, Sydney.

¹⁰ Brown, D., and Hyam, S. (2007), *op cit*, (pp 189)

According to research undertaken by the Productivity Commission self-employed contractors fall broadly into a category of “non-traditional work”. Their research identified that:

“Self-employed contractors are the second largest of the non-traditional forms of employment, with around 0.8 million persons or 8 per cent of all employed persons in 2004. This category experienced a decline in both relative and absolute terms between 1998 and 2001. From 2001 to 2004, it grew in number, but not as a proportion of the workforce.”¹¹

In discussing the issues around non-traditional employment the view of the Productivity Commission paper was that:

“Non-traditional work is mostly a temporary or transitory experience, except for a few groups of casual employees, such as women with children. For many people who are not currently employed, non-traditional work provides a means of gaining employment and a stepping stone to ongoing employment.”¹²

Precarious Employment

The significance of changing working arrangements has been recognised in Australia and the other industrialised countries. There is a substantial quantity of research attached to the OHS implications of persons employed in “*more flexible or less secure forms of work arrangements*”.¹³ These arrangements have been labelled contingent or precarious employment.

Researchers have labelled persons engaged as self-employed contractors as undertaking employment of a precarious nature. Other categories of precarious employment include casual, labour-hire, and temporary arrangements.

In noting the growth of precarious employment patterns Maxwell in his review of OHS in Victoria observed the following:

“It has been estimated that 85% of net employment growth is in “precarious employment” categories. Most of the job losses in the period from 1985 to 2001 were associated with industries which had traditionally provided full-time, permanent employment. By 2002 employees with paid leave entitlements made up only 58% of the Australian workforce.”¹⁴

¹¹Productivity Commission (2006), *The Role of Non-Traditional Work in the Australian Labour Market*, (pp. 18), Commission Research Paper, Melbourne, May.

¹² *ibid*, (pp. xviii).

¹³ Quinlan, M, (2004) Flexible Work and Organisation Arrangements. In Bluff, E, Gunningham, N, and Johnstone, R, *OHS Regulation for a Changing World of Work*, (pp120-145), The Federation Press, Leichhardt, N.S.W.

¹⁴ Chris Maxwell (2004), *op cit*, (pp. 2), State of Victoria, Australia.

It is of interest to note that in a study entitled *Empirical Study of Employment Arrangements and Precariousness in Australia* the factors said to constitute the notion of “precariousness” remain without precise:

“Both employment arrangements and precariousness have been simplistically defined in previous research. As a first step towards developing more refined measures of precariousness, we have developed an expanded set of mutually exclusive employment arrangements. The previous use of dichotomous measures of precariousness and employment arrangements has led to a conflation of the two. While these two constructs overlap to a large degree, examining the patterns of various indicators of precariousness (such as multiple job holding, length of employment under two years, and involuntary periods of unemployment in the last five years) by employment arrangements shows how the two constructs can be distinguished”¹⁵

This study makes specific reference to some factors that would indicate that not all “self-employed” should be considered to be in precarious employment:

“The Other Self-employed were the least exposed in terms of job insecurity, highlighting the importance of including the full population spectrum of work arrangements when considering implications for government policy”¹⁶

A sector of growing workforce?

Waite and Wills undertook an analysis of the numbers of the workforce considered to be self-employed contractors. According to their research the share of self-employed contractors in total employment rose from about 7.3 percent in 1978 to 8.4 percent in 1998. This represents a 15 percent increase over that period.¹⁷

In information obtained from an organisation representing independent contractors the following claim is made:

“Independent Contractors of Australia has used Productivity Commission and FOES 2004 data to claim that the share of independent contractors in total employment in Australia has grown from 16.4 per cent of total employment in 1978 to 19.9 per cent in 2004 (or 1.9 million). This estimate is based on the total number of owner managers in incorporated and unincorporated enterprises, and therefore includes owner managers with employees, which the Productivity Commission argues should not be included in the estimate.”¹⁸

¹⁵ Ostry A., Quinlan M., Louie A., S. Keegel T., Shoveller J., and LaMonta A.,(2006) Empirical Study of Employment Arrangements and Precariousness in Australia In *Industrial Relations*, (pp. 465-489), Volume 61, No. 3, Summer.

¹⁶ *ibid* (pp. 486)

¹⁷ Waite, M. and Wills L. (2001), *op cit*, (pp.17).

¹⁸ Independent Contractors of Australia, Website

Accordingly, estimates range from approximately 800,000 to 2 million independent contractors in 2004 (or from approximately 8 per cent to 20 per cent of all Australian employed persons).¹⁹

Self-Employed Contractors, Independent Contractors and Sub-contractors

Within Australia there has been vigorous debate on issues around what is a “self-employed contractor”. These matters are not without controversy. In particular, considerable debate exists about some definitions and categories of “contractor”.

Some commentators and researchers ascribe the term “dependent contractor” to persons employed on a commercial contract but with work arrangements consistent with them being an employee.²⁰

Other participants in the debate such as the Australian Chamber of Commerce and Industry (ACCI) see no reason to establish a distinction between categories of contractor:

*“Contractors are contractors, whether dependent or independent. ACCI strongly rejects the notion of dependent contracting as a (sic) inherently different form of contracting, and the premises upon which the distinction is based, and the purposes for which it is made. Contracting is a commercial relationship between commercial parties: no more – no less.”*²¹

The ACCI in support of the growth of independent contracting within Australia contribute the following opinion of self-employed contractors:

*“the values of entrepreneurship, risk taking, investment and choice which underpin contracts for services are values that should be welcomed, encouraged and highly regarded by policy makers.”*²²

When is a duck not a duck?

Other commentators are more sceptical about issues surrounding the growth of independent contracting. What underpins the concerns of some is that many arrangements are designed in order to mask employment relationships and deny employment rights to workers.

¹⁹House of Representatives, *Explanatory Memorandum, Independent Contractors Bill 2006*, The Parliament of the Commonwealth of Australia, (pp. 4)

²⁰ Waite, M. and Will, L. (2001), *Self-employed contractors in Australia: incidence and characteristics*, Productivity Commission Staff Research Paper, AusInfo, Canberra.

²¹ *ibid*, pp 23.

²² ACCI, (2005), *Submission House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, Inquiry Into Independent Contractors and Labour Hire Arrangements*, March. (pp.6)

An article by Simon Curren entitled “*When is a duck not a duck*” discusses issues associated with the common law assessment of employment arrangements and the potential that “*contractual façade(s)*” sometimes disguise employment relationships.²³

Professor Andrew Stewart in his submission to the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation Inquiry into independent contracting and labour hire arrangements raised concerns about circumstances where contractors were not genuinely operating their own business. He says as follows:

“There is a fundamental distinction between being an employee and an independent contractor. The essential difference is that an employee works for someone else, while an independent contractor operates their own business. It is a distinction that almost everyone in the community understands. It has also been recognised by the Australian courts, at least as a matter of principle.”²⁴

Professor Stewart continues and observes that frequently independent contractors do not enter contracts for services that are genuine or fair. In recognition of his concern about this issue he proposes a definition of employment as a means dealing with such circumstances. In addressing questionable contractual arrangements he says:

“Nevertheless, it should not be lawful to agree (whether freely or not) to provide services as a contractor when in functional terms the person should be treated as an employee. There are two fundamental reasons why it should not be possible for a person to “choose” to work as a contractor without genuinely operating an independent business. The first is that in many (though not all) instances the choice will simply not be free or unfettered, but rather the product of superior bargaining power on the part of the hirer. A courier, cleaner or security guard who is told they must accept contractor status if they are to be given work is hardly exercising a free choice. But even if the choice is genuinely made, there must nonetheless be limits to freedom of contract. We do not generally allow consumers to contract out of laws enacted for their protection, so why should we allow workers to do so? It is illegal for an employee to agree to work on the basis that they receive less than award wages, or no superannuation or annual leave. So why should it be lawful to achieve some or all of those outcomes by contriving a worker to appear to be a contractor, even if the worker acquiesces?”²⁵

²³ Curren, S., (2004) ‘When is a duck not a duck’ in Law Society Bulletin, Oct, (pp. 26)

²⁴ Stewart A, (2005) *op cit*, (pp. 2)

²⁵ *ibid*, (pp. 3)

Somewhat dishearteningly and consistent with the observations attached to our research, Professor Stewart submits that:

“The reality though is that any competent lawyer can take almost any form of employment relationship and reconstruct it as something that the common law would treat as a relationship between principal and contractor (or contractor and subcontractor), thereby avoiding the effect of much industrial legislation.”²⁶

ECONOMIC IMPERITIVES

Economic pressures

Changes in the character of the workplace including activities like “outsourcing” of categories of work are said to have been influenced by the globalization of production and successive rounds of restructuring and downsizing. Although, the incidence of outsourcing is not said to be a new practice its pace and scope is known to have escalated in the in past generation.

In the previously discussed review of the Victorian OHS legislation by Maxwell the following observation is made;

“Patterns of employment have undergone fundamental change, in both the public and private sectors. Employers have sought to reduce output costs per unit, by aiming for improved productivity. This drive for greater productivity has led to “vertical disintegration” of large organisations into smaller units, each functionally resembling a small enterprise. “Downsizing” and “lean production” have been recurrent themes.”²⁷

Quinlan in an article entitled “Flexible Work and Organisational Arrangements” says that:

“Flexible work arrangements and organisational restructuring have been promoted as critical to enhancing productivity to meet global competition”²⁸

It is clear that the issues of modern working arrangements have already influenced public policy and that in turn this has had some material impact in legislative terms.

According to the government responsible for the introduction of the Independent Contractors Bill (2006) the benefits of independent contractors were as follows:

“The flexibility that independent contractors provide is essential to Australian business. Businesses can use specialist contractors for a range of non-core activities, as needed, allowing them to focus on their core business more effectively. This can enable business to compete more effectively in Australian

²⁶ *ibid*, (pp. 5).

²⁷ Maxwell, C (2004), *op cit*, (pp 29).

²⁸ Quinlan, M (2004), *op cit* in Bluff et al, (pp. 122).

and international markets and to adapt to changing economic conditions. It also facilitates businesses engaging workers on a short-term basis to address fluctuating work levels.

For the independent contractor, it can provide more freedom to choose working hours, to decide when to take holidays, who to work for and what type of work to undertake. High demand for specialist contractors in particular industries contributes to higher wages and ease of worker mobility. These factors can make independent contracting attractive to many workers. For professionals and tradespeople, this may equate to gaining higher pay without the managerial responsibility that tends to accompany higher paying jobs in large organisations.”²⁹

However, it is noted in the explanatory memorandum that there are some concessions associated with working as a self-employed contractor. To this extent the memorandum makes the following contribution:

”On the other hand, these contractors would no longer benefit from conditions and protections available to employees under workplace relations legislation. They will become responsible for their own taxation and superannuation arrangements, and lose any future entitlements they might have received as employees. However, there is anecdotal evidence that independent contractors generally tend to be paid more to compensate them for having to take responsibility themselves for remitting tax and contributing to superannuation. Nevertheless, these responsibilities may be particularly difficult for contract outworkers in the textile, clothing and footwear industry (TCF) who have long been acknowledged as particularly vulnerable to exploitation. (See separate section on TCF outworkers below). Difficulties also arise in the owner-driver sector (see separate section on owner-drivers below).”³⁰

Uhlmann in an interesting comment concerning the overall outcome of the report of the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, (2005) *Making it work: Inquiry into independent contracting and labour hire arrangements*³¹ says the following:

*“Whilst the report highlighted differences along party lines in the definitional approach and means of regulating independent contracting, there was unanimous agreement on a range of other workplace matters. The committee agreed on a number of recommendations including the development of business resources for independent contracting; clarifying responsibilities and addressing occupational health and safety needs of workers; and improving access to skill development for labour hire workers”.*³²

²⁹ House of Representatives, Explanatory Memorandum, *Independent Contractors Bill 2006*, The Parliament of the Commonwealth of Australia, (pp. 12).

³⁰ *loc cit.*

³¹ House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, (2005) *Making it work: Inquiry into independent contracting and labour hire arrangements*

³² Uhlmann, C., (2005), “Employment’s new way”. In *About the House*, (pp. 48), November.

An employer interviewed about participating in the reference group associated with this project and engaged in the cleaning sector commented:

"certain areas of this business are so "price-driven" that it is impossible to place a competitive tender when responsible for the cost of employing workers directly".

Having considered a research by Mayhew and Gibson, Maxwell in his review of the Victorian scenario observed:

*"Intense competition for contract-based work tends to result in "lowest common denominator" OHS outcomes, the "normalisation" of injury ("well, a bloke might occasionally lose a finger, but that is just part of it") and high levels of underreporting of occupational injuries."*³³

Professor Stewart goes further on the implications of unsatisfactory regulation of employment arrangements such as that of independent contractors. He recognises that there are some businesses that benefit from the ill-defined regulatory framework and enforcement of aspect of employment law. He considers that those firms that seek to benefit from these arrangements have an unfair competitive advantage over those who lawfully comply with employment obligations. To that effect he says:

*"But in the end, if firms wish to secure labour from a subordinate and dependent workforce, they should be prepared to bear the cost of the regulation that is associated with employing staff. To insist otherwise, and to maintain some "right" to contract out of employment entitlements through carefully structured arrangements, is not only to defeat the very purpose of that regulation but to obtain an unfair competitive advantage over businesses that employ their labour directly."*³⁴

In an article entitled *OHS Effects of Outsourcing and Homework* Quinlan and Bohle assess a range of OHS research involving sub-contractual arrangements over the past 20 years.³⁵ The view expressed in the article is that the change in working arrangements has received little attention from governments in their laws and policies.

Quinlan and Bohle express a concern that economic and reward pressures are likely to result in increased work intensity and compromises in OHS.³⁶

³³ Maxwell, C. (2004), *op cit*, (p 30)

³⁴ Stewart A, (2005), *Submission on Independent Contracting and Labour Hire*, for House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation (pp.16)

³⁵ Quinlan, M., and Bohle, P., (2008) Under pressure, Out of control, or home alone? Reviewing research and policy debates on the occupational health and safety effects of outsourcing and home-based work in *International Journal of Health Services*, (pp 289-523) Baywood, Publishing, Volume 38, Number 3.

³⁶ *ibid*, (pp. 505)

In another assessment of OHS research Quinlan's study concluded that there "is mounting evidence that these changes are having adverse effects on workers, health, safety and wellbeing".³⁷

REGULATORY FRAMEWORK AND ENFORCEMENT CHALLENGES

Robens and its legacy

The challenges of OHS and self-employed contracting can be attributed in no small way to the regulatory system we have developed. Our legislative framework is recognised to have evolved from the conclusions of the 1972 report chaired by Lord Robens.

For jurisdictions abroad and throughout Australia the Robens Report³⁸ remains the bellwether of OHS reform. No comprehensive assessment or review of OHS legislation fails to acknowledge the contribution and influence of that review. The content of that review and the legislation drawn from its recommendations has undergone scrutiny at many levels and notably in respect to issues around flexible working arrangements.

Invariably, influential participants strongly sway the outcomes of any review that appeals for public submissions. To this extent and despite its pre-eminence as an OHS review, the Robens Report was arguably no different. The submissions considered in the course of the review were largely the traditional industrial relations perspectives of workers and employers. In many elements of the report the perspectives of employers and unions have heavily shaped the subsequent recommendations. Perhaps, insufficient attention was applied to the non-traditional work arrangements.

In specifically addressing the issues relating to self-employed contracting the Robens Report makes the following input:

*"...in many parts of industry and commerce self-employed persons work in circumstances where their acts and omissions are very likely to have a direct bearing on the safety of employed persons. Moreover, the example set by self-employed persons can influence the behaviour of employees."*³⁹

The Robens Report acknowledged that self-employed persons posed a particular challenge to the style of legislation proposed in the recommendations of that review:

*"We recognise that there are practical difficulties in enforcing the application of this type of legislation to the self-employed. Nevertheless we are in no doubt that the attempt has to be made".*⁴⁰

³⁷ Quinlan (2004) *op cit*, (pp. 122)

³⁸ Robens A, (1972), *Safety and Health at Work - Report of Committee 1970-72*, Her Majesty's Stationery Office, London.

³⁹ *ibid*, (pp. 54)

⁴⁰ *loc cit*

In discussing some particular circumstances of the self-employed the report contemplates the following:

*“where self-employed persons may be to all intents and purposes in the same position as employees as regards their methods and conditions of work, that is to say their methods of work and working environment may not be within their direct control. In such circumstances their obligations should be to co-operate in complying with any relevant safety provisions”.*⁴¹

It is difficult to precisely assume from this statement what circumstances were in the thoughts of the authors of the report. However, the questions it raises are key to the questions our project intends to consider. The extent to which such obligations should extend and how best to such obligations should apply is seemingly the crux. One might proffer that not much has changed in the intervening years but if the report was commissioned today one might speculate that issues around the nature and extent of such responsibility would have received more earnest consideration.

The report considers issues of participation to be key to achieving successful OHS outcomes and says so in the following sense:

*“if progress is to be made there must be adequate arrangements for both management and workpeople to play their full part.”*⁴²

For the purposes of our research, the issues to be drawn from this we believe to be at least twofold. Firstly, this notion inherently focuses on the conventional or traditional workplace where there is an employee/employer relationship. Secondly, in the current mechanisms for participation do not contemplate structures that involved parties who may not be employees.

The “wisdom of Robens” as some observers have argued was the simplicity of an approach that relied upon general duties, self-regulation and the reluctance to heavily prescribe. However, the same commentators have also observed that the value of the Robens style may be said to have diminished with the passage of time and the inclination to regulate.⁴³

In a broad comment about the current state of OHS Regulation in and beyond Tasmania Brown and Hyam state:

“To sum up, we appear to be witnessing simultaneous movement to deregulate (particularly in the labour market); pressure for centralisation of regulation; and a return to the piecemeal creation of more regulation applying to specific problems, so criticised by Robens in his report Safety and Health at Work”.

⁴¹ *ibid*, (pp. 55)

⁴²*loc cit*.

⁴³ Brown, D., and Hyam, S., (2007) *op cit*, (pp. 250)

“In workplace health and safety matters we seem to have blundered our way full circle back to the period before Robens. If we really want to prevent work-related death, injury or illness in the complex and confusing times we live in now, we need at least to rediscover the wisdom of Robens.”⁴⁴

At the time that the Robens review was undertaken the world of work was recognised to have been markedly different from today’s concept of the workplace. The changes in the nature and form of what constitutes the “workplace” are widely acknowledged.

“Laing (2002) and Maxwell (2005) noted that the workplace health and safety legislative framework is predicated on quite a different work environment to the one that currently exists. Since the economy was manufacturing-based at the time that the legislative framework was designed, the inclination of the legislation would have been towards eliminating physical hazards associated with production processes of factories, mines, agriculture and to a lesser extent, shops.”⁴⁵

The process considering the harmonisation of Australian OHS legislation received many submissions and acknowledged that the modern Australian workplace is often a very different environment to that envisaged by Robens. The harmonisation process was an opportunity to deliver some national resolution on issues associated with modern working arrangements.⁴⁶

As a point of note, the fundamental approach drawn from Robens Report is not without its critics. In particular, Woolf in observations on some of the assumptions of the report says, *“the Robens Committee was faced with a choice between unenforceable law or law which, as a matter of declared policy, was not to be enforced”*.⁴⁷

A central tenet of Woolf critique is that the principal culprits in poor occupational health and safety performance were not apathy and complex law as presumed by Robens but rather negligent management and an insufficiently empowered and resourced inspectorate. Woolf is of the view that a self-regulatory style was less likely to achieve better OHS outcomes than appropriately enforced regulation.⁴⁸

⁴⁴ *ibid.*

⁴⁵ *ibid.*, (pp. 189)

⁴⁶ *Editors note - despite contemporary workplaces and emerging problems being a key focus of the harmonisation review a brief analysis indicated that there is surprisingly little reference to changes designed specifically to overcome problems arising from non-traditional working arrangements.*

⁴⁷ Woolf A, (2005), “Robens Report – the wrong approach?” in *Policy and Practice in Health and Safety*, (pp 131-136), Vol 3.2, IOSH Services, March.

⁴⁸ *ibid.*, (pp. 132).

Statutory Duties

All Australian jurisdictions have recognised and apply duties of care upon person working as self-employed contractors. Sometimes these obligations reflect duties more akin to those of employees and at other times those more aligned to employers.

Table 1.

<i>Victoria</i>	<i>South Australia</i>
24. Duties of self-employed persons to other persons	22. Duties of <u>employers</u> and self-employed persons
(1) A self-employed person must ensure, so far as is reasonably practicable, that persons are not exposed to risks to their health or safety arising from the conduct of the undertaking of the self-employed person.	(1) An employer or a self-employed person must take reasonable care to protect his or her own health and safety at work.

Table 1. appears to demonstrate an anomaly that arises across several Australian jurisdictions in so much that in some states a self-employed contractor may not owe an inherent duty of care to oneself. The anomaly would not seem to eventuate in South Australia.

General Duties and Chains-of-responsibility

In most Australian jurisdictions OHS legislation contemplates and accommodates responsibilities in relationships between principal and self-employed contractor. In the context of the *Occupational Health, Safety and Welfare Act (SA) 1986 (OHSW Act)* a principal has a responsibility for the safety of the self-employed contractor so far as is reasonably practicable is safe from injury and risks to health. To that extent the provision of the act reads as follows:

4 - Interpretation

*(2) For the purposes of this Act, where a person (the **contractor**) is engaged to perform work for another person (the **principal**) in the course of a trade or business carried on by the principal, the contractor, and any person employed or engaged by the contractor to carry out or to assist in carrying out the work, will be taken to be employed by the principal but the principal's duties under this Act in relation to them extend only to matters over which the principal has control or would have control but for some agreement to the contrary between the principal and the contractor.*

The provision of the South Australian *OHSW Act* of interest in the context of a self-employed person reads as follows:

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

Johnstone, Quinlan and Walters observe that where work is undertaken away from the principals workplace the duties to self-employed contractors would be possibly not be owed a duty of care. They are more impressed with the concept evident in the Victorian and Queensland provision, which have adopted the notion of “*conduct of the undertaking*”.

According to Quinlan the general duties provisions in Australian jurisdictions establish a hierarchy of responsibility however he believes that:

“evidence indicates that the growth of precarious employment is associated with a fracturing of statutory responsibilities (at least in the eyes of those being regulated) that is undermining effective implementation of legislation.”⁴⁹

According to a number of observers, it is apparent that thorough “*chains-of-responsibility*” are not inherent components of our statute. It would appear that if a considered approach to this matter was developed in legislation there is potential for significant shortcomings to be addressed. It is possible to demonstrate a lack of robustness in legislation when the complexity of outsourcing and “*disorganisation*” is evident in working arrangements.

Sometimes “*paper compliance*” is deployed as a shield that conceals less than satisfactory systems of OHS management. Complex legal documentation purporting to address OHS regularly bears no resemblance to operational practices.

Our office has discussed the issues of OHS risk management and training for self-employed contractors by the principals that have employment arrangement with self-employed contractors. It is interesting to note that some principals recounted that they have received legal guidance counselling them against concerted involvement in OHS management associated with their self-employed contractors. They have been advised that assisting self-employed contractors establish safe systems of work may contribute to a dispute around the occupational status of the self-employed contractor (possibly transforming the engagement to an employer and employee relationship).

⁴⁹ Quinlan, M., (2004), in Bluff et al, (Eds.) *op cit*, (pp. 126)

Our research has also ascertained that there are documents wherein principal contractors oblige their self-employed contractors to meet particular OHS requirements or expectations. The pitch of the guidance from the principal contractor appears to recognise that their self-employed contractors may not have the requisite knowledge or skill to engage in thorough OHS management. An analysis of the expectations we consider would fail to embrace a comprehensive response to the OHS needs of the self-employed contractors.

This would seem to demonstrate an unsatisfactory halfway house. A situation appears to have developed where shortcomings associated with OHS are recognised but there is little inclination to appropriately assess and control risk. It would not appear to achieve a satisfactory “chains-of-responsibility” approach to OHS.

According to Quinlan precarious employment arrangements increase the potential risk of ignorance or misunderstanding of legislative requirements and that:

*“regulators expressed concern that employers often presume that outsourcing an activity or leasing a worker diminished their responsibility”*⁵⁰

Enforcement Challenge

Research conducted by Johnston, Quinlan and McNamara assessed the perceptions of inspectors on changed work arrangements. According to their study:

*“changed work arrangements were seen by OHS inspectors as a significant challenge, complicating their activities and disarticulating understanding about the respective obligations of stakeholders.”*⁵¹

For the purposes of their report Johnston, Quinlan and McNamara undertook interviews with inspectors in a number of jurisdictions. The report made further conclusions in the ensuing manner:

“the pervasiveness of these arrangements, widespread confusion amongst duty-holders, deliberate risk-shifting and limits to the inspectoral resources posed problems in securing an acceptable or enduring level of compliance”.⁵²

Much is written about the logistical difficulty that the growth of micro business poses for enforcement. That relatively few inspections of OHS practices occur in this sector is widely recognised.

⁵⁰ *ibid*, (pp. 127)

⁵¹ Johnstone, R., Quinlan, M., and McNamara, M. (2008), *Australian Health and Safety Inspectors perceptions and action in relation to changed work arrangements*, Staff Research Paper, (pp 20) ANU, Canberra.

⁵² *loc cit*.

In a previously referenced study relating to this matter Quinlan and Bohle observe that. There is:

“...less regulatory protection for these workers, because subcontracting and home-based work weaken existing regulatory regimes and place additional logistical demands on already stretched inspectorates.”⁵³

Deeming Provisions

OHS, Worker Compensation and Industrial Relations legislation across all Australian jurisdictions have seen the development of “deeming provisions”.

Most of the reformed OHS statutes include provisions that deem certain categories of worker including independent or self-employed contractors in some instances to be considered ‘employees’. This affords these workers the protections of the employer’s general duties to employees. The most extensive ‘*deeming provision*’ is to be found in Western Australia.⁵⁴

The use of deeming provisions across various instruments within South Australian legislation can be seen to have given rise to what can be reasonably described as piecemeal or ad hoc conventions. (See Appendix 1). An example of the incongruity that “*deeming*” generates is that in some instances a self-employed cleaner would be considered an employee for workers compensation purposes however a self-employed security officer employed in the same workplace would not.

The issues paper calling on submissions relating to the National OHS Review discusses matters associated with “*deeming provisions*” in the following terms:

“Jurisdictional approaches vary in relation to independent contractors and subcontractors who provide services under contracts for services. Some jurisdictions treat the contractor as an employee through the use of ‘deeming’ provisions and other jurisdictions rely on provisions for the protection of ‘others’. Some jurisdictions deem a contractor to be an employee when applying the general duty of an employer. This obligation is limited to matters over which the employer has control or would have had control if not for any agreement claiming to remove the control. Alternatively, the contractor may be understood as someone who is self-employed. Some jurisdictions have express provisions under which ‘principals’ (who engage persons other than employees to perform work) are taken to have the responsibilities of employers in relation to contractors and employees of contractors.”⁵⁵

⁵³ Quinlan, M. and Bohle, P., (2008) *op cit* (pp 505)

⁵⁴ Johnstone, R. (2005), *Regulating Occupational Health and Safety in a Changing Labour Market Working Paper 34*, Australian National University, June.

⁵⁵ Issues paper, (2008) (pp. 13)

There appears to be a chorus of agreement from many authoritative voices that the expansion of “deeming provisions” in OHS or workers compensation legislation will not provide the silver bullet nor even a satisfactory mechanism to resolve issues of poor understanding and compliance among self-employed contractors.

Professor Stewart appears to have concerns about the efficacy of “*deeming provisions*” as a means of coping with deficiencies in the application of law with associated with certain employment arrangements wherein he says:

“Rather than simply give in to the growing tide of evasive arrangements, or add even further complexity to the existing patchwork of deeming provisions that apply in different contexts and at different times....”⁵⁶

EMERGING ISSUES AND EMERGING RESPONSES

Systematic Occupational Health and Safety Management Systems

In returning to the evidence of weaknesses in Occupational Health and Safety Management Systems (OHSM) many researches have considered the administrative mechanisms established in workplaces. It is apparent that such administrative mechanisms can be established in situations involving self-employed contractors.

There is evidence that principals or their self-employed contractors sometimes establish elaborate “paper compliance” trails that appear to put in place systems to manage OHS. Such administrative measures are not necessarily translated into effective practice.

Nichols and Tucker (2000) when discussing this issue in the context of OHSM state:

“Government resources for OHS enforcement have never been close to sufficient, so that regulators set priorities and use the scarce resources available to them efficiently. There is a distinct danger that the OHSM system approach to regulation will make a virtue out of necessity and become an excuse for further diminishing the resources for adequate enforcement in the false belief that we have in fact achieved self-reliant workplaces. This is particularly true of any government whose key health and safety message is that co-operation between workers and employers is natural because after all safety always pays. It is fundamental to OHSM thinking and we think it dangerous.”⁵⁷

In further discussion of the shortfalls in OHSM in a comparison of the Norwegian and Australian experience Saksvik concludes:

“More important perhaps, were our findings relating to the effectiveness of implementation processes in ensuring that SOHSM achieved its objectives. In this regard we found that paper compliance, or the documentation of procedures

⁵⁶ Stewart, A. (2005) *op cit*, (pp. 15).

⁵⁷Nichols T and Tucker in Frick et al, (Eds.), *op cit*, (pp. 308).

*not translating into actual practice, represented a serious limitation in both countries. This raises critical questions about SOHSM, not just in terms of devising ways of addressing this limitation but regarding the alleged superiority of monitoring systems compliance rather than compliance with specific OHS standards.*⁵⁸

One might reasonably conclude from Saksvik's further observation that he remains unconvinced that OHSM has been satisfactorily considered in the context of precarious employment:

*"The capacity of a relatively rigid SOHSM model to adapt to increasingly fractured and changing work arrangements represents a question that would benefit from further and more detailed field-work based comparative research."*⁵⁹

Salsvik makes reference to the opinion expressed in Frick, et al who have made observations about regulatory provisions aimed at addressing self-regulation and OHSM. Frick, et al (2000) comment that contributors to their text regarded OHSM in a number of different ways. They noted three distinct perspectives. Initially, that OHSM was of paramount importance in making self-regulation work and lending OHS policy a transparent and preventive character, enhancing the participation and influence of workers and 'managing' to contribute to a better working environment. Alternatively, a 'paper tiger' proposition in which such 'systematic OHSM' becomes synonymous with further bureaucratisation and a "*process of management which is based on a mechanistic model of organisational processes*" that obstruct strategies for dealing with OHS by preventing shop-floor participation. Or lastly, a sham hypothesis in which OHSM is merely a disguise behind which a hidden and largely economically driven agenda of deregulation is in operation."⁶⁰

Data Scarcity

Central to a satisfactory understanding of the current state of OHS is reliable information. In the context of OHS it would seem apparent that for a significant sector of the workforce little information is known or recorded. Occupational morbidity and mortality rates associated with self-employed contractors are poorly documented.

Quinlan notes that workers compensation claims filed with the existing schemes are generally considered to be the major source of workplace disease and accident data. With the changes in employment arrangements the data "*is becoming an increasingly inadequate source to base preventive activities*".⁶¹

⁵⁸Saksvik, P. and Quinlan, M., (2003) *Regulating Systematic Occupational Health and Safety Management Comparing the Norwegian and Australian Experience* in *Industrial Relations*, (pp. 33-59) Volume 58, No. 1, Winter 2003.

⁵⁹ *ibid*, (pp. 56)

⁶⁰ Frick, K., Jensen, P.L., Quinlan, M. and Wilthagen, T. (Eds), (2000) *Systematic Occupational Health and Safety Management*, (pp 4), Oxford, Pergamon.

⁶¹ Quinlan, M., (2004) in Bluff et al *op cit* (pp. 136).

Across a range of the key functions undertaken by the South Australian OHS enforcement agency SafeWork SA, self-employed persons appeared to be represented in lower numbers than would likely be expected in the context of the actual proportion of the workforce they comprise.⁶²

SafeWork SA provided data in relation to the number of complaints received, investigations finalised, the application of prohibition and improvement notices and convictions recorded. SafeWork SA also provided anecdotal perspectives from senior inspectors that strongly indicated that self-employed contractors were considerably less likely to be subjected to the application of enforcement activities relative to what we might perceive to be their level of workforce participation to be.⁶³ The issue of enforcement activity and self-employed contracting appeared to be most apparent in relation to construction industry.

The information provided by SafeWork SA would appear to support an argument for better analysis or statistical record keeping in relation to workforce status and enforcement activity.

What can be made of such data is clearly open to interpretation. It is possible that this indicates that self-employed contractors are less likely to engage in unsafe work practices. However, our understanding of the working arrangements of self-employed contractors, suggests there should be no confidence that this is the case. It is more likely to reinforce the claim that non-traditional work arrangements pose a challenge to regulatory agencies.

It would seem more reasonable to conclude that this supports an assertion that self-employed contractors are more likely to operate outside of the regulatory framework. In order for an inspection to be initiated by the regulatory authority it would in many instances be incumbent upon the self-employed person reporting his or her own activity.

Somewhat ironically Robens in his criticisms of the official statistics at the time of his report said the following:

*“Many of those who made submissions to us expressed considerable doubts about the quality and usefulness of the official statistics of accidents and diseases...public discussion of trends in safety and health at work takes place against a statistical background which is fragmented and incomplete”.*⁶⁴

There is evidence that insufficient data collection and analysis remains a challenge for enforcement agencies. Consistent with a theme identified in our research there is a strong suggestion that self-employed contractors remain a largely invisible workforce. It is recognised that enforcement of regulation is particularly difficult where little is known about the arrangement of work.

⁶² Data provided by SafeWork SA December 2008.

⁶³ Data provided by SafeWork SA December 2008.

⁶⁴ Robens (1972), *op cit*, (pp. 135)

In looking at the recent developments in the construction industry and principally associated with questions of an industrial relations nature Wilcox makes the observations:

“No aspect of the building and construction industry is more important than occupational health and safety (“OHS”). On this aspect, the interests of employers and employees (and governments) converge.”⁶⁵

In an indication of further unreliable data Wilcox having considered the Australian Safety and Compensation Council, *Compendium of Workers’ Compensation Statistics Australia 2005-2006* makes the subsequent and perplexing observation;

“When self-employed workers are excluded, the construction sector improvement is less pleasing. There are no frequency rate figures that exclude self-employed workers. However, the incidence rate improvement is 19.29 per cent and 17.40 per cent, for employed building construction workers and non-building construction workers respectively. These figures are much the same as those for all employees in all industries.”⁶⁶

Notwithstanding the scarcity of data some research indicates that “own account” workers that includes self-employed contractors are more likely to suffer occupational fatalities than other categories of worker. Mayhew in reporting data relating to the early 1990’s makes the following statement:

“In Australia, staff involved in the second ‘Work-Related Fatalities’ study examined coronial records for all traumatic work-related deaths over the period 1989 and 1992 (i.e. not just those for whom workers’ compensation claims were made). It was found that ‘own account’ workers were 10.2% of the workforce but suffered 22% of all traumatic fatalities at work (Driscoll, pers. comm). As the discussion below shows, Australian small business and precarious workers also appear to have a far higher probability of non-fatal work-related injury and illness than do their counterparts in large-scale enterprises.”⁶⁷

Cost Shifting and Equity

It is valuable for there to be some consideration of the equity in the equation of the real costs associated with OHS interventions. To this extent Culyer and Tompa consider concepts of “equity”. According to their study:

“Equity is commonly considered to be of two main kinds: distributive equity/justice which refers to the fairness of allocation of benefits and burdens

⁶⁵ Wilcox M., (2008). *Proposed Building and Construction Division of Fair Work Australia Discussion Paper*, (pp. 19), Commonwealth of Australia, Canberra.

⁶⁶ *ibid.*, (pp. 19).

⁶⁷ Mayhew, C., OHS Challenges in Australian Small Businesses: Old Problems and Emerging Risks in *Safety Science Monitor*, (pp.27), Article 4 Vol. 6.

*and procedural equity/justice, which refers to the fairness and acceptability of decision-making processes”.*⁶⁸

Culyer and Tomba establish that many factors associated with reforms or restructuring of processes in the milieu of OHS are not fully explored:

*“In the context of OHS interventions and associated costs incurred and the consequences produced, equal or unequal treatment for the purposes of fairness or equity amounts to assigning priorities to costs and consequences accordingly... many research studies arbitrarily restrict the categories of cost or consequence considered, for example by ignoring costs or consequences that fall on workers families or by attributing implicitly high weight to the positive productivity effects on the bottom line...”*⁶⁹

Culyer and Tomba appear to provide a reasoned argument for employers to consider more thoroughly the implications of their decisions and properly evaluate any change in process. They explain the argument by suggesting self-employed contractors might assume many of the consequences and risks in return for insufficient rewards. To this extent they conclude:

*“The implications for assessing equity aspects of OHS interventions should be apparent: if it is possible for the initial incidence of the costs or benefits of any change to be shifted to others, then any assessment of the equity of the change that fails to account for this would be flawed. How significant such effects are is an empirical matter.”*⁷⁰

Among the factors likely to receive little recognition when processes are restructured or “shifted” are issues such as occupational injury insurance. Quinlan notes that regulators have recognised that the reduction in the coverage of workers compensation systems has transferred costs to the social security and public health scheme.⁷¹

Participatory Mechanisms

The Robens review foresaw future improvements in Occupational Health and Safety as entwined in the contribution that workers would make in the respect of hazard identification and control.

Self-employed contractors may be more or less cognisant of safety issues than other categories of worker. It is the case however, that they will not be subject to the same requirement to improve their conduct that traditional workers are likely to appreciate.

⁶⁸ Tompa, E., Culyer, A., And Dolinschi, R., (Eds.) (2008), *Economic Evaluation of Interventions for Occupational Health and Safety; Developing Good Practice*, (pp. 215) Oxford University Press, New York.

⁶⁹ *ibid*, (pp. 217).

⁷⁰ *ibid*, (pp. 230).

⁷¹ Quinlan, M., (2004) in Bluff et al, (Eds.) *op cit*, (pp. 136).

It is unlikely that self-employed contractors will be subjected to what the Robens report considers the collective pressure to improve systems. On issues that drive OHS improvement Robens said:

*“effective safety awareness is developed by an accumulation of influences and pressures operating at many levels - that of the boardroom, the senior manager, the supervisor, the trade unions the worker on the shop floor”.*⁷²

Indeed, in the case of self-employed contractors effective safety awareness will often operate in isolation.

Maxwell (2004) in considering questions of concern to self-employed contractors observes:

*“Precarious work arrangements can create enclaves of workers who are effectively excluded from OHS systems within workplaces. These workers are more likely to find themselves in socially-isolated and poorly-planned work settings, and to be subjected to more authoritarian, less consultative forms of management.”*⁷³

Walters in an article dealing with current developments in OHS says;

*“If health and safety representatives and joint arrangements for health and safety are effective in improving health and safety performance, and, as we have seen there is quite strong evidence that they are, then it is important to know what makes them effective.”*⁷⁴

In an article entitled *Statutory Occupational Health and Safety Workplace arrangements for a Modern Labour Market* Johnstone, Quinlan and Walters⁷⁵ address a number of the benefits of and impediments to worker participation in OHS structures. Specifically they observe:

*“The need to promote worker involvement in OHS is accepted at the international level (see ILO Convention concerning Occupational Safety and Health and the Working Environment, No155 of 1981) and has strong ethical (workers bear the burden of failure to manage risk at work) and practical foundations. With regard to the latter point it should be noted that there is a growing body of evidence on the positive benefits of worker participation in OHS (for a summary see Walters & Frick 2000).”*⁷⁶

⁷²Robens, (1972) *op cit*, (pp. 56)

⁷³Maxwell, (2004) *op cit*, (pp. 31)

⁷⁴Walters, D., (2003) *Working Paper 10, Workplace Arrangements for OHS in the 21st Century*, July 2003.

⁷⁵ Johnstone, R., Quinlan, M., and Walters, D., (2005) *Statutory Occupational Health and Safety Workplace arrangements for a Modern Labour Market*, in the *Journal of Industrial Relations*, (pp. 93-112), Sage Publications, London, Vol 47, No. 1, March 2005.

⁷⁶ *ibid*, (pp. 94)

The research reviewed for the paper of Johnstone et al (2005) identifies better OHS outcomes in workplaces where structures of employee representation are established. Other research considered showed that improved safety compliance was linked to the presence of safety representatives.⁷⁷

The assessment of Johnstone et al (2005) in the context health and safety representatives and the deeming provisions of the OHS (SA) Act is that self-employed contractors would be precluded from any such participatory regime.⁷⁸ They again emphasise that participation in OHS structures is “*generally crafted around the traditional labour law paradigm*”.

They suggest that the changes in the organisation of work have so diminished the intent of existing OHS statutory requirements that alternate regulatory arrangement might be necessary. They see merit in exploring changes in the method by which HSRs are elected and HSCs are constituted.

Union Membership

The decline in union membership as a proportion of the workforce is widely acknowledged. In terms of a percentage of the workforce Johnstone⁷⁹ cites a decline in union membership from 46% in 1986 to 19% in 2007. Self-employed contractors have not tended to be members of trade unions and remain very unlikely to join unions.

Johnstone also states that 96% of the private sector were small businesses defined as employing less than 20 employees.⁸⁰

Recently unions have been seen to represent self-employed contractors. The ability for unions to bargain collectively on behalf of self-employed contractors appears to be a change in the industrial environment that incidentally has the potential to influence OHS outcomes. Evident in the construction and transport industries, the issue might extend to other categories of work.

A recent draft determination of the Australian Competition and Consumer Commission (ACCC) has granted the Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland (CFMEU Qld) an entitlement to represent owner-drivers in the earthmoving industry. Although it principally involves commercial contracts it may be that OHS matters could also be contemplated in such contracts.⁸¹

It is foreseeable that moves toward collective representation on questions of OHS could bring some positive change. Representations by trade and labour unions on

⁷⁷ *ibid*, (pp. 95)

⁷⁸ *ibid*, (pp.103)

⁷⁹ Johnstone, R. (2008) *Harmonising Occupational Health and Safety Regulation in Australia: First Report of the National OHS Review*, (pp. 15), National Research Centre for OHS Regulation, ANU, Canberra.

⁸⁰ *loc cit*.

⁸¹ ACCC, (2009), *Draft Determination*, February, Authorisation No. A91103.

behalf of self-employed contractors have the potential to bring additional recognition and attention to the experiences of self-employed contractors.

Johnstone, et al (2005) are of the opinion that unions are routinely linked to the likelihood or otherwise of organisations choosing to follow the spirit and intent of Robens style legislation:

“The effectiveness of participatory mechanisms depends not only on the formal requirements under OHS legislation but also on the institutional infrastructure upon which these mechanisms to varying degree rely. Unions largely provide training and logistical support for HSRs, Unions play an indirect role in workplace HSCs (Bohle & Quinlan 2000:305-309). As a product of the early 1970s, the Robens Report (which served as a model for both British and Australian OHS legislation), presumed a level of union membership and influence to make participatory mechanisms work.”⁸²

Walters and Nichols (2007) note that “*trade union density is inversely proportional to workplace size*” and hence health and safety representative are least likely to be found in small enterprises. They comment that;

“it is quite clear that that best practice we observed was in larger workplaces...”⁸³

Emerging Hazards

In an issues paper released by the agency coordinating the national review into the Model OHS laws a number of emerging hazards were identified. Interesting, many of the key emerging issues were likely to be of direct significance to the employment arrangements of self-employed contractors.⁸⁴

High among the “new issues” considered to be of significance was a question on the notion of workplace. The issues paper noted:

“Generally, the duties of care in principal OHS Acts are limited so that they cover a ‘workplace’ or ‘premises’, though in some circumstances this is extended to areas ‘at or near a workplace’. However, the definition of workplace has evolved to mean any place where work is performed, i.e. the focus is on the conduct of work. For example, Queensland’s Workplace Health and Safety Act 1995 defines a ‘workplace’ as any place where work is, or is to be performed by either a worker or a person conducting a business or undertaking. This approach covers work activities that are undertaken outside the confines of the traditional workplace, for example in private residences, in vehicles or at

⁸² Johnstone, et al. (2005) *op cit.* (pp. 107)

⁸³ Walters D., and Nichols T. (2007), *Worker Representation and Workplace Health and Safety* (pp. 153), Palgrave Macmillan, Basingstoke.

⁸⁴ Department of Education, Employment and Workplace Relations (2008) *National Review into Model OHS Laws: Issues Paper*, Commonwealth of Australia, May 2008, Barton, ACT.

temporary workplaces (e.g. work on transmission lines, work in public places).⁸⁵

Of direct significance to the employment arrangements of self-employed contractors, the issues paper also recognised that the organisation of work was itself an emerging OHS issue;

“A key issue identified in a number of recent reviews of OHS legislation is how duties of care should extend beyond traditional employment relationships and address contemporary forms of work organisation and labour market arrangements, e.g., contracting, franchising, and labour hire. The manner in which jurisdictions have attempted to deal with these changes in their OHS laws varies considerably. Australia has experienced unprecedented growth in casual, part-time and temporary work, outsourcing, job-sharing and the use of agency labour and home workers. The use of migrant workers has increased due to skilled labour shortages. These changes in the structure and organisation of work pose regulatory challenges for the duties of care, for effective worker participation in OHS and for compliance and enforcement.”⁸⁶

Consistent with much of the research identified for this report, the *Issues Paper* considering model national OHS laws cites other emerging OHS matters of direct relevance to self-employed contractors. In particular, psychosocial and work environment problems are said to be emerging issues of concern:

“It is a feature of the ongoing changes to the economy, technology, work organisation and population demographics that new hazards and risks are emerging. This also affects the prevalence and consequences of existing hazards and risks. For example, more attention is being given to psychosocial and work environment problems, such as stress, fatigue and bullying. While the duties of care in OHS laws aim to protect persons from all types of hazards and risks arising from work activities, the importance of particular issues is being specifically recognised in some OHS Acts. For example, the objectives of the NSW OHS Act 2000 refer to promoting a work environment that is adapted to the physiological and psychological needs of people at work.”⁸⁷

The duty to consult was as previously noted a key requirement arising from the Robens Report. This has only been recognized in the context of the employee/employer relationship. Pressure from stakeholders was considered critical to favorable OHS outcome. The issues paper notes:

“However, work relationships have changed significantly since the Robens Report, and some jurisdictions have recognised the need to extend consultation provisions beyond the employer and employee relationship to include contractors. There is a great deal of variation across jurisdictions in relation to:

⁸⁵ *ibid.*, (pp. 8).

⁸⁶ *ibid.*, (pp. 9).

⁸⁷ *loc cit*

- *the inclusion in legislation of the concept of consultation or a definition of that term;*
- *specifying the nature of consultation, when it is required and how it should be undertaken;*
- *who should be consulted and the means by which consultation may or must be facilitated; and*
- *whether consultation is an explicit obligation for employers.*

Some jurisdictions allow employers and employees to agree on arrangements for consultation and representation that suit the needs of the particular workplace.”⁸⁸

The poor capacity of self-employed contractors to effectively assess and control risks broadly defined as psychosocial hazards ⁸⁹ requires more analysis but is recognized. There is a strong suggestion that psychosocial hazards are commonly misunderstood in conventional workplaces let alone in other employment arrangement. Stress, fatigue, bullying and occupational violence are largely an unknown dimension in the context of self-employed working arrangements

In conducting a review of OHS studies Quinlan, “*found that clear association between precarious employment and adverse OHS outcomes*”⁹⁰.

In an article exploring issues of non-standard employment, subcontracting, flexibility and health Thébaud-Mony ⁹¹ makes reference to an experience in the French nuclear power industry, where subcontracting workers engaged on power station maintenance account for 80% of radiation hazard exposure.

Community Sector Employment

Recent data analysis by SafeWork SA has identified the Community Sector as an area of growing concern in the context of Income Maintenance Claim Rate and the high incidence of claimants.⁹²

SafeWork SA’ s report says:

“Community services’ would be the prime candidate for a substantially increased reduction target”⁹³

The report recognises that the Community Services Industry is subject to low levels of enforcement and regulatory activities relative other industry sectors.

⁸⁸ Department of Education, Employment and Workplace Relations, (2008) *op cit* (pp. 20)

⁸⁹ Maxwell (2004) *op cit*, (pp.31)

⁹⁰ Quinlan (2004), *op cit*, (pp. 122)

⁹¹ Thébaud-Mony Annie (2001) Casualisation and Flexibility: Impact on Worker's Health, TUTB Newsletter N°15-16 - February 2001, (pp.16-22)

⁹² SafeWork SA (2009) *Unpublished statistical information*, SafeWork SA, Adelaide, August .

⁹³ *loc cit*.

Of particular interest to our research is a finding that Personal Care Assistants are only behind heavy truck drivers in terms of occupation of income maintenance claimants.⁹⁴ Self-employed contractors undertaking personal care work will not be reflected in SafeWork's statistics but we might assume that self-employed contractors are at no less risk of injury than those who are employees. The implication attached to this situation is worthy of considerable scrutiny.

Workers Compensation

There is evidence that in many Australian jurisdictions the obligation of self-employed contractors to hold occupational injury insurance (workers compensation) is unsatisfactorily. Matters of occupational injury insurance for self-employed contractors are subject to minimum standards and hence negligible policing. The implications of unsatisfactory occupational injury insurance for a significant sector of the workforce have serious ramifications for public policy and the financial security of this category of worker.

In a paper concerning OHS Regulation for the 21st Century Walter observes that:

*“The costs of work-related injury and ill-health (calculated to represent a loss of anything from 1 to 5 per cent of GNP) has helped to ensure that slogans such as ‘good health is good business’, keeping workers ‘healthy happy and here’ and the ‘business case’ have come to dominate the rhetoric of governance of the work environment.”*⁹⁵

Johnstone notes that changing work arrangements have had a material impact on the extent to which Workers Compensation systems provide workplace injury insurance. He says:

*“...because of the increased percentages of contingent and precarious workers, including self-employed contractors and sub-contractors, the percentage of workers covered by workers compensation systems is likely to be declining”.*⁹⁶

There remains a largely unanswered question on how the real costs of workplace injuries are calculated. It is certainly the case that within the South Australian jurisdiction, statistics gathered by Work Cover that aim to “*create a greater awareness of workplace injury issues*” in no way assists our understanding of the experience of self-employed contractors save for those “*deemed workers*” under the Workers Rehabilitation and Compensation Act (SA) 1996.⁹⁷

Self-employed contractors are generally excluded from the traditional workers compensation schemes (notable exceptions being “*deemed worker*” provisions of evident in most systems).

⁹⁴ *loc cit.*

⁹⁵ Walters, D (2003) *op cit.*, (pp. 22)

⁹⁶ Johnstone, R (2008) *op cit.*, (pp. 15)

⁹⁷ WorkCover Corporation of South Australia (2008) *WorkCoverSA Statistical Review Part 2006-07*, (pp. 4)

Few research studies appear to have considered the level of cover and maintenance of adequate occupational injury insurance held by self-employed contractors.

The anecdotal evidence gathered by our office suggests that self-employed contractors routinely make little provisions for occupational injury insurance. In instances where a degree of occupational injury insurance has been evident no provision for medical or rehabilitation costs have been considered.

The Department of Family and Community Services in its submission to the Productivity Commission's enquiry into National Workers' Compensation and Occupational Health and Safety Frameworks, released in June 2004 comment as follows:

“Although State compensation schemes are responsible for supporting injured workers from the time of injury, where an individual is unable to attribute responsibility for an accident or illness, the social security system effectively becomes a de facto compensation scheme. Definitional exclusion of many persons from the workers compensation system and the changing nature and form of workplace relations are resulting in a significant number of workers falling outside the scope and coverage of the traditional workers compensation systems. The self-employed are, in most cases, excluded from coverage and left to make their own personal accident compensation insurance arrangements. For those that fail to take up a personal insurance policy, or for those that fall through the cracks of the workers compensation system for a number of other reasons, the income support system is often the only recourse.”⁹⁸

The Tasmanian workers compensation legislation (see below) has adopted an approach where self-employed contractors are possibly more likely to have and maintain an entitlement to occupational injury insurance. A principal contractor assumes responsibility to maintain workers compensation insurance where an self-employed contractor does not demonstrate that they have their own insurance arrangement. Such an approach appears to have the ability to overcome concerns about under-insurance for this sector.

A home based personal carer working as self-employed contractor contacted our agency and reported that she had been paying an occupational injury insurance premium as a component of her contract. Thirty cents from each hour of pay was contributed toward her insurance premium. She was injured whilst carrying shopping on behalf of her disabled client. She was unable to work for a considerable period as a consequence of the injury. The insurance premium theoretically provided *income protection* for the duration of the contract. As she could not work the client terminated the contract. When the contract was terminated she was no longer entitled to *income protection* from the insurance policy. The insurance premium made no reference to payment of her medical costs.

⁹⁸Productivity Commission, (2004), *National Workers' Compensation and Occupational Health and Safety Frameworks, Report No. 27*, (pp. 160), Canberra, March.

4B Contractors

- (1) Subject to subsection (2), where a person makes a contract with a contractor to perform work exceeding \$100 in value that is not work incidental to a trade or business regularly carried on by the contractor in the contractor's own name or under a business or firm name, and the contractor does not sublet the contract or employ any worker, the contractor is taken to be a worker employed by the person making the contract.
- (2) If a contractor to whom subsection (1) applies takes out his or her own personal accident insurance, the contractor is taken not to be a worker for the period during which that insurance remains valid.
- (3) If a contractor takes out his or her own personal accident insurance, the contractor is to provide the person with whom the contract is made with evidence of the contractor's insurance.
- (4) If a contractor does not take out his or her own personal accident insurance, he or she is to advise the person with whom the contract is made that the contractor has not taken out such insurance.⁹⁹

As the issue of occupational injury insurance has broad implication for public policy this matter alone requires considerably more scrutiny.

Industry Developments

In some industry sectors with a prevalence of self-employed contractors and perhaps where the inherent hazards and probability of harm are broadly recognised recent developments have been evident. The theoretical approaches of the two developments discussed below are arguably markedly inconsistent with each other.

Transport industry

In response to issues associated with fatigue in the long distance trucking industry the state of New South Wales developed and implemented regulations under the OHS Act that impose obligations on consignees and consignors.¹⁰⁰

Fatigue was seen to be a significant factor in the high rates of fatalities and serious injuries in road accidents involving heavy vehicle drivers. An estimated 8% of fatal heavy vehicle accidents involved driver fatigue in New South Wales.¹⁰¹

⁹⁹ *Workers Rehabilitation and Compensation Act 1988*, State of Tasmania

¹⁰⁰ *The Occupational Health and Safety Amendment (Long Distance Truck Driver Fatigue) Regulation 2005. Occupational Health and Safety Act 2000 (NSW)*. – Operative 1 March 2005.

¹⁰¹ Transport Workers Union of Australia (NSW Branch), (2006), *Submission to the National Transport Commission – Model legislation Heavy Vehicle Driver Fatigue) Regulation 2006*, (pp. 3).

The long distance truck driver fatigue regulation requires the same measure of risk assessment and control from employees and self-employed contractors. The regulation requires that consignors and consignees who enter into a contract with a self-employed carrier to transport freight long distance must identify, assess the risk of harm from fatigue to any driver under that contract.

Consignors and consignees must also prepare, in consultation with drivers (including self-employed or owner-drivers) a Driver Fatigue Management Plan (DFMP).

The approach can be said to follow a “chains-of-responsibility” perspective to occupational health and safety management.

According to the transport industry team the impact of the new regime is yet to be meaningfully analysed.

Construction Industry

In consultation between enforcement agencies and industry, the OHSE Subbypack has recently been developed for application in the Australian building and construction industry. Accommodating the inconsistencies evident in the various jurisdictions the OHSE Subbypack has been reproduced in a number of Australian states. According to the introduction of the Victorian publication the document has following purpose:

“It is provided to assist an organisation to develop an OHSE Management Plan and is relevant whether an organisation has minimal or no OHSE arrangements in place or is looking to improve upon an existing OHSE Management System.”¹⁰²

The Subbypack provides a framework that includes policy documents, risk assessment and control guidance, reporting templates and check lists.

The Subbypack requires self-employed contractors to undertake a substantial assessment of their working practices and to consider the implementation of control over their systems. The document runs to seventy-eight pages and covers issues including workers compensation and injury management. Inherently, the approach associated with the SubbyPack requires the self-employed contractor to demonstrate a concerted commitment to occupation health and safety management.

According to the construction team of the NSW branch of WorkCover the level of uptake and extent of application is yet to be assessed.

Innovations

¹⁰²*OHSE SubbyPack, A tool for Self Employed Persons, Suppliers, Service Providers, Contractors, and Subcontractors in the Australian Building and Construction Industry*, (pp. 4), Victorian Construction Industry Alliance.

Sweden has for a considerable period adopted the concept of roving or regional health and safety officers. Norway and Italy have also experimented with the concept.¹⁰³

Such ideas might have the ability to assist in coping with the logistical task of enforcement agencies when dealing with small and medium sized enterprises.

Walters notes that "*there are few widespread initiatives that have specifically and successfully tackled the question of health and safety organization in a sustainable way in small enterprises.*"¹⁰⁴ He expresses a concern that such mechanisms will only be adopted by firms with an established commitment to OHS.

CONCLUSION

The research material identified for the preparation of this review provides insight of considerable value to the direction of our project.

The *New World of Work and Employment* is a phenomenon of interest to researchers in many developed economies. Australian researchers have undertaken a marked volume of the investigation of precarious work. A number for Australian academics have visited the legal and OHS implications of self-employed contracting. A number of significant inquiries have identified the challenging elements attached to self-employed contracting. Generally, the research supports the view of confused and complex OHS outcomes.

The research recognises that there is generally unsatisfactory reporting of injury and illness data and indeed there is an absence of any satisfactory data collection mechanism for most categories of self-employed contractors. The incidence of injury or illness among self-employed contractors is largely unknown. The challenges posed for regulatory agencies are well documented. The hazards likely to confront the self-employed contractors are not clearly or consistently understood.

In many instances the growth of self-employed contracting appears to be associated with a perceived transmission of risk in the context of OHS and as well as other imposts. Aspects of the research identified for this review support a thesis that risk is often borne by individual's least able to contemplate the implications of the arrangements into which they have entered.

Work undertaken in private homes by carers and support workers engaged as self-employed contractors has received little attention from researchers. This framework for providing care to elderly, disabled or otherwise vulnerable persons would also appear to have received little public recognition or research scrutiny. The numbers of workers engaged in the Community Sector are likely to grow into the future. This field is of interest in the context of an ageing populations and stated aims of providing

¹⁰³ Frick, K., and Walters D., (1998) *Worker representation on health and safety in small enterprises: lessons from a Swedish approach* (pp. 155), in *International Labour Review*, Vol. 137, 1998.

¹⁰⁴ *ibid*, (pp. 153).

care for aged or invalided persons outside of institutional settings. The Community Sector has been identified as an area of high incidence of injury and illness. Research focused on carers and support workers engaged as self-employed contractors may provide a valuable and original contribution.

The inconsistent or hollow provision of occupational injury insurance has implications for public policy, as it is likely that a considerable proportion of the costs of workplace injury are already being borne as an additional burden on the public health system.

In preparation for the next phase of our examination it will be necessary to consult with professionals and researchers that have already explored the occupational health and safety and occupational injury insurance implications of self-employed contracting arrangements.

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APPENDIX 1

Fair Work Act 1994

- (b) a contract under which a person (the **employer**) engages another (the **employee**) to drive a vehicle that is not registered in the employee's name to provide a public passenger service (even though the contract would not be recognised at common law as a contract of employment); or

Exception –

The contract is not a contract of employment if the vehicle is a taxi and the contract would not be recognised at common law as a contract of employment.

- (c) a contract under which a person (the **employer**) engages another (the **employee**) to carry out personally the work of cleaning premises (even though the contract would not be recognised at common law as a contract of employment); or

- (d) a contract under which a person (the **employer**) engages another (the **employee**) to carry out work as an outworker (even though the contract not be recognised at common law as a contract of employment);

Occupational Health, Safety and Welfare Act 1986

For the purposes of this Act, where a person (the **contractor**) is engaged to perform work for another person (the **principal**) in the course of a trade or business carried on by the principal, the contractor, and any person employed or engaged by the contractor to carry out or to assist in carrying out the work, will be taken to be employed by the principal but the principal's duties under this Act in relation to them extend only to matters over which the principal has control or would have control but for some agreement to the contrary between the principal and the contractor.

Workers Rehabilitation and Compensation Act 1996

5 - Legislative definitions

- (1) For the purposes of the definition of **contract of service** in section 3(1) of the Act (but subject to this regulation), the following classes of work under a contract, arrangement or understanding are prescribed classes of work:
- (a) building work, other than wall or floor tiling, where—
 - (i) the work is performed by one person to the contract, arrangement or understanding (the worker) in the course of or for the purposes of a trade or business carried on by another person to the contract, arrangement or understanding (the employer); and

- (ii) the work is performed personally by the worker (whether or not the worker supplies any tools, plant or equipment); and
- (iii) the worker does not employ any other person to carry out any part of the work; and
- (iv) the value of any materials supplied, or reasonably expected to be supplied, by the worker does not exceed—
 - (A) 4 per cent of the total amount payable, or reasonably expected to be payable, under or pursuant to the contract, arrangement or understanding; or
 - (B) \$50, whichever is the greater; and
 - (v) the value of any one tool, or any single item of plant or equipment, owned or leased by the worker for work purposes (whether or not it is used in the performance of the particular work) does not exceed—
 - (A) in 1999—\$12 000;
 - (B) in a subsequent year—an amount (calculated to the nearest multiple of \$100) that bears to \$12 000 the same proportion as the Consumer Price Index for the September quarter of the immediately preceding year bears to the Consumer Price Index for the September quarter, 1998;
- (b) cleaning work, where—
 - (i) the work is performed by one person to the contract, arrangement or understanding (the worker) in the course of or for the purposes of a trade or business carried on by another person to the contract, arrangement or understanding (the employer); and
 - (ii) the work is performed personally by the worker (whether or not the worker supplies any tools, plant or equipment); and
 - (iii) the worker does not employ any other person to carry out any part of the work; and
 - (iv) —
 - (A) in the case of window cleaning work—the value of any materials supplied, or reasonably expected to be supplied, by the worker does not exceed—
 - if the term of the contract, arrangement or understanding is not more than one month—\$25;
 - if the term of the contract, arrangement or understanding is more than one month—an average of \$25 per month;
 - (B) in any other case—the value of any materials supplied, or reasonably expected to be supplied, by the worker does not exceed—
 - if the term of the contract, arrangement or understanding is not more than one month—\$50;
 - if the term of the contract, arrangement or understanding is more than one month—an average of \$50 per month;
- (c) driving a motor vehicle used for the purposes of transporting goods or materials (whether or not the vehicle is registered in the driver's name) where the driver is paid under the Local Government Employees Award or the Adelaide City Corporation Award and where—
 - (i) the work is performed by one person to the contract, arrangement or understanding (the worker) in the course of or for the purposes of a trade or business carried on by another person to the contract, arrangement or understanding (the employer); and

- (ii) the work is performed personally by the worker (whether or not the worker supplies any tools, plant or equipment); and
- (iii) the worker does not employ any other person to carry out any part of the work; and
- (iv) the value of any materials supplied, or reasonably expected to be supplied, by the worker does not exceed \$50;
- (d) driving a taxi-cab or similar motor vehicle used for the purpose of transporting members of the public where the driver does not hold or lease a licence issued in relation to the vehicle and where—
 - (i) the work is performed by one person to the contract, arrangement or understanding (the worker) in the course of or for the purposes of a trade or business carried on by another person to the contract, arrangement or understanding (the employer); and
 - (ii) the work is performed personally by the worker (whether or not the worker supplies any tools, plant or equipment); and
 - (iii) the worker does not employ any other person to carry out any part of the work; and
 - (iv) the value of any materials supplied, or reasonably expected to be supplied, by the worker does not exceed \$50;
- (e) driving or riding for fee or reward a vehicle, other than a commercial motor vehicle, for the purpose of transporting by road goods or materials (including money) where the driver or rider does not simultaneously own or operate more than one vehicle for work purposes and where—
 - (i) the work is performed by one person to the contract, arrangement or understanding (the worker) in the course of or for the purposes of a trade or business carried on by another person to the contract, arrangement or understanding (the employer); and
 - (ii) the work is performed personally by the worker (whether or not the worker supplies any tools, plant or equipment); and
 - (iii) the worker does not employ any other person to carry out any part of the work; and
 - (iv) the value of any materials supplied, or reasonably expected to be supplied, by the worker does not exceed \$50; and
 - (v) the goods or materials being transported are not owned (and have not been previously owned) by the driver or rider (as the case may be), or by the employer;
- (f) performing as a singer, dancer, musician, ventriloquist, acrobat, juggler, comedian or other entertainer at a hotel, discotheque, restaurant, dance hall, club, reception house or other similar venue, but excluding work as an actor, model or mannequin, or as any other type of entertainer, in performing as part of a circus, concert recital, opera, operetta, mime, play or other similar performance, where—
 - (i) the work is performed by one person to the contract, arrangement or understanding (the worker) in the course of or for the purposes of a trade or business carried on by another person to the contract, arrangement or understanding (the employer); and
 - (ii) the work is performed personally by the worker (whether or not the worker supplies any tools, plant or equipment); and
 - (iii) the worker does not employ any other person to carry out any part of the work; and

- (iv) the value of any materials supplied, or reasonably expected to be supplied, by the worker does not exceed \$50;
- (g) thoroughbred riding work where the work is performed by a licensed jockey (and, for the purposes of the application of the Act to a licensed jockey as a worker, TRSA will be taken to be his or her employer).
- (2) For the purposes of subregulation (1)—
 - (a) the value of any tool, plant or equipment owned or leased by a worker is the price that, at the time that the worker enters into the relevant contract, arrangement or understanding, the worker would reasonably be expected to pay if the worker were to purchase an equivalent, unused, tool or item of plant or equipment; and
 - (b) a vehicle will not be taken to be used for work purposes if its sole or principal use is to transport the worker, and any tools, plant or equipment, to any work site.
- (3) If—
 - (a) a licensed gas fitter is engaged by Boral Energy Limited to perform building work; and
 - (b) the licensed gas fitter supplies materials for the purposes of that work, that work is not included in the classes of work prescribed by subregulation (1).
- (4) If—
 - (a) a person performs work as an outworker; and
 - (b) any aspect of that work is governed by an award or industrial agreement that is expressed to apply to outworkers (or a specified class or classes of outworkers), that work is prescribed work for the purposes of the definition of **contract of service** in section 3(1) of the Act.
- (5) Subject to subregulation (6), the work of a minister, priest or other member of a religious order is a prescribed class of work for the purposes of the definition of **contract of service** in section 3(1) of the Act.
- (6) Pursuant to section 3(7) of the Act, the following persons are excluded from the application of the Act:
 - (a) a minister ministering within The Anglican Church of Australia in South Australia; or
 - (b) a priest or other member of a religious order ministering within the Catholic Church of South Australia; or
 - (c) a pastor ministering within the Lutheran Church of Australia South Australia District Inc.; or
 - (d) an ordained minister, deaconess or lay pastor of The Uniting Church in Australia ministering in South Australia in an approved placement under the "Classification of Ministers" of that Church; or
 - (e) an officer of The Salvation Army appointed in South Australia under the orders and regulations for officers of The Salvation Army.
- (7) The work of a Review Officer appointed under the Act is prescribed work for the purposes of the definition of **contract of service** in section 3(1) of the Act (and, for the purposes of the application of the Act to such a Review Officer as a worker, the Crown will be taken to be his or her employer).
- (8) For the purposes of the definition of **local government corporation** in section 3(1) of the Act, the following bodies are prescribed as being within this definition:
 - (a) committees of a council under the *Local Government Act 1999*;
 - (b) subsidiaries of a council (or councils) established under the *Local*

Government Act 1999;

(c) control boards established under the *Animal and Plant Control (Agricultural Protection and Other Purposes) Act 1986;*

(d) the Local Government Finance Authority of South Australia established under the *Local Government Finance Authority Act 1983;*

(e) the Local Government Superannuation Board continued under the *Local Government Act 1999;*

(f) Local Government Training Authority (S.A.) Incorporated;

(g) Council Purchasing Authority Pty. Limited.

(10) For the purposes of section 3(6) of the Act, a prescribed circumstance is where a person (the principal) contracts with another person (the contractor) who is not registered as an employer under the Act.

(11) Pursuant to section 3(7) of the Act, but subject to subregulation (12), a worker who is employed by an employer to participate as a contestant in a sporting or athletic activity (and to engage in training or preparation with a view to such participation, and other associated activities) is, in relation to that employment, excluded from the application of the Act.

(12) Subregulation (11) does not apply to—

(a) a person authorised or permitted by a racing controlling authority within the meaning of the *Authorised Betting Operations Act 2000* to ride or drive in a race within the meaning of that Act; or

(b) a boxer or wrestler employed or engaged for a fee to take part in a boxing or wrestling match.

(13) A person (the **driver**) who is employed or engaged by another (the **principal**) to transport goods or materials (including money) by motor vehicle in the course of or for the purposes of a trade or business carried on by the principal is excluded from the application of this Act if—

(a) the motor vehicle is a commercial motor vehicle; and

(b) the motor vehicle is owned, leased or hired by the driver; and

(c) the motor vehicle is not owned by, leased from or hired out by, or otherwise supplied by (directly or indirectly)—

(i) the principal; or

(ii) a third person who is related to the principal; and

(d) the goods or materials are not owned (and have not been previously owned) by the driver or by the principal.

(14) For the purposes of subregulation (13), a principal and another person will be taken to be related if—

(a) they are employer and employee; or

(b) the other person is accustomed or under an obligation (whether formal or informal) to control the use of the relevant motor vehicle in accordance with the directions or determinations of the principal.

(15) Pursuant to section 3(7) of the Act, a person *Compensation Act 1992* of the Commonwealth application of the Act.