OUTSOURCING RISK? THE REGULATION OF OCCUPATIONAL HEALTH AND SAFETY WHERE SUBCONTRACTORS ARE EMPLOYED

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I. INTRODUCTION

The subcontracting out of production tasks and services is not a new phenomenon, but from the late 1970s, and more especially over the last 15 years, the practice—now frequently referred to as outsourcing—has grown substantially across a range of industries in most industrialized countries.[1] Recent surveys undertaken in the United States, Europe, and Australia have all identified a rapid increase in outsourcing/subcontracting, especially amongst large private and public sector organizations.[2] The Second Australian Workplace Industrial Relations Survey found that the number of contractors, agency workers, outworkers, and volunteers had increased by almost 40% in the last 5 years to 1997 with contracting out more common in the public sector than the private sector.[3] Outsourcing has become a major tool by which large organizations have sought to increase competitiveness/cut costs, bypass regulatory controls, and secure more flexible employment arrangements. In the

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1. M. Quinlan, *Labour Market Restructuring in Industrialised Societies: An Overview*, 9(1) ECON. & LAB. REL. REV. 11-19 (1998).

2. *See* K. Abraham & S. Taylor, *Firm's Use of Outside Contractors: Theory and Evidence*, 14(3) J. LAB. ECON. 394-424 (1996); M. Sharpe, *Outsourcing, Organisational Competitiveness and Work*, 18(4) J. LAB. RES. 535-49 (1997); C. Brewster, L. Mayne & O. Tregaskis, *Flexible Working in Europe: A Review of the Evidence*, 37 (special issue) MGMT. INT'L REV. 85-103 (1997); A. MOOREHEAD ET AL., CHANGES AT WORK: THE SECOND AUSTRALIAN WORKPLACE INDUSTRIAL RELATIONS SURVEY (1997).

3. A. MOOREHEAD ET AL., *id.*

public sector, it has largely been driven by neo-liberalist[4] policies of corporatization and competitive tendering.

Outsourcing often entails subtle, but, nonetheless, significant changes to the organization of work or production processes and sometimes the location at which tasks are undertaken. It also alters legal relations between the organization that previously used its own employees to provide the product or task and those now contracted to do this. The legal status of outsourced workers may vary substantially from self-employed individuals or groups, the employees of small firms, casuals employed by telecommuting companies operating marketing or call centers, and the temporary labor provided by large labor hire agencies. The supply of temporary workers has become an industry in its own right. A survey conducted by the U.S. Bureau of Labor Statistics found that the number of workers employed by temporary help supply firms with over 20 employees had increased by 43% between 1989 and 1994, reaching 1.2 million by 1995 (one labor leasing firm, Manpower, is now claimed to be the largest single private employer in the United States).[5] Available evidence indicates that the use of particular categories of contract labor varies widely between different industries and activities.[6]

Until recently, the effects on OHS of the changes to work organization and legal relations associated with outsourcing were largely ignored. There is a growing body of international research indicating that outsourcing is having serious negative effects on OHS.[7]

4. Neo-liberalism refers to the philosophy underlying a broad set of influential policies in most industrial countries since the late 1970s. Essentially, neo-liberalism aims to increase the role of market forces and competition in policy formulation and implementation, along with greater reliance on the private sector. This includes (i) adoption of private sector management structures within government agencies (corporatization), and (ii) enabling private firms to undertake tasks previously performed within these agencies (outsourcing), usually selected from a round of bids (competitive tendering).

5. U.S. BUREAU OF LABOR STATISTICS, DEPARTMENT OF LABOR, NEW SURVEY REPORTS ON WAGES AND BENEFITS FOR TEMPORARY HELP SERVICE WORKERS (1995).

6. *See* M. Wooden & A. VandenHeuvel, *The Use of Contractors in Australian Workplaces*, 8(2) LAB. ECON. & PRODUCTIVITY 163-94, 181 (1996).

7. *See*, *e.g.*, C. Wright, *Routine Deaths: Fatal Accidents in the Oil Industry*, 34(2) SOC. REV. 265-89 (1986); C. Wright, *A Fallible Safety System: Institutionalised Irrationality in the Offshore Oil and Gas Industry*, 42(1) SOC. REV. 79-103 (1994); V. Blank et al., *Hidden Accident Rates and Patterns in the Swedish Mining Industry Due to the Involvement of Contract Workers*, 21(1) SAFETY SCI. 23-35 (1995); Y. Ono et al., *Reports of Work Related Musculoskeletal Injury Amongst Home Care Service Workers Compared With Nursery School Workers and the General Population of Employed Women in Sweden*, 52 OCCUPATIONAL & ENVTL. MED. 686-93 (1995); J. Rebitzer, *Job Safety and Contract Workers in the Petrochemical Industry*, 34(1) INDUS. REL. 40-57 (1995); D. Rousseau & C. Libuser, *Contingent Workers in High Risk Environments*, Winter CAL. MGMT. REV. 109-110 (1997); C. Mayhew, M. Quinlan & R. Ferris, *The Effects of Subcontracting/Outsourcing on Occupational Health and Safety: Survey Evidence from Four Australian Industries*, 25(1-3) SAFETY SCI. 63-178 (1997).

An international review of research on the OHS effects of outsourcing (such as changes to injury rates and severity, OHS knowledge and compliance) published since 1984, identified 29 studies of which 23 found negative OHS outcomes. The remaining 6 results were deemed indeterminate due to the absence of reliable benchmarks or controls. In other words, all studies where an effect could be determined found outsourcing adversely affected OHS.[8]

As yet, this research has exerted little influence on regulators and policymakers. Rather, recognition by regulators of the OHS problems associated with outsourcing has been fractured and largely a response to specific major incidents. Perhaps the most publicized examples in the United States were several explosions at petrochemical plants in the late 1980s, and the crash of a ValuJet DC-9 airliner into the Florida everglades in 1996 (killing all 110 onboard). In both cases, the incidents were clearly linked to the use of independent contractors on maintenance activities.[9] In the 2 years prior to its crash, the ValuJet DC-9 had made 7 forced landings due to a variety of malfunctions. In the latter case, investigators believed the crash was due to a fire sparked by oxygen generators in the jet's forward cargo hold. It was alleged the hazard could have been prevented had workers for the maintenance firm, SabreTech, fitted a three-cent safety cap to the generators, something the Acting U.S. Attorney Guy Lewis described as a clear case of "putting corporate profits ahead of public safety." In December 1999, the by then defunct (itself a regulatory issue) SabreTech was convicted by a federal jury on 9 counts in connection with improper handling packaging of oxygen generators blamed for the fire in the cargo hold of the doomed plane.[10]

Similar incidents have also occurred in Australia, including one involving the Australian Defence Forces (ADF). Under federal government direction, the ADF has entered into widespread outsourcing of maintenance and other activities. In May 1998, 4 seamen died when leaks to flexible fuel lines caused a fire in the engine room of the supply ship HMAS Westralia. During the official inquiry, evidence was presented that the contractor supervising the manufacture and installation of the fuel hoses had been understaffed and had not used suitably qualified personnel. It is worth noting in

8. M. Quinlan, C. Mayhew & P. Bohle, *The Global Expansion of Precarious Employment, Work Disorganisation and Occupational Health: A Review of Recent Research*, 31(2) INT'L J. HEALTH SERVICES 335-414 (2001).

9. J. Rebitzer, *Job Safety and Contract Workers in the Petrochemical Industry*, 34(1) INDUS. REL. 40-57 (1995); D. Rousseau & C. Libuser, *Contingent Workers in High Risk Environments*, 39(2) CAL. MGMT. REV. 103-121 (1997).

10. INT'L HERALD TRIB., Dec. 8, 1999, at 2.

passing that a lack of expertise or failure to assess the competencies of contractors has been identified in other serious incidents.[11] In response to this aspect of the Westralia incident, Chief of Navy, Vice Admiral Don Chalmers announced that the Navy would need to spend far more time ensuring private contractors met safety standards. However, the problem extended beyond contractors. The Inquiry found the Westralia's officer responsible for maintenance had not been trained in contract administration, having received only a 2-3 day finance/purchasing course.[12] Even before the incident, defense force personnel (not just navy, but also air force) responsible for safety had been expressing concern about their capacity to manage safety where significant activities like maintenance were outsourced. Another problem not considered by either the government or the Westralia Inquiry concerned defense force establishments where more than one agency or department was present. In at least some of these, the commanding officer might have overall responsibility for safety on site without the corresponding authority to demand appropriate actions by other agencies with facilities on site.

These incidents, and the legal complexities they raise, are symptomatic of but some of the challenges posed by outsourcing. Historically, OHS legislation and the preventative regimes based on it were largely directed at single entity employers and their employees in large workplaces. A similar focus applied to workers' compensation systems, even where there was notional coverage of self-employed workers and other types of contingent labor. The growth in outsourcing creates a number of problems for existing regulatory regimes dealing with OHS and employment standards, most notably:

- A disarticulation of production processes and service delivery into either multiple employer units at a particular work site, each with its own control structure, or the simultaneous fragmentation of tasks and work sites (as in the case of subcontracting, the transport of goods and services). This complicates the chain of legal responsibility, even when legislation places an overriding duty on the major contractor.
- The fracturing of tasks into separate contractual units invariably contributes to a greater level of work disorganization, not only because chains of command are

11. A. YATES, GOVERNMENT AS AN INFORMED BUYER: RECOGNISING TECHNICAL EXPERTISE AS A CRUCIAL FACTOR IN THE SUCCESS OF ENGINEERING CONTRACTS 62-67 (2000).

12. *Id*. at 64.

> now more complicated, but also because the new units frequently cut across the informal and formal rules and understandings that govern workplace behavior. For example, contractors and their employees may be unaware of the many pieces of informal knowledge used by regular workers to avoid hazardous situations or the consequences of apparently harmless acts on other workers. Disorganization can also result from cuts to staffing levels and reduction in the level of qualified personnel.
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> - Types of work arrangements and a shift in work arrangements to locations that are difficult to regulate. For example, outsourcing is often associated with cost or performance pressures that encourage risk-taking or changes in the employment status of workers (most often from employee to self-employed status) that raise regulatory difficulties. Further, outsourcing has contributed to the re-emergence of home-based work and even child labor within industrialized countries. Attempts to regulate home-based work present significant legal and logistical hurdles. Finally, as we have argued elsewhere, there is clear evidence that outsourcing is associated with a diminution and disarticulation of the knowledge of various parties about their legal obligations with regard to OHS.[13]

Outsourcing also raises issues in terms of workers' compensation and rehabilitation systems, notably the extent outsourced workers are covered by statutory systems, who is responsible for paying workers' compensation insurance, and efforts made to ensure coverage is achieved in practice.[14] While these are important questions, this paper will concentrate on prevention. The remainder of the paper will examine OHS regulation pertaining to contractors in two countries, Australia and the United States. It will examine how the regulatory framework has addressed contractors and efforts by government agencies to address the problems associated with outsourcing through their compliance strategies.

13. C. Mayhew & M. Quinlan, *The Management of Occupational Health and Safety Where Subcontractors Are Employed*, 13(2) J. OCCUPATIONAL HEALTH & SAFETY—AUSTRALIA & NEW ZEALAND 161-74 (1997); M. Quinlan & C. Mayhew, *Precarious Employment, Work Re-Organisation and the Fracturing of OHS Management*, *in* SYSTEMATIC OCCUPATIONAL HEALTH AND SAFETY MANAGEMENT: PERSPECTIVES ON AN INTERNATIONAL DEVELOPMENT 193-197 (K. Frick et al. eds., 2000).

14. M. Quinlan & C. Mayhew, *Precarious Employment and Workers' Compensation*, 22(5&6) INT'L J. L. & PSYCHIATRY 491-520 (1999).

II. REGULATION OF CONTRACTORS IN AUSTRALIA

A. Regulation Under OHS Legislation

As in many other countries, until very recently, comparatively little attention was given to address the OHS implications of outsourcing, either in terms of regulatory design or compliance strategies. Unlike the United States where OHS is primarily the responsibility of the Federal government, although there is scope for State plans (see below), and like Canada, OHS legislation in Australia has remained primarily a state/territory responsibility with federal legislation largely being restricted to specific categories of workers (notably federal government employees, maritime and air transport workers). Between 1974 and 1989, all state and territory OHS laws underwent major changes—an overhaul clearly influenced by the 1972 Robens Report in the United Kingdom. The reforms included the introduction of general duty provisions; regulations and codes of practice, principally incorporating performance standards, risk assessment processes, and documentation requirements; participatory mechanisms (workplace committees and employee health and safety representatives); and, changes to enforcement. The principal acts are similar across Australian states, although there are minor variations and revisions are constant.

Partly by accident and partly by design, the revised laws provided avenues for dealing with outsourced work. The Robens Committee was not unaware of the risks associated with self-employed and subcontract workers, and made it clear they should not be exempt from the new legislation.

> . . . Those who work on a self-employed basis in circumstances where their acts or omissions could endanger other workers (employed or self-employed), or the general public, should be brought within scope of new legislation.[15]

The new Australian OHS statutes impose general duties upon "employers" in relation to their "employees" or "workers," and many adopt a wide definition of "worker" that includes voluntary labor and family helpers. The new statutes also place duties on employers and self-employed persons in relation to persons other than the self-employed person's or employer's employees. Although the wording of these statutes varies from jurisdiction to jurisdiction, the duty to persons other than employees requires employers and self-employed

15. ROBENS, SAFETY AND HEALTH AT WORK, REPORT OF THE COMMITTEE 1970-72, ¶ 175 (Robens Report) (1972).

persons to ensure that the health and safety of these persons is not affected by the employer or self-employed person's work, or, in the Eastern Australian states (New South Wales, Victoria and Queensland), by the "conduct of the undertaking." This latter expression has been very broadly interpreted by the courts to include the ancillary activities conducted by the employer or self-employed person, such as maintenance and cleaning. This duty would appear to cover all outsourced workers, including contractors, franchisees, and lease labor.[16] In some jurisdictions, the employers' general duty to employees includes a separate provision, whereby employees of a subcontractor are deemed to be employees of the major contractor for the purposes of the act. However, even when this was not the case, the overriding duty to non-employees means that employers cannot use outsourcing to formally avoid their liability under OHS legislation. The position was neatly summarized by the English House of Lords, which stated in 1996,[17] that the duty to non-employees

> is indifferent to the nature of the contractual relationships by which the employer chooses to conduct [its undertaking]. . . . [A] person conducting his own undertaking is free to decide how he will do so. . . . If, therefore, the employer engages an independent contractor to do work which forms part of the employer's undertaking, he must stipulate for whatever conditions are needed to avoid those risks and are reasonably practicable. . . . The employer must take reasonably practical steps to avoid risks to the contractor's servants which arise, not merely from the physical state of the premises . . . but also from the inadequacy of the arrangements which the employer makes with the contractors for how they will do the work.

The case law also makes it clear that the employer or self-employed person cannot delegate responsibility for developing a safe system of work for contractors and subcontractors and must personally ensure that the safe system of work is actually implemented.[18]

In Victoria and Queensland, the wording of the employer and self-employed persons' duty to non-employees has meant that, in effect, it makes little difference whether a worker is classified as an "employee" or as an "independent contractor." In either case, the employer will owe the worker a similar duty, albeit under different

16. R. Johnstone, *Paradigm Crossed? The Statutory Occupational Health and Safety Obligations of the Business Undertaking*, 12 AUSTRALIAN J. LAB. L. 73-112 (1999).

17. R v. Associated Octel Co. Ltd., 4 All ER 846, at 850-51 (1996).

18. *See* Johnstone, *supra* note 16; W. Thompson, *Contractors: OHS Legal Obligations*, 16 J. OCCUPATIONAL HEALTH & SAFETY—AUSTRALIA AND NEW ZEALAND 493 (2000).

sections of the relevant OHS statute. In New South Wales, however, the duty to non-employees is only owed while they are at the employer's workplace. This significantly limits the scope of the employer's duty to independent contractors carrying out work for the employer away from the employer's workplace, for example home-based workers and leased labor. The New South Wales Industrial Relations Commission has, however, shown commendable flexibility in categorizing workers engaged by labor hire companies. Although each case will depend upon its own particular facts, the Australian courts have generally held that modern labor hire arrangements involve contractual relationships between the labor hire company and the client, and the labor hire company and the worker, with no contractual relationship between the client and the worker. In *Swift Placements Pty. Ltd. v. Work Cover Authority of New South Wales*,[19] the New South Wales Industrial Relations Commission in full session upheld the trial judge's decision to categorize a labor hire worker as an "employee" of the labor hire company and rejected an argument that the labor hire company was not the employer because the worker was subject to the directions of the client. The Commission held that on the facts before them, the contract between the labor hire company and the worker was one of employment. The contract was for the employee to perform work "on a casual basis from time-to-time and where the performance of work, for which wages would be paid, would depend on the [labour hire company] allocating work to [the employee] according to the requirements of its clients." The contract between the worker and the labor hire company contained numerous indicia of the employment relationship, including a sufficient degree of control: The employee had to contact the labor hire company daily to ascertain whether work was available, had to attend the place nominated for work and undertake the work directed, had to follow the directions of the person nominated by the company to give directions (the client), and so on. The Full Bench accepted the view taken by the trial judge that the contract between the labor hire company and worker obliged the worker to carry out work at the client premises "under the full direction and control" of the client. This did not undermine the "ultimate or legal control" exercised by the labor hire company, which ultimately would enable the labor hire company to dismiss the worker for inadequate performance.[20]

19. 96 IR 69 (2000).
20. *See also* Mason & Cox Pty. Ltd. v. McCann, 74 SASR 438 (1999).

Queensland has introduced provisions to require greater coordination of the activities of contractors and subcontractors involved in construction work. Regulations require principal contractors, demolishers, contractors, and subcontractors to prepare workplace health and safety work plans prior to commencing certain kinds of construction work. Principal contractors, subcontractors, and contractors are required to exchange copies of their own work plans before starting work, and are required to discuss with each other the relevant OHS issues based on their work plans. The regulation envisages that the work plan requirement operates as a risk assessment tool and as a mechanism to coordinate the OHS measures taken by principal contractors, contractors, and subcontractors. Failure to comply with the requirement is an offense.

At the same time, both the Robens Report and succeeding Australian laws failed to fully integrate subcontractors into the new legislative model. The need to consult was a central feature of the duty of care responsibility envisaged by the Robens Committee,[21] and both this and a supporting structure of participatory mechanisms (joint workplace committees and employee health and safety representatives) were incorporated into Australian OHS legislation. However, neither the need to consult nor the participatory mechanisms gave any explicit recognition to the complications posed by subcontracting arrangements. Rather, consultation and participatory mechanisms were clearly predicated on the model of a large workplace organized on traditional hierarchical lines and where the vast majority of workers were employed directly on site. The model also implicitly presumed a significant union presence to facilitate participatory mechanisms (to train, provide information and logistical support to representatives, and commitment). Without these supports, the legislative provisions on participation were liable to be less than meaningful.[22]

From the early 1990s onwards, state OHS agencies' became increasingly concerned at the number of serious incidents involving contractors. One response was for enforcement agencies to introduce programs covering contractors in specific industries. Two such programs were introduced in New South Wales and Victoria. In 1998, for example, the New South Wales Government entered into a

21. *See supra* note 15, ¶ 70.

22. For an overview of the role of worker participation in OHS laws, *see* D. Walters & L. Vogel, *Risk Assessment and Worker Participation in Health and Safety: A European Overview*, paper presented to POLICIES FOR OCCUPATIONAL HEALTH AND SAFETY MANAGEMENT SYSTEMS AND WORKPLACE CHANGE CONFERENCE, Amsterdam (Sept. 21, 1998).

Memorandum of Understanding with 17 major contractors in construction to work together to implement OHS best practice. The contractors committed themselves to work with the government to improve the industry's OHS and to make OHS a priority in their organizations. In the construction industry, this process is a catalyst for OHS reform in the industry by establishing a framework and timetable for change for the major contractors, which will flow on to subcontractors. A number of tools have emerged from the process, including a supervising training resource manual (covering the duty of care, risk management, OHS management systems); a "subbie pack" to help subcontractors manage OHS; a positive performance "Safety Meter;" and, hazard profiles for key work activities. In 2000, the Victorian OHS inspectorate adopted a strategy of "zero tolerance" in the construction industry to try to prevent repeated non-compliance from site to site. The inspectorate will issue notices for each breach detected. Where the inspectorate detects non-compliance with improvement or prohibition notices or where it finds repeat contraventions on the same or another site, it will conduct an immediate investigation for the purposes of prosecution. The inspectorate has begun to use tools like spreadsheets to track notices issued to contractors and subcontractors so that it can keep better records of contraventions by contractors and subcontractors from site to site.

Another response was an increasing level of prosecutions following serious incidents involving contractors. Agencies generally targeted the major contractor, though in some cases both the principal contractor and the subcontractor were prosecuted for breaches under the general duty provisions. For example, in 2000, George Weston Foods was fined $120,000 for breaches of the New South Wales Occupational Health and Safety Act after one of its employees entered a shed, fell into an open pit, and was fatally injured. The shed was unlit because the subcontractors contracted by contractors, engaged by George Weston, to do cleaning work had disconnected the internal overhead light in the shed from the power supply outlet. In 1998, the subcontractors were fined a total of $17,000 and the contractors, in 1999, a total of $19,000 for contraventions of the legislation. In another example, a principal contractor, Kayuu Pty. Ltd., was fined $65,000 for breaches of the New South Wales Act when it failed to coordinate the activities of various trade contractors at a building site, resulting in injuries to a worker.[23]

23. WORKCOVER NEW SOUTH WALES, 42 WORKCOVER NEWS 22-23 (2000).

The issue of coordination has arisen in other cases, one example being a Victorian prosecution in which the principal contractor, AB and MA Chick Pty. Ltd., was engaged by the army to construct a vehicle workshop. The principal contractor subcontracted concreting work to Dynamic Engineering Construction Company Pty. Ltd., which in turn engaged Graham Hallett and his partner Christopher Ross as the concrete pumping operators. A self-employed worker was electrocuted after the principal contractor had failed to arrange for the power to be turned off during the operation and had failed to attend to other safety matters. The magistrate commented that the principal contractor should have arranged a meeting of all concerned parties to coordinate activities and, being in overall control of the activities, had substantial responsibility to ensure that the incident did not happen. Dynamic Engineering had failed to check the qualifications and training of key operators and had failed to ensure other safety matters. Hallett, though absent at the time of the incident, should have taken adequate measures, such as ensuring an observer was on site. Ross, the operator of the boom pump that had caused the incident, had failed to ensure that the truck supporting the boom was fitted with a ground driven spike for insulation purposes and had not been trained. Each party was convicted and fined for contravening the employer or self-employed person's duty to non-employees discussed above.[24]

Publicized prosecutions of parties in subcontracting relationships has caused a growing level of concern within industry, particularly as relatively few firms had an effective contractor management system in place. For many, their liability under general duty provisions was a revelation. Those who promoted outsourcing, including large management consulting firms, had seldom identified potential OHS problems, let alone ways of addressing them (though a contractor management industry quickly mushroomed).

Enforcement action against principal contractors and contractors has also been taken using administrative sanctions, particularly improvement notices (a notice requiring a contravention to be remedied within a specified time), prohibition notices (requiring an activity presenting an immediate risk to any person to cease pending the removal of the risk), and infringement notices (on-the-spot fines). For example, in late 1999, a principal contractor in New South Wales had a total of $9,000 on-the-spot fine imposed upon it after an

24. VICTORIAN WORKCOVER AUTHORITY, 3/4 RECENT PROSECUTIONS 1998, 13-14 (1999).

inspection that revealed hazards such as missing handrails, protruding steel bars, scaffolding contravening the relevant Australian Standard, inadequate lighting in stairwells, and failure to ensure adequate supervision of employees.[25]

In addition, a number of contractors have been prosecuted under the "mainstream" criminal law for manslaughter, following fatalities resulting from the contractor's gross negligence. For example, in Victoria in 1994, a small family company, Denbo Pty. Ltd., operating as an earth moving contractor, was convicted of manslaughter after an employee died of head injuries after a truck with defective brakes went out of control down a steep track. In 1999, the sole director of a company in Queensland was imprisoned for manslaughter after a subcontractor died while driving a scraper with faulty brakes.

At first, government OHS agencies themselves made little attempt to provide industry with guidance on contractor management, even where government competitive tendering policies were largely responsible for a substantial increase in outsourcing. One exception concerned local government operations in Victoria. When the Victorian government directed local governments put 50% of their activities to competitive tender, it found many were unable to manage OHS problems involving contractors. As a result, the Victorian WorkCover Authority[26] issued a set of guidelines for managing contractor safety risks. Other agencies responded to perceived problems by issuing contractor guidelines. In 1995, New South Wales WorkCover issued a guide on home-based work and Comcare (the agency dealing with federal employees) issued its own guide on outsourcing. Two years later, the WorkCover Corporation of South Australia issued guidelines for managing OHS in the labor hire industry and, in 1999, the Queensland Division of Workplace Health and Safety followed suit. A number of state agencies have also developed contractor management guides for the building and construction industry. This material has some value. However, it covers only a fraction of the industries where outsourcing is widespread and is often rather narrow and rule-based in its focus, emphasizing legal obligations and contract/tender conditions, but overlooking the economic pressures that encourage rule evasion and unsafe practices amongst subcontractors. Some industry/employer

25. CCH, 1:7 MANAGING CONTRACTORS 3 (Dec. 1999).

26. VICTORIAN WORKCOVER AUTHORITY, MANAGING CONTRACTOR HEALTH AND SAFETY RISKS: GUIDELINES FOR LOCAL GOVERNMENT (1999).

associations have moved to fill the gap,[27] but this too remains exceptional. The peak body for the recruitment industry in Australia, the Recruitment and Consulting Services Association (RCSA), has worked in collaboration with the OHS agencies in New South Wales, Victoria, and Western Australia on booklets aimed at improving labor hire companies' awareness of their OHS responsibilities.[28] One initiative was the production of a booklet entitled *Health and Safety Induction Programs*. These publications have been criticized by the Australian Council of Trade Unions (ACTU) for understating the labor hire agencies' legal obligations to workers under the OHS statutes (see *infra*), for focusing on the responsibilities of the worker and the host employer rather than the labor hire agency, and for not mentioning unions, OHS representatives, consultative processes to improve OHS measures, or participation by workers in host employer OHS management systems.[29] The ACTU has itself produced a guidance note for Unions entitled *OHS & Labour Hire*.[30]

Quite apart from the issue of whether those engaged in outsourcing have adequate information as to how to comply, there is a question as to whether prosecution under the general duty provisions is sufficient to dissuade hazardous practices. Some recent Australian cases demonstrate both the positive message that can be sent out, but also the limitations of an approach that at best targets the consequences of outsourcing long after the decision has been made.

One example of this relates to labor hire firms. In 1997, a Sydney pump manufacturer, Warman International, was fined $480,000 (reduced on appeal to $160,000) in the NSW Industrial Court after 5 workers, including 2 supplied by Drake Personnel Limited, suffered serious hand injuries in a 2-month period due to unguarded machinery and inadequate training.[31] Drake, in turn, was also prosecuted under the NSW OHS Act, 1983.[32] The company pleaded guilty to the charge and was convicted and fined $50,000. In determining the appropriate level of fine, Justice Hungerford[33] observed that the employer in the position of Drake

27. *See, e.g.*, CHAMBER OF MINERALS AND ENERGY OF WESTERN AUSTRALIA, A GUIDE TO CONTRACTOR OCCUPATIONAL HEALTH AND SAFETY MANAGEMENT IN WESTERN AUSTRALIAN MINES (1997).

28. VICTORIAN WORKCOVER AUTHORITY, WORK WORDS 12 (Mar. 2000).

29. AUSTRALIAN COUNCIL OF TRADE UNIONS (ACTU), ACTU COMMENTS ON RECRUITMENT AND CONSULTING SERVICES ASSOCIATION PUBLICATIONS (2000).

30. *Id*.

31. HEALTH STANDARD 17 (Aug. 1998).

32. WorkCover Authority of New South Wales (Inspector Ankucic) v. Drake Personnel Limited, 89 IR 374 (1997).

33. *Id*. at 382.

> has a special responsibility to ensure the health, safety and welfare of its employees at the other workplace for no reason other than that workplace is removed from the employer's direct management and control and would usually be at a location foreign, or at least unfamiliar, to the employees concerned.

He stated that it was not acceptable for Drake:

> . . . to plead reliance on Warman as the client to take appropriate steps to ensure safety in the workplace for all persons engaged on its premises. True it be that Warman itself may have offended against the OHS Act, but that does not, it seems to me, lessen the seriousness of the offences committed here by the defendant as the employer.

Commenting on the case, Evan Smith, a Senior Officer for WorkCover's OHS Prosecutions Branch, stated:

> This case will have a significant impact on those who supply short-term contractors. . . . Labour-hire companies are going to have to look at the worksite and make sure there is a proper system of work and proper equipment before they send anyone there. They are going to have to do a proper risk assessment. They are going to have to ensure the workers they send are trained on the equipment they will be using and they must tell the workers not to touch the equipment until they get properly trained.
>
> Companies like Drake don't control a workplace. They can't tell the occupiers what to do, but they can tell them that if they don't get the place up to standard, they won't send people there. This decision will put labour-hire companies on notice that they are responsible for the safety of their employees.[34]

In another case involving the same labor hire agency, the New South Wales Industrial Relations Commission further developed the employer's general duty as it applied to a labor hire company. In *Drake Personnel Limited v. WorkCover Authority of New South Wales (Inspector Ch'ng)*,[35] the Full Bench of the NSW Industrial Relations Commission dismissed an appeal by Drake against a decision of the Chief Industrial Magistrate to convict Drake of a breach of the employer's general duty under section 15 of the OHSA(NSW) when a Drake employee was injured on an unguarded machine at the client's premises. Prior to placement, Drake had shown the employee a training video and provided her with an instructional booklet. Drake had also sent a field staff consultant to the client's premises to inspect the machine (which was properly guarded), upon which the employee was said by the client to be working through the procedure she was to

34. *See supra* note 31.
35. 90 IR 432 (1999).

perform. The worker had been asked by the client to work on another unguarded machine and had suffered an injury. The client had not told Drake that the employee would be required to work on that machine and the field staff consultant had not been shown the machine when she visited the premises. Drake argued that it had taken all reasonable steps to protect the employee and having been shown by the client the machine that the employee was to work on, could not have been reasonably aware that she would be moved to another machine. Indeed, Drake argued that it had no knowledge of the existence of the machine upon which the injury had occurred. The court accepted that the risk that Drake had to guard against was the risk that its employee would be instructed to work on an unguarded machine and Drake's omission was a failure to require the client to notify Drake before transferring the employee to work on another machine.

The Industrial Relations Commission[36] stated that:

> . . . an employer who sends its employees into another workplace over which they exercise limited control is, for that reason, under a particular positive obligation to ensure that those premises, or the work done, do not present a threat to the health , safety or welfare of those employees. . . . A labour hire company cannot escape liability merely because the client to whom an employee is hired out is also under a duty to ensure that persons working at their workplace are not exposed to risks to their health and safety or because of some alleged implied obligation to inform the labour hire company of the work to be performed. . . . This obligation would, in appropriate circumstances, require it to ensure that its employees are not instructed to, and do not, carry out work in a manner that is unsafe. In the present case, it seems to us that this would require, at the very least, that the appellant give an express instruction to the client and its employee that it be notified before the employee is instructed to work on a different machine.

Indeed, the Commission indicated that it may be that the labor hire company's obligations will not be met by a contractual term in the contract with the client that the employee not be transferred to other work without prior notice. "The labour hirer has a positive obligation under section 15(1) to directly supervise and monitor the work of the employee to ensure a safe working environment."[37]

Prosecutions of labor hire agencies have occurred in other states. In December 1999, a Victorian Industrial Magistrate convicted and fined a labor hire agency, Extrastaff Pty. Ltd., when a worker placed

36. *Id*. at 455-56.
37. *Id.* at 456.

by Extrastaff at a host employer had 4 fingers amputated on an unguarded power press. Extrastaff had failed to ensure that the worker had adequate training, information, and supervision in the operation of the power press.[38] In imposing a $40,000 fine upon Extrastaff, Magistrate David McLennan stated that the culpability of Extrastaff was as great as that of the host employer (NCI Specialty Metal Products), which was also convicted and fined ($80,000). He stated:[39]

> Merely because an employer hires out staff to other industries as part of the business of the employer, liability for the occupational health and safety of the employee is not thereby brought to an end. There is a responsibility to ensure that the workplace into which the employee is brought is safe; no less than if the employee was working on the employer's own premises.

In December 2000, the Victorian WorkCover Authority successfully prosecuted Drake Personnel in the Magistrates Court for a breach of the employer's general duty to employees in the Victorian OHS Act. The client employer had previously been convicted and fined for breaching its obligations to the worker, who had been injured on an unguarded machine. The case was significant because the magistrate, building on the cases described above, found that even though Drake was a large organization with a client base of 8,840 nationally and supplying 30,835 employees nationally to 11,377 sites, it had a duty to "ensure that all hazards associated with the use of the machine were identified, that an assessment of risks associated with hazards was made, and that any risk associated with the use of the machine was controlled."[40]

There can be no doubt that these are significant cases. One small, but fairly immediate effect of the first *Drake* case discussed above was to encourage OHS managers from literally hundreds of private and public employers (including Warman's) throughout Australia to attend one-day industry conferences on contractor safety management. More importantly, perhaps, it was probably the first contractor case outside the construction industry to involve a labor hire firm. The great majority of previous cases involved subcontractors (and their employees), who were actually working on site rather than supplying workers to another employer. For labor hire firms, it raised an array of legal responsibilities most had never

38. VICTORIAN WORKCOVER AUTHORITY, RECENT PROSECUTIONS 48 (2000).

39. *See supra* note 28.

40. *See* Reiss v. Drake Personnel Ltd., trading as Drake Industrial, Ringwood Magistrates Court, at 24 (Dec. 7, 2000).

anticipated. A number responded by significantly upgrading their OHS function to try and put adequate controls in place. Given the rapid expansion of the labor hire or labor agency sector in Australia, the United States, and other industrialized countries over the past 20 years,[41] this was arguably long overdue, especially where young and inexperienced workers are placed in dangerous work-settings (as occurred in the *Warman* case). The case helped to indicate an array of overlapping legal responsibilities for those supplying and using temporary workers.

At the same time, the *Drake* case also raises questions about the adequacy of the regulatory response. Agency labor expanded (and continues to expand) to cover a wide array of occupations and workplaces without reference to the OHS implications of these changed work arrangements. Belated prosecutions alone are unlikely to be able to rectify the situation because for some labor agencies at least remedial measures pose significant practical difficulties. Where labor agencies provide a limited array of specialized and skilled labor into relatively predictable work situations/processes, as in the case of skilled engineering workers or where the workers are being supplied for relatively safe work activities like clerical work, then devising appropriate controls should be readily achievable. However, where large agencies like Drake's are supplying literally hundreds of different occupational groups into highly disparate work situations (and for widely varying periods of time), the issue of ensuring adequate risk assessment, worker training, induction, and a matching of skills with tasks represents a large and complex logistical challenge. Indeed, there is a real question as to whether a management system could be devised that would cope with such a scale of operations. In other words, we may be witnessing the growth of forms of business and work organization that are essentially unmanageable in terms of OHS, at least as far as achieving the standards or outcomes that have been deemed acceptable in the past.

B. Regulation Under the Arbitration/Award System

Historically, there had been attempts to regulate the employment conditions of contractors and home-based workers under both state and federal industrial awards. Unlike the United States, United Kingdom, and other more voluntarist collective bargaining systems that used state or private arbitration as a secondary dispute resolution

41. *See supra* note 1, at 14.

mechanism for special groups of workers or protracted disputes, in Australia, permanent federal and state government arbitration tribunals established at beginning of the 20th century were, until the mid-1990s, the focus of collective negotiations and the setting of minimum labor standards.[42] The system sponsored collective representation by both workers and employers, granting unions legal recognition, rights of entry, and a right to bargain. The system is compulsory in the sense that while the parties could and often did negotiate directly, the tribunals can intervene to settle disputes by promoting conciliation or enforcing an arbitrated judgment where one party refused to negotiate or a settlement could not be reached. Determinations, known as awards, were developed to cover particular occupations and industries (single employer awards were rare) and included a wide range of employment matters (wages, hours, shift loadings, shift breaks, meal allowances, training, discipline, etc.—typically at least 50-60 items). These provisions have the status of enforceable legal minimum standards. Tribunals have their own inspectorates, although unions play a considerable role in enforcement. The award system covers the vast majority of employed workers (and occasionally special categories of subcontractors). From the 1980s, regulatory changes promoted a shift to employer-specific enterprise agreements (including, in some cases, individual worker contracts), but to a varying extent these still rest upon the base of the original award system and standards.[43]

In Australia, the industry-specific awards handed down by arbitral tribunals have, amongst other things, established an extensive set of minimum labor standards that largely obviate the need for specific minimum standards legislation. While direct reference to OHS in awards is usually restricted, the establishment of standards in relation to wages, hours, and other matters clearly had OHS implications, by dealing with the risks posed by overwork/fatigue and corner-cutting or dangerous practices encouraged by underpayment or intense competition for jobs. With regard to subcontractors, this intervention took two forms, namely, provisions permitting the voiding of contracts deemed to be unfair and provisions in some awards requiring that contractors or home-based workers should

42. *See* FOUNDATIONS OF ARBITRATION (S. McIntyre & R. Mitchell eds., 1989); R. Mitchell & M. Rimmer, *Labour Law, Deregulation and Flexibility in Australian Industrial Relations*, 12 COMP. LAB. L.J. 1 (1990).

43. *See* B. CREIGHTON & A. STEWART, LABOUR LAW: AN INTRODUCTION Ch. 6 (3rd ed. 2000).

receive the same pay and conditions as applied to employees covered by the award.

Only three Australian jurisdictions, the Commonwealth, New South Wales, and Queensland make provision for the Federal Court and the New South Wales and Queensland Industrial Relations Commissions respectively to review contracts to determine whether the conditions imposed upon contractors were unfair or harsh, and to set aside or vary contracts found to be unfair. The voiding of contracts provisions have mainly been used in relation to exploitative contracts entered into by owner-truck drivers. While useful in relation to specific cases and at a symbolic level, these provisions have had, at best, a limited effect in terms of eliminating contracts whose conditions encouraged dangerous driving practices and other high-risk behavior. More important, as far as a number of unions were concerned (including the Transport Workers' Union), was the second option of extending award coverage and especially provisions on pay rates and hours to incorporate self-employed or home-based workers. Even here, the scope of action has been confined to a number of industries and attempts at coverage have been made problematic by jurisdictional issues about the coverage of persons who are not employees. This is because the federal Workplace Relations Act of 1996 confines an "industrial dispute" to "matters pertaining to the relationship between employers and employees." This would appear to exclude all disputes involving workers who are not technically "employees." However, there have been cases where it has been accepted that a union representing employees may legitimately dispute with employers about the terms upon which contractors are to be employed and may seek to have award conditions extended to them.[44]

A leading example of this form of intervention and the problems that have arisen in a context of labor market restructuring is the clothing or garment industry. Home-based work (commonly referred to as outwork) has always been a feature of the clothing industry. However, from the mid-1980s, a combination of tariff changes and increased international competition resulted in a simultaneous decline in factory-based employment and the expansion of outwork to reach a level of at least 100,000 outworkers or 3 times the number of factory employees by 1996.[45] A key reason for the shift to outwork was its

44. R v. Moore; Ex Parte Federated Miscellaneous Workers Union of Australia, 140 CLR 470 (1978); CREIGHTON & STEWART, *id*. at 81.

45. C. Mayhew & M. Quinlan, *Outsourcing and Occupational Health and Safety: A Comparative Study of Factory-Based and Outworkers in the Australian TCF Industry*, Industrial

relatively cheapness with a 1997 survey finding outworkers were paid between A$2 and A$5 per hour or well under half the minimum award rate for factory-based workers.[46] Both federal and state awards covering clothing workers had long contained clauses specifying that home-based garment workers should receive the same basic pay and hour entitlements of factory-based workers. However, the effectiveness of these clauses was undermined by a combination of jurisdictional ambiguities (i.e. were outworkers employees?) and limited compliance activity on the part of government inspectorates.

In 1987, union agitation led to strengthening the outworker provisions in the federal clothing trade's award. Amongst other things, those engaging outworkers were required to be registered and to provide a list of outworkers and work details to the Industrial Registrar after making application to a Board of Reference (clauses 26, 27 and 27A of the federal Clothing Trades Award). In essence, the clauses provided a basis for enforcing award requirements through the registration process and the need to maintain work records. The union was also able to play a proactive part in compliance, extending the role unions already typically played in enforcing minimum award standards. The presiding commissioner hearing the union's claim had ruled that outworkers were employees and had also called for a major enforcement campaign by the federal inspectorate. The inspectorate responded to this call and several blitzes were undertaken in 1989 and 1992. However, while the new provisions had some effect, there was little or no follow-up to the widespread evasion detected in blitzes and compliance efforts lapsed after 1992. Faced with a lack of government inspectoral activity, the Textile, Clothing, and Footwear Union (TCFU) has joined church and bodies in a community-action campaign (Fair Wear), built on a voluntary code of practice, as well as initiating its own prosecutions for award breaches. On June 29, 1998, for example, the TCFU summonsed companies including Nike Australia, Adidas Australia, Davenport Industries, Australian Defence Apparel, and Portman's for breaches of outworker provisions, notable failure to keep outworker records, and paying outworkers as little as $2 per hour. In 60 other cases brought earlier by the union, companies had agreed to sign the Code of Practice and pay a penalty rather than proceed to a hearing.[47]

Relations Research Centre Research Monograph No. 40, University of New South Wales, Sydney (1998).

46. *Id*.

47. WORKFORCE 1169, at 5 (July 3, 1998).

Despite the union's efforts, evasion of award requirements remains the norm. The implications of this for OHS were made plain by a study originally commissioned by the National Occupational Health and Safety Commission (NOHSC), which found that outworkers reported over 3 times the number of injuries (mainly over-use injuries and including chronic injuries) as their factory-based counterparts. It was argued that the higher level of injury was a direct consequence of the longer work hours of outworkers (itself a response to low payment levels) and the pressures induced by a combination of piecework payment and short production deadlines.[48] In addition to recommending the provision of information to outworkers and prosecution of middlemen and retailers under the general duty provisions of OHS legislation, the report called for an abolition of piecework, as well as enforcement of outworker award conditions and state government and industry codes designed to reinforce this. A federal Senate report on garment outworkers[49] called on NOHSC to review the report with a view to "implementing its recommendations in the very near future."

However, the award recommendations ran counter to the federal government's industrial relations policy that sought to circumscribe awards and promote a contractualist, even individualized, conception of employment relationships. Government members on the Senate committee refused to support the award and code recommendations,[50] simply indicating that NOHSC should consider implementing the information and OHS legislation-based prosecutions "in the future." This stance was consistent with a government information campaign on clothing outworkers launched by the federal Minister for Workplace Relations and Small Business (Peter Reith) in June 1998. While making reference to award entitlements, the information kit noted that these were under review (see *infra*) and, curiously, contained an elaborate point form description of the legal bases for deciding whether an outworker was an employee or an independent contractor. The union viewed this as not simply reopening the ambiguities that Commissioner Riordan had sought to remove in 1987, but providing middlemen with a guide as to how they could structure their work relationships to ensure that outworkers would be categorized as independent contractors and, as such, presumably

48. *See* MAYHEW & QUINLAN, *supra* note 45.

49. SENATE ECONOMIC REFERENCES COMMITTEE, REVIEW OF THE INQUIRY INTO OUTWORKERS IN THE GARMENT INDUSTRY, PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA, CANBERRA 8 (1998).

50. *Id*.

exempt them from award entitlements. In launching the information campaign, the minister emphasized the government's preference for voluntary codes (in contrast to the NSW code) and argued that outworkers should seek to negotiate Australian Workplace Agreements (AWAs).

Apart from NSW, the future of these provisions was also jeopardized by reforms to industrial relations laws at both state and federal level. The Workplace Relations Act, introduced by a newly elected conservative federal Coalition government in 1996, entailed a number of changes impacting contractors and union attempts to regulate them. Most importantly, the new Act stripped all awards back to a set of 20 specified minimum provisions. From July 1, 1998, these were to be the only enforceable award conditions, with all other matters being the subject of direct negotiation between workers or unions and their employers (the new law also provided for individual employment agreements and enhanced employers' ability to bypass unions). The original bill had specified only 18 minimum conditions, but 2 additional matters were added after negotiations in the Senate. While the specified minimum conditions did not include contractors in any general sense, one of the late inclusions was the pay and conditions of outworkers. This inclusion was clearly influenced by a concurrent Senate inquiry into the exploitation of garment outworkers.[51]

However, it is not clear whether this inclusion would protect even the one group of subcontracted workers at which it was specifically directed (apart from textile, clothing, and footwear, the only federal award with outworker clauses relates to dry-cleaning workers). As already noted, the federal Clothing Trades Award clauses on outworkers (clauses 26, 27 and 27A) specified that they should receive award rates and conditions and, more crucially, provide a mechanism for achieving this through compulsory registration and recordkeeping. When the TCFUA became aware that the implementation clauses would almost certainly be removed as part of the award simplification process, it succeeded in having the matter referred to a full bench of the Australian Industrial Relations Commission. The TCFUA amassed considerable supporting evidence and the full bench ultimately ruled in the union's favor. Nevertheless, the victory was largely symbolic because unlike some state jurisdictions, recent

51. SENATE ECONOMIC REFERENCES COMMITTEE, OUTWORKING IN THE GARMENT INDUSTRY, FINAL REPORT, PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA, CANBERRA (1996).

federal governments have made no real effort to ensure the provisions are enforced, reflecting a more general wind-down of inspectoral activities since the early 1990s.[52] Imbued with a neo-liberalist philosophy, the current federal government refused to support an ILO convention on clothing outworkers in 1996, and its only formal response to the evidence on outworker exploitation/safety problems has been to issue a problematic information kit.

In December 1999, the NSW government's Minister for Industrial Relations, Jeff Shaw, announced new moves to deal with the widespread evasion of wages, hours, and health and safety standards by those employing outworkers in the clothing industry.[53] The government response was informed by evidence that, like the United States, exploitative and unsafe work practices were ultimately a consequence of the desire of retailers to lower production costs (paying prices that many must know cannot be achieved using workers paid the legal award rate). Further, like sweated workers in the United States, the outwork workforce is predominantly composed of recently arrived immigrant women who are isolated and relatively powerless to protect themselves from exploitative work arrangements. To deal with this, the NSW government made retailers the target of its new regulatory strategy. The new strategy, entitled "Behind the Label," holds clothing retailers responsible for how their products are made. Under the strategy, retailers are required to deal only with suppliers who are accredited as meeting NSW labor standards and must also disclose information about their contracts. Both retailers and manufacturers are required to sign up to recognized industry codes (including that developed by the union). The government committed itself to establish an Ethical Clothing Trades Council comprising union, community, retailer, and manufacturer representatives to recommend additional components for a mandatory code and to report on retail and supplier compliance. The government also committed itself to ensure outworkers are deemed as employees under the Industrial Relations Act and to introduce provisions with tough penalties enabling outworkers to recover unpaid remuneration from fashion houses, manufacturers, and other suppliers.

The new strategy was welcomed by the Textile, Clothing, and Footwear Union of Australia, but criticized by the executive director

52. C. Mayhew & M. Quinlan, *The Effects of Outsourcing on Occupational Health and Safety: A Comparative Study of Factory-Based Workers and Outworkers in the Australian Clothing Industry*, 29(1) INT'L J. HEALTH SERVICES 91-92 (1999).

53. SYDNEY MORNING HERALD, Dec. 17, 1999.

of the Australian Retailers Association, Mr. Bill Healey. Following intense lobbying from a range of interest groups, the NSW government finally committed itself to implementing the strategy in March 2001.[54]

The strategy is notable for a number of reasons. First, it is indicative of a growing concern by government regulators at the consequences of unrestricted or effectively unregulated outsourcing, at least in some industries where there is clear evidence that this has had significant adverse effects on OHS and labor standards. The NSW government response had been mooted for some time and followed widespread consultation with experts and interested parties earlier in the year. Further, the NSW action may well spread to other states. In October 1999, a joint statement by four Labor state ministers (NSW, Victoria, Tasmania, and Queensland) called for coordinated federal action on problems relating to clothing outworkers and road transport workers, threatening to take action themselves if the federal government refused. Since this time, the Textile, Clothing, and Footwear Union has sought to have state governments adopt the NSW government's "Behind the Label" strategy (in 2001, a Labor government was elected in Western Australia). Further, in 2000, the NSW government initiated an inquiry into safety in the long haul trucking industry, receiving cooperation from a number of other state governments. Key inquiry recommendations explicitly address the subcontracting issue.

Clothing and road transport may be seen as extreme cases. On the other hand, they may be a precursor to new forms of regulatory intervention. The indications are that where severe problems are identified and where the industry partners cannot or will not address these issues or where voluntary codes fail, governments may turn to industry-specific regulatory solutions.

Finally, what also sets a significant precedent here is the targeting of retailers rather than manufacturers and middlemen who allocate jobs to outworkers. Government regulators are becoming increasingly aware that focusing enforcement at what appears to be the immediate employer may not prove all that effective. In response, they are trying to identify other parties like retailers, suppliers, etc., who are seen to be more critical actors. It is worth noting that the general duty provisions found under most OHS Acts cover a wide range of parties (not just employers) and so there is considerable scope for "mix and matching" the target of compliance activities

54. New South Wales Minister for Industrial Relations, Media Release, Mar. 25, 2001.

industry by industry. In short, even those using outsourced labor indirectly (as in purchasing a product manufactured by outsourced labor) should not presume their action is exempt from legal implications.

C. Controls on Government Contracts

In recent years, the NSW state Labor government has undertaken a number of initiatives in relation to independent contractors and outworkers. In February 1998, the NSW Department of Public Works issued a Code of Practice on the employment and outwork obligations of textile, clothing, and footwear suppliers. The Code[55] covered all government departments and agencies that were estimated to purchase a total of around $40 million worth of clothing and footwear annually. It required agencies to ensure that suppliers met all minimum labor and OHS standards, including relevant state and federal award provisions on outworkers (provisions in the NSW clothing industry award mirror those in the federal award discussed below). Tenderers were required to provide evidence of compliance with applicable industrial awards and a statutory declaration before a tender could be considered. Agencies were required to monitor performance of selected suppliers, to provide a quarterly report on compliance to the State Contracts Board, and establish mechanisms to deal with transgressions from the Code. In order to promote awareness of the Code, it was printed in a number of languages (reflecting the largely immigrant workforce) and interested parties were obliged to promote its existence to outworkers. The Code also reinforced implementation mechanisms of provisions of awards, most notably the compulsory registration of contractors and outworkers, the keeping of a record of work done by outworkers, and making this information available to the TCFUA.

In many respects, the Code mirrored a voluntary Code of Practice that the TCFUA had promoted in the private sector (prior to the NSW government introducing the "Behind the Label" strategy) that had been signed by key industry bodies, as well as a number of large manufacturers and retailers. The critical difference was that government mandated compliance with its code and gave the State Contracts Board the specific task of monitoring compliance. Thus far,

55. NEW SOUTH WALES GOVERNMENT, CODE OF PRACTICE ON EMPLOYMENT AND OUTWORK OBLIGATIONS, TEXTILE CLOTHING, AND FOOTWEAR SUPPLIERS, DEPARTMENT OF PUBLIC WORKS AND SERVICES REP. NO. 97103, Sydney (1998).

it appears no other state government or federal government has adopted this approach.

III. REGULATION OF CONTRACTORS IN THE UNITED STATES

In the United States, unlike Australia, OHS legislation is largely a federal responsibility. The Occupational Safety and Health Act of 1970 covers federal government employees and most private sector employees. The major exclusions are state government employees (covered by state legislation) and the nuclear power and mining industries that are covered by separate federal laws. Further, the Occupational Safety and Health Act of 1970 (sections 18(b)-(h) and 23) encourages states to develop and operate, guided by the federal Occupational Safety and Health Authority (OSHA), state health and safety plans if certain conditions are met. These conditions include that (i) a state agency is designated to run the program; (ii) the state agency has sufficient funds and legal authority to conduct the program; and, (iii) the state health and safety standards are at least as effective as the federal standards. Twenty-five state plans (including "state" plans in the Virgin Islands and Puerto Rico) have been approved by the Secretary of Labor. Most state-plan states have adopted the OSHA regulations and in some areas, such as criminal prosecution of employers, some of the state plans are more stringent than the federal OSHA standard. While we acknowledge that state plans may provide for stricter regulation of contractors than is provided at the federal level, we confine our discussion in this article to federal regulation of contractors.[56]

Apart from the provisions of the Occupational Safety and Health Act of 1970, which have been applied to contractors, the federal government and its agencies have adopted three types of controls on contractors. First, the federal government has introduced a series of requirements dealing with its own outsourcing and similar measures have been undertaken in some states. Second, individual government units, such as the Department of Energy, have introduced elaborate contractor management systems to govern their own operations and suppliers. Third, there are a number of regulatory controls on contractors in particular industries.

56. We thank the *Journal*'s anonymous referee for raising this issue.

A. Regulatory Controls on Contractors

As already noted, OHS legislation in Australia is largely built around general duty provisions and there can be no doubt these provisions cover outsourcing arrangements. By way of contrast, in the United States, federal OHS legislation is largely built on a series of prescriptive standards. Section 5(a)(2) of the Occupational Safety and Health Act of 1970 requires the employer to comply with promulgated OSHA standards (see also section 5(b)). In all cases not covered by specific standards, section 5(a)(1) of the Occupational Safety and Health Act imposes upon the employer a general duty to "furnish to each of his employees, employment and a place of employment that are free from recognised hazards that are causing or are likely to cause death or serious physical harm to his employees." This provision has been used to deal with hazards not covered by prescriptive standards such as those associated with manual handling/ergonomics. The general duty in section 5(1)(a) was enacted to augment rather than take precedence over specific standards, and consequently, the general rule is that citation for a breach of the general duty is improper where there is a relevant specific standard.[57] There is, however, an exception to this rule when, for example, "an employer knows a particular safety standard is inadequate to protect his workers against the specific hazard it is intended to address, or that the conditions in his place of employment are such that the safety standard will not adequately deal with the hazards to which the employees are exposed . . ."[58]

The Occupational Safety and Health Act of 1970, unlike the Australian general duty provisions, does not impose a general duty upon self-employed persons. Contractors' subcontractors will only owe duties if they come within the category of "employer," that is, if they employ labor.

The Occupational Safety and Health Act also does not expressly provide that the employer's duties are in relation to persons other than employees. Indeed, the wording of section 5(a)(1) limits the employer's duty to ensure the safety of its own employees.[59] The specific standards promulgated under section 5(a)(ii), on the other hand, imply a specific duty to a more general class and have given rise

57. *See* Brisk Waterproofing Co., 1 OHSC 1263, 1973-74, OSHD ¶ 16,345 (1973).

58. United Auto Workers v. General Dynamics Land Systems Division, 815 F.2d 1570, at 1577 (D.C. Cir.), *cert. denied*, 484 U.S. 976 (1987). We thank the *Journal*'s anonymous referee for pointing us to this exception.

59. *See* Brennan v. OSHRC, 513 F.2d 1032, 1038 (2nd Cir. 1975); United States of America v. Pitt-Des Moines, Inc., 168 F.3d 976 (7th Cir. 1998).

to the so-called multi-employer doctrine. This doctrine holds that on multi-employer work sites, an employer who creates a safety hazard can be liable under the Act, regardless of whether the employees exposed to risk are its own or those of another employer on the site.[60] In other words, the courts have held that an employer who controls an area and creates a hazard may be found in violation of OSHA standards (section 5(a)(2)) if its own employees or employees of another employer engaged in a common undertaking are exposed or at least have access to the zone of danger.

In *United States of America v. Pitt-Des Moines, Inc*.,[61] the United States Court of Appeals, 47th Circuit, upheld the application of the multi-employer doctrine. Briefly, in *Pitt-Des Moines*, the U.S. Postal Service (USPS) was constructing a General Mail facility in Chicago and selected Hyman/Power as the general contractor and Turner/Oxanne as USPS's on-site representative. Hyman/Power contracted with Pitt-Des Moines (PDM) to erect the structural steel for the project. PDM subcontracted part of the steel erection work to MA Steel. During the project, Turner/Oxanne identified a procedure followed by PDM that allegedly did not conform to OSHA standards. It notified Hyman/Power, which in turn notified PDM. PDM claimed that the procedure was safe and continued to follow it, despite the warnings. The defective procedure resulted in the collapse of the steel structure and the deaths of an employee of PDM and the foreman of MA Steel. A federal grand jury indicted PDM for willfully violating the Occupational Safety and Health Act of 1970 and fined PDM $1,000,000, and placed it on probation for 5 years.

On appeal, PDM challenged the district court's decision that PDM could be liable for the death of MA Steel's foreman without proof that he was PDM's employee, as long as it could be shown that he was an employee of the worksite exposed to a risk created by PDM's violations. The appeal court upheld the multi-employer doctrine, noting that "the Act's legislative history suggests that its primary focus was making places of employment, rather than specific employees, safe from work related hazards." "[O]nce an employer is deemed responsible for complying with OSHA regulations, it is obligated to protect every employee who works at its workplace."[62] The appeal court emphasized that the doctrine only seeks to hold liable those employers who actually create hazardous situations by

60. Anthony Crane Rental, Inc. v. Reich, 70 F.3d 1298, 1305 (D.C. Cir. 1995); Brennan, *id*.; Beatty Equipment Leasing v. Secretary of Labor, 577 F.2d 534, 537 (9th Cir. 1978).

61. *See supra* note 59.

62. Teal v. E.I. Du Pont de Nemours & Co., 728 F.2d 799, 804, 805 (6th Cir. 1984).

violating safety standards. "The class of employees who will trigger liability under the multi-employer doctrine should be limited to those with regular access to the areas controlled or directly impacted by the employer accused of violating the safety regulation." The doctrine is limited to exposure by the employers of the violating employer "or those of other employers engaged in a common undertaking."[63] The application of the doctrine also depends on the wording of the regulatory provision—if the wording makes it clear that the employer's duty lies only in relation to the employer's employees, the doctrine will not apply.

In the construction industry, OSHA in recent times has tried to ensure that principal contractors are made responsible for the behavior of their subcontractors by fining principal contractors for contraventions committed by subcontractors.[64] Initially, OSHA's approach to construction sites with many contractors and subcontractors was to cite a contractor or subcontractor for a violation if one or more of the employer's employees were exposed to a hazard that resulted from non-compliance with an OSHA standard, regardless of who had created the hazard. If, for example, a contractor failed to comply with a standard aimed at preventing falling objects, any other contractor whose employees were exposed to the risk of being struck by those falling objects was in violation of the OSHA Act or the standard. In these situations, OSHA often issued citations to all employers at the site, arguing that each contractor had a duty to keep its employees away from the hazard, even if it meant stopping all work on the site.[65]

This approach was challenged in 1975, in a case where a subcontractor was cited for exposing its employees to risk of injury where the general contractor had breached an OSHA standard by failing to place guardrails around floor openings.[66] The court held that even though the subcontractor's employees were clearly exposed to risk of injury, subcontractors should not be held in violation of non-serious violations that they neither created nor were responsible for pursuant to their contractual duties. The court reasoned that Congress could not have intended to impose the burden of controlling the risk on subcontractors who did not have the appropriate employees to abate the hazard. The court explicitly confined its ruling

63. *See supra* note 59, at 1037.

64. P. Arden, *Subcontract for Safety First*, 146(5) SAFETY & HEALTH 44 (1992).

65. M. MORAN, CONSTRUCTION SAFETY HANDBOOK: A PRACTICAL GUIDE TO OSHA COMPLIANCE AND INJURY PREVENTION 5 (1996).

66. Anning Johnson Co. v. OSHARC, 516 F.2d 1081 (7th Cir. 1975).

to non-serious violations created by another contractor, leaving open the possibility that OSHA can use the strategy for serious violations. In short, for serious violations, every employer having employees exposed to the hazards presented by the violations can be cited, even if another employer was contractually responsible for the necessary violations. Subcontractors can protect themselves by proving that they lacked the expertise to recognize the hazard or that they took all reasonable steps available to them to protect their employees.[67] A general contractor can be held liable for violations committed by subcontractors if the general contractor could reasonably be expected to prevent or detect and abate in its supervisory capacity over the whole site, even if the main contractor's employees are not actually exposed to the hazard.[68] Three factors are relevant in deciding whether a general contractor should be liable for safety violations by its subcontractors, namely the degree of supervisory capacity, the nature of the violation of the standard, and the nature and extent of the precautionary measures taken.[69]

OSHA's current policy[70] on multi-employer worksites where contractors and subcontractors work envisages issuing citations against the employer whose employees are exposed to hazards (the exposing employer), and, in addition, against:

- the employer who actually causes or creates the hazard that violates the OSHA standard (the creating employer);
- the employer who has the general supervisory authority over the worksite, who is responsible, by contract or through actual practice, for safety and health conditions on the worksite, and who has the authority for ensuring that hazardous situations are corrected (the controlling employer); and,
- the employer who is engaged in a common undertaking, on the same worksite, as the exposing employer and has the responsibility for actually correcting the hazard (the correcting employer): For example, where the employer is given responsibility for installing a safety device.

Only exposing employers are to be cited for a violation of the general duty in section 5(a)(i). A two-step process is to be followed to

67. *See supra* note 65, at 436.

68. Gil Haugan d/b/a Haugan Construction Co., 7 OSH Cas (BNA) 2006 (Rev. Comm'n 1979).

69. Grossman Steel & Aluminum Corp., 4 OSH Cas (BNA) 1185 (Rev. Comm'n 1976). *See generally* MORAN, *supra* note 65, at 436.

70. *See* OSHA FIELD OPERATIONS MANUAL, Ch. V, F.1.a., and OSHA Instruction, CPL 2-0.124, MULTI-EMPLOYER CITATION POLICY, Oct. 12, 1999.

determine when one or more employers are to be cited for a hazardous condition that violates an OSHA standard. The first step is to determine whether the employer is a creating, exposing, correcting, or controlling employer. An employer may have more than one role. If the employer falls into one of the categories, step two requires a determination as to whether the employer's actions were sufficient to meet those obligations. The extent of the actions required of employers varies depending on the category they fall within. Where the employer's actions were not sufficient to meet its obligations, the employer is to be cited. For example, if the exposing employer created the violation, it is as citable for the violation as a creating employer. If another employer created the violation, the exposing employer is citable if (a) it knew of the hazard or failed to exercise reasonable diligence to discover the condition, and (b) it failed to take steps consistent with its authority to protect its employees. If the exposing employer lacks authority to correct the hazard, it is citable if it fails (i) to ask the creating and/or controlling employer to correct the hazard, (ii) to inform its employees of the hazard, and (iii) to take reasonable alternative protective measures. The correcting employer must exercise reasonable care in preventing and discovering violations and must meet its obligations for correcting the hazard. The extent of measures that a controlling employer must take to satisfy its duty is less than what is required of an employer required to protect its own employees. The controlling employer must exercise reasonable care to detect and prevent violations on site.

As a result of this policy, OSHA regularly brings citations against contractors for hazards created in relation to their employees and to other employees under the multi-employer doctrine. It is common for citations to be brought against a number of parties in one workplace. Most multiple citations in the United States concern construction contractors. A recent (and typical) example arose out of an incident in March 2000, when a scaffold collapsed during the construction of a theatre in Providence, Rhode Island. OSHA cited the general contractor for a total of $14,400 in fines for 4 alleged serious violations under the construction standard: for loading a scaffold in excess of its rated capacity; failing to have a competent person inspect the scaffold for defects prior to each work shift; failure to provide fall protection; and, improper bracing and unstable cribbing. The sheet rock contractor was cited for $62,500 in fines for 3 alleged repeat violations for loading a scaffold in excess of its rated capacity, failure to have a competent person inspect scaffolding before each shift, and failure to provide fall protection. It was also cited for one serious violation for

failure to situate scaffold legs on base plates. Further, it was cited with another serious violation for failure to train employees. The contractor, which erected the scaffold, faced $19,500 in fines for 4 alleged serious violations similar to those brought against the general contractor.[71] A further example was the citation in February 2000, in New Rochelle, New York, of 3 construction contractors (a general contractor, a scaffolding contractor, and a plastering contractor) for a total of 2 willful, 5 repeat, 10 serious, and 1 other-than-serious violation of OSHA standards with proposed penalties totaling $133,000.[72] However, not all examples are in the construction industry. In September 2000, OSHA cited 3 employers (the principal contractor and 2 contractors) for a total of $67,250 after 4 employees (2 employed by each of the contractors) suffered burn injuries while cleaning out duct work in a power generating unit in New Hampshire.[73]

Apart from the multi-employer doctrine, we are unaware of any significant attempt by OSHA to use the general duty clause in section 5 of the Act to deal with contractor related hazards. However, general duty provisions found within subsidiary legislation do more explicitly address the contractor issue. For example, under OSHA's Construction Rules,[74] the prime contractor must assume overall responsibility for work site compliance with OHS regulations. In addition, these rules[75] provide that:

> it shall be a condition of each contract . . . that no contractor or subcontractor for any part of the contract work shall require any laborer or mechanic employed in the performance of the contract to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health and safety.

Further, the OSHA Process Safety Management Standard of Highly Hazardous Chemicals Standard[76] requires employers to evaluate safety performance in selecting contractors, to inform contractors of known hazards and emergency procedures, to implement safe work practices, and to monitor the safety record of contractors. Contractors were required to ensure that their employees were adequately trained, informed of on-site hazards, and

71. *OSHA Proposes Over $96,000 in Fines Against Three Contractors in Connection with March 23rd Scaffold Collapse at Providence Pace Mall*, OSHA REGIONAL NEWS RELEASE, BOS 2000-134 (Nov. 25, 2000).

72. OSHA REGIONAL NEWS RELEASE, Region 2 News Release, NY 110 (Feb. 14, 2000).

73. OSHA REGIONAL NEWS RELEASE, Region 1 News Release, BOS 2000-129 (Sept. 18, 2000).

74. 29 CFR § 1926 (2002).

75. *Id.*

76. 29 CFR § 1910.119 (2002).

followed site safety rules. Supporting the Standard was an elaborate compliance and enforcement guide[77] covering matters such as consultation with contractor employees, training/selection, and equipment inspection. The standard was introduced after a number of serious explosions in the petrochemical industry during the late 1980s, most notably that at the Phillips 66 Pasadena complex in 1989.[78] Congress instructed OSHA to undertake investigations that revealed that a trend to outsourcing played a significant role in these incidents. Petrochemical companies had subcontracted routine maintenance to cut costs, but these contract workers were unfamiliar with workplace complexities, had received insufficient induction, safety training and supervision, and often failed to comply with established safeguards. These problems were clearly linked to what the study found to be the most striking feature of the petrochemical industry, namely "the distance that host managers maintain from contract employees on site."[79] Nor was the distancing entirely accidental. "Host plants avoid training and directing contract employees in order to escape potentially expensive legal liabilities associated with being declared the employer of contract employees."[80]

There had been complex court litigation over who is the employer of contract workers with determinations relying heavily on the degree of control exercised over them. This approach encouraged host managements to minimize the control they exercised over contract workers. In other words, the reasoning used by courts encouraged disorganization at the workplace. As Rebitzer[81] argues, the most direct solution to this problem was to assign liability for contract employees to the host plant management through legislation. The Process Safety Management Standard achieved this outcome, but was restricted to a particular industry. The absence of a more overarching legislative standard on contractors has meant, not surprisingly, that there is considerable uncertainty, ignorance, and debate over this issue amongst OHS managers. This is despite OSHA's recent efforts to pursue a consistent approach and its

77. *Id*. OSHA, PROCESS SAFETY MANAGEMENT OF HIGHLY HAZARDOUS CHEMICALS—COMPLIANCE GUIDELINES AND ENFORCEMENT PROCEDURES, DEPARTMENT OF LABOR, Washington (1992).

78. J. Rebitzer, *Job Safety and Contract Workers in the Petrochemical Industry*, 34(1) IND. REL. 40-57 (1995); OSHA, CORPORATE OSHA COMPLIANCE HISTORY: A NEW APPLICATION OF ENVIRONMENTAL DUE DILIGENCE FOR THE PRIVATE AND PUBLIC SECTOR, OSHA DATA REGULATORY COMPLIANCE HISTORY INFORMATION SERVICE, Washington (1997).

79. Rebitzer, *id*. at 40, 43.

80. *Id.* at 40-57.

81. *Id.* at 40, 55-56.

willingness to launch multiple prosecutions of subcontractors and general contractors/occupiers or the host employer based on a single incident or breach.

Even the rather sparse attempts to regulate contractors under existing legislation have not gone uncontested. The contractor issue has become enmeshed in a more general political struggle over the role and direction of OSHA. In 1997, Republican Representative Ballenger introduced two bills with the potential to constrain OSHA's capacity to address the contractor issue. One bill,[82] introduced in July (by March 1998, it was the subject of hearings before the Subcommittee on Workforce Protections), sought to exempt from citation an employer on a multi-employer site who had no employees exposed to the violation and had not caused the violation or assumed responsibility for ensuring compliance by other employers at the site. This bill was a direct response to OSHA's enforcement policy that a general contractor or owner should have an overall responsibility for OHS on the entire worksite. Ballenger stated this approach achieved the intent of Democrat sponsored bills that failed to pass the 102nd and 103rd Congresses. He alleged this approach had discouraged general contractors and owners from including reference to safety in contracts with subcontractors, or from intervening with their on-site activities for fear that OSHA would use this to hold them liable for all workplace violations.[83] This was an interesting interpretation. The evidence of the petrochemical industry just discussed is that the distancing tactics of general contractors and employers predated both the failed Democrat bills and OSHA's enforcement policy, were part of a more general strategy of limiting legal liability, and had more to do with court decision-making processes than OSHA.

Irrespective of any action by OSHA, state and federal courts were already grappling with the respective OHS responsibilities of contractors and subcontractors.[84] A more compelling reading of events is that employers used the "safety distancing" approach in an effort to evade legal liability for actions involving subcontractors and that the OSHA approach was a response to this. Ballenger's bill left the issue of the disorganization typically associated with outsourcing unresolved. He also failed to acknowledge that OSHA's stance was essentially similar to that adopted by OHS agencies in countries like Australia, where the regulatory duty of major contractors was

82. H.R. REP. NO. 2879.

83. CONG. REC. E2232 (Nov. 8, 1997).

84. *See, e.g.*, Plummer v. Bechtel Construction Co., 440 Mich. 646, 489 N.W.2d 66 (1992) *and* DuPlantis v. Shell Offshore Inc., 948 F.2d 187 (5th Cir. 1991).

unambiguous. Ballenger's bill should be seen as but one of a raft of Republican sponsored bills that aimed at making OSHA less prosecutorial and more employer-friendly. At least one of these, a bill introduced by Ballenger in November 1997, to reduce violation penalties for small business, is also relevant to the outsourcing issue since many subcontractors fit within this category. Neither of the Ballenger bills has been enacted.

Finally, it is worth pointing to another form of regulatory avoidance used in subcontracting and labor leasing situations, namely hold harmless contracts. Hold harmless contracts afford a means of shifting the balance of legal burdens between two parties, although this often means that the more powerful party is able to transfer costs and risks to the weaker party. For employers, the use of hold harmless clauses appears to offer an effective way of avoiding the regulatory burden and difficulty of managing contractors. For regulators like OSHA on the other hand, these contracts could be seen as direct threats to attempt to target the principle contractor in compliance programs. These issues were highlighted by a case in Washington State. In November 1998, an explosion at the coking unit of a refinery in Anacortes, Washington killed 6 workers after a change was made in procedures for cooling a separation drum. The company handling the coking unit (Equilon) subsequently agreed to pay a settlement of $4.4 million (including substantial penalties, donations, and other payments)—the largest in the history of Washington state. An Equilon contractor (Western Plant Services Inc.), 4 employees of whom were killed in the incident, was fined $2,800 for failing to ensure its workers didn't have to rely entirely on Equilon's decision to remove the drumhead without water cooling. Equilon subsequently filed suit against Western Plant Services, which had signed a hold harmless contract with Equilon and which Equilon officials blamed for the incident. This action, if successful, would clearly weaken OSHA's ability to target its penalty and compliance regime in ways designed to maximize changes in management behavior (ignoring the impact of adverse publicity arising from prosecutions).

In Australia, the use of hold harmless contracts in labor leasing arrangements has aroused some concern. However, in practice, these contracts could prove difficult to enforce since the general duty provisions in OHS statutes place the regulatory burden on the prime contractor and the contracts may be therefore deemed as an attempt to defeat legislative intent.

B. Specific Industry Regulations

As noted earlier, the nuclear industry is governed by separate legislation under the auspices of the Nuclear Regulatory Commission. The U.S. Department of Energy (DOE) has developed a comprehensive health and safety management system that incorporates elaborate controls on contractors and operations.

OHS in the mining industry is governed by the Mine Safety and Health Act administered by the Mines Safety and Health Administration (MSHA). Unlike Australia, extensive use has been made of contract miners in the coal mining industry. Aware of significant safety problems involving contractors, the MSHA has kept separate injury statistics for miners directly employed by mine operators and those working for contractors across all areas of mining (i.e. metal, nonmetal, stone, sand, and gravel). These statistics reinforce the disparity in OHS performance. In the 5 years of 1991-95, the fatal injury rate per 200,000 employees in metal and nonmetal mining was 0.02 for mine operator employees and 0.07 amongst employees of independent contractors—or more than 3 times higher. In an effort to address this, MSHA has signed agreements with major coal mining companies that aim to improve contractor safety performance. The agreements include provisions on ensuring all parties are clearly aware of their safety responsibilities, establishing minimum qualification levels for contractor/subcontractor employees, regular audits of contractors' safety performance, and debarring safety violators from further contracts.[85]

C. Controls on Government Contracts

In the United States, there have been legislative attempts to ensure that those tendering for government contracts abide by minimum labor standards over a number of years, although, as in other countries,[86] the momentum behind such measures appears to have increased in recent times. Section 35 of the federal Walsh-Healey Act (1936) on Public Contracts required that, in relation to any contract made with a federal agency and department worth more than $10,000, the contractor must abide by minimum standards in relation to wages, hours, or work, and the employment of child labor. Federal (and state and municipal) contract or acquisition regulations

85. D. McAteer, Assistant Secretary of Labor for Mine Safety and Health, *Contractor Safety Agreements May Reduce Injuries, Violations*, AGGMAN ONLINE OPINIONS 896 (1997).

86. Anonymous, *Kitt Seeks Safety Rider on Contracts*, IRISH TIMES, Apr. 25, 1998.

may include tender requirements to comply with OSHA standards, and some contracts even require a period free of OSHA violations. In 1991, an accident prevention clause[87] was inserted into the Federal Acquisition Regulations, placing a duty on contractors to maintain work environments that safeguarded the public and government personnel. However, according to OSHA (1997), federal and state regulatory requirements to accept the "lowest responsible bidder" has resulted in the awarding of contracts to firms with a poor OHS records or firms that deliberately underbid and then cut costs by methods, such as targeting OHS compliance:

> Unless the contract scope of work establishes the contractors' specific safety obligations rather than simply stating a broad, ambiguous and difficult to enforce requirement to "comply with all applicable safety regulations," or the definition of "responsible" does not include an acceptable safety record, the public agency may be hamstrung by their own legislative language.[88]

The OSHA document goes on to cite instances where unsafe contractors have caused costly delays in projects, as well as expensive litigation where their actions result in property damage or injuries to third parties. The latter has also aroused concerns amongst municipal governments and state agencies in Australia with the Victorian government issuing a contractor management manual in response to problems associated with competitive tendering requirements for local government.[89] For its part, OSHA recommended that agencies obtain the past violation history of applicant contractors, which may reveal misrepresentations that could be used to debar them.

In several states, notably Connecticut[90] and Maine,[91] laws preclude firms being awarded government contracts (for 3 and 2 years, respectively) where they have been convicted of willful or serious safety violations. In November 1994, a bill was placed before the New Jersey Legislative Assembly that contained a similar debarment process, while also proposing that 10% bid allowance be given to firms with an exemplary OHS record. In December 1995, a bill to amend the federal Occupational Safety and Health Act (Federal Contractors Safety and Health Enforcement) Act of 1995, proposed that any person or entity "with a clear pattern and practice" of violating OHS legislation be debarred from federal contracts for a

87. Clause 52.236-13.
88. OSHA, *supra* note 78, at 2.
89. *See* Mayhew & Quinlan, *supra* note 13, at 163-64.
90. CONN. GEN. STAT. § 31, Ch. 557, pt. III.
91. ME. REV. STAT. ANN. tit. 26, Ch. 19.

period of 3 years. This bill received support from a number of professional bodies, including the American Industrial Hygienists Association.[92]

Responding to a congressional request, the United States Government Accounting Office[93] examined compliance of federal contractors with OHS regulations for the year 1994 (a year the U.S. government spent $176 billion on outsourcing goods and services). The report confirmed that contracts were being awarded to firms violating OHS regulations with penalties totaling $10.9 million. It identified 261 federal contractors with contracts worth $38 billion, who had been fined at least $15,000 for violations identified in 345 worksite inspections (the average violation penalty imposed was $32,000 and 8% of the firms had been fined in excess of $100,000). Indeed, federal contractors were responsible for 16% of all significant penalty inspections. Common violations included failure to protect workers from electrical hazards (11% of violations) or provide proper machine guarding (10%). In 88% of the inspections, OSHA classified at least 1 violation as serious (i.e. posing a risk of death or serious harm to workers). Fatalities (35) and serious injuries requiring hospitalization (55) occurred at the work sites of 50 contractors. In 69% of inspections, OSHA inspectors identified at least 1 willful violation (i.e. a violation intentionally and knowingly committed). In 29 (8%) of the inspections, contractors were cited for repeat violations. Around 68% of the work sites where violations occurred employed fewer than 500 people, although in some cases the employer concerned was very large (such as the United Parcel Service that employs 285,000 workers). Violators included large contractors, with 5% receiving more than $500 million in contracts. Over half the violators were engaged in manufacturing with the next most significant category being construction. The report concluded that OSHA and contracting agencies should:

> develop policies and procedures to facilitate the exchange of information that would increase the likelihood that a company's safety and health record is considered in decisions to award a contract or suspend an existing contractor. The prospect of debarment or suspension can provide impetus for a contractor to undertake remedial measures to improve working conditions.

92. V. Rose, President, American Industrial Hygienists Association, correspondence to Honorable Lane Evans, United States House of Representatives, Washington, DC, Feb. 27, 1996.

93. UNITED STATES GOVERNMENT ACCOUNTING OFFICE (GAO), OCCUPATIONAL SAFETY AND HEALTH: VIOLATIONS OF SAFETY AND HEALTH REGULATIONS BY FEDERAL CONTRACTORS, REPORT TO CONGRESS, GAO/HEHS-96-157 (Aug. 23, 1996).

> OSHA could also emphasise the importance of contractors' complying with safety and health requirements by considering whether and how an employer's status as a federal contractor could be used in setting priorities for targeting inspections.[94]

It also recommended OSHA give inspection priority to high hazard workplaces operated by companies receiving federal contracts. It recognized that this would place additional demands on OSHA's limited inspectoral resources. The last problem affects most other OHS agencies as they try to respond to the implications of the growth in outsourcing, including those driven by policies of placing government activities out to competitive tender.

In one of its last acts, the Clinton administration issued new rules to take effect from January 19, 2001, strengthening the vetting process so contracting officers will scrutinize companies' records of compliance with labor, environmental, civil rights, consumer, tax, and other laws before awarding government contracts. Those found to have a record of routine violations risk being found "non-responsible" and disqualified from the contract under consideration. However, business groups, including the Chamber of Commerce and National Association of Manufacturers, immediately challenged the rules in federal court. Very early in his term, President George W. Bush temporarily suspended these "responsible contractor" rules.[95]

D. Government-Industry Partnerships

One of the pillars of the "New OSHA" initiative that emanated from the Clinton-Gore administration in the mid-1990s was the strategy of creating "creative partnerships" between OSHA and industry. Employers were given a choice—either they can work in partnership together with employees and OSHA to improve OHS beyond OSHA's minimum requirements, or they could be subject to traditional command-and-control regulation, with tougher enforcement for non-compliance with OSHA standards. The OSHA Strategic Partnership Program for Worker Safety and Health was adopted on November 13, 1998. In a partnership, OSHA would enter into an extended voluntary cooperative relationship with groups of employers, employees, and employee representatives in order to encourage, assist, and recognize their efforts to eliminate serious hazards and achieve a high level of worker safety and health.[96] OSHA

94. *Id*. at 5.
95. AFL-CIO, WORK IN PROGRESS, June 18, 2001.
96. OSHA, OSHA PARTNERSHIP PAGE (2000), *at* http://www.osha-slc.gov/fso/vpp/

and its partner identified a common goal, developed a plan for achieving the goal, and cooperated in the implementation of the plan. OSHA would still, however, continue to enforce the requirements of the Occupational Safety and Health Act where employers failed voluntarily to protect their workers.

For example, in February 2000, OSHA and the Associated Building Contractors (ABC) entered into a partnership aimed at establishing a national framework for the recognition of construction contractors with exemplary safety records. Under the terms of the partnership, ABC would create a 4-step program with "platinum" being the highest level of recognition for members with exemplary safety records and practices.[97] To reach the platinum level, contractors would have to meet stringent safety guidelines, which include:[98]

- an occupational injury and illness rate of less than 8.0 (industry average is 8.8);
- a site-specific written safety and health program, based upon either ANSI or OSHA guidelines, that includes employee involvement;
- training for employees on hazards specific to their jobs;
- effective supervisor training modeled on OSHA's 10 hour construction safety course;
- designated safety personnel who receive training equivalent to OSHA's 30 hour construction safety training course; and,
- a track record that includes no willful or repeat violations in the last three years, and no fatalities or catastrophic accidents in the last three years that result in serious citations.

In return for meeting these criteria, OSHA, after a verification inspection, will

- not target the site for a planned—or "programmed"—inspection within the next twelve months;
- conduct an unplanned inspection only in response to reports of imminent danger, a fatality or catastrophic accident, and a signed complaint;
- handle other complaints, except in cases of serious injury, by telephone and fax;

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partnerships.

97. OSHA, OSHA Trade News Release, *Agreement Expected to Create "National Framework": OSHA Partners with Contractors*, Feb. 14, 2000.

98. *Id.*

- not issue penalties for non-serious violations that are promptly abated; and,
- reduce any citation by the maximum amounts for good faith, size and history.

Under the agreement, local ABC committees would visit construction sites to verify data submitted by contractors seeking to become platinum members. The National ABC safety director would conduct a series of random verification visits and submit annual reports to OSHA. OSHA would inspect less than 10% of the sites to verify compliance with the program.

IV. CONCLUSION

Outsourcing has emerged as a major problem for OHS regulators in both Australia and the United States. It increases the likelihood of multi-employer worksites, corner-cutting, and dangerous forms of work disorganization, as well as situations where the legal responsibilities of employers are more ambiguous and attenuated. While subcontracting and the leasing of workers had been a long-term feature of the some industries (like construction), the expansion of these practices to other industries creates additional logistical demands on often already stretched inspectorates. More pervasive subcontracting and labor leasing arrangements can present regulatory difficulties, even in industries where such arrangements are long-standing.

Australian regulators are beginning to develop partnership approaches to compliance, building upon the experience of OSHA in the 1990s. In both countries, there is evidence of increased used of prosecution (in Australia) and citations (in the United States) against a range of employers and contractors involved in single incidents where workers are placed at risk. For a number of reasons, regulators in both Australia and the United States have tried to address these problems by focusing enforcement activity on the main contractor (i.e. the party who initiated the outsourcing process). In Australia, the OHS statutory framework is more flexible than that in the United States and imposes duties upon employers and self-employed persons in relation to employees and persons other than employees. The judicial decisions declaring that these duties are non-delegable and personal to the employer and self-employed person provide relatively unambiguous support for an enforcement approach focusing on the principal contractor, although there is certainly plenty of scope for enforcement agencies to target subcontractors. In the United States,

the situation (apart from those covered by the Process Safety Management Standard) is more ambiguous, although this ambiguity reflects the narrow scope of the Occupational Safety and Health Act, with its principal focus on duties owed by employers to employees, and in part, resistance by employers in the courts and attempts to reshape OSHA by the Republican Party in Congress. This appears to have had some effect in reshaping enforcement activity.

This resistance should be seen as part of a broader struggle over the reshaping of work structures and employment relationships to suit employer interests, especially those of big business. In the United States, the push to use contingent workers, and especially independent contractors, is linked not simply to labor-supply flexibility, but also lower unit labor costs and taxation savings. The importance of the latter is apparent from the advice proffered by management consultants promoting such arrangements and the more recent phenomenon of law firms specializing in advising those already using contingent workers (and responding to initiatives by the IRS to address the tax losses resulting from this expansion). The thrust of this advice is how to construct an arrangement where temporary workers will be categorized as independent contractors, not employees; key recommendations with regard to this include an explicit distancing of direct management control over employment practices. Within some areas of the public sector, treating temporary workers as if they were employees of the government agency rather than its vendor have also been seen as inconsistent with the principles of competitive tendering/outsourcing.[99] The efforts by OSHA to make prime contractors take responsibility for their subcontractors would place pressure on them to take control of subcontractors in a way that threatens this distancing and the manipulation of legal forms it entails. Although OHS agencies in Australia have not had to fight to assert the legal responsibility of prime contractors, they still face practical difficulties implementing controls precisely because of the taxation and minimum labor standards/cost advantages that accrue to employers using contingent workers.

Finally, it should be noted that outsourcing/subcontracting represents only one of a range of significant changes to work organization and employment arrangements taking place in most industrialized countries that pose a challenge to OHS regulators. As

99. *See, e.g.*, KING COUNTY AUDITOR'S OFFICE, TEMPORARY CONTRACT WORKERS REP. NO. 95-01—REPORT SUMMARY (1995), *available at* http://www.metroke.gov/auditor/1995/tempwork.htm.

we have shown in this article, other changes such as the growth of temporary/casual work, labor leasing, telecommuting, and home-based work have begun to draw the attention of regulators—though some like franchising remain neglected. For example, a recent Canadian report considered regulation in relation to homework.[100] It highlighted the gender implications of homework. Gender effects apply to other work changes, and those in connection to some like home-based work echo the problems of sweated labor debated a century earlier. Each of these changes poses a potentially serious challenge to securing minimum OHS standards, but the response of regulatory agencies is partial, belated, and often hamstrung by limited resources. What is particularly disturbing is the recognition that even in the one area where efforts to combat adverse effects have been carried out for some period of time, namely in relation to subcontracting, the results of regulatory intervention are, at best, very limited. If the same pattern were to hold for other changes in work arrangements, then a serious deterioration in OHS will not be arrested. In the end, effective remedies to these problems may lie more in terms of arresting the growth of more disorganized and dangerous work arrangements.

100. S. Bernstein, K. Lippel & L. Lamarche, *Women and Homework: The Canadian Legislative Framework,* REPORT TO STATUS OF WOMEN: CANADA, UNIVERSITE DU QUEBEC, MONTREAL (2000).