Regulating Work Health and Safety in Multilateral Business Arrangements

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Abstract

This article examines the regulation of work health and safety (WHS) in multilateral business arrangements in Australia. The focus is on the regulatory standards set out in the current WHS Acts and on approaches to the monitoring and enforcement of these standards. The article shows that the policy underpinning these Acts is to protect all workers in all kinds of work arrangements arising from new and changing business models, and from all kinds of existing and emerging hazards. It argues that the primary duty of care in s 19 of the Acts clearly covers workers carrying out work in most multilateral work arrangements, but that there is uncertainty about whether the drafting of s 19 is clear enough to achieve this policy objective in all circumstances. The article also examines the positive and proactive due diligence duty on officers, and the extensive inspection and enforcement powers given to WHS inspectorates to ensure compliance with these extensive duties.

Introduction

This article examines the way in which work health and safety (WHS) in multilateral business arrangements[1] has been, and can be, regulated in Australia. The focus of the article is on the regulatory standards set out in the current Work Health and Safety Acts (WHS Acts),[2] and approaches to the monitoring and enforcement of these standards.

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1 These include supply chain and franchising arrangements, other kinds of contractual chains, and labour hire and other triangular work relationships arranged through digital platforms. Detailed discussions of these arrangements can be found in the other articles in this special issue.

2 Lack of space prevents a detailed discussion of the occupational health and safety statutes, in Victoria and Western Australia, which have not yet adopted the provisions of the Model Work

WHS, like wages and working time, is a core labour law obligation. Business formats that include precarious and/or fragmented work arrangements can have significant negative WHS consequences: arrangements that lead to greater job insecurity, poorer pay, reduced access to training, less control over working time, and inadequate participation in WHS generally result in increased incidence of cardiovascular disease, burnout and depression, and poorer safety outcomes.[3] To explain why this happens, Quinlan and colleagues[4] argue, first, that the competitive pressures that induce firms to introduce fragmented and/or precarious work arrangements also encourage corner cutting on WHS (underbidding on contracts, inadequately maintained equipment, reductions in staff levels, reduced training or supervision), faster production, and longer work hours. Second, these types of work arrangements often lead to fractured, complex and disorganised work processes, weaker chains of responsibility, inadequate specific job and WHS knowledge among workers moving from job to job, less control over working time, and a lack of worker voice. Third, work is commonly relocated to small or medium sized firms, which face greater challenges in their efforts to manage WHS effectively. Finally, WHS regulation has been slow to adjust to these changing work patterns.

This article addresses the last issue. It explains how, rather than take a piecemeal approach to addressing issues arising from changing work arrangements, the WHS Acts make genuine attempts to ensure the health and safety of all kinds of workers carrying out work in all kinds work arrangements. In doing so, it teases out some lessons for other areas of labour law.

Standard setting

The duty of care to non-employees

While the occupational health and safety statutes introduced in Australia in the 1980s and early 1990s did not explicitly establish standards to protect workers outside the employment paradigm, they did provide significant protections to workers

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Health and Safety Act .For the background to the WHS Acts, see R Johnstone, E Bluff and A Clayton, *Work Health and Safety Law and Policy*, 3rd ed, Thomson LawBook, Sydney, 2012, 124-130.

3 For more detailed discussion of the particular kinds of WHS issues faced by workers engaged in each type of arrangement, see M Quinlan, *The effects of non-standard forms of employment on worker health and safety* (International Labour Office, 2015), especially 3-13.

4 Ibid, 14-20.

who were not the direct employees of the employer. For example, the centrepiece of each of these statutes, the employer's duty to their employees – such as section 21 of the Occupational Health and Safety Act 1985 (Vic) (OHSA(Vic)) – protects casual employees, and requires the employer to provide information, supervision and training to non-employees (such as independent contractors and their employees) to ensure that their activities do not put the employer's employees at risk.[5]

Most of the statutes also imposed duties on employers and self-employed persons to persons who were not employees, such as visitors to workplaces, customers and passers-by.[6] In some statutes, this duty to 'others' also protected contractors, subcontractors, franchisees, and their employees and contractors.[7] Interpreting the equivalent provision in s 3 of the UK HASAW Act, the House of Lords in *R v Associated Octel Co Ltd*[8] stated that the WHS general duties are 'personal' to the employer, and are non-delegable. While an employer is free to decide how to conduct its business, it must not create WHS risks to the workers concerned – in this particular case, independent contractors. The employer's duty to persons other than employees is defined by particular activities, namely the conduct of its undertaking. The fact that work is carried out for an employer by independent contractors does not take the work outside the scope of the employer's undertaking, and an employer engaging an independent contractor must take all reasonably practicable precautions to avoid risks, including in the arrangements made with the contractors for how they will do the work.[9] The approach taken in *Associated Octe*l has been followed by Australian courts.[10]

In Australia, this duty to 'others' was radically recast in Queensland from 2003 to 2005 following two reviews of the Workplace Health and Safety Act 1995 (Qld). These amendments replaced the general duties owed in that Act by 'employers' and 'self-employed persons' with an extensive duty, in s 28(1), on a 'person who conducts a business or an undertaking' to 'ensure' the WHS 'of the person, each of

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5 See *R v Swan Hunter Shipbuilders* [1982] 1 All ER 264, interpreting the equivalent employer's duty to employees in s 2 of the Health and Safety etc at Work Act 1974 (UK) (HASAW Act).

6 See OHSA (Vic) ss 22 and 23.

7 Ibid. See R Johnstone, 'Paradigm Crossed? The Statutory Occupational Health and Safety Obligations of the Business Undertaking' (1999) 12 *AJLL* 73-112.

8 [1996] 4 All ER 846.

9 Ibid at 850-1.

10 See *R v Commercial Industrial Construction Group Pty Ltd* (2006) 14 VR 321; [2006] VSCA 181 (*CICG*); *ABC Developmental Learning Centres Pty Ltd v Wallace* (2007) 16 VR 409; 172 A Crim R 269; [2007] VSCA 138;.*DPP v Vibro-Pile (Aust) Pty Ltd* (2016) 49 VR 676 (*Vibro-Pile*).

the person's workers and any other persons is not affected by the conduct of the employer's business or undertaking.' The Act had already defined 'worker' broadly as a person who 'does work, other than under a contract for services, for or at the direction of an employer', including volunteers.[11] This approach to the main general duty on the WHS statutes was subsequently taken up in the two territories.[12]

The National OHS Review's proposed primary duty of care

This recast duty of care on the person conducting a business or undertaking to workers and to others was then adopted, and expanded, by the National Occupational Health and Safety Review (National OHS Review) charged, in 2008, with reviewing the principal WHS legislation of each jurisdiction to identify areas of best practice, common practice and inconsistency and to recommend a model WHS Act, and, in doing so, 'to take into account the changing nature of work and employment arrangements'.[13] Chapter 2 of the National OHS Review's *First Report* outlined the significant changes in the nature and organisation of work in Australia in the previous 20 years, and noted the significant evidence that these re-emerging forms of work have an adverse impact on WHS, that regulatory frameworks were having difficulty addressing these issues, and that changes in work relationships and in industry structure would continually lead to changes in the kinds of hazards and risks at work.

The National OHS Review was concerned to develop WHS legislation with a 'wide coverage' that, 'without requiring frequent amendments', protected workers in all kinds of work arrangements arising from new and changing business models, and from all kinds of existing and emerging hazards.[14]

To impose the main duty of care upon an employer and upon a self-employed person was, the National OHS Review concluded, 'too limited, as it maintains the link to the employment relationship as a determinant of the duty of care' and 'the changing nature of work arrangements and relationships make this link no longer

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11 S 11.

12 See Work Safety Act 2008 (ACT) s 21 and the Workplace Health and Safety Act 2007 (NT) ss 4 and 55.

13 Commonwealth of Australia, *First Report to the Workplace Relations Ministers' Council* (National OHS Review Panel), Canberra: Commonwealth of Australia, October 2008, iii (*First Report*).

14 Ibid xiii.

sufficient to protect all persons engaged in work activities.'[15] There may be circumstances where the person with active control or influence over the way work is conducted is neither an employer nor a self-employed person,[16] and the person carrying out the work might not be an employee, but, for example, a contractor or engaged in arrangements like share farming or share fishing.[17] Thus the National OHS Review recommended that the primary duty holder's obligations should not be limited to any particular relationships, and that the primary duty of care should not be limited to the workplace, but 'should apply to any work activity and work consequences, wherever they may occur, resulting from the conduct of the business or undertaking.'[18]

These recommendations were to be operationalised in the model WHS Act by a 'primary' general duty upon a 'person conducting a business or an undertaking' (PCBU) and owed to 'workers' broadly defined and 'others'.[19] This went beyond the general duty of PCBUs in s 28 of the Queensland Act in that it was to be an overarching or umbrella duty, purporting to impose WHS obligations on all persons who are in a position to eliminate or control all work-related hazards and risks. The National OHS Review proposed the following primary general duty clause:

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

It commented that 'This expression of the primary duty of care would cover new and evolving work arrangements ….'[20]

The primary duty of care in the WHS Acts

The primary duty of care in the WHS Acts in s 19 modifies the clause proposed by the National OHS Review. The first difference is that s 19 splits the duty, with a duty to workers in s 19(1), and a duty to 'others' in s 19(2).

The duty to 'workers' is set out in s 19(1):

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15 Ibid 46 [6.32].
16 Ibid [6.33].
17 Ibid 48 [6.67].
18 Ibid, recommendation 17, and see recommendation 3(a) and (b).
19 Ibid, recommendation 3(c), and for further discussion 21-26.
20 Ibid xiv.

‘A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:

(a) workers engaged, or caused to be engaged by the person; and

(b) workers whose activities in carrying out work are influenced or directed by the person,

while the workers are at work in the business or undertaking.’

Consistent with the recommendations of the National OHS Review this duty is imposed on the PCBU, whether as employer, occupier or in some other capacity, whether on their own or with others, and whether or not the work is carried out for profit or gain.[21] The *Explanatory Memorandum*[22] states that the phrase ‘business or undertaking’ is ‘intended to be read broadly’ and it is clearly envisaged that all lead businesses (whether franchisors, principal contractors, or retailers at the top of a supply chain), labour hire agencies, client firms engaging labour hire workers, head contractors, contractors, sub-contractors, and franchisees are PCBUs.[23] Digital platform businesses are PCBUs, regardless of whether they are ‘labour’ platforms organising the performance of productive tasks or ‘capital’ platforms which facilitate the sale or rent of assets, or whether they provide crowdwork or work-on-demand systems.[24] A natural person can be both a PCBU and a ‘worker’: for example, a self-employed subcontractor engaged by a contractor is a ‘worker’, and if she runs her own business (which might include engaging a sub-subcontractor), she is also a PCBU.[25]

Whether a person ‘running a household’ might be a PCBU is a little more problematic. Householders often employ or engage persons to carry out cooking, child care, maintenance and other tasks, sometimes through digital platforms. It is not at all clear whether a household is an ‘undertaking’. The dictionary definition of an ‘undertaking’ includes ‘an enterprise, or a project, or work undertaken or to be

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21 See s 5.

22 At [24]. See also Safe Work Australia, *Interpretive Guideline: The Meaning of ‘A Persons Conducting a Business or Undertaking’, 2.*

23 See *First Report,* above n 13*,* 50-1 ([6.63]-[6.70]), *Explanatory Memorandum* [23], *Interpretive Guideline*, ibid, 2. See also T Hardy ‘Who should be held liable for workplace contraventions and on what basis?’ (2016) 29 *AJLL* 78 at Pt V(a); and R Johnstone and M Tooma, *Work Health and Safety Regulation in Australia: The Model Act*, Federation Press, Sydney, 2012, 79-86.

24 A Stewart and J Stanford, ‘Regulating work in the gig economy: What are the options?’ (2017) 28(3) *ELRR* 420 at 422, referring to typologies developed by Farrell and Greig, and Stephano, respectively.

25 WHS Acts ss 7(3) and 19(5).

undertaken.'[26] The *Interpretive Guideline* makes it clear that the 'duties of a PCBU are all associated with the carrying out of work'.[27] The *Explanatory Memorandum* states that a householder is a PCBU 'where there is an employment relationship between the householder and a worker' (for example, a cook or nanny),[28] but that, in the absence of a contract of employment, the persons who 'are not intended to be PCBUs' include 'individual householders who engage persons other than employees for home maintenance and repairs'.[29] But this guidance does not include an explanation of what the householder's *undertaking* is, and there is a strong case that the WHS Acts should be amended to clarify when and in what sorts of activities a householder is conducting 'an undertaking.'[30]

An important point to note is that the WHS Acts currently do include a provision that regulates WHS in maintenance, repair and other work carried out by outsiders for a household. If a householder engages a tradesperson, including through a digital platform, to carry out work, the tradesperson will be a worker,[31] and wherever the worker carries out the work for their own or their employer's business or undertaking is 'a workplace.'[32] Section 29 of the WHS Acts imposes a duty on a 'person at a workplace' (namely the householder) to take 'reasonable care' that his or her 'acts or omissions do not adversely affect the health and safety of other persons'.

The s 19(1) duty is owed to 'workers', who are defined as persons who carry out work 'in any capacity' for a PCBU (s 7(1)), and include not just employees, but also contractors, employees of contractors, labour hire employees, outworkers and volunteers. Note that this definition only requires the worker to work for *a* PCBU – it does not require the worker to work for *the* PCBU who owes the s 19(1) duty.[33] In

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26 Commonwealth of Australia*, Second Report to the Workplace Relations Minister's Council,* National Review into Model OHS Laws, Canberra: Commonwealth of Australia, January 2009 (*Second Report*) [23.14].

27 Above n 20, 1.

28 At [24]. See also ibid 3.

29 See [25].

30 Some tasks carried out for a householder involve major risks – eg, working at height (specifically regulated by Chapter 4.4 of the Work Health and Safety Regulation) and asbestos removal (regulated by Chapter 8 of the Regulation which specifies, inter alia, that friable asbestos can only be removed by an A Class licensed removalist). See also Australian Government, Senate Select Committee on the Future of Work and Workers, *Hope is not a strategy – our shared responsibility for the future of work and workers*, Senate, September 2018, 80-1, 92.

31 *Interpretive Guideline*, above n 22, 3.

32 WHS Acts s 8.

33 See, for example, *Moore v Fielders Steel Roofing Pty Ltd* [2005] SAIRC 75.

Balthazaar v McGuire; Department of Human Services (Commonwealth),[34] a case concerned with the meaning of 'worker' in Part 6-4B of the Fair Work Act 2009 (Cth), Watson DP held that a person in receipt of carer payments under social security legislation was a person performing work (as a carer) but was not a person performing work **for** the Department of Human Services, and was therefore not a 'worker'. This seems uncontroversial, as does the view that workers at the bottom of supply chains *are* carrying out work *for* one or more of the businesses in the supply chain and a labour hire worker is carrying out work *for* the client firm.[35] Persons provided with work through a digital 'labour' platform can be carrying out work *for* their *own* business or undertaking. They are clearly carrying out work *for* the end user. If the end user is not a PCBU and in the unlikely event that the worker is not carrying out work for their own business or undertaking, then the question will be whether they are carrying out work *for* the digital platform? The answer will most likely be yes where the digital platform is a vertically integrated (or disintegrated) firm, like Uber,[36] but each case will depend on its particular arrangements. The issue is more complex if the digital platform plays an intermediary role, bringing together end-users and persons selling their labour, and again each case will depend on the exact nature of the relationship between the intermediary and the worker.

A second major change from the National OHS Review's proposed primary duty clause is that the s 19(1) duty is owed to workers who are 'engaged', 'caused to be engaged', 'influenced' or 'directed' by the PCBU 'while they are at work in the business or undertaking'. Nothing in these four specifications of the relationship between the PCBU and the worker in s 19(1) suggests that there must be a direct contractual relationship between the PCBU and the worker.

The term 'engaged' has been broadly interpreted to include not only contractors engaged by the person, but also sub-contractors, sub-subcontractors, and so on further down the contractual chain.[37] This begs the question: what does 'cause to engage' mean? If 'engage' is defined narrowly, to require a 'direct' contractual relationship, then 'cause to engage' would cover the relationship between the lead

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34 [2014] FWC 2076.

35 See again *First Report,* above n 13, at 50.

36 See Stewart and McCrystal in this special issue.

37 See *R v ACR Roofing* (2004) 11 VR 187 (particularly Nettle J at [54]) interpreting s 21(3) of the Occupational Health and Safety Act 1985 (Vic). See also *Moore v Fielders Steel Roofing*, above n 31.

contractor business and sub-contractors, sub-subcontractors etc. [38] The *Explanatory Memorandum*[39] suggests that it covers the situation where a worker is 'placed with another person to carry out work for that person' – for example, a 'client' who has engaged an agency worker from an agency. Tooma[40] argues that it covers 'situations where the PCBU "'causes" workers to be engaged as part of the PCBU's undertaking, even where the PCBU is not a contractual party to any of the arrangements', for example where a sub-contractor is engaged by a client on the recommendation of a construction project manager.[41] If this analysis is correct, a digital 'labour' platform bringing together buyers and sellers of labour most likely satisfies this element of 'cause to engage'.

While the clause 'workers whose activities in carrying out work are influenced or directed by the person' was not in the National OHS Review Panel's draft primary duty of care, the words 'influence' and 'direct' were frequently used in *First Report* to describe the situations that the primary duty was intended to cover.[42] The *Shorter Oxford English* Dictionary[43] defines 'influence' as 'an action exerted, imperceptibly or by indirect means, by one person or thing on another so as to cause changes in conduct, development, conditions etc; and 'direct' to mean 'control, govern the actions or movements of, guide with advice.'[44] The *Explanatory Memorandum*[45] states that

> many who perform work activities do so under the effective direction or influence of someone other than a person employing them under an employment contract. … For these reasons, the Bill provides a broader scope for the primary duty of care, to require those who control or influence the way work is done to protect the health and safety of those carrying out the work.

As the National OHS Review pointed out, the 'only limiter in the duty should be that labour is provided for the purposes of, or in the course of, the conduct of a business or undertaking. All arrangements of whatever nature that meet that description would

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38 See *Explanatory Memorandum* [77].
39 Ibid.
40 Johnstone and Tooma, above n 23, at 49.
41 Ibid.
42 See, eg, *First Report*, above n 13, [4.6], [6.33], [6.36], [6.47], [6.70], [6.82].
43 6th ed, 1993, at 1379.
44 Ibid 692.
45 At [74] and [75].

be the subject of the duty of care'.[46] Section 19(1) expresses the limiter as requiring the PCBU to ensure the health and safety of workers 'while the workers are *at work in* the business or undertaking'

The courts have usually taken a broad interpretation of 'conduct of the undertaking' in the pre-harmonisation Australian WHS statutes,[47] including following the approach of the UK House of Lords in the *Associated Octel* decision.[48] The extent of the business or undertaking is a question of fact to be determined on a case-by-case basis,[49] and might require careful analysis of complex business structures.[50] The issue of whether the PCBU has 'control' over the work is not a relevant factor.[51] In most cases, the answer will be obvious.[52] More than one person may be conducting a business or undertaking in any one situation.[53]

In *Whittaker v Delmina Pty Ltd*[54] Hansen J stated that the word 'undertaking':

> is broad in its meaning … deliberately to ensure that the section is effective to impose the duty it states. ... In my view it means the business or enterprise of the employer . . . and the word 'conduct' refers to the activity or what is done in the course of carrying on the business or enterprise. A business or enterprise . . . may be seen to be conducting its operation, performing work or providing services at one or more places, permanent or temporary and whether or not possessing a defined physical boundary. The circumstances may be as infinite as they may be variable.[55]

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46 *First Report*, above n 13, 51 at [6.69]

47 In addition to cases discussed in this article, see *Essential Energy and WorkCover Authority of NSW* [2012] NSWIRComm 83; *WorkCover Authority of NSW v Edmund Hubert Kuipers and Civil Services Pty Ltd* [2004] NSWIRComm 303, [55]); *R v Mara* [1987] 1 WLR 87; *WorkCover Authority of NSW v Thiess Pty Ltd* [2003] NSWIRComm 325; *VWA v Horsham City Council* [2008] VSC 404 [36].

48 See, again, *Vibro-Pile,* above n 10.

49 *Associated Octel,* above n 8, at 853

50 *Inspector Alwyn Piggott v CSR Emoleum Services Pty Ltd* [2003] NSWIRComm 282 at para [226]; see also *R v Associated Octel Co Ltd* [1996] 4 All ER 846.

51 *Associated Octel*, above n 8; *Vibro-Pile*, above n 10, at [169]-[179].

52 *Associated Octel,* above n 8, at 851.

53 *WorkCover Authority of NSW v Techniskill-Namutoni Pty Ltd* [1995] NSWIRComm 127 at [8]; *R v Mara* [1987] 1 WLR 87.

54 (1998) 87 IR 268 at 280-281, examining the employer's duty to 'non-employees' under s 22 of the OHSA (Vic).

55 At [47].

Hansen J also noted that the legislature had deliberately chosen not to use the word 'workplace' to define the duty and that 'the word "undertaking" should not be read as synonymous with "workplace". It is neither helpful or necessary to do so'.[56]

In *DPP v Vibro-Pile (Aust) Pty Ltd*[57] the Victorian Court of Appeal approved the approach taken in *Whittaker v Delmina*.

In *WorkCover Authority of New South Wales v Chubb Security Australia Pty Limited,*[58] the New South Wales Industrial Relations Commission in Court Session accepted that Chubb, which provided security services to clients, was conducting its undertaking when it directed a sub-contractor to attend the premises of a client and pick up and deliver cash to the client.[59]

The courts have found that 'ancillary activities' such as obtaining supplies, making deliveries, cleaning, maintenance and repairs are also part of the conduct of the undertaking.[60] Sometimes, the 'place where the activity takes place' will be 'decisive', as Lord Hoffman noted in *Associated Octel*, where 'cleaning of the office curtains at the dry cleaners; the repair of the sales manager's car in the garage, maintenance work on machinery returned to the manufacturer's factory' would probably not be part of the manufacturer's undertaking.[61]

In conclusion, while each case will depend on its particular facts, work carried out by workers in core activities in supply chains, franchises, labour hire arrangements and digital 'labour' platforms will most likely be within the conduct of the business or undertaking of the PCBUs in the arrangement. But in each instance, the scope of the business or undertaking must be carefully analysed to see whether the worker is carrying out the work 'in the business or undertaking'. It may be, for example, that the business or undertaking of some retailers at the top of a supply chain will be properly construed as not including the production of goods produced in the supply chain.

The WHS Acts make it clear that duties – including the s 19 duty, and the duties discussed later in this article – cannot be delegated (s 14), that one person can owe

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56 Ibid.
57 Above n 10.
58 [2005] NSWIRComm 263.
59 At [32] and [43]. See also [27].
60 *Associated Octel,* above n 8*,* at 851-852; *R v Mara,* above n 47.
61 Above n 8, at 852.

a number of duties (s 15), that more than one person can hold a duty, and that each person must comply with the duty even though it might be also owed by others (s 16). These principles mean that a lead business cannot shift liability, responsibility or risk onto smaller businesses or workers: a worker at the end of a chain of contractual arrangements will be owed the primary duty by all PCBUs in the chain that can be shown to have engaged, caused the engagement of, influenced or directed the worker. Leased workers who are employed or engaged by a labour hire agency but carry out work for a client firm will be owed the primary duty by both the client and the agency.[62]

If, for some reason, the person carrying out the work in a work arrangement does not fall within s 19(1) – for example if a gig worker is not 'at work in' the digital platform's business or undertaking – they are owed the s 19(2) duty, which provides that a PCBU:

> 'must ensure, so far as is reasonably practicable, that the health and safety of *other persons* is not put at risk from work carried out as part of the conduct of the business or undertaking.'

For example, a gig worker allocated work through the digital platform is still owed the s 19(2) duty even though she may herself not be 'at work in' the digital platform's business. The *Explanatory Memorandum* notes that this duty – not to 'put at risk' – is not the same as the s 19(1) duty – 'to ensure the health and safety' – in that it is 'not a positive duty';[63] but it is a preventative duty and must be discharged by managing risk.[64]

The ss 19(1) and (2) duties are ongoing duties and are inchoate, in that they will be contravened if workers are exposed to risks that can be eliminated, or reduced, with reasonably practicable measures, even if workers do not suffer any form of illness or injury. Applying judicial interpretations of the pre-harmonisation WHS general duties

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62 The Victorian Inquiry into the Labour Hire Industry and Insecure Work: Final Report, 31 August 2016, recommended (recommendation 5) that 'the Model Work Health and Safety Act approach to regulating labour hire relationships be adopted in Victoria'. Labour Hire Licencing Acts in Victoria (2018), Queensland (2017) and South Australia (2017) require labour hire service providers and users to be licensed.

63 At [82]

64 At [83]. See also s 19(3).

to the primary duty of care,[65] the courts will require PCBUs to take a structured, systematic approach to WHS: PCBUs must actively assess and take account of all risks that might foreseeably arise; create systems to deal with these risks and, to the extent possible, eliminate them; and instruct and train workers to apply these systems, and supervise; and assess from time to time whether those systems are working.

This systematic approach includes significant responsibilities in triangular work arrangements – for example, a labour hire agency has been required:[66]

> to take positive steps to ensure that the premises to which its employees are sent to work do not present risk to health and safety. 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 which is unsafe … The labour hirer has a positive obligation … to directly supervise and monitor the work of the employee to ensure a safe working environment.[67]

Labour hire companies always have one measure of control – 'simply a refusal to supply its employees to [the host] until appropriate and sufficient measures to ensure safety were implemented'.[68] Arguably, the s 19 duties of a digital labour platform acting as an intermediary to *arrange*, rather than facilitate, a work relationship between a worker and end user may be, in some circumstances, analogous to the duties of a labour hire agency – but the extent of the duty in each case depends on its particular circumstances and is always only to implement measures that are 'reasonably practicable'.

Reasonably practicable' is defined in s 18, and requires the PCBU to 'take into account and weigh up all relevant matters', including the matters listed in s 18:

(a) the likelihood of the hazard or the risk concerned occurring; and

(b) the degree of harm that might result from the hazard or the risk; and

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65 See, for example, *Inspector Ching v Bros Bins Systems Pty Ltd; Inspector Ching v Expo Pty Ltd t/as Tibby Rose Auto* [2004] NSWIRComm 197at [32]; *WorkCover Authority of NSW v Milltech Pty Ltd* [2001] NSWIRC 51 and the cases cited therein at [31-33]. See also Code of Practice: *How to Manage Work Health and Safety Risks.*

66 *Drake Personnel Ltd (t/as Drake Industrial) v WorkCover Authority (NSW)* (1999) 90 IR 432.

67 Ibid, *a*t 456.

68 *WorkCover Authority (NSW) v Labour Co-operative Ltd (No 1)* [2001] NSWIRComm 223 at [53].

(c) what the person concerned knows, or ought reasonably to know, about:

(i) the hazard or the risk; and

(ii) ways of eliminating or minimising the risk; and

(d) the availability and suitability of ways to eliminate or minimise the risk; and

(e) *after* assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the *cost is grossly disproportionate to the risk*.[69]

PCBUs are not expected to undertake WHS preventive measures that are not reasonably practicable, assessed objectively. The High Court has stated that

> the duty does not require an employer to take every *possible* step that could be taken. The steps that are to be taken in performance of the duty are those that are reasonably practicable for the employer to take to achieve the identified end of providing and maintaining a safe working environment.[70]

But the PCBU must be creative, imaginative and proactive in the way it goes about its search for measures to ensure WHS, as the following discussion of the duties of officers illustrates.

Other key duties

The National OHS Review proposed that 'officers' have a duty of care, but rejected the models of attributed and accessorial liability in the then current occupational health and safety Acts.[71] Instead, it proposed a positive duty to apply immediately, rather than after a contravention by the company.[72] Officers should 'proactively take steps'[73] to fulfil a 'positive duty … to exercise due diligence to ensure the compliance by the entity of which they are an officer with the duties of care of that entity under the model Act'.[74]

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69 Emphasis added.
70 *Baiada Poultry Pty Ltd v R* (2012) 246 CLR 92 at [15].
71 For a brief discussion of these models, see Johnstone and Tooma, above n 23, at 102-4.
72 *First Report*, above n 13, at [8.29]:
73 Ibid, recommendation 1(d).
74 . Ibid, recommendation 42.

Consequently, s 27(1) of the WHS Acts imposes a duty on *each* 'officer'[75] of *each* PCBU to 'exercise due diligence to ensure that' the PCBU 'complies with' a duty or obligation that the PCBU owes under the Act. It is a positive and proactive duty, in that an officer can breach of their s 27 duty whether or not the PBCU has breached, or been found guilty of an offence under, the Act.[76] Note that the standard is not 'reasonable practicability', but 'due diligence', a standard 'well known by' officers,[77] who have due diligence obligations under the *Corporations Law*. Section 27 simply applies this standard to WHS matters.

Section 27(5) defines 'due diligence' to include taking 'reasonable steps' to:[78]

a) 'acquire and keep up-to-date knowledge of work health and safety matters', including likely future issues and trends, in order to make well-informed WHS decisions.[79] This includes up-to-date knowledge of WHS legal obligations and of 'human, technical, organisational and environmental factors that determine the health and safety of the system as a whole'.[80]
b) 'gain an understanding of the nature of the' PCBU's operations 'and generally of the hazards and risks associated with those operations'. Officers need to have first-hand knowledge and genuine *understanding* of the risks facing their organisations (including how they arise and are managed), gained through technical competence in the industry and field visits (including discussions with workers), so that they can interpret data presented to them, and react appropriately.[81]
c) ensure that the PCBU 'has available for use, and uses, appropriate resources and processes to eliminate or minimize risks to' WHS 'from work carried out as part of the conduct of the business or undertaking'. Officers must ensure that the PCBU's systematic approach to WHS management is well designed, with adequate and transparent investment in WHS personnel, infrastructure, processes and systems.[82]

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75 Defined in s 4 of the WHS Acts, referring to s 9 of the Corporations Act 2001 (Cth).
76 See s 27(4).
77 *First Report*, above n 13, at [8.29].
78 This is a 'non-exhaustive list of steps': *Explanatory Memorandum* at [125].
79 See Johnstone and Tooma, above n 23, 111.
80 Ibid 112.
81 Ibid 113-6
82 Ibid 117-120.

d) ensure that the PCBU 'has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information'. Officers must ensure that PCBUs receive information and make inquiries sufficient to enable them to monitor their WHS performance, learn from mistakes and drive improvements.[83] This includes removing incentives for under-reporting, and supplementing negative performance indicators (for example, 'failure data' like the lost-time injury rate) with positive performance indicators (any action, behaviour, or process undertaken actively to improve WHS).[84]

e) ensure that the PCBU 'has, and implements, processes for complying with any duty or obligation under the Act'. This might include an annual legal compliance audit, and processes for triggering reviews of policies if there are regulatory developments or organisational changes affecting WHS.[85]

f) 'verify the provision and use of the resources and processes' referred to above, by commissioning and monitoring WHS audits, officers' undertaking their own audits, officers' exercising a reasonable degree of supervision and control over the activities of the company's executive officers' management of WHS, or constructive and proactive peer reviews. Officers should not just rely on assurances from others.[86]

These are far-reaching duties, and require each company secretary, director and senior manager of the lead business and of each PCBU in the business arrangement to have extensive knowledge of the arrangements, and the WHS risks faced by all workers within those arrangements.

Another very important duty with a major impact on WHS management in multilateral business organisations is found in s 46,[87] which provides that:

> If more than one person has a duty in relation to the same matter under this Act, each person with the duty must, so far as is reasonably practicable,

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83 Ibid. See also *ASIC v Healey* [2011] FCA 717 at [576]-[582].
84 Johnstone and Tooma, above n 23, 122-123.
85 Ibid 124.
86 Ibid 124-127.
87 There is no equivalent provision in the Occupational Health and Safety Act 2004 (Vic) or the Occupational Safety and Health Act 1984 (WA).

consult, co-operate and co-ordinate activities with all other persons who have a duty in relation to the same matter.

This duty addresses the problem of hazards arising from fractured, complex and disorganised work processes – and ensures the involvement of *all* PCBUs and officers in WHS. The *Code of Practice: Work Health and Safety Consultation, Cooperation and Coordination* makes it clear that PCBUs in complex business structures must find out who else is carrying out work, and must work together with other PCBUs in a cooperative and coordinated way to eliminate or minimise risks so far as is reasonably practicable.

Section 46 has a very significant role to play in contractual chains, franchises and the tripartite work relationships – all the PCBUs involved in the arrangement that owe a s 19 duty, for example, are obliged, so far as is reasonably practicable, to 'consult, co-operate and co-ordinate activities with all other' PCBUs; and the officer of each of the PCBUs has a similar duty.[88]

If s 46 establishes a 'horizontal duty' to consult, the another key provision, s 47, establishes a 'vertical' duty. It provides that a PCBU must, so far as is reasonably practicable, consult with workers (or their health and safety representative (HSR)) who carry out work for the business or undertaking and who are, or are likely to be, directly affected by a WHS matter. Note here that the PCBU's s 47 duty is only to consult workers carrying out work for *the* PCBU.[89] Each retailer or client, head contractor, contractor and sub-contractor must consult each of the workers (or their HSR) who carry out work for them in the contractual chain; the franchisor and franchisee must consult all the workers working for the franchisee; the labour hire agency (and where relevant, the digital labour platform) must consult all workers carrying out work for the agency (or platform), to the extent that consultation can be suitably accomplished in the circumstances, and must consult, co-operate and co-ordinate with other PCBUs in doing so.[90]

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88 For examples of how this duty might play out in multilateral business arrangements, see *Code of Practice: Work Health and Safety Consultation, Cooperation and Coordination,* 16-17. See further Johnstone and Tooma, above n 23, 86-88.

89 Cf the discussion of s 19(1) above.

90 See again s 46.

Further, the WHS Acts make provision, in Part 5, for workers to organise themselves in work groups across the multilateral business arrangements. All workers can negotiate with one or more PCBUs in one or more workplaces to establish work groups, each of which may elect a HSR for that work group.[91] An elected HSR has extensive powers, including to inspect workplaces, investigate worker complaints, be present at interviews between workers and PCBUs or inspectors, receive information about WHS, be consulted on WHS issues, confer with a PCBU over WHS issues, and monitor PCBU compliance with the WHS Acts. HSRs can participate in processes to resolve WHS issues[92] and have the power to direct that work cease if it causes a serious, imminent and immediate risk to workers.[93] A HSR also has the power to issue a provisional improvement notice (PIN) if the representative has the reasonable belief that a PCBU is not complying with those provisions[94] – this includes issuing a PIN if the HSR reasonably believes that an officer has contrived the positive and proactive due diligence duty under s 27.

It is important to note that each worker[95] has an *individual* right, under s 84, to refuse work that causes a serious, imminent and immediate risk to the worker.

These horizontal and vertical consultation duties are imposed on all PCBUs in multi-lateral business arrangements, and are non-delegable. Further, the HSR provisions delegate to HSRs across the multilateral business arrangement the regulatory functions of monitoring and enforcing compliance in WHS matters within their work groups.

Further, all workers can be members of, and represented by, health and safety committees.[96] Finally, Part 6 of the *WHS Acts* includes union entry provisions enabling WHS permit holders to investigate suspected contraventions of the Acts.

These representation and participation provisions are not, however, without some potential shortcomings. It will sometimes be difficult for gig workers, home-based workers, temporary labour hire workers, casual workers or short term subcontractors to trigger and benefit from the vertical consultation provisions. Some PCBUs will

91 See, in particular, Pt 5, Div 3, Subdiv 3.
92 Ss 80-82,
93 S 85.
94 WHS Acts Pt 5, Div 7.
95 See again the definition of 'worker' in s 7.
96 See WHS Acts ss 68(2)(e), 75-79.

have to devote significant resources to worker consultation, representation and participation. The 'level of consultation' should 'be proportionate to the circumstances', including the significance of the particular WHS issue,[97] and must ensure that the PCBU 'has all the relevant available information, including the views of workers and can therefore make a properly informed decision'.[98]

Enforcing the WHS Acts in multilateral business arrangements

The WHS Acts are a very good example of decentred and polycentric enforced self-regulation,[99] in that

- the ss 19, 46 and 47 duties require each PCBU, while consulting their workers (and/or their HSRs) and in collaboration with the other PCBUs, to carry out systematic WHS management across the business or undertaking (for example, the whole supply chain or franchise), and
- the ss 27 and 46 duties require each officer to exercise due diligence to ensure that their PCBU fulfils these duties; and
- HSRs and authorised union officials can inspect the business or undertaking to monitor compliance with these and other duties: HSRs can issue PINs where any contraventions are detected and can direct that dangerous work cease; and individual workers can refuse to carry out dangerous work.

Both HSRs and unions are supported by .the WHS inspectorates, which, as external state regulators, have broad discretions to monitor and enforce the provisions of the *WHS Acts*.[100] The inspectorates make extensive use of 'informal' approaches to enforcement, preferring to educate, advise and persuade duty holders to take measures to comply with their WHS obligations. Most inspectorates also issue informal (in the sense of having no legal mandate) oral or written directions.[101]

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97 *Explanatory Memorandum* [199]. See also *Code of Practice: Work Health and Safety Consultation, Co-operation and Co-ordination.*

98 Ibid.

99 See R Johnstone, 'Regulating Health and Safety in "Vertically Disintegrated' Work Arrangements: The Example of Supply Chains' in J Howe, A Chapman and I Landau, *The Evolving Project of Labour Law: Foundations, Development and Future Directions,* Federation Press, 2017, 130 at 136-7.

100 See WHA Acts Parts 9-13, and E Bluff and R Johnstone, 'Supporting and enforcing compliance with Australia's harmonised WHS laws' (2017) 30 AJLL 30.

101 See A Stewart et al, *Creighton & Stewart's Labour Law*, 6 ed, Federation Press, Sydney, 2016, 587.

Inspectors also have significant formal enforcement powers under the WHS Acts. These include statutory notices: improvement notices, requiring a duty holder to remedy a contravention of the Act;[102] prohibition notices, requiring a person to stop an activity that poses a serious risk to any person emanating from an immediate or imminent exposure to a hazard;[103] and, in most jurisdictions, infringement notices (on-the-spot fines) for some contraventions.[104] Regulators can also require PCBUs to produce documents,[105] and report having no difficulty in getting documentation about contractual arrangements in contractual chains. WHS regulators can also accept enforceable undertakings offered by a person who is alleged to have breached an obligation in the WHS Acts, and generally require the undertaking to include improvements to WHS at the offeror's workplace, in the industry, and in the general community.

Finally, the regulator can initiate a *criminal* prosecution for an offence against the Act, with potential maximum fines as high as $3 million (for corporations 'reckless as to the risk of death or serious injury or illness')[106] and $1.5 million (for corporations where there is a risk of death or serious injury or illness).[107] The WHS Acts also contemplate a range of orders for non-pecuniary sanctions. These include:

- *Adverse publicity orders* requiring an offender to publicise the offence, its consequences and the penalty imposed (s 236).
- *Restoration orders* requiring the offender to take specified steps 'to remedy any matter caused by the commission of the offence' (s 237).
- *WHS project orders* requiring an offender to 'undertake a specified project for the general improvement' of WHS (s 238).
- *Court-ordered WHS undertakings*, which enable the court to adjourn proceedings for up to two years upon the offender giving specified undertakings (s 239).
- *Injunctions* requiring an offender to cease contravening the Act (s 240).

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102 WHS Acts ss 191-193.
103 Ibid ss 195-197.
104 See Stewart et al, above n 101, 586-7.
105 Ss 155 and 171, and see *Hunter Quarries Pty Ltd v State of New South Wales (Department of Trade & Investment*) [2014] NSWSC 1580.
106 S 31 (category 1 offences). Individuals, including officers, committing category 1 offences may face up to 5 years imprisonment. The WHS Act 2011 (Qld) maxima are expressed in penalty units (currently $126.15) so that the maximum penalties are 26% larger in Queensland than elsewhere.
107 Ibid s 32 (category 2 offences).

- *Training orders* requiring the person to undertake, or arrange for workers to undertake, a specified course of training (s 241).

In Queensland[108] PCBUs and officers can also be prosecuted for industrial manslaughter under Part 2A of the WHS Act 2011 (Qld) where a worker dies as a result of an injury in the course of carrying out work for the business or undertaking and the PCBU or officer is negligent about conduct causing the death of the worker.[109] The maximum penalty for an individual is 20 years imprisonment; and for a body corporate 100,000 penalty units.[110]

WHS regulators have wide discretion in choosing their strategies to monitor and enforce WHS duties in complex multilateral business structures. They can choose to treat each PCBU in the structure as a separate duty holder, and concentrate their monitoring and enforcement efforts on those parties. Alternatively, inspectorates can take a more creative and strategic approach, view the structure as an entity in itself, and focus their inspection and enforcement activities on the PCBUs that have most influence over the structure. Such an approach has been mapped out by David Weil's model of 'strategic enforcement' in which inspection and enforcement focus on higher levels of industry structures, make greater use of general deterrence to change behaviour at lower levels, and seek to address the underlying factors that lead to non-compliance, and to change the behaviour of (lead) firms at the market level rather than on a case-by-case basis.[111]

The WHS inspectorate's extensive enforcement powers, the breadth and inchoate nature of the PCBU's primary duty and the officer's duty, and the polycentric model of monitoring and enforcement described above provide a bold inspectorate with the opportunity to prompt, exhort, coerce and otherwise oversee the self-regulatory measures of PCBUs and their officers at all levels in a multilateral business arrangement.[112] Inspectorates can use their enforcement powers to support self-

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108 See also Part 2A of the Crimes Act 1900 (ACT) which makes provision for the crime of Industrial Manslaughter in the Australian Capital Territory.

109 See ss 244 or 251 for the means of imputing to a body corporate or public authority particular conduct of employees, agents or officers of the body corporate or public authority.

110 See n 106 above. At the time of writing the maximum penalty is $12,615,000.

111 See especially D Weil, *Improving Workplace Conditions Through Strategic Enforcement*, A Report to the Wage and Hour Division (US Department of Labor), May 2010; and D Weil 'Creating a strategic enforcement approach to address wage theft: One academic's journey in organizational change' (2018) 60(3) JIR:437-460.

112 A possible approach using Weil's model of strategic enforcement is discussed in Johnstone 2017 above n 99.

regulation through systematic WHS management overseen by HSRs and other worker representatives and to ensure that all PCBUs take responsibility for the WHS of all workers in the arrangement. The Australian WHS regulatory model has a rare regulatory tool to prompt a systematic approach from the top of the structure: the positive and proactive nature of the officers' duty means that an inspector or a HSR can seek to stimulate systematic compliance in the lead PCBU and in all other PCBUs within the arrangement, and can issue an improvement notice or PIN, respectively, if an officer is not exercising due diligence.

There is, however, very little evidence that the WHS regulatory agencies have, to date, taken a creative and strategic approach to regulating WHS in complex multilateral business arrangements. Certainly, the WHS regulators have not been as creative and strategic as the Fair Work Ombudsman in its approach to multilateral business arrangements.[113]

To begin with, Safe Work Australia (SWA) still has not produced any codes of practice or other significant guidance material on how the WHS Acts apply to the various multilateral business arrangements and how PCBUs should go about ensuring the WHS of all workers within their arrangements in order to comply with WHS duties in supply chains, franchise arrangements, labour hire or digital labour platforms, and there are sparse, if any guidance material from the state and territory WHS regulators.

An analysis of available data on enforcement practices also suggests that regulators adopt a conservative approach to enforcement.[114] Interviews with WHS regulators did not reveal any strategies to address multilateral business arrangements, or to enforce the officers' duty proactively.[115] There is no helpful data on the kinds of issues that regulators address with statutory notices. An analysis of prosecution data available on each of the regulator's website reveals that it is rare for a prosecution to focus on complex multilateral business arrangements, and the few prosecutions of parties in multilateral arrangements usually involve simple contractual relationships in the construction industry. Most prosecutions focus on single PCBUs only, and

113 See, eg, J Webster, 'More than underpayments and civil penalties – Taking a strategic approach to regulatory workplace relations litigation' (2017) 59(3) JIR 354–373; T Hardy & J Howe, 'Chain Reaction: A Strategic Approach to Addressing Employment Noncompliance in Complex Supply Chains' (2015) 57 JIR 563.

114 See Bluff and Johnstone, above n 100.

115 Ibid.

most involve a failure to comply with a WHS duty which exposes an individual to a risk of death or serious injury or illness (a s 32 category 2 offence). To date there has only been one prosecution of a s 31 category 1 offence, which resulted in a fine of $1 million.[116]

By the end of 2017, only 11 successful s 27 prosecutions had been conducted in New South Wales (out of a total of 102 successful prosecutions since 2014), eight in Queensland (out of 122 since 2013), and two in South Australia (out of 25 since 2013). None of these prosecutions has focused on the positive and proactive nature of the duty – each involved a prosecution of an officer in addition to a prosecution of a PCBU for breach of s 19.

There have been two prosecutions for breaches of s 46 – one in South Australia and one in Queensland.

The potential for general deterrence has not been utilised. Even the most determined researcher finds it difficult to gather helpful data on WHS prosecution outcomes. The average level of fines in successful prosecutions are still relatively low and are quite inconsistent across the jurisdictions, but it appears that they *are* rising, which affirms the potential for general deterrence to become more significant in enforcement strategies. For example, until the end of 2017 the average fine for category 2 s 19 offences committed by corporations was $147,264 in New South Wales, $58,045 in Queensland and $86,618 in South Australia. Only in Queensland is there any significant use of non-pecuniary sanctions: by the end of 2017 in Queensland, the courts had made ten section 241 training orders (two in one case), 21 court ordered undertakings under section 239, and seven good behaviour bonds. .

At state and territory level, there appears to be little interest in addressing inspection and enforcement issues in multilateral business organisations. The recent Workplace Health and Safety (WHSQ) Best Practice Review contained minimal discussion of such issues, apart from labour hire, where the Review recommended[117] that there be formal cooperation between WHSQ and the new Labour Hire inspectorate and that Inspectors under the Labour Hire Licensing system be trained and appointed as WHS inspectors.

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116 *Orr v Cudal Lime Products Pty Ltd and Shannon* [2018] NSWDC 27.

117 T Lyons, Best Practice Review of Workplace Health and Safety Queensland, *Final Report*, 2017, recommendation 58. See further n 62 above.

At federal level there have been few encouraging developments. SWA[118] has a focus on improving WHS 'through supply chains and networks.' The Heads of Workplace Safety Authorities has a Supply Chains and Networks Working Group, and has developed harmonised guidance material on the duties of PCBUs involved in supply chains. WHSQ's Industry Action Plans for the metals manufacturing, meat processing and road freight industries seek to ensure that supply chain participants 'understand their cumulative impact', use 'commercial relationships within supply chains' to improve' WHS; and that 'industry leaders champion' WHS in supply chains.

Conclusion

This article has shown that the policy underpinning the WHS statutes is to protect all workers in all kinds of work arrangements arising from new and changing business models, and from all kinds of existing and emerging hazards. The primary duty of care in s 19 of the WHS Acts requires a PCBU to ensure the WHS of (i) all workers engaged, caused to be engaged, or whose work is influenced or directed, by the PCBU, and (ii) others. This article has argued that these two limbs of the primary duty clearly cover workers carrying out work in most multilateral work arrangements, though there is uncertainty about whether the drafting of s 19 is clear enough about the circumstances in which householders are PCBUs; the scope and extent of the business or undertaking, particularly in supply chains, franchises and where work is allocated by a digital platform; and what it means for a worker to carry out work 'for a PCBU', amongst other issues. The WHS Acts also place a positive and proactive due diligence duty on officers to ensure that their PCBU has a good understanding of WHS and the business structure, and fully implements a systematic approach to WHS management. Together ss 19 and 27 seek to impose extensive proactive and constitutive duties on PCBUs and officers to ensure the WHS of all workers in all types of business arrangements. The WHS Regulation, and the Codes of Practice made under the WHS Acts, to date have, however, failed to provide adequate guidance about how PCBUs should go about managing WHS systematically in the different types of work arrangements, including how workers may be most effectively consulted.

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118 Safe Work Australia, *Australian Work Health and Safety Strategy 2012-2022*, 7.

The Safe Work Australia 2018 Review of the model WHS laws identified the emergence of the digital economy as 'the first real test of the broad definition of PCBU'.[119] While employers and the WHS regulators submitted that the WHS Acts are broad enough to deal with emerging business models, the Final report of the Review noted that 'this view has not been comprehensively tested to date'.[120] The Review recommended that 'Safe Work Australia develop criteria to continuously assess new and emerging business models, industries and hazards to identify if there is a need for legislative change, new model WHS Regulations and model Codes.'[121] It further recommended that a new model Code be developed 'to provide practical guidance on how PCBUs can meet the obligations associated with the [P]rinciples contained in ss 13-17' of the WHS Acts (discussed earlier in this article), 'including examples of the application of the Principles to labour hire, outsourcing, franchising, gig economy and other modern working arrangements', and examples of the processes to consult, co-operate and co-ordinate with other duty holders in s 46 of the WHS Acts.[122] The Review report also suggested that the National Compliance and Enforcement Policy be modified to reinforce the enforcement approach to labour hire, franchising and gig work.[123]

This article also shows that the WHS Acts provide the WHS inspectorates with extensive inspection and enforcement powers, including criminal prosecution of breaches of the WHS statutes, to take proactive measures to ensure compliance with these extensive duties. The regulatory literature has proposed strong inspection and enforcement models – most notably 'strategic enforcement' – to eliminate work-related hazards by addressing their underlying causes, but to date Australian WHS enforcement practices have not taken up these models, and instead have been reactive, have barely focused on enforcing the s 27 officers' duty, and have taken little strategic action against PCBUs at the top of multilateral business arrangements.

What can other areas of labour law learn from this approach to regulating WHS in multilateral business models? While, as Stewart and McCrystal in this issue argue,

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119 Safe Work Australia, *2018 Review of the model WHS laws, Discussion Paper*, February 2018, 28.

120 M Boland, *Review of the model Work Health and Safety laws Final Report*, Safe Work Australia, Canberra, 2018, 42.

121 Ibid, 43 (Recommendation 3).

122 Ibid 57 (Recommendation 5).

123 Ibid 42.

the PCBU and broadly defined worker approach is not readily transferable to *all* other areas of labour law, there are some areas – such as provisions to ensure equal treatment of workers, freedom from harassment, privacy, cheap and effective dispute resolution, whistleblower protection and fair dealing – where such an approach might be considered.

The positive and proactive due diligence duty, requiring officers to gain substantive knowledge of labour law issues and the operation of their business model and to take measures to institutionalise and ensure compliance with all labour law obligations across a business structure, is also worth considering. So, too, is the use of significant criminal financial penalties to maximise general deterrence, and a duty to consult, cooperate and coordinate with other businesses in a multilateral business model to ensure that workers receive their full labour law entitlements.