At the Centre

In this edition of Regulation at Work we present the regular updates on Developments in Regulation, Key Research and Reports, Key Cases, International News and Other Developments. The Feature Article in this issue by Centre Research Fellow Dr Liz Bluff is titled ‘PCBU, Officer, Worker or What? - Duty Holders in the National Model Work Health and Safety Legislation’. As the name suggests the article examines the definition and interpretation of the meaning of each of these duty holders in the model national legislation.

New working papers

There is a new Centre working paper available. This is working paper 81, Operator Competence and Capacity – Lessons from the Montara Blowout, by Dr Jan Hayes, Senior Research Fellow, Australian National University. Drawing on reports and documents from the Inquiry into the Montara blowout in the Timor Sea off the northwest coast of Australia in August 2009, this working paper analyses critical decisions made by individuals on the rig and in onshore management in the period leading up to the catastrophic event. Dr Hayes uses the concepts of operator competence and capacity to demonstrate that the operator of the facility had significant management and system deficiencies in areas such as understanding the need for multiple barriers, management and technical supervision, integrity assurance and the use of risk assessment to justify departures from established standards. The paper proposes some changes in regulatory policy regarding safety to more effectively prevent such incidents in the future. The report is online at: http://ohs.anu.edu.au/publications/index.php.

In another paper, prepared in her role as Senior Research Fellow with the Energy Pipelines Cooperative Research Centre (EPCRC), Dr Hayes discusses the research agenda of the EPCRC which is focusing on social and organisational reasons for failures to apply technical knowledge to prevent accidents. The paper is Organisational Safety - a New Research Venture for the Australian Pipeline Industry. The EPCRC’s research interests relating to safety include: how pipeline integrity can be included in incentive schemes for senior managers; the impact of organisational design on the influence that public safety and pipeline integrity specialists have in pipeline operations; and safety in the design process and operations. Other research interests are work practices that lead to pipeline damage due to external interference, and how younger engineers view their safety responsibilities. The paper outlining the EPCRC’s
At the Centre (continued)


More information about the Centre

More information about the National Research Centre for OHS Regulation, its publications and activities, and about OHS regulation and OHS regulatory research more generally, can be found online at: http://ohs.anu.edu.au.

Developments in Regulation

National Model Work Health and Safety Legislation – Australian governments have begun to enact or moved to enact legislation to give effect to the national model Work Health and Safety Bill:

Queensland - on 26 May 2011 the Queensland Parliament became the first to pass the Work Health and Safety Act 2011. As the national model Act did not include recreational diving, a new Safety in Recreational Water Activities Act 2011 (the SRWA Act) was also passed by the Queensland Parliament.

New South Wales – the NSW Parliament passed legislation to enact the national model Bill on 1 June 2011. This Act departs from the national model Act by preserving the possibility of union prosecutions in some situations. The Act also makes changes to the court responsible for hearing work health and safety offences. These will no longer be heard by the Industrial Court of New South Wales, but by the mainstream criminal courts. Category 2 and 3 offences will be heard either by the Local Court or the District Court, depending on the penalty sought by the prosecutor. The more serious Category 1 offences will be heard as an indictable offence by the Supreme Court. The Industrial Relations Commission’s role will be limited to administrative aspects of the legislation, such as authorisation of health and safety representatives, issuing work health and safety entry permits for union officials, and reviewing decisions made by WorkCover inspectors. The changes relating to the courts are not a departure from the model Act as the relevant court was not defined in the model Bill. This was a matter for each jurisdiction to decide. However, the role of the NSW Industrial Court will be markedly different from the role it has had for many years under the 1983 and 2000 OHS Acts.

South Australia - a Work Health and Safety Bill was reintroduced to Parliament on 19 May 2011.

The Commonwealth – the government called for comment on specific provisions proposed to be included in the Commonwealth WHS Bill (the comment period has now closed).

Other jurisdictions - As Regulation at Work goes to press, the other jurisdictions have not yet moved to enact the national model legislation.
Developments in Regulation (continued)

Information about the developments in Queensland, New South Wales, South Australia and the Commonwealth jurisdictions is online at:


New South Wales - the *Occupational Health and Safety Amendment Act* 2011 received the Royal Assent on 7 June 2011 and commenced on that day. This legislation amends the OHS Act 2000 (NSW) by establishing that all the general duties in NSW are qualified by the words ‘so far as is reasonably practicable’, and repealing the defence under section 28 which dealt with reasonable practicability. These changes shift the onus of proof from the defendant to the prosecution. The Amendment Act is online at: http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/0/5016501b29e8ae50ca2578860020c73e/$FILE/b2011-019-d13-House.pdf

Victoria – Parliament passed the *Crimes Amendment (Bullying) Bill 2011* which amends provisions in the state’s *Crimes Act* relating to stalking to cover serious forms of bullying. The amendment is online at: http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs.nsf/ee665e366dbc6cb0ca256da400837f6b/78EDF40A8F5C481CCA257869007C7C73/$FILE/571060bs1.pdf

Also Australia-wide - A trans-Tasman working group of the Heads of Workplace Safety Authorities, including regulators, industry and union representatives, has developed measures to reduce fatalities and serious injuries relating to quad bikes (all terrain vehicles). The measures include point of sale information, sale options to fit roll over protection and other safety features, nationally recognised quad bike rider training and limitations on carrying passengers. More information is online at: http://www.hwsa.org.au.

Other Developments

**Nanogovernance** – The European Trade Union Institute (ETUI) has issued a proposal to establish a registry of nanomaterial-containing articles. The rationale for the initiative is that comprehensive data is needed to improve knowledge of what is on the market, who is exposed and what should be regulated. Some European Member States have developed their own initiatives but these are not harmonised. The document is online at:

Key Research and Reports

Standards setting

Rogers M, ‘Risk management and the record of the precautionary principle in EU case law’ (2011) 14(4) Journal of Risk Research, 467-484. This article critically analyses the case law relating to the application of the precautionary principle in the European Union up to the end of 2008. Some risk regulators have applied the precautionary principle as a response to the failure of risk management in circumstances of scientific uncertainty. The European Union incorporated the precautionary principle into its primary law in 1992 and issued an explanatory communication on the precautionary principle in 2000. The communication presented five criteria that should govern precautionary actions, which have been reflected in secondary laws in a number of sectors. The practical application of this body of law is being clarified through the case law of the European Union courts. The analysis of case law reported in this article found that the courts use the first criterion (proportionality) effectively, but not the fifth criterion (responding to the dynamics of scientific progress). The paper concludes with a discussion regarding the future management of uncertain risks and the precautionary principle in the light of the case law.

Lofstedt R, ‘Risk versus hazard – how to regulate in the 21st century’ (2011) 2 European Journal of Risk Regulation, 149-168. This article examines the debate in Europe about whether to regulate chemicals based on intrinsic hazard, assessment of risk, or a combination of both. The article discusses the specific examples of how European regulators are handling the regulation of two chemical compounds, Bisphenol A and Deca BDE (a brominated flame retardant), drawing on 45 interviews with regulators, policy makers and industry representatives.

Sinden A et al, Twelve Crucial Health, Safety, and Environmental Regulations: Will the Obama Administration Finish in Time? Centre for Progressive Reform White Paper no. 2011-21, University of Maryland School of Law, United States, 2011. When the Obama Administration came to power it promised to reinvigorate protections for public, worker and consumer health and safety, and the environment which had been dismantled or held back by the previous administration. This paper identifies 12 critical environmental, health, and safety regulations planned by the Obama administration. The paper reports on their progress and discusses obstacles to their passage and implementation. The agencies responsible for these 12 sets of regulations face many challenges, of which shrinking resources is a fundamental one as well as newly energised Republican opposition to regulations that they perceive will stifle economic growth. The paper is online at: http://ssrn.com/abstract=1816731.

Approaches to securing compliance and enforcement

Gezelius S and Hauck M, ‘Toward a theory of compliance in state-regulated livelihoods: a comparative study of compliance motivations in developed and developing world fisheries’ (2011) 45(2) Law and Society, 435-470. This article reports research examining how states can best promote citizens’ compliance with laws that regulate their livelihoods. Based on ethnographic research with fishing communities in three countries (Norway, Canada, and South Africa) the article compares individuals’ compliance motivations under different socio-economic and political conditions. The authors identify three types of compliance motivations: deterrence, moral support for the law’s content, and the legislator’s authority. They then identify preconditions that respectively explain the three types of compliance motivations – enforcement, empowerment of citizens, and civic identity. The authors argue that the compliance discourse in a particular country must be framed to include the governable preconditions for compliance that have not been met in that country. Thus, a func-
tional strategy for eliciting compliance would vary between countries and discourses about compliance in the developed world are not necessarily transferable to developing countries.


Fine J and Gordon J, ‘Workers’ organizations. Strengthening labor standards enforcement through partnerships with workers’ organizations’ (2010) 38 *Politics and Society*, 552-585. In this article the authors argue that in the United States, structures of employment in low-wage industries, a diminished labor inspectorate, and an unworkable immigration regime have combined to create an environment where violations of basic workplace laws are everyday occurrences. The article discusses four ‘logics’ of detection and enforcement, and suggests that there is a mismatch between the enforcement strategies of most federal and state labor inspectorates and the industries in which non-compliance is a continuing problem. The authors propose giving public interest groups such as unions and worker centres a formal, ongoing role in enforcement in low-wage sectors. They use three case studies to illustrate how empowering these parties to work in partnership with government could increase enforcement of workplace laws and reduce non-compliance. The article is online at: http://pas.sagepub.com/content/38/4/552.

(2011) 5(2) *Regulation & Governance*. This edition of the journal presents a series of articles that debate the practice of ‘regulation by litigation’ with reference to Morriss A et al’s book, *Regulation by Litigation*, Yale University Press, New Haven, US, 2008. Regulation by litigation is the practice of using litigation as a means of imposing substantive regulatory measures. Examples are the US EPA’s law suit against heavy duty diesel engine manufacturers, asbestos and silica dust litigation by private attorneys, and private and state lawsuits against cigarette manufacturers. The articles in this edition of *Regulation and Governance* consider the strengths and weaknesses of the practice of regulation by litigation, how it differs from other uses of litigation to achieve policy goals, and why regulators may choose litigation over other options.

**OHS management**

(2011) 49(7) *Safety Science*. This edition of the journal presents ten articles addressing different issues and challenges in OHS management, from key researchers in the field of OHS management. The articles address worker consultation and participation, OHS management in supply chains, various types of certification, auditing of OHS management, and psychosocial risk management.

Frick K and Kempa V, *Occupational Health & Safety Management Systems - When are They Good for Your Health?* Report 119, European Trade Union Institute, Brussels, 2011. This report examines management systems devised by private firms and promoted by national authorities, and how they are interpreted and put into practice in workplaces. Information about the report is online at: http://hesa.etui-rehs.org/uk/publications/pub55.htm
Investigation of incidents

Dekker S et al. ‘The complexity of failure: implications of complexity theory for safety investigations’ (2011) 49(6) Safety Science 939-945. In the context of accidents it is common for those investigating them to focus on specific elements of failure (a 'Newtonian analysis'). Particular assumptions are made about the relationship between cause and effect, foreseeability of harm, time-reversibility and the ability to produce the 'true story' of an accident. This paper draws on complexity theory to propose that safety performance (including accidents) is the result of complex interactions and relationships. That is, it is an emergent property of complexity. The paper presents a 'post-Newtonian analysis' of failure in complex systems. Using such an approach, rather than looking for 'causes' or attempting to uncover the 'true story', investigators would gather multiple narratives from different perspectives inside the complex system. Investigators would value different, partially contradictory or partially overlapping accounts of how accidents come about as an organisation can learn more from these different perspectives.

Unionisation and health and safety

Morantz A, Coal Mine Safety: Do Unions Make a Difference? Stanford Law and Economics Olin Working Paper no. 413, Stanford School of Law, Stanford, United States, 2011. This paper reports on a study examining the relationship between unionisation and underground, bituminous coal mine safety in the United States from 1993 to 2008. The study found that unionisation predicted a substantial and significant decline in traumatic mining injuries and fatalities, which was especially pronounced among larger mines. Unionisation was associated with 17-33% less traumatic injuries and 33-72% less fatalities. However, unionisation was also associated with higher total and non-traumatic injuries, suggesting that injury reporting practices differ substantially between union and non-union mines. The author notes that unionisation’s effect on reducing the frequency of traumatic injuries has increased since the mid 1990s. The paper is online at:

Occupation and cancer

Villeneuve S et al, ‘Breast cancer risk by occupation and industry: analysis of the CECILE study, a population-based case-control study in France’ (2011) 54(7) American Journal of Industrial Medicine, 499-509. This article reports research identifying that certain occupations are associated with an increased risk of breast cancer. The researchers conducted a population-based case–control study in France including 1,230 breast cancer cases and 1,315 population controls with detailed information on lifetime work history. After adjustment for well-established risk factors for breast cancer, the researchers found that odds ratios were marginally increased in some white-collar occupations, textile workers, rubber and plastics product makers, tailors and dressmakers, and women employed for more than 10 years as nurses. The incidence of breast cancer was also increased among women employed in the manufacture of chemicals and non-metallic mineral products. The incidence of breast cancer was lower for women in agriculture. The authors conclude that the findings suggest a possible role of night-shift work, solvents and endocrine disrupting chemicals in breast cancer and that these require further detailed assessment.
Key Research and Reports (continued)

Hutchings S and Rushton L, *The Burden of Occupational Cancer in Great Britain - Predicting the Future Burden of Occupational Cancer – Methodology*, Health and Safety Executive Research Report RR 849, HMSO, Norwich, 2011. This report describes the methodology developed to estimate the future burden of cancers in the UK that are attributable to occupational exposure. The method takes into account past and projected trends in exposure and quantifies the impact of possible strategies to reduce the future burden of cancers (such as compliance with exposure limits). The report is online at: [http://www.hse.gov.uk](http://www.hse.gov.uk).

**Psychosocial risks**

Lilley R et al, ‘Combined exposures to workplace psychosocial stressors: relationships with mental health in a sample of NZ cleaners and clerical workers’ (2011) 54(5) *American Journal of Industrial Medicine*, 405-409. This article reports research that extends previous studies that have found that a combined measure of common psychosocial stressors, called job pressure, is strongly associated with poor mental health in high status workers. The current study involved a national random sample of cleaners and clerical workers in New Zealand and collected data on job stressors, demographics and mental health from these workers, using computer-assisted telephone interviews. The study found that combined exposure to high job demands, low job control and job insecurity (high job pressure) was associated with markedly elevated odds (13-fold or higher) of poor mental health after adjustment for age, sex, occupation, and education. Combined with previous findings, this study suggests that simultaneous exposure to more than one occupational psychosocial stressor may greatly increase the risk of poor mental health among both lower and higher status workers.

Lehmann A et al, ‘Subjective underchallenge at work and its impact on mental health’ (2011) *International Archives of Occupational and Environmental Health* (no pages). This article reports the findings of a German study of underchallenge at work that found a significant association with depressiveness, which was mediated by life satisfaction. The association was moderated by education. For participants with high or low education level, the association was stronger, and the association was weaker for those with a medium education level. The authors conclude that it is not only work overload but also being under-challenged that can negatively affect mental health. The article is online at: [http://www.springerlink.com/content/m567r18rq67854j9/fulltext.pdf](http://www.springerlink.com/content/m567r18rq67854j9/fulltext.pdf).

**Working hours**

Peetz D and Murray G, ‘You get really old, really quick’ (2011) 53 *Journal of Industrial Relations*, 13-29. This article reports on research that examined job-quality, the extent and impact of working involuntary long hours and control over working time among mining employees, and possible policy responses. The researchers analysed data from the Australian Bureau of Statistics, the Australian Work and Life Index survey, a survey of employees in Queensland, and qualitative interviews with 135 people associated with the Queensland mining industry. They found evidence of substantial involuntary long hours in mining, closely related to 24-hour operations and 12-hour shifts, and with adverse implications for work-life balance which is made worse where employees do not have input into the design of rosters. The authors conclude there is a need to revisit protections for employees against being forced to work ‘unreasonable’ hours above the national standard of 38 hours per week, and strong support for a ceiling on hours worked per week.
McCann D and Murray J, *The Legal Regulation of Working Time in Domestic Work*, Conditions of Work Employment Series no. 27, International Labour Office, Geneva, 2010. The International Labour Office (ILO) is considering the adoption of an international standard (a Convention supplemented by a Recommendation) on domestic work. The proposed standard is aimed at setting minimum protection to workers who provide housekeeping services, and look after children and elderly members of other people's households. The standard is intended to address the often long, unpredictable and unlimited hours worked by domestic workers. This paper reports on mechanisms to identify, limit and appropriately calculate working time for domestic workers, and suggests potential frameworks for regulating working time. The paper is online at: http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_150650.pdf.

**Construction health and safety**


Davis Langdon, *Health and Safety in Public Sector Construction Procurement - A Follow-Up Study*, Health and Safety Executive Research Report RR 848, HMSO, Norwich, 2011. This report discusses a study of health and safety issues in public sector construction procurement. The study was based on interviews with public sector construction clients (response rate 25%). The interviews suggested that there had been little significant improvement in how public sector clients discharged their health and safety obligations during the procurement of construction projects. The report is online at: http://www.hse.gov.uk.

Pye K et al, *A Commentary on Routes to Competence in the Construction Sector*, Health and Safety Executive Research Report RR 877, HMSO, Norwich, 2011. This report examines the adequacy of current routes to competence in the UK construction industry. These routes are qualifications (work-based and college-based), short courses, safety passport courses, competent person development, on-the-job mentoring and general experience. The report is online at: http://www.hse.gov.uk.

**Major hazards and exposure to airborne contaminants**

Ahrenholz S and Sylvain D, ‘*Deepwater Horizon Response Workers Exposures Assessment at the Source: MC252 Well No 1*’, National Institute for Occupational Safety and Health, US, 2011. This report presents the findings of a health hazard evaluation conducted by the National Institute for Occupational Safety and Health (NIOSH) of Deepwater Horizon response workers aboard two main vessels that worked to contain, control, and ultimately stop the release of oil into the Gulf of Mexico from the damaged blow out preventer (BOP) at the site of the Deepwater Horizon Mississippi Canyon (MC) 252 Well No. 1 oil release. The assessment was part of a series of requests from BP concerning workers involved in the response. The report discusses the availability, use and adequacy of respiratory protection, and the need to adjust occupational exposure limits for worker exposures over 12 hour, seven day per week work schedules.
Key Research and Reports (continued)

Nanomaterials

(2011) 53 (June) Journal of Occupational and Environmental Medicine. This edition of the journal presents 24 articles which address different issues relating to nanomaterials and worker health. The articles variously address health surveillance, exposure registries, current toxicological knowledge, epidemiological research and risk control.

Occupational medical services

Suk J, Preventive Health at Work: a Comparative Approach, Benjamin N Cardozo School of Law, Yeshiva University, New York, 2011. This article compares how medical clinics function in United States companies French workplace health services, and why they function differently. The article finds that such health services are governed by fundamentally different employment law regimes, which have significant consequences for their ability to optimise workers’ health and pursue public health goals. The article is online at: http://ssrn.com/abstract=1856750.

Boone J et al, Recessions are Bad for Workplace Safety, Discussion Paper no. 2011-050, CentER, Department of Economics, Tilburg University, Netherlands, 2011. This paper discusses the fluctuations in workplace accidents which may be related effort and working hours, as well as reporting behavior. The paper uses data on workplace accidents from an Austrian matched worker-firm dataset to study how economic factors affect workplace accidents. The authors find that workers who report an accident in a particular period of time are more likely to be fired later on. Also, recessions influence the reporting of moderate workplace accidents. If workers think the probability of dismissals at a firm is high, they are less likely to report a moderate workplace accident. The paper is online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1816292.

International News: Mobile phones and brain cancers

The World Health Organisation’s International Agency for Research on Cancer (IARC) has classified radiofrequency electromagnetic fields as possibly carcinogenic to humans (Group 2B) based on an increased risk for glioma, a malignant type of brain cancer associated with mobile (wireless) phone use. An IARC expert working group considered hundreds of scientific articles including several recent in-press scientific articles from the Interphone Study (see below).

A report summarising the main conclusions of the IARC working group and the evaluations of the carcinogenic hazard from radiofrequency electromagnetic fields (including the use of mobile phones) will be published in The Lancet Oncology in July 2011. The IARC working group’s full findings will be published as an IARC monograph, volume 102, in the near future, at http://www.iarc.fr.

A statement outlining the IARC’s findings is online at: http://www.iarc.fr/en/mediacentre/pr/2011/pdfs/pr208_E.pdf.
Interphone Study Group, ‘Brain tumour risk in relation to mobile telephone use: results of the INTERPHONE international case–control study’ (2010) *International Journal of Epidemiology*, 1–20. In view of evidence of the health effects of low-level exposures to radio frequency electromagnetic fields (RF), and the rapidly increasing and widespread use of mobile phones the International Agency for Research on Cancer (IARC) initiated, in the late 1990s, a multi-national study to examine the relationship between mobile phone use and brain cancer risk. The research has involved case-control studies for acoustic neurinoma, gliomas, meningiomas and tumours of the parotid gland. These are the tumours that, if RF are carcinogenic, would be most likely to be related to mobile telephone use. A study of leukaemia risk is also planned, conditional on funding. The participating countries are Australia, Canada, Denmark, Finland, France, Germany, Israel, Italy, Japan, New Zealand, Norway, Sweden and the UK. In order to maximise the power of finding a risk if it exists, the studies are mainly focused on tumours in people aged 30-59 who had the highest prevalence of mobile phone use 5 to 10 years ago, and on regions within the participating countries with longest and highest use of mobile phones.

This article presents the findings of the research to date in relation to glioma (2708 cases) and meningioma (2409 cases). Overall, for all cases of glioma and meningioma, no statistically significant increase in the risk of these disease was observed with use of mobile phones. There were, however, suggestions of an increased risk of glioma at the highest exposure levels, although biases and error in the data prevented a causal interpretation. There are also some patterns of concern in the data for glioma. The odds ratio for glioma tended to be greater in the temporal lobe than in other lobes of the brain, and in people who reported usual phone use on the same side of the head as their tumour rather than on the opposite side. The authors conclude that the possible effects of long-term heavy use of mobile phones require further investigation.

This conclusion has been echoed in a separate statement from the Director of the IARC, Dr Christopher Wild. He has warned that the observations of brain cancer for those with the highest level of cumulative mobile phone call time, coupled with the increased use of mobile phones (particularly among young people), indicate the need for measures to reduce RF exposure (such as hands free devices), as well as further investigation of mobile phone use and brain cancer risk.


Key Cases

Reasonable practicability of measures and the general duties

Laing O’Rourke (BMC) Pty Ltd v Kirwin [2011] WASCA 117

WorkSafe WA prosecuted Laing O’Rourke with two charges under the employer’s general duty to employees in section 19(1) (and sections 19A(2) and 19A(3) and 23D) of the Occupational Safety and Health Act 1986 (WA) for failing to ensure the health and safety of an employee and a subcontractor, both of whom were seriously injured when the March 2007 cyclone overturned the residential units or camp huts (dongas). The residential village and facilities had been built by other companies. (In separate proceedings WorkSafe WA also charged seven other employers.) The building work was done in accordance with plans and specifications approved by the local authority, but the approved plans and specifications submitted contained a significant error. ‘The buildings were supposed to be able to withstand a wind load related to the region and the terrain where the village was located, but the specifications specified an inappropriate wind load’ (para [12]). The camp had been situated in an area of the Pilbara ‘notorious for cyclonic activity’ (para [13]). Laing O’Rourke had not been responsible for, or in any way associated with, the construction of the dongas.

Laing O’Rourke was successful in defending the charges in the magistrates’ court, but, on appeal, Murray J in the Supreme Court allowed the appeal and convicted the company, after finding that it had done nothing to ensure the dongas were safe. Murray J was of the view that an inexpensive engineering inspection would have revealed the problem.

On further appeal to the Western Australian Court of Appeal, Laing O’Rourke argued that the Supreme Court decision amounted to ‘the imposition of an absolute duty’ when the general duty only required an employer to do all that was ‘practicable’ (defined in OSHA section 3(1) as ‘reasonably practicable’).

Murphy JA (with whom Martin CJ and Mazza J agreed) allowed the appeal and set aside the convictions. Murphy JA said that ‘section 19(1) is an obligation to provide and maintain a working environment in which its employees are not exposed to hazards only so far as is reasonably practicable’ (para [31]). Further, Murphy JA observed that, of the factors in the definition of ‘practicable’ (para [33]).

The ‘state of knowledge’ relating to, inter alia, the injury, the risk of injury and the means of removing or mitigating the risk, referred to in the definition of ‘practicable’, is objective. It is that possessed by persons generally who are engaged in the relevant field of activity and not merely the actual knowledge in fact possessed by a specific employer in the particular circumstances.

Murphy JA concluded that (paras [67]-[69]):

[B]y concluding that the appellant was required to carry out its own inquiries and investigations, including by obtaining engineering advice, into the design and fabrication of the dongas for the purpose of assessing their suitability for cyclonic conditions, [Murray J in the Supreme Court] ascribed a content to the duty under s 19 which went beyond what was reasonably practicable in the circumstances.
The taking of refuge in an appropriate shelter was generally regarded as the safest way to avoid injury in cyclonic conditions. There was nothing in the magistrate’s findings of fact (which the judge accepted) to indicate to [Laing O’Rourke] prior to the accident that the donga accommodation … was unsuitable for use as a safe refuge, for which purpose shire-approved accommodation was commonly adopted in work environments in cyclone-affected areas. Nor was there anything to suggest that a reasonable employer in the position of [Laing O’Rourke] would have appreciated or foreseen that the accommodation was not properly designed and built to withstand the weather conditions that affect the area in which it was located, or that it otherwise posed a risk of injury in the event of a cyclone. The donga accommodation was understood to have been built for a reputable and competent organisation with good quality control, and to have met the requirements of the local authority, including in relation to building standards for cyclone-affected areas.

As the magistrate found, the prosecution did not point to any particular evidence which indicated a reason for the appellant to undertake its own inquiries and investigations, and the evidence was ‘all the other way’ …. The evidence relied on by the prosecution to the effect that the donga accommodation was unsuitable only emerged with the benefit of hindsight.

Further, Murphy JA stated (para [71]) that ‘the prosecution did not establish any measures or means by which it could be said that it was practicable for the appellant to ascertain, including by obtaining engineering advice, that the dongas were not properly designed and built to withstand the relevant cyclonic conditions.’ There were no structural engineers at the camp, and there ‘was no evidence that, had a structural engineer been engaged and sent to Rail Camp 1 to inspect the dongas, he or she would have discovered the error in the specifications and plans approved by the local authority concerning the appropriate wind region’ (para [73]). Further (Para [74]):

There was no evidence that had [Laing O’Rourke] or an engineer made inquiries … concerning the construction of the dongas, they would have been told anything other than that they had been constructed in accordance with the plans and specifications approved by the shire and applicable building standards. There was no evidence that had the appellant or a structural engineer retained by it made inquiries of the local authority, the local authority would have responded to such inquiries. Nor was there evidence that any response, even if given, would have revealed anything more than the fact that the plans and specifications had been approved by the shire.

**Townsville Gymnastics Association Inc and Dean Allan Coggins [2011] QIRComm 69**

A gymnast was practising on a tumble track at a Townsville Gymnastic Association Inc (TGA) gym. After successfully completing a routine she attempted to ‘rebound’ straight into another routine, and she was fatally injured when her head hit an exposed section of the concrete floor and the edge of the crash mats. TGA was charged with contravening the main general duty in section 28(1) of the *Workplace Health and Safety Act 1995* (Qld), TGA argued that the gymnast’s ‘unconventional’ technique created a risk it could not be expected to control. TGA argued that the tumble track had been used without incident for more than 14 years, and that the flooring did not constitute a hazard because gymnasts completing routines would not enter the uncovered area unless they rebounded. The decision to rebound from one routine to another was ‘contrary to training and contrary to practice’, and created a risk TGA could not control. These arguments were rejected both by the magistrate at first instance, and by Hall P on appeal in the Industrial Court of Queensland.
The magistrate concluded (see para [2] of the Industrial Court judgment) that:

[T]he hazard(s) identified in the particulars should not be interpreted in such a narrow fashion and the defendant has an obligation to ensure that a person who successfully negotiates the tumble track is not injured elsewhere in the workplace. The workplace in this instance clearly includes the rest of the gymnasium and particularly includes the area of concrete floor commencing at the end of the landing area of the tumble track apparatus.

Hall P (at para [3]) stated that this ‘conclusion gave effect to the literal and grammatical meaning of the language used’ in the relevant provisions in the Workplace Health and Safety Act.

**Common law negligence and the relevance of safety measures taken after an incident**

*Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11

In this case a worker, employed by Transfield and working at a site operated by BHP Billiton, sued a company (WOMA) that supplied vacuum equipment, a hose and personnel to operate the equipment and assist other users of the equipment. The case was brought after the hose of the vacuum equipment was clogged and the worker suffered a serious injury to his arm. The High Court of Australia, in a 3:2 decision, ruled in favour of the worker. The majority (Heydon, Crennan and Bell JJ) criticised the trial judge’s unwillingness to accept the worker’s evidence and accepted that, because the worker was not cross examined, his evidence should be accepted. The majority then found that WOMA owed a common law duty of care, and stated that (para [79]):

> It was reasonably foreseeable to WOMA that the vacuum facility it provided to Transfield, and particularly the hose, would be used by Transfield employees to clean out the reactors. It was also reasonably foreseeable that from time to time the hose would get blocked and have to be unblocked. And it was reasonably foreseeable that different workers, whether employed by Transfield, WOMA or [another company], might work on the task of unblocking the hose, and hand it back and forth while the suction-creating power unit was in operation. Thus there was a duty on WOMA to provide a hose, truck and vacuuming facility that would not subject foreseeable users of the hose (including those who might be inadvertent at times) to an unreasonable risk of injury in relation to the uses to which it was reasonably foreseeable that it might be put. On that basis WOMA’s duty of care extended to risks in relation to the passing of the hose, whether those risks arose from the way the hose was designed (for example, without a break box), or the way it was to be used (for example, without the protection of instruction to turn the power off while it was being handed back and forth between workers).

One issue that arose was the exact status of the principle in *Nelson v John Lysaght (Australia) Ltd* (1975) 132 CLR 201 at 214 that safety measures taken after an incident can provide evidence of what precautions should have been taken beforehand. The majority at para [94] stated that:

> Plainly the mere fact that one change was recommended after the accident and the other introduced after the accident does not support a conclusion of breach of duty. The significance of these events is only to show what could have been done, not what should have been done. Whether what was done
later should have been done earlier depends, inter alia, on whether "it was inordinately expensive or in any other way disadvantageous". No evidence of inordinate expense or other disadvantage in either technique was called by the first respondent or pointed to in argument. The first respondent put no other significant argument in relation to breach of duty, as distinct from causation.

The majority found that there was sufficient evidence of two breaches of the duty – the failure to provide the break box (only implemented after the incident) and the failure to have a system shutting down the strong suction when the tube needed to be unblocked.

**Common law negligence and asbestos in the UK**

*Sienkiewicz v Greif (UK) Ltd; Knowsley Metropolitan BC v Willmore [2011] UKSC 10*

In this decision of the Supreme Court of the United Kingdom (formerly the Appellate Committee of the House of Lords), two defendants had appealed against decisions of the Court of Appeal favouring plaintiffs who had contracted mesothelioma, after being exposed to asbestos in their workplace and school respectively and also in the general environment. In cases brought by persons who suffer mesothelioma after wrongful exposure to asbestos, the usual requirement that a claimant must show that it is more likely than not that the harm he or she has suffered has been caused by the defendant's breach has been relaxed where claims were made against multiple employers who had each been found to be in breach of duty - see *Fairchild v Glenhaven Funeral Services Ltd* [2002] ICR 798 (HL(E)), developed in *Barker v Corus UK Ltd* [2006] ICR 809 and varied by section 3 of the *Compensation Act* 2006. As the Supreme Court noted in para [1] of their decision:

The rule in its current form can be stated as follows: when a victim contracts mesothelioma each person who has, in breach of duty, been responsible for exposing the victim to a significant quantity of asbestos dust and thus creating "a material increase in risk" of the victim contracting the disease will be held to be jointly and severally liable for causing the disease.

This relaxation of the rules of causation reflects the fact that medical science cannot presently determine which asbestos fibre or fibres has, 20-30 years later, caused the mesothelioma to develop. The two appeals leading to this decision raised the issue of whether this rule applies in cases where only one defendant is proved to have exposed the victims to asbestos, and where the victims were also exposed to asbestos in the general atmosphere.

The Supreme Court unanimously dismissed the appeals. It held that the *Fairchild* exception applies to cases of mesothelioma involving a single defendant and that there is no rule requiring a plaintiff to show that the defendant's breach of duty doubled the risk of developing mesothelioma.

**Constitutional consequences of the overlap of the Civil Aviation Safety Regime and the OHS statutes**
Key Cases (continued)

Heli-Aust Pty Ltd v Cahill [2011] FCAFC 62

A helicopter performing low-flying locust-control work in NSW collided with an electrical power line. The pilot and a passenger were killed, and another passenger seriously injured. Heli-Aust Pty Ltd was prosecuted under the Occupational Health and Safety Act 2000 (NSW).

Heli-Aust Pty Ltd argued that the Occupational Health and Safety Act 2000 (NSW) did not apply to the incident because the Commonwealth Civil Aviation Act 1988, Civil Aviation Regulations 1988 and Civil Aviation Safety Regulations 1998 ‘covered the field’. As a consequence, it argued, state and territory laws were excluded because, under section 109 of the Commonwealth Constitution, where State and Commonwealth laws conflict, Commonwealth laws prevail. The Full Court of the Federal Court of Australia (Moore, Stone and Flick JJ) accepted that argument.

Sentencing

Inspector Fraser v Karabelas [2011] NSWIRComm 56

The principal of totality enables the sentencing court to make a downward adjustment in the sum of the fines imposed in a single case to reflect the overall criminality of a series of offences arising from the same or closely related incidents and where there was a significant overlap of offences: see State of New South Wales (Department of Education and Training and Department of Juvenile Justice) v Cahill (No 2) [2011] NSWIRComm 33.

In Inspector Fraser v Karabelas the Full Bench of the Industrial Court of New South Wales (Boland P, Walton VP, Haylen J) held that the principle had been incorrectly applied in sentencing a company director who had ‘an attitude of deliberate defiance’ and a ‘conscious refusal’ to comply with OHS laws, and had resulted in a ‘manifestly inadequate’ overall fine. See further paras [35-44].
Feature Article: PCBU, Officer, Worker or What? - Duty Holders in the National Model Work Health and Safety Legislation

The national Model Work Health and Safety Bill, which is to be enacted by Commonwealth, state and territory governments by January 2012, incorporates a range of duty holders. The primary duty holder is the ‘person conducting a business or undertaking’ (PCBU). This person may have further obligations if the PCBU is involved in certain types of activities such as the design, manufacture or supply of substances, plant or structures. While the PCBU is the primary duty holder, ‘officers’, ‘workers’ and ‘others’ also have duties.

The model Bill provides definitions of ‘person conducting a business or undertaking’, ‘officer’ and ‘worker’ but for those applying the concepts in the context of the operations of a particular business or undertaking, there may be a degree of uncertainty about how they should be interpreted. This article addresses the questions - who or what is a PCBU? Who is an officer? And, who is a worker?

In this article, Centre Research Fellow Dr Liz Bluff discusses the duty holders with reference to the Model Work Health and Safety Bill, which is referred to here as the model Work Health and Safety Act (the model Act or WHSA) in anticipation of its enactment in each jurisdiction by January 2012. Centre Co-Director Professor Richard Johnstone (Griffith University) and Mr Neil Foster (University of Newcastle) reviewed and provided comments on an earlier draft of the article. We note that some aspects of the interpretation of the duty holders in the model Act are not clear cut and unambiguous.

The Centre is therefore presenting this article to encourage discussion and further clarification of the duty holders. Readers are invited to provide feedback to nrchosr@anu.edu.au, if they consider that any aspect should be interpreted differently, and also to provide an explanation and sources for any alternative interpretation. The Centre will provide an update on these issues in a working paper or later edition of Regulation at Work. Also, recognising that there is ambiguity about some aspects of the interpretation of the duty holders, readers should carefully make their own assessment of information in the article and check with other authoritative sources before relying on the article for their own purposes.

The Person Conducting a Business or Undertaking

The three member panel that reviewed the future directions for work health and safety legislation in Australia recognised that there have been significant changes in the labour market and the organisation of work in this country over the last 20 years. Among other matters they identified that the growth in labour hire, outsourcing and franchising, as well as the use of outworkers, home-based and migrant workers are fundamental shifts in work relationships and work arrangements that demand a new approach in work health and safety legislation. The review panel recommended that the model Act should incorporate an overarching, ‘primary duty of care’ which would be owed by a person conducting a business or an undertaking (the PCBU). In making this recommendation, the panel was not simply introducing a new term to replace the old term ‘employer’. The panel was seeking to establish a duty of care that would require all persons who conduct businesses or other undertakings to take responsibility for work health and safety (as employers, principal contractors, contractors, franchisors or otherwise), and in relation to all persons engaged in work activities for the business or undertaking (as employees, labour hire workers, contractors or otherwise).
In the model Act, the primary duty of the person conducting a business or undertaking (the PCBU) is set out in section 19. The PCBU must ensure, so far as is reasonably practicable, the health and safety of workers engaged, or caused to be engaged by the PCBU, and workers whose work activities are influenced or directed by the PCBU, while they are at work in the business or undertaking (WHSA s 19(1)). The PCBU must also 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 (WHSA s 19(2)).

To ensure health and safety, the PCBU must eliminate risks to health and safety, so far as is reasonably practicable, and if it is not reasonably practicable to eliminate risks the PCBU must minimise risks, so far as is reasonably practicable (WHSA s 17). Without limiting these requirements, a PCBU has specific obligations relating to: the work environment, plant, structures, systems of work, substances and facilities for the welfare of workers; information, training, instruction and supervision; monitoring the health of workers and workplace conditions; and accommodation for workers (WHSA s 19(3)-(4)).

A PCBU may have further obligations if the PCBU is involved in specific kinds of activities. These activities concern the management and control of workplaces, or fixtures, fittings or plant at workplaces. They also encompass the ‘upstream’ functions of design, manufacture, import or supply of plant, substances or structures, as well as the activities of installing, constructing or commissioning plant or structures.

A crucial question then is who or what is a PCBU? Section 5 of the model Act provides some explanation of the meaning of ‘person conducting a business or undertaking’. This section states that a **PCBU includes** a person conducting a business or undertaking alone or with others, whether for profit or gain or not, including as a partnership and as an unincorporated association. A note to the primary duty confirms that a self-employed person (sole trader) is also a PCBU (note to WHSA s 19(5)). Section 5 of the model Act states that the meaning of a **PCBU excludes** an elected member of a local authority and a volunteer association which is a group of volunteers working together for one or more community purposes where none of the volunteers, alone or jointly, employs any person to carry out work for the volunteer association (WHSA ss 5(7)-5(8)). The regulations may also define other persons excluded from the meaning of PCBU (WHSA s 5 (6)), but none have been defined as yet.\(^5\)

A PCBU may be an **individual person** or a **legal entity**. This will depend on how the business or undertaking is set up, that is, its legal structure. Examples of PCBUs who are **individuals** are partners in partnerships, individual trustees of trusts (as with some family businesses), committee members of unincorporated associations and sole traders (self-employed persons). Examples of PCBUs that are **legal entities** are incorporated bodies such as public and private companies, incorporated associations, trustees that are companies, cooperatives that are companies, and local authorities (municipal corporations or councils). The reason that these ‘artificial’ legal entities are PCBUs is that the word ‘person’ is deemed by interpretation legislation to include companies and other incorporated bodies. (See for example section 21(1) of the *Interpretation Act 1987* (NSW) and section 22(1)(a) of the *Acts Interpretation Act 1901* (Cth)). Government departments (the Crown), and other public authorities are also legal entities. As legal entities these types of businesses or undertakings have a ‘legal personality’ independent from their individual owners, workforces and/or members.
Feature Article (continued)

In everyday language, PCBUs might be the principals in supply chains and the contractors and sub-contractors that operate in those supply chains, as in the construction or transport industries. They might be franchisors that own an overarching company and the franchisees that operate to the franchisors’ business systems, as for many fast food outlets. They might be private sector businesses, public sector agencies or local government authorities (councils). If a PCBU employs people as employees, the PCBU will be an employer. The PCBU might be very large organisation with hundreds of its own employees, or a medium or small business. The smallest kind of PCBU is a self-employed person or sole trader. A particular PCBU might operate alone or engage with many other PCBUs in the course of conducting the business or undertaking.

The table below presents some examples of PCBUs for some different types of businesses and undertakings.

<table>
<thead>
<tr>
<th>Type of business or undertaking</th>
<th>Examples of PCBUs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sole trader/self-employed person</td>
<td>The sole trader/self-employed person</td>
</tr>
<tr>
<td>Partnership</td>
<td>Partners in the partnership</td>
</tr>
<tr>
<td>Unincorporated association</td>
<td>Committee members of the association NOT a volunteer unless the association has one or more employees</td>
</tr>
<tr>
<td>Incorporated association</td>
<td>The association NOT a volunteer association unless the association has one or more employees</td>
</tr>
<tr>
<td>A public or private company</td>
<td>The company</td>
</tr>
<tr>
<td>A university that is a public authority</td>
<td>The university</td>
</tr>
<tr>
<td>Government department</td>
<td>The department</td>
</tr>
<tr>
<td>An independent school</td>
<td>The school</td>
</tr>
<tr>
<td>A local authority (council)</td>
<td>The municipal corporation or council NOT an elected member of the local authority</td>
</tr>
<tr>
<td>A cooperative that is a company</td>
<td>The cooperative</td>
</tr>
</tbody>
</table>

Officers of businesses or undertakings

In addition to the PCBU, higher level responsibility for work health and safety rests with any officer of the business or undertaking. The rationale underpinning the duty of officers is that if individuals in senior management or governing positions in businesses or undertakings face the possibility of personal criminal liability for breaches of work health and safety legislation, that this may help to concentrate their minds, shape their motivations and encourage them to ensure that the business or undertaking has the resources and arrangements in place to comply with its legal obligations.

The officer’s duty is to exercise due diligence to ensure that the PCBU complies with the PCBU’s duties or obligations (WHSA s 27(1)). The meaning of due diligence is set out in the model Act and relates to knowledge of work health and safety matters, understanding the hazards and risks associated with the business or undertaking’s operations, and resources and processes to
eliminate or minimise risks. It also concerns information about incidents, hazards and risks, processes for complying with the PCBU’s duties and obligations, and arrangements to verify the provision and use of resources and processes (WHSA s 27(5). The elements of due diligence as defined in the model Act are not exhaustive and allow a court to take other matters into account. They are framed quite broadly and would be likely to embrace a comprehensive and proactive approach to managing work health and safety.

Who then are the officers who will need to exercise due diligence? The first point to note is that an officer is an individual (unlike the PCBU which may be an individual or an entity). The model Act provides separate definitions of an officer for businesses and undertakings generally, and for Crown or public authorities (WHSA ss 4, 247, 252). There is a common principle that is reflected in each of the definitions - an officer is a person who makes or participates in making decisions that affect the whole, or a substantial part, of a business or undertaking.

In addition to this principle, for businesses or undertakings other than the Crown or public authorities, the definition of officer is more detailed and is drawn from section 9 of the Commonwealth Corporations Act 2001. This section provides definitions for officers of corporations, and for officers of other entities that are neither corporations nor individuals. The Corporations Act 2001 defines an officer of a corporation as:

- a director or secretary of the corporation; or
- a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation, or who has the capacity to affect significantly the corporation’s financial standing, or in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding a person who gives advice in the proper performance of functions attaching to the person’s professional capacity or business relationship with the directors of the corporation); or
- a receiver, or a receiver and manager, of the property of the corporation; or
- an administrator of the corporation, an administrator of a deed of company arrangement executed by the corporation, or a liquidator of the corporation; or
- a trustee or other person administering a compromise or arrangements made between the corporation and someone else.

For other entities that are not corporations and not individuals, section 9 of the Corporations Act 2001 defines an officer to include an office holder of an unincorporated association, or a person who makes, or participates in making decisions that affect the whole, or a substantial part, of the business of the entity, or who has the capacity to affect significantly the entity’s financial standing.

There is a degree of uncertainty about how far down the management hierarchy the officer level responsibility might apply. The review panel that made recommendations for the model Act considered that the expression ‘makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation’, as used in section 9 of the Corporations Act, would be far less likely to have unintended application to middle managers. Certainly, a ‘middle-level’ or ‘line’ manager will not be an officer if he or she has minimal ability to influence decisions affecting work health and safety. However, in some businesses or undertakings, particularly very large ones, middle level managers may have a high degree of power and influence. If they make or participate in decisions that affect a substantial part of the organisation, they may be officers for the purposes of the model Act.

Apart from the definitions of officer in sections 4, 247 and 252, the model Act makes some additional provisions concerning officers in particular types of businesses or undertakings. A
Feature Article (continued)

partner in a partnership is excluded from the definition of an officer in section 4 of the model Act. (This is different from section 9 of the Corporations Act which states\(^{11}\) that a partner in a partnership is an officer). For unincorporated associations more generally, the model Act appears to envisage that there will be officers. Division 5 of Part 2 of the model Act, which deals with offences and penalties (see below), establishes that an officer of an unincorporated association (other than a volunteer) may be liable for a failure to comply with the duty of officers in section 27 (WHSA s 34 (3)). With regard to local authorities,\(^ {12}\) their elected members, acting in that capacity, are not officers (WHSA s 4). Ministers of a State or of the Commonwealth are also not officers (WHSA s 247).

Ultimately, a sharper delineation of who is an officer in particular circumstances will only be provided as the courts interpret the duty of officers on a case-by-case basis. The table below presents some examples of officers for some different types of businesses and undertakings.

<table>
<thead>
<tr>
<th>Type of business or undertaking</th>
<th>Examples of officers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sole trader</td>
<td>None</td>
</tr>
<tr>
<td>Partnership</td>
<td>None</td>
</tr>
</tbody>
</table>
| Unincorporated association\(^ {13}\) | • Each office holder (except volunteers)  
  • Each other person who:  
    • Makes, or participates in making decisions that affect the whole, or a substantial part, of the business of the association  
    • Has the capacity to affect significantly the entity’s financial standing.  |
| A public or private company\(^ {14}\) | • Each director of the company  
  • Each other person:  
    • Who makes or participates in decisions that affect the whole or a substantial part of the business (eg a chief executive)  
    • Who has the capacity to significantly affect the corporation’s financial standing  
    • Whose instructions or wishes the directors of the corporation are accustomed to act on\(^ {15}\)  |
| A university that is a public authority\(^ {16}\) | • Each member of the university council  
  • Each other person who makes or participates in decisions that affect the whole or a substantial part of the university (for example, the vice chancellor)  |
| Government department (the Crown)\(^ {17}\) | • Senior public servants such as a director general or chief executive  
  • Any other person who makes or participates in making decisions that affect the whole, or a substantial part, of the department (eg an executive or senior managers group).  |

NOT a Minister of the State or Commonwealth.
Workers

Any person who performs work in any capacity for a business or undertaking is a ‘worker’. This includes any person who works as an employee, contractor or sub-contractor, an employee of a contractor or sub-contractor, an employee of a labour hire company assigned to work for a PCBU, an outworker, an apprentice or trainee, a student gaining work experience, a volunteer, and any other prescribed class of person (WHSA s 7).

The duties of workers are to take reasonable care for their own health and safety, and take reasonable care that their acts or omissions do not adversely affect the health and safety of other persons (WHSA s 28). Workers must comply, so far as they are reasonably able, with any reasonable instruction that is given by the PCBU to allow the PCBU to comply with the Act, and they must cooperate with any reasonable policy or procedure of the PCBU that relates to health or safety at the workplace and has been notified to them.

A PCBU who is an individual and carries out work for his or her own or another business or undertaking is also a worker (WHSA s 7(3)). Also, a person who is an officer for a business or undertaking is a worker as well if that person performs work in any capacity for the business or undertaking, or for another business or undertaking.

If a person in a management position in a business or undertaking is not the PCBU, and does not meet any of the definitions for an officer, that person will be a worker for the purposes of the model Act. This will generally be the case for middle and line managers, supervisors and team leaders. These individuals will have the same legal duties as other workers, although how their duties translate into practice in a business or undertaking will be commensurate with their management or supervisory roles. For example, a PCBU’s work health and safety policy might assign middle managers the role of managing work in their budget areas in a way that is safe and without risks to the health for workers. In order to cooperate with this policy, which they must do to comply with the duty in WHSA s 28(d), managers would need to play a role in work health and safety that is different from other workers.
Offences and Penalties

Apart from determining the nature of a person’s duties and obligations under the work health and safety legislation, whether the person is a PCBU, officer, worker or other person will also affect the level of any penalty that may be imposed by the courts if the person breaches the legislation.

In the model Act, the most serious offence (category 1) is ‘reckless conduct’ where a duty holder (as a PCBU, officer, worker or other person) engages in conduct, without reasonable excuse, that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness, and is reckless as to that risk (WHSA s 31). A less reprehensible but still serious offence (category 2) is where a person fails to comply with that duty, and that failure exposes an individual to a risk of death or serious injury or illness (WHSA s 32). The third type of offence (category 3) applies to other circumstances where a duty holder fails to comply with their duty (WHSA s 33). All three categories of offences are ‘inchoate’ in that risks arising from a duty holder’s failure to comply with their duty of care may merit sanctions, and not only the actual occurrence of death, injury or illness.

For each category of offence, the highest penalty is for a ‘body corporate’ (that is, a corporation or another kind of incorporated body). There is a mid-range penalty for an offence committed by a PCBU who is an individual, and the same level of penalty applies to an officer of a body corporate. The lowest penalty is for an offence committed by an individual who is neither an officer nor a PCBU. The penalties are set out in sections 31 to 33 of the model Act, and summarised in the table below.

The model Act establishes some important exceptions in relation to penalties and offences (WHSA s 34). Volunteers do not commit offences for failures to comply with a health and safety duty, except in relation to the duty of workers and the duties of other persons (WHSA s 34(1)). Officers of unincorporated associations may be liable for a failure to comply with the officer duty in section 27 of the model Act but otherwise unincorporated associations do not commit offences under the Act, and are not liable for civil penalties (WHSA s 34(2)-(3)(a)). However, a member of an unincorporated association may be liable for failure to comply with the duties of workers or the duties of other persons (WHSA s 34(3)(b)).

| Categories of Offences and Penalties for Different Types of Duty Holders |
|-----------------------------|-----------------------------|-----------------------------|
| PCBU - body corporate (not volunteer association or unincorporated association) | Category 1 (breach of duty + serious risk + recklessness) $3 million | Category 2 (breach of duty + serious risk) $1.5 million | Category 3 (other breach of duty) $500,000 |
| PCBU - individual (not volunteer) | $600,000 or 5 years gaol | $300,000 | $100,000 |
Readers should note that there are lower maximum penalties for offences committed by officers if the offence is not under Part 2, Divisions 2 and 3 of the model Act. For example, an officer can be liable if the PCBU commits an offence by contravening the duty to consult with other duty holders (WHSA s 46) or the duty to consult workers (WHSA s 47). In these cases, the maximum penalty for the officer is the maximum that an individual would face for that offence (WHSA s 27(3)), which is $20,000 for these examples (WHSA ss 46 and 47(1)).

Also, in addition to the possibility of a fine or a gaol sentence, as set out in the Table and discussion above, a court may make one or more orders against an ‘offender’, the person who is convicted or found guilty of an offence against the Act (WHSA ss 234-235). The offender may be an individual or a legal entity. The types of orders relate to adverse publicity, restoration (remedial action), specified projects to improve work health and safety, work health and safety undertakings, injunctions cease contravention of the Act, specified courses of training (WHSA ss 236-241).

Conclusion

As explained at the beginning of this article, the Centre is presenting this analysis of the duty holders in the model Act to encourage discussion and further clarification of how the duty holders should be interpreted. We remind readers again that if you consider that any aspect should be interpreted differently, please provide your feedback to nrchosr@anu.edu.au, together with your explanation for any alternative interpretation. The Centre will present an update on these issues in a working paper or later edition of Regulation at Work.

Endnotes

1 Queensland became the first jurisdiction to enact the legislation with Royal Assent being given to the Work Health and Safety Act 2011 (Qld) on 26 May 2011. New South Wales followed on 1 June 2011, departing slightly from the national model Act by preserving the possibility of union prosecutions in some situations. In both states the legislation will commence operation on 1 Jan 2012.


4 A volunteer is a person acting on a voluntary basis, whether or not the person receives out-of-
pocket expenses (WHSA s 4).

5 The model WHS regulations are not yet finalised but the draft issued in December 2010 identified one exclusion. This was strata title ‘bodies corporate’ that are responsible for common areas used only for residential purposes, and that do not engage any worker as an employee (Draft WHS Regulations 2010, r 1.1.7).


7 The definition of ‘corporation’ in section 57A of the Corporations Act 2001 states that a corporation includes a company, any body corporate (wherever incorporated), and an unincorporated body that under the law of its place of origin, may sue or be sued, hold property in the name of an office holder duly appointed for that purpose.

8 Section 9 of the Corporations Act 2001 also defines the term ‘director’ and section 201B deals with who can be a director, stating that a director must be an ‘individual’, that is a ‘natural person’ and not a corporate legal entity. It is likely that the intention of the drafters of the national model Work Health and Safety Act is that references to ‘officer’ in the model Act are to individuals, especially taking into account the rationale underpinning the duty of officers. See Stewart-Crompton et al 2008, above n 2, cls 8.3-8.4.

9 This relates to an external administrator of a corporation.


11 In the definition of officer for entities that are not corporations or individuals.

12 Each jurisdiction is to determine the ‘local authorities’ for that jurisdiction.

13 See the definition of officer of an entity that is neither an individual nor a corporation in section 9 of the Corporations Act 2001.

14 See the general definition of officer of a corporation in section 9 of the Corporations Act 2001.

15 Excluding a person who gives advice in the proper performance of functions attaching to the person’s professional capacity or business relationship with directors of the corporation.

16 See WHSA s 252.

17 See WHSA s 247, which also contains the exemption for Ministers.

18 This example assumes, as will usually be the case, that the independent school is incorporated.

19 Excluding a person who gives advice in the proper performance of functions attaching to the person’s professional capacity or business relationship with the school board.

20 A local authority is a public authority and hence the relevant definition of officer is WHSA s 252. (See also definitions of ‘public authority’ in WHSA s 4 (in the jurisdictions where the legislation has been enacted)).

21 See the concluding words of the definition of ‘officer’ in WHSA s 4.

22 A volunteer is a person who is acting on a voluntary basis, irrespective of whether the person receives out-of-pocket expenses (WHSA s 4).

23 Note that a person can have more than one duty by virtue of being in more than one class of duty holder (WHSA s 15).
Feature Article (continued)

24 See WHSA s 5(7) – a volunteer association is not a PCBU.

25 See exception in WHSA s 34(2).

26 However, a volunteer may be liable for offences under WHSA s 28 (duties of workers) and WHSA s 29 (duties of other persons). See WHSA s 34(1).

27 See WHSA s 34(3)(a), which provides that an officer of an unincorporated association who is not a volunteer may be liable for a failure to comply with the officer duty in WHSA s 27.

28 See WHSA s 34(3)(a) which excludes from liability any officer who is a volunteer.

29 Volunteers are only liable in relation to breaches of WHSA ss 28 and 29 (duties of workers and others). See WHSA s 34(1).

30 In relation to breaches of WHSA ss 28 and 29 (duties of workers and others). See WHSA s 34(3)(b).