The Centre’s website is now operational and can be accessed at http://www.ohs.anu.edu.au. The website includes information about the Centre, its members, the National OHS Regulatory Research Consortium, Centre research projects and Centre publications.

Centre working papers

The Centre recently worked with WorkSafe Victoria to produce a report which brought together research from Australia, and from overseas, on the use of infringement notices for the enforcement of OHS legislation. A Working Paper on the subject will be produced as part of the Centre’s Working Paper series in February 2003. To date, the Centre has published six Working Papers on its website. They are:

- The Legal Framework for Regulating Road Transport Safety: Chains of Responsibility, Compliance and Enforcement;
- Regulating Farm Safety: Towards an Optimal Policy Mix;
- The Legal Concept of Work-Related Injury and Disease in Australian OHS and Workers’ Compensation Systems. This paper has also been published as an article in (2002) 15(2) Australian Journal of Labour Law 105;
- Regulatory Character and Regulatory Reform: Exploring the Nexus Between Globalization and Safety Standards;
- The Prevention of Occupational Injuries and Illness: The Role of Economic Incentives; and
- Safety, Courts and Crime.

Research grant

The Centre’s Director, Professor Richard Johnstone, and National OHS Regulatory Research Consortium member, Professor Michael Quinlan, were successful in their application for an Australian Research Council Discovery Grant for 2003 to 2005. The grant will fund a project entitled The Implementation of Process Regulation in Occupational Health and Safety: A Comparative Study of Policy and Practice. This project will analyse the development and implementation of process standards (for example, standards requiring duty holders to follow risk management procedures) in four jurisdictions, assessing their evolution, effectiveness and ability to meet changing workplace circumstances. The project will link up with similar research planned for a number of European and North American jurisdictions.

Centre submission on genetic screening

In early November, the Centre presented a submission to the Australian Law Reform Commission and National Health and Medical Research Council’s Joint Inquiry Into Protection of Human Genetic Screening Information. The Inquiry’s terms of reference are to address ways to protect privacy and against unfair discrimination; and to ensure the highest ethical standards in research and practice, in relation to the use of genetic screening for health-related testing and for identification testing. The Centre’s submission, available on our website in late January 2003, discusses the implications of incorporating genetic screening into employment screening regimes or occupational health surveillance programs. Proposals to regulate genetic screening for OHS purposes are discussed.
Developments in regulation


National inquiries into workers’ compensation and OHS

While the terms of reference of the Productivity Commission’s inquiry into workers compensation and occupational health and safety have yet to be agreed upon by the Federal Government, the Federal House of Representatives’ Standing Committee on Employment and Workplace Relations’ Inquiry into aspects of Australian workers’ compensation schemes is well underway.


Readers of this newsletter can keep up-to-date with the latest on the Productivity Commission’s inquiry by going to [http://www.pc.gov.au](http://www.pc.gov.au).
Developments in regulation

Coal mining - NSW


Off-shore petroleum

In September, the Ministerial Council on Minerals and Petroleum Resources agreed on the creation of an independent national offshore safety authority to improve safety across the offshore petroleum industry and deliver world-best practice safety regulation for Australia. The authority, which should be operational in 2004, will cover both Commonwealth and State coastal waters. It will be accountable to the Commonwealth, State and NT ministers. Information is at http://www.industry.gov.au/content/controfiles/display_details.cfm?ObjectID=3FFF79CB-7E81-4A41-A9DB6443ECD30BF8.

Transport safety investigation


Road transport

The National Road Transport Commission released three documents in late September 2002 proposing a regulatory regime for vehicles with a Gross Vehicle Mass of 12 tonnes or more, as well as buses with 12 or more seats. The proposals are aimed at achieving both improved road safety and greater consistency between road transport and OHS regulation. It is anticipated that Transport Ministers will give final approval to model legislation in late 2003. The model regulation will then form the basis of States’ and Territories’ legislation. Although public comment closed on 22 November 2002, copies of the following drafts can be downloaded from the NRTC website:


An industry/government seminar was hosted by the National Road Transport Commission and the Australian Road Transport Safety Bureau on 22 and 23 October 2002 aimed at identifying strategies and actions that could be fed into the development of a National Heavy Vehicle Safety Strategy. A communique from the seminar is available at http://www.nrtc.gov.au/publications/content/nhvss.doc.

Rail transport - NSW

A Bill to repeal the Rail Safety Act 1993 was introduced into the NSW Parliament in late October 2002. Amongst other things, the Bill requires a stricter regime for the accreditation of construction workers and supervisors, and introduces a system of random drug and alcohol testing of railway employees and some bus and ferry employees. The Rail Safety Bill 2002 is now awaiting assent. A copy of the Bill and associated information can be found at http://www.parliament.nsw.gov.au/prod/web/phweb.nsf/frames/bills.

Radiation protection and nuclear safety

Associate members of the Centre

The Centre has two associate members located outside its physical environment.

- Andrew Hopkins is a Reader in Sociology at the Australian National University in Canberra, where he teaches courses on criminology and the sociology of disasters. His research has focussed on the regulation and management of occupational health and safety and his most recent books are about the causes of and the regulatory responses to the Longford gas plant explosion (The Esso Longford Trial, will appear later this month). He is also working on the meaning of "safety culture" and a paper on this topic will shortly be posted on the NRCOHSR website; and

- Alan Clayton is an independent scholar working primarily in the field of accident compensation and injury prevention. He holds honours degrees in both law and political science. He has published widely in the field of accident compensation and was the first non-North American to be appointed to the editorial board of Workers’ Compensation Policy Review, a leading research journal in the United States. He has undertaken work for a wide range of bodies including the International Labour Office, the Institute of Work and Health in Toronto and a number of Australian accident compensation regulators and has held the position of Executive Officer to the Australian Heads of Workers Compensation Authorities.

Key research & reports

Effect of OHS authority interventions

W Gray and J Mendeloff, The Declining Effects of OSHA Inspections on Manufacturing Injuries: 1979 to 1998, National Bureau of Economic Research, Massachusetts, 2002. (A copy of the paper is at http://papers.nber.org/papers/W9119). The effectiveness of the US Occupational Safety and Health Administration’s (OSHA) system of inspection and citation for offences under OHS legislation has been the subject of a number of empirical studies. This study examines more recent trends and finds that the average impact of OSHA inspections on injury rates has declined substantially over time from 15% in the early 1980s, to 8% in the late 1980s, and to 1% in the 1990s. The authors are unable to provide an explanation for the declining impact but suggest several possible contributors. These are: the fact that inspections have much weaker preventive effects in larger establishments; there is a declining impact over time with repeated inspections of the same workplace; inspections may focus on matters that are not the principal causes of injury and hence have less preventive effect; and rising costs of workers’ compensation have resulted in greater attention to OHS which may have diminished the extra incentives provided by OSHA inspections. A final possible explanation is changes in the way OSHA conducts inspections. From mid-1995 there was less emphasis on the number of violations cited and more emphasis on encouraging firms to problem solve and reduce workplace hazards. The authors conclude that reasons for the apparent declining impact require further investigation.

DC Maré and KL Papps, “The Effects of Occupational Safety and Health Interventions” (2002) Special Issue Labour Market Bulletin 2000-02 101-131. (A copy of this paper is at http://www.dol.govt.nz/PDFs/lb2000d.pdf). The authors consider the impact that interventions by the New Zealand Occupational Safety and Health Service might have on reducing workplace accidents. Very little empirical work has been undertaken in this area and yet it is crucial in attempting to evaluate the effectiveness of OHS regulatory regimes. New Zealand is a particularly useful case because comparatively, the regime created under the Health and Safety in Employment Act 1992, relies heavily on employer initiatives and only requires the government to play a facilitative, supportive and very occasionally, coercive role in improving OHS standards. Given that many other developing countries require a more active role for government, this study examined whether there was any statistical divergence where material was available. After constructing a relatively simple research sample in highly mathematical language, the authors concluded, “the less prescriptive approach to regulation has not generated markedly different findings.” Overall, although both this study and others available are somewhat inconclusive, the authors did suggest that the impact of government interventions in reducing accidents was minimal. This study is useful in confirming other statistical findings and also highlights particular areas within OHS empirical analysis where there is a lot of research still to be done.

Amey VECTRA, Measuring the Health and Safety Executive’s Field Operations Division Effectiveness, Research Report RR046, HSE, London, 2002. (A copy this paper is at http://www.hse.gov.uk/research/rhtmr/rr046.htm). This reports on a project commissioned by the HSE to evaluate approaches to the measurement of the effectiveness of the various OHS inspection activities in ensuring duty holder compliance with OHS regulations.
Key research & reports (continued)

Regulation

D Walters (ed), Regulating Health and Safety Management in the European Union: A Study of the Dynamics of Change, Peter Lang, Brussels, 2002. This book explores the dynamics of change in OHS regulation in the European Union (EU). It examines the relationship between national and EU level regulatory provisions (represented by the EU Framework Directive 89/391), and the influences on the development and implementation of the Directive in seven EU countries – Denmark, France, Germany, Italy, the Netherlands, Sweden and the United Kingdom. Authors writing about each of these countries answer the central research questions: “What has been the impact of the EU Framework Directive on the processes and dynamics of change in national systems for the governance of occupational safety and health? How has the nature of national socio-economic, political, technical and regulatory structures, cultures, practices and processes influenced, filtered and formed national reception, transposition and implementation of the Framework Directive?”. The seven essays on the implementation of the framework in each of the chosen countries show that “while all of the countries studied have implemented the requirements of the Framework Directive, they have not done so to the same degree, in the same sequence, subject to the same national influences or with the same results” (p 275). Nevertheless there were common features in both the implementation process and their outcomes. Amongst other things it: gives a comprehensive description of the Framework Directive and its development from the 1960s (chapter 2); provides a detailed analysis of OHS regulation in the seven countries covered in the book; explores the notion of “risk assessment” which is central to the Framework Directive, but which also had some antecedents in some of the countries studied; discusses the importance of worker participation in OHS management; and outlines the place of preventive services (a European institution which is little known in Australia).

P L Jensen, “Risk Assessment: A Regulatory Strategy for Stimulating Working Environment Activities” (2001) 11 Human Factors and Ergonomics in Manufacturing 101-116. This article reports on qualitative studies of the Danish approach to workplace assessment (WPA), and argues that firms implementing WPA requirements have “focused on physical working environment problems while wider psychosocial problems have been ignored”, and that there is no evidence that WPA has become a recurrent activity within Danish firms. (See further Jensen’s article “Assessing Assessment”, noted in the first issue of this newsletter).

PS Fischbeck and RS Farrow (eds), Improving Regulation: Cases in Environment, Health and Safety. Resources for the Future, Washington DC, 2002. This edited collection covers a wide range of regulation and policy issues in the related fields of safety, health and environmental protection. Of particular interest to OHS specialists, are the sections on the implementation of performance-based regulations, genetic testing and the workplace, workplace accident and compliance monitoring, and the impact of organizational politics, science, technology and performance on regulation. Overall, an insightful assembly of essays on a variety of issues of regulatory importance.

S Tombs “Understanding Regulation?” (2002) 11(1) Social & Legal Studies 113-133. Tombs’ review of recent books by Braithwaite, Clarke, Slapper and Tweedale, moves beyond specific consideration of their works to a critique of the currently predominant cooperative models of regulation and endorsement of compliance oriented enforcement and self-regulation. He criticises this approach, and much of the current debate about the appropriate regulatory mix of self-regulation, regulatory communities and dialogue, as ignoring the centrality and significance of power. In particular it “forgets” the historical exercise of corporate power to oppose and undermine external regulation, as documented in the work of Slapper and Tweedale. Finally Tombs argues for the return of “regulation with a distinctly punitive edge” to the political and academic agenda currently dominated by the acceptance of cooperative approaches as the only feasible form of regulation.

Key research & reports (continued)

Workers’ compensation and OHS

A Claynton, R Johnstone and S Sceats, “The Legal Concept of Work-Related Injury and Disease in Australian OHS and Workers’ Compensation Systems” (2002) Australian Journal of Labour Law 15: 105-153. This article explores the nature of “work-relatedness” in three core criteria of workers’ compensation coverage, namely those of “worker”, “injury/disease”, and the requisite employment connection between a claimant’s employment and the injury or disease. In respect of OHS systems, the “work-relatedness” concept is examined both in regards to OHS reporting requirements, and in respect of the general duties that form the backbone of Australian OHS regulation.

T Thomason and S Pozzebon, “Determinants of Firm Workplace Health and Safety Claims Management Practices”, (2002) Industrial and Labor Relations Review 55:286-307. The relationship between workers’ compensation pricing systems, particularly experience-rating regimes, and safer workplaces, remains a highly contested area of scholarship. This experience-rating study reports the findings of a 1995 survey by the authors of 450 Quebec firms with more than 50 employees. One of the criticisms of experience-rating studies to date, has been their neglect of the effect of experience rating on firm practices, particularly in terms of disputation of claims. This study is probably only the third study (both previous studies being Canadian) to address this issue directly. There are two main conclusions from the study: They are that experience-rated firms are more likely to:

- Implement measures to prevent workplace injury and disease than firms that were not experience-rated; and
- Engage in aggressive claims management and challenging claims.

There are, however, some weaknesses in the study, and the first conclusion may simply represent an associational rather than a causal relationship.

Court interpretation of OHS regulations and OHS authority guidance material

B Pearce, How the courts are interpreting HSE guidance and health and safety regulations: an exploratory study of court judgements in personal injury claims for WRULDS. RR010, HSE, London, 2002. (A copy of this paper is at http://www.hse.gov.uk/research/rhtm/index.htm). This reports on an exploratory study of how the courts have interpreted OHS regulations and Health and Safety Executive (HSE) guidance material by procuring and analysing the transcripts of relevant court judgements in personal injury claims for work related upper limb disorders (WRULDs).

Worker participation and health and safety representatives (HSRs)

D Walters, Working safely in small enterprises in Europe: Towards a sustainable system for worker participation and representation, ETUC, Brussels, 2002. This book reports on a project undertaken for the European Trade Union Confederation to investigate and make better known the extent to which schemes of worker representation in OHS act to raise OHS standards in small workplaces through promoting greater consultation in OHS; increasing health and safety awareness amongst workers and owner/managers; and achieving tangible health and safety requirements. Copies of the book can be ordered on http://www.etuc.org/tutb/uk/publication_resume23.html.

In the first of a series of planned biennial surveys, the ACTU recently published A Report on the 2001 National Survey of Health and Safety Representatives. (See http://actu.labor.net.au/public/papers/2001survey.html). The report examines OHS at 1275 workplaces across Australia from the perspective of health and safety representatives. Although the survey has methodological limitations, its findings and conclusions are of interest. These include:

- A minority of employers (as reported by HSRs) regularly carry out OHS inspections;
- A quarter of HSRs have never received any OHS training; and
- Stress, long hours and bullying are matters of concern to HSRs.

Key research & reports (continued)

Corporate social responsibility

C Holliday, S Schmidheiny and P Watts, Walking the Talk: The Business Case for Sustainable Development, Greenleaf Press, UK, 2002. The central theme of this book is that the most successful companies can benefit, both economically and in terms of their “licence to operate”, from implementing socially responsible business practices. Written by three highly experienced business leaders, it provides a number of success stories from this perspective. However, critical readers may question how far the “win-win” perspective can be taken, and whether such a business case exists, for example, in relation to occupational diseases with long latency periods.

Precautionary principle

Journal of Risk Research, (2002), 5(4): 285-417 – special edition. The precautionary principle is a regulatory decision-making tool increasingly used in environmental and public health policy in situations involving incomplete knowledge about risk. Several versions of the precautionary principle exist ranging from more:

- “Argumentative” versions (sometimes called “modest” or “weaker”), such as “uncertainty or lack of scientific evidence about a risk does not justify regulatory inaction”; to
- “Prescriptive” versions (sometimes called “aggressive” or “stronger”), such as “when an activity suggests threats to health/safety/environment, even though a cause-effect relationship has not been proved, uncertainty justifies regulatory action”; to
- “Absolutist” versions that shift the burden of proof to “require the banning of a potentially risky activity until such time as the activity proponent can demonstrate no risk exists from the activity, or that the risk is ‘acceptable’”.

This latest issue of the Journal of Risk Research provides insights and viewpoints on the application of the precautionary principle in a range of contexts, and its relationship with quantitative risk assessment. The authors of the papers include both proponents and critics of the precautionary principle. A common issue identified across the papers is the need to better operationalise the precautionary principle if it is to be more accepted in governmental decision-making in situations involving uncertainty and risk to health, safety and the environment.

Two other recent publications concerning the precautionary principle include:


The UK Health and Safety Executive recently published two research reports relating to societal concerns about risk. They are: RR035: Taking account of societal concerns about risk: framing the problem (at http://www.hse.gov.uk/research/rhtm/rr035.htm); and RR034: Understanding and responding to societal concerns (at http://www.hse.gov.uk/research/rhtm/rr034.htm).

Conference report - Current issues in regulation: enforcement and compliance

This Conference, in September 2002 brought together regulatory researchers and practitioners from a wide range of disciplines, including trade practices, public safety, environment and OHS. Issues reported on covered such topics as contemporary approaches to regulation, regulatory conflict, compliance strategies and managing and evaluating regulatory compliance. Richard Johnstone from the Centre spoke on Safety, Courts and Crime, while Robert Seljak from the Queensland Division of Workplace Health and Safety Health and Safety, Cath Duane from WorkSafe Victoria and Michelle Patterson from WorkCover NSW, all spoke on the practical aspects of enforcement in their respective jurisdictions. Shane Stockill, a PhD student reported his on-going research into the Implications for the Responsive Regulation of Workplace Health and Safety in Queensland.

Amongst the many thoughtful presentations given at the seminar were cross-discipline papers by John Braithwaite from the Research School of Social Sciences, ANU on Risk Society and Meta-Regulation, Christine Parker from the University of New South Wales on Is There A Reliable Way To Evaluate Organisational Compliance Programs?, and Karen Yeung from Oxford University on Is adverse media publicity a legitimate regulatory compliance technique?. Conference paper abstracts are at http://www.aic.gov.au/conferences/regulation/.
Key research & reports (continued)

Working hours and fatigue

K Heiler, The Struggle for Time: A Review of Extended Shifts in the Tasmanian Mining Industry: Overview Report, accirt, Sydney, 2002. This report reviews the findings of a study commissioned by the Tasmanian Government into the effects that long working hours have on miners’ OHS, and on family and community life. Heiler undertook extensive field research across Tasmania in which she interviewed over a thousand miners, managers and the families of miners. She explored the short and long-term impacts of 12 hour shifts on both miners and their families. Heiler found that:

- The majority of miners’ partners expressed concern for safety at work, for the health and well-being of their partners, and for the stability of the family unit;
- Many workers reported that the long shifts did not give them sufficient opportunity to recuperate between shifts, and that they experienced sleep deprivation and fatigue;
- Although a general statutory duty of care for employers to provide safe systems of work exist, this was often found to be misunderstood, enforcement of specific standards was difficult, with inspectors underresourced, and management was more often concerned with the imperatives of production and profit;
- Workers were often unwilling to notify their employers of their OHS concerns because many remuneration schemes included productivity as a factor in wages; and
- Consultation mechanisms were often inadequate.

Although Heiler acknowledges the possible gains to be made from stronger compliance within the existing regulatory framework, Heiler argues strongly for an overhaul of the system to give legislative recognition of the potential hazards involved in areas of worker fatigue. The overview report and more detailed analysis can be found at the Tasmanian OHS Authority’s website at http://www.wst.tas.gov.au/wstpublish/node/strugglefort-23.htm. Both the NSW and Queensland jurisdictions have supplemented current legislation with requirements on how to manage fatigue in the mining industry.

Longford explosion


OHS and immigrant workers


New international journal

The first issue of a new international journal, Policy and Practice in Health and Safety, will be published in the first half of 2003. The journal will be edited by Professor David Walters, the newly appointed TUC Professor of Work Environment at Cardiff University. The journal aims “to help shape the future development of the discipline as well as enhancing recognition of its role in wider scientific, academic, legal and policy making circles.” Further information about the journal, including guidance notes for authors, can be found at www.iosh.co.uk/policyandpractice.
**International news**


**Singapore** - The Ministry of Manpower recently introduced a new scheme to “Type Approve” lifting equipment, starting with the tower cranes, in Singapore. As from 1st April 2004, only type-approved tower cranes can be used in Singapore. Guidance on this can be found at [http://www.gov.sg/mom/wpeaw/isfile/pdf/LE5-02.pdf](http://www.gov.sg/mom/wpeaw/isfile/pdf/LE5-02.pdf).

**UK** - The London-based, Centre for Corporate Accountability (CCA) launched its quarterly newsletter, *Corporate Crime Update* in 2002. The newsletter provides “information on work-related deaths, coroners’ inquests, and health and safety and manslaughter prosecutions”, as well as “news on important legal and policy developments on corporate crime issues”. The newsletter is at [http://www.corporateaccountability.org/newsletter.htm](http://www.corporateaccountability.org/newsletter.htm).


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**OHS in construction**

Health and Safety Executive, *Revitalising Health and Safety in Construction* Discussion Paper, 2002. In June 2000, the HSE launched the *Revitalising Health and Safety* initiative, which included the setting of specific, measurable targets for reducing the toll of occupational injuries and ill health in the UK. A substantial focus is the construction industry, given its size and its poor health and safety performance (construction workers are six times more likely than other workers to be killed at work). This discussion document is an important step in that process. It identifies the reasons for the industry’s weak OHS performance (the confrontational culture of the industry, confusing lowest cost tenders with the best value, corner-cutting, a shortage of skilled workers’ shortcomings in leadership etc) and seeks to plot the best direction for reform. In doing so, it builds on the progress already made by the construction health and safety summit of February 2001. That summit concluded that there are no quick fixes for improving the industry’s poor OHS record, and that nothing short of a fundamental cultural change will deliver results. But how is such change to be achieved?

The discussion paper explores the importance of leadership, corporate responsibility and economic levers; the role of construction workers themselves (including employment status, competence and employment relations); the potential for working better together (commitment, co-operation, communication and corporate competence); the particular challenges of tackling health in construction, and the best roles for government. As regards the latter, the emphasis is on government as initiator, legislator and enforcer. As *Revitalising Health and Safety* said: “Government must lead by example. All public bodies must demonstrate best practice in health and safety management. Public procurement must lead the way in achieving effective action on health and safety consideration and promoting best practice right through the supply chain. Wherever possible, wider Government policy must further health and safety objectives”. Beyond this, the paper appropriately raises questions rather than purporting to provide answers. Responses are requested by 31 December 2002. A copy of the document is available at [http://www.hse.gov.uk](http://www.hse.gov.uk).
OHS sentencing principles

All of the Australian OHS statutes provide for criminal prosecution of OHS offences. Once a court decides that the OHS offences alleged by OHS prosecutors have been proved, it determines the penalty to be imposed. Courts possess a large degree of discretion and there is no simple formula for OHS sentencing. This issue of the newsletter provides a brief introduction to OHS sentencing principles developed in New South Wales by the New South Wales Industrial Relations Commission, and includes a brief discussion of cases decided in the last few months. (For principles developed by the Victorian County Court, see http://www.ohs.anu.edu.au/publications/pdf/working_paper_6.pdf). Although the New South Wales OHS Acts of 1983 and 2000 make provision for sanctions like imprisonment and adverse publicity orders, in practice sentencing principles have been developed in the context of fines.

The general aim of OHS legislation is to ensure a safe system of work for all people at the workplace (see section 3 of the Occupational Health and Safety Act 2000 (NSW) (OHSA (NSW)), and the statutes seek to encourage a proactive approach to OHS with duty holders exercising constant vigilance to prevent work-related illness or injury occurring. Like many other criminal statutes, the NSW OHSA (NSW) is intimately linked to community aspirations and so it should be seen ultimately as reflecting the community’s need for and support of a safe working environment. In sentencing OHS offenders, the courts tend to stress the importance of the broader context of reaffirming community standards and the need for deterrence. Deterrence theory seeks to use punishment to prevent the defendant (specific deterrence) or the public generally (general deterrence) from breaking the law. Most OHS cases will have regard to general deterrence as a crucial part of the sentencing process. General deterrence acts as an affirmation of community expectations and penalties imposed can therefore be cited as examples to other potential offenders. Even where a defendant demonstrates good character or a commitment to rehabilitation, the court may still be obliged to take into account the need for general deterrence. On the other hand, if the particular defendant has demonstrated a high level of contrition and has undertaken measures to improve workplace safety, there will be less need to deter them specifically from other breaches in the future. Especially where a company’s operations have ceased or will soon cease, there is very little need for specific deterrence (see Carmody v Power [2002] NSWIRComm 286 at 14).

“The primary factor” in determining the appropriate level of fine in NSW OHS prosecutions is “the objective seriousness of the offence charged”, which includes the “nature and quality of the offence, and the clear policy of the Act in relation to the establishment of safe standards and the protection of the workforce.” (WorkCover v Walco Hoist Rentals Pty Ltd [2000] 99 IR 163 at 185). A serious and obvious breach with the potential to cause serious illness, injury or death will, because of its nature and quality, warrant a very high penalty even if no-one was actually killed or injured.

“The gravity of the consequences of an accident, such as the damage or injury, does not of itself, dictate the seriousness of the offence or the amount of the penalty. However, a breach where there was every prospect of serious consequences might be assessed on a different basis to a breach unlikely to have such consequences. The occurrence of death or serious consequences might be assessed on a different basis to a breach unlikely to have such consequences” (see Walco Hoist Rentals at 185).

The maximum penalty available for the offence is an important indicator of “public expression” by parliament of the seriousness of the offence. The sentencing court must assess the relative seriousness of the offender’s offence in relation to a worst case for which the maximum penalty is specified (see Walco Hoist Rentals at 185-186). However, this does not mean that the maximum penalty is only available where the court cannot envisage a worse case or that some lesser penalty is appropriate because the sentencing court can envisage a more heinous factual scenario: Camilleri’s Stockfeeds Pty Ltd v EPA [1993] 32 NSWLR 683 at 698).

Related to maximum penalty and the seriousness of the offence are a number of related considerations, which assist the court in settling on a conclusion. Glynn J outlines these considerations in two recent cases (Jones v NSW (Department of Public Works and Services) [2002] NSWIRComm 284 and Inspector Vierow v Rail Infrastructure Corporation [2002] NSWIRComm 273) as follows:

- While foreseeability is not relevant in determining whether an offence has been committed, it may be relevant to sentencing. Where the risk to health and safety is reasonably foreseeable, this will be an aggravating factor in the assessment of the case’s seriousness. In Jones v NSW, a construction worker was injured after falling from an insufficiently secured scaffold. There were guidelines in place that had not been followed and it was conceded that the risk of a fall was likely. Such a finding contributed to the seriousness of the offence as it impacted adversely on the defendant’s culpability. See also Benbow v Converquip [2001] NSWIRComm 86 at 46-48;
- The gravity of the risk to safety also relates to the seriousness of the offence; and
- “Neglect of simple well known precautions to deal with an evidence and grave risk of injury, of which the defendant was fully cognisant, takes a matter towards a ‘worst category’” of case (Jones v NSW at 31). Again, in the case of Jones v NSW, because there were Construction Safety Regulations specifically relating to scaffolding that had been disregarded, this intensified the seriousness of the breach.

Continued on page 11
Once the objective seriousness of the offence has been considered, the court will give some credit if the defendant has entered a guilty plea. Parliament and the courts have recognised the benefits for the community of early guilty pleas and thus there is generally a 10-25% discount in such cases. For parties that have entered their plea as early as possible, their discount will be close to 25%.

After considering these objective factors, courts may also consider a number of subjective factors, although these subjective factors should never override the case’s objective seriousness (Lawrenson Diecasting v WorkCover (1999) 90 IR 464). The subjective might include:

- **Previous conviction(s) of the defendant**: The prior record of the particular defendant is relevant to sentencing, and an absence of prior convictions is usually a factor accepted by the courts as a mitigating factor in determining penalty. Previous convictions are an aggravating factor, but they cannot be used as a way of excessively increasing a sentence so that it is disproportionate with the particular breach being considered;

- **Financial capacity of the defendant**: Although courts will not simply lessen a penalty because of a defendant's inability to pay, it will be a consideration. A small, family-operated firm's ability to pay was therefore an important factor considered by the court in WorkCover (NSW) v Walco Hoist v Rentals (No 2) (2000) 99 IR 163. Especially because of the subjective aspects relating to the company’s owner having a terminal illness, a large penalty would have burdened his heirs and would not have served as a deterrence mechanism on the company itself;

- **Subjective mitigating factors in favour of the defendant** are usually related to the assistance given to the injured worker and/or family, proactive steps taken to increase safety standards at the workplace, the means of the defendant, systems of risk prevention already in place, remedial measures taken since the incident, the defendant’s past and current history, including personal considerations. Again, the facts of Walco Hoist are very useful for an exploration of the impact that subjective mitigating factors can have on reducing a sentence. On the other hand, in Vierow v Rail Infrastructure Corporation [2002] NSWIRC Comm 273 Glynn J criticised the nature of some of the changes made by the defendant, but did not let this influence the level of the discount handed down, because of the general emphasis of the defendant on risk assessment and risk management. Although subjective factors will be included along with the objective seriousness of the case, these should never override the case’s seriousness (Lawrenson Diecasting v WorkCover (1999) 90 IR 464);

- **Principles of parity and consistency**, which both relate to the interests of equal justice and are defined by the Full Bench in Capral at 62 in the following terms: “Consistency is relevant to the sentencing of different offenders with similar characteristics who have committed similar crimes, and to the sentencing of co-offenders in the same crime. The principle of parity is usually considered applicable only to the sentencing of co-offenders in the same crime.” Also see WorkCover v Ledonne Constructions [2001] NSWIRComm 272 at 29 for a good discussion of the authorities on this point; and

- **Principle of totality**: Where multiple offences arise out of one incident, and the events constituting those offences are connected, the court is to avoid imposing separate penalties on the defendant and instead should consider the case in its totality.

Some of these principles have been most recently applied very succinctly in Patton v Hansen Yuncken [2002] NSWIRComm 314. Other very helpful discussions of sentencing principles can be found in WorkCover v McDonald’s (1999) 95 IR 383, Warman v WorkCover (1988) 80 IR 326 and Wendy Thompson’s useful overview of sentencing in Understanding New South Wales Occupational Health and Safety Legislation, 3rd edition, CCH, Sydney, 2001: 52-64.

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**Ethical clothing code of practice**

On 9th October 2002, the Australian Retailers Association, and the Textile, Clothing and Footwear Union signed the NSW Ethical Clothing Code of Practice. This initiative is part of a wider NSW government policy to address the conditions faced by many women working in the clothing industry. In May of this year, a $4 million campaign called Behind the Label was launched to investigate and improve working conditions for outworkers. The ACT government has signaled that it will follow NSW. For information about the Code, as well as the Behind the Label initiative, visit [http://www.dir.nsw.gov.au/behindthelabel/index.html](http://www.dir.nsw.gov.au/behindthelabel/index.html).
Key case


Recently, the High Court handed down a very important judgment on the law of nervous shock and its intersection with an employer’s general duty to provide a safe system of work. In Annetts v Australian Stations Pty Ltd HCA [2002], the Court reconsidered the requirements for recovering damages for nervous shock, ultimately holding that the law is about the nature of the relationship between the plaintiff and defendant as well as the reasonable foreseeability of the psychiatric injury occurring, rather than specific requirements of temporality or proximity. The case centered around the tragic death of 16 year old James Annetts, who was employed by the defendant as a jackeroo to work on Flora Station, situated in the remote region of the Kimberley in Western Australia. Because of the harsh and isolated conditions, Mr and Mrs Annetts had only agreed to allow their son to work on the station once they had been assured by the employer that he would be under constant supervision, in the company of other men and be taught necessary procedures for his own safety. The assurance granted by the employer created a duty of care between the employer and James’ parents. If this duty were breached and caused damage in a reasonably foreseeable way, the Court held that it was possible for Mr and Mrs Annetts to pursue compensation for the nervous shock they suffered. In this case, the assurance undertaken by the employer was clearly breached when James was sent to work far from the station without adequate training or supervision. He later died alone in the desert as a direct result of his employer’s negligence. Typically, the law of negligence has required that where plaintiffs seek damages for nervous shock, they must link the shock suffered with some physically or temporally proximate scenario, for example, being witness to an accident. Here, the Court dismissed the need for such specific categories largely on policy grounds. According to Gummow & Kirby JJ, “[a] rule that renders liability for psychiatric harm conditional on the geographic or temporal distance of the plaintiff from the distressing phenomenon, or on the means by which the plaintiff acquires knowledge of that phenomenon, is apt to produce arbitrary outcomes and to exclude meritorious claims” (at para 221). Mr and Mrs Annetts could also rely on the fact that they had a prior relationship with the employer because of the assurances given about their son’s safety. Thus, Haynes J summed up the case as follows: “the defendant owed the plaintiffs a duty take reasonable care to avoid psychiatric injury to parents of reasonable or ordinary fortitude in consequence of the defendant negligently causing death or injury to their son” (at para 304). It was reasonably foreseeable that the news of their son missing, the anxiety of waiting and his subsequent death would give rise to psychiatric harm.

Coming events


April 2003, Glasgow, Scotland - The Institution of Occupational Safety and Health (IOSH) will hold its Annual Conference and Exhibition Professionals in Partnership from 23 to 24th April 2003. The conference will examine how interdisciplinary working and co-operation between professionals can contribute to the successful achievement of national goals and targets. For more information on the conference, visit http://www.ioshconference.co.uk/pages/home.asp.

June 2003, Rome, Italy - The Italian Workers Compensation Authority, in collaboration with other European Workers Compensation and Health & Safety at Work Organisations, and the European Forum, is organising WorkCongress6, the 6th International Congress on Work Injuries Prevention, Rehabilitation and Compensation from 8 to 11 June 2003. For more information on the conference, visit http://www.workcongress6.org/.


July 2003, Ballarat, Australia - The Victorian Institute of Occupational Safety and Health at the University of Ballarat is hosting a research symposium Safety Based on Fact Not Fiction from 17 to 18 July 2003. It will explore whether OHS risk management techniques can cope with the changing nature of work and emerging health and psychosocial risks. For information on the conference, email viosh@ballarat.edu.au.