News from the Centre

This is the third Newsletter produced by the Centre as part of its mission to monitor and report on developments in OHS regulation. We are always on the lookout for reports, articles and books on different aspects of OHS regulation – so if you come across anything of interest in this area, please let us know, and we will include it in the next issue of Regulation at Work.

New working paper

A new working paper has been published on our website at http://www.ohs.anu.edu.au/publications/index.html. The working paper, by Andrew Hopkins, is titled Safety Culture, Mindfulness and Safe Behaviour: Converging Ideas?


The Centre coordinates and provides administrative support for the Consortium. The Consortium aims to foster, develop and support an interdisciplinary collaborative network of Australian researchers interested in OHS regulation, in order to increase the amount of high quality evidence-based and policy focused research into OHS regulation. For further information about the consortium see http://www.ohs.anu.edu.au/consortium/index.html. Two of the Consortium members are profiled on page 4.

“Work-in-progress” workshop

In February 2003, the Centre hosted the first “work-in-progress” workshop of the National OHS Regulatory Research Consortium. The aim of the workshop was to help consortium members to develop their research, through discussion and feedback. We look forward to the fruits of the workshop emerging in the form of completed research projects, many with important implications for OHS regulation and policy.
Developments in regulation

Conference: Australian OHS Regulation for the 21st Century

The National Occupational Health and Safety Commission (NOHSC) and the Centre are jointly hosting the conference, Australian OHS Regulation for the 21st Century, on 21 and 22 July 2003 on the Gold Coast. The conference will bring together leading Australian and overseas researchers, stakeholders and regulators to: explore new models of OHS regulation, appropriate to the issues facing OHS regulators and stakeholders in the 21st century; examine possible developments in the existing OHS regulatory models which would ensure that work-related disease and injury are better prevented; explore gaps and deficiencies in current OHS regulatory arrangements; examine the continued relevance of the Robens’ model of regulation and the way it has been applied in Australian jurisdictions; and explore the lessons for OHS regulation that might be gained from other areas of regulation and from regulatory theory. For the latest on the conference and registration, visit the NOHSC website at http://www.nohsc.gov.au/NewsAndWhatsNew/UpcomingConferences/.


ACT - The Standing Committee on Legal Affairs has started its public consultations on the Crimes (Industrial Manslaughter) Amendment Bill 2002 that was introduced into the Legislative Assembly on 12 December 2002. Information on the work of the Committee is at http://www.legassembly.act.gov.au/committees/.

ACT - The Legislative Assembly agreed to a an amended motion on 20 November 2002 that calls on the ACT Government to: implement a mandatory Code of Practice for Retailers in the ACT to ensure corporate transparency in relation to textile, clothing and footwear contracts; establish a Fair Trading Code Administration Committee to oversee the Code of Practice; amend the Occupational Health and Safety Act (1989) and Occupational Health and Safety Regulations, to ensure the best possible protection for outworkers; and move to ethically source all ACT Government textile, clothing and footwear contracts through the government procurement process. Text of the debate is at http://www.hansard.act.gov.au/hansard/2002/pdfs/20021120.pdf.

Tasmania—Changes to the Workplace Health and Safety Act 1995 were finalised in November 2002. Key amendments include: introduction of infringement notices clarifying the employers duty of care; notice to persons appointed as responsible officers; extension of the order to recall, destroy or prevent use of an unsafe or dangerous product, to cover structures; the scope of inspectors’ powers of entry and to seek information; recovery of costs of investigation of offences; changing the time for commencing proceedings to 12 months from the day an inspector becomes aware of the offence; and enforceable agreements between the Secretary of the Department and a duty holder. Additional information is at: http://www.wst.tas.gov.au/resource/changestothe.htm.


Workers’ Compensation and Occupational Health and Safety (OHS) Frameworks

The Parliamentary Secretary to the Treasurer referred the Workers’ Compensation and OHS Frameworks inquiry to the Productivity Commission on 13 March 2002.

Included in the issues to be addressed in the inquiry are:

• the development of consistent definitions of employer, employee and workplace;
• the most appropriate incentives to achieve early intervention;
• options to reduce regulatory burdens and compliance costs and the interrelation between OHS and workers’ compensation regulatory frameworks under different regulatory models; and
• the infrastructure needed/relative costs to the jurisdictions/nationally to support the different models.

Developments in regulation

Royal Commission into the Building and Construction Industry - The final report of the Royal Commission was presented to the Governor-General on 24 February 2003 and tabled in Parliament on 26-27 March 2003. A copy of the report is at http://www.royalcombcii.gov.au/index.asp. In particular, recommendations 17 to 35, inclusive, relate to OHS. These include recommendations aimed at ensuring that OHS issues in the building and construction industry are addressed in the implementation of the National Action Plans under the National Occupational Health and Safety Strategy 2002-2012, including those relating to safe design and Governments' ability to influence in the areas of procurement.

National Road Transport Commission (NRTC) - A draft Road Transport (Compliance and Enforcement) Bill is being finalised for submission to Australian Transport Ministers. If approved by them, it will be made available to each of the jurisdictions to implement within their own road transport law frameworks. Information is at the NRTC website at http://www.nrtc.gov.au/news/nr2003mar6.asp?lo=news&ex=releases. Also, an international seminar aimed at advancing international co-operation on performance-based standards for heavy vehicles was held in Melbourne on 10-12 February 2003. The seminar was organised by the International Forum for Road Transport Technology, and was jointly hosted by the Australian National Road Transport Commission and the New Zealand Land Transport Safety Authority. Keynote addresses, abstracts and speaker slides from the seminar can be found at http://www.nrtc.gov.au/news/workshops.asp?lo=news.

Australian Radiation Protection and Nuclear Safety Agency (ARPANSA) - Action is being taken by ARPANSA and the other Australian radiation protection authorities to implement the recommendations from the National Competition Policy Review of Radiation Protection Legislation Radiation in relation to legislative amendments, national uniformity and trans-boundary issues. At the same time, the CEO of ARPANSA is contracting out project work in the areas of regulatory style, third-party certification and occupational licensing. Details of each project can be found in the Implementation Plan (at http://www.arpansa.gov.au/pubs/ncp/imp_plan.pdf). Other details regarding the NCP Review, including the Final Report and details of the advertised consultancies, can found on the ARPANSA Web site at http://www.arpansa.gov.au/ncp.htm.

Transport Safety Investigation - The Transport Safety Investigation Bill 2002, which both updates the Australian Transport Safety Bureau's powers to investigate aviation and marine incidents, and allows the ATSB to investigate incidents involving the interstate rail system, was passed through the Federal Senate on 26 March 2003. It is intended to commence operation on 1 July 2003. Copies of the Bill and associated documentation is at http://www.atsb.gov.au/atsb/tsi_bill/index.cfm.

Review of SA OHS regulation

The Review of the Workers Compensation and Occupational Health, Safety and Welfare Systems in South Australia report was released early in 2003. It makes a series of recommendations for consideration by a yet to be established, independent, tripartite advisory body, the “SafeWork SA Authority”. It also recommends that all OHSW functions be transferred from the existing SA WorkCover Corporation, to the current OHS inspectorate, Workplace Services. Amongst other recommendations, are proposals to: (1) reduce the training entitlement of worker health and safety representatives; (2) make OHS training of responsible officers, managers and supervisors (already required by OHSWA (SA): s 19), and OHS committee members, mandatory; (3) require documentation of OHS policies already required by OHSWA (SA): s 20), training and risk management practices; (4) amend the employer’s statutory duty to others, requiring them to “ensure” the health and safety of others; (5) rename the “improvement notice” to “notice of agreed compliance”; (6) introduce infringement notices for some specific offences; (7) establish an Investigations Unit with a dedicated solicitor for prosecutions work; (8) change the time limit for prosecutions to allow proceedings to be initiated up to two years from the date the inspectorate becomes aware of the offence; (9) review penalties and provide for a proportion of a monetary fine to be paid to victims of an offence; and (10) introduce court-ordered enforceable undertakings. A copy of the report is at www.eric.sa.gov.au/show_page.jsp?id=2645.
Consortium members - profiles

In this edition, we profile two of the members of the National Occupational Health and Safety Regulatory Research Consortium whose research we have reported in earlier editions of Regulation at Work:

- **Fiona Haines** is a senior lecturer in the Department of Criminology, University of Melbourne. Her current work includes understanding the problem of regulatory complexity and the impact of conflicting demands of governments on regulatees as well as research into the impact of globalization on safety standards in SE Asia. Dr Haines has worked with various government departments and authorities. She has developed, with Professor Arie Freiberg, a postgraduate subject *Compliance, Regulation and Crime* where government regulators from across the country and postgraduate students explore the current challenges facing regulators in controlling corporate and professional conduct.

- **Claire Mayhew** is Visiting Fellow in the "Bullying and Violence" project team in the School of Management at Griffith University, and an Associate of the Industrial Relations Research Centre at the University of New South Wales. Her current work is concerned with the prevention and management of occupational violence and bullying. Dr Mayhew also has particular interests in OHS among small business and the self-employed, and in the variation in OHS outcomes between precariously employed workers and those on longer-term contracts.

Further details on these, and other, members of the Consortium are at the Centre’s website, at [http://www.ohs.anu.edu.au/consortium/index.html](http://www.ohs.anu.edu.au/consortium/index.html).

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**Workplace violence and bullying**

New guidance on preventing and reducing workplace bullying and violence has recently been released by several Australian OHS agencies. In particular:

- SA WorkCover Corporation has links to a series of publications on workplace violence at [http://www.workcover.com/resources/publications/PubsSafeWork.htm#WorkplaceViol](http://www.workcover.com/resources/publications/PubsSafeWork.htm#WorkplaceViol);
- WorkSafe Western Australia Commission has established a web page with links to new guidance notes on dealing with workplace bullying at [http://www1.safetyline.wa.gov.au/pagebin/guidwswa0076.htm](http://www1.safetyline.wa.gov.au/pagebin/guidwswa0076.htm); and

In the UK, the Health and Safety Executive has recently published the proceedings of its December 2002 conference on *Tackling work related violence - putting policies into practice* at [http://www.hse.gov.uk/hthdir/noframes/violence.htm](http://www.hse.gov.uk/hthdir/noframes/violence.htm).
Key research & reports (continued)

Contractors and telework

R Johnstone, C Mayhew and M Quinlan, “Outsourcing risk? The regulation of occupational health and safety where subcontractors are employed” (2001) 22 (2/3) Comparative Labor Law and Policy Journal 351-393. This article briefly identifies how outsourcing/subcontracting can undermine OHS, and then analyses the way in which Australian and US OHS agencies regulate the problem. The section on Australia covers regulation under OHS legislation, regulation under the Arbitration/Award system in Australia, and controls on government contracts; while the US section discusses regulatory controls on contractors, specific industry regulations, and controls on government contracts. The authors argue that the legal framework in Australia makes it easier for regulators to address subcontracting issues than is the case in the USA, but that regulatory regimes in both countries are sub-optimal, partly because regulators lack resources and a full understanding of the risks, and partly because attempts at regulation cut across neo-liberal ideas that drive government policies more generally.

S Montreuil and K Lippel, “Telework and Occupational Health: A Quebec Empirical Study and Regulatory Implications” (2003) 41 Safety Science 331-358. This article discusses OHS issues in home-based telework including coverage by, but ineffective application of, OHS and workers compensation legislation in Canada. This research is also reported in the Centre Francophone D'informatisation Des Organisations’ (CEFRO) Symposium proceedings summary report: From telework to new forms of work in the information society, 2002 at http://www.cefrio.qc.ca/english/pdf/actcollang.pdf.

Enforcement and prosecution in the UK

K Hawkins, Law as a last resort: Prosecution decision-making in a regulatory agency, Oxford University Press, Oxford, 2002. This is an excellent “interpretive” socio-legal study of the prosecutorial decision-making by the officers in the British Health and Safety Executive. The study is based, inter alia, on interviews with senior HSE staff and with field inspectors, official documents, and the analysis of prosecution and fatality files. The book documents and studies the use of discretion by legal actors. It analyses the routine practices and decision-making of the inspectorate, and seeks to understand how and why prosecution decisions (including decisions not to prosecute) are made. The book is organised to “move from the general to the particular in its analysis of the conditions under which prosecution is employed.” First it analyses prosecutorial decision-making within its broader social, political and economic environments. It then analyses the “defined setting” of decisions – the formal arrangements and legal powers of inspectors, prosecution policy, and the “imagery and symbolism of prosecution.” Finally, it analyses the decision-making “frames” employed by individual decision-makers to make sense of what they encounter. These decision frames include individual’s theories of compliance and punishment, the organisational concerns of individual officers, conceptions of blame and the conditions under which prosecution is regarded as a deserved outcome, and the interplay of formal legal rules and informal organisational practices. While Hawkins deliberately presents “as dispassionate an analysis as possible”, the book does draw conclusions about how legal officials actually make decisions, and these insights will be of great interest to policy makers.

Centre for Corporate Accountability, Safety last: The under-enforcement of safety law, CCA, London, 2002. This report is a statistical audit of the work undertaken by Health and Safety Executive OHS “operational” inspectors over a five year period from 1 April 1996 to 31 March 2001. It looks at five industry groupings (agriculture, construction, manufacturing, the energy/extractive industries, and the service sector), and at different parts of the country to compare (a) the number of premises inspectors inspect; (b) the number of reported incidents they investigate; (c) the number of enforcement notices they impose; and (d) the number of prosecutions conducted. Further information is at http://www.corporateaccountability.org/press_releases/14Oct02.htm.
Key research & reports (continued)

Regulatory risk

R Baldwin and R Anderson, *Rethinking regulatory risk*, DLA/Enterprise LSE, London, 2002. The expression “regulatory risks” refers to risks that business organizations or their directors will suffer criminal or quasi-criminal sanctions following regulatory breaches in areas such as OHS, environment, competition and financial services law. This report examines whether UK companies think that they and their staff now face greater levels of regulatory risk than in former years; levels of perceived awareness and preparedness among senior corporate executives; what companies are doing to manage regulatory risks effectively; and factors which prevent good risk management. It argues that regulatory risks are growing, that increasingly corporate executives are recognising that managing regulatory risks is very important, but that the majority of UK executives were not confident that their corporations had a risk management system that identified and evaluated material regulatory risks. Of the drivers of action on risk management, the report identifies fear of damage to corporate reputation as by far the most important, followed by fear of corporate criminal liability and penalties.

Managerial leadership

A O’Dea and R Flin *The role of managerial leadership in determining workplace safety outcomes*, Health and Safety Executive, Norwich, 2003. This report examines the role of managerial leadership in determining organisational OHS outcomes, on the basis of a review of studies relevant to corporate governance, factors that drive action on OHS, management style and OHS climate. Like OHS management research more generally many of the studies relevant to leadership and OHS have been undertaken in larger, often high risk organisations, especially in western Europe or North America. Some of the studies are also based on a single company or small sample sizes. Hence there is a need for caution about generalising work in this area to a wider range of organisations. The report includes a useful discussion of UK corporate governance requirements that require companies to identify, evaluate and manage their significant risks, and to maintain sound systems of internal control over a wide range of business risks, which may extend to organisational control of OHS. A copy of the report is at [http://www.hse.gov.uk/research/rrhtm/rr044.htm](http://www.hse.gov.uk/research/rrhtm/rr044.htm).

Civil and administrative penalties

Australian Law Reform Commission, *Principled regulation: Federal civil & administrative penalties in Australia* (ALRC 95), ALRC, Canberra, 2003. This report is the result of a three-year inquiry into the use of civil and administrative penalty schemes under Australian federal law. Civil penalties are an alternative to fines, prison sentences and other criminal punishments, and are imposed by the courts. Administrative penalties arise automatically by operation of the law - such as additional tax for late payment, or loss of benefits for breach of social security requirements. Both civil and administrative penalties are increasingly likely to be used because they are quicker and easier to enforce. In the final report the ALRC identifies areas for improving the transparency, consistency and fairness of laws and procedures. A key recommendation of the report is that Parliament enact a ‘Regulatory Contraventions Statute’ which would parallel the Commonwealth Criminal Code and provide a set of principles and standards relating to civil and administrative penalties, and the processes that apply to their imposition. The report is available online at [http://www.alrc.gov.au](http://www.alrc.gov.au).

Fatality data and its usefulness

T Driscoll, R Mitchell, J Mandryk, S Healey, L Hendrie and B Hull, “Coverage of work related fatalities in Australia by compensation and occupational health and safety agencies “ (2003) 60 *Journal Occupational and Environmental Medicine* 195-200. Driscoll et al provide a timely reminder of the limitations of relying on incomplete fatality data derived from workers’ compensation datasets and OHS agency investigations to track trends and identify causation factors associated with fatalities, and to allocate resources to prevent workplace fatalities. The abstract is at [http://oem.bmjournals.com/cgi/content/abstract/60/3/165](http://oem.bmjournals.com/cgi/content/abstract/60/3/165).
Key research & reports (continued)

Evaluation of Norwegian OHS strategy

P Saksvik, H Torvatn, and K Nytrø, “Systematic occupational health and safety work in Norway: A decade of implementation”, Safety Science, (article in press). In 1992, Norway introduced a regulation requiring all organisations to implement systematic action to ensure and document OHS control, in accordance with the requirements of Norwegian OHS law. The key elements of the Norwegian model are: preparation; delegation of responsibilities, systematic identification of OHS problems; prioritising; action planning; implementation; evaluation and continuous improvement. This article reports on the third in a series of studies undertaken at intervals since the introduction of the Norwegian regulation, to report on progress with implementation. Based on telephone interviews with a randomly selected, representative sample, 47% of Norwegian organisations fulfilled the requirements of the regulations in 1999. This compares with an implementation rate of 8% and 42% in 1993 and 1996 respectively. As at 1999, a further 39% were implementing the law. Organisations implementing OHS included large, medium and some smaller firms, although micro-businesses were less likely to have implemented the regulation. The authors attribute some of the success of the Norwegian approach to the fact that the OHS authorities have continuously supported this regulation for a decade and will continue to do so, with only minor refinements in response to workplace requirements.

Regulatory reform and standards

A special issue in (2002) 9:6 Journal of European Public Policy discusses regulatory reform in Europe. While it does not specifically discuss OHS regulation, it includes a range of papers on changes in regulatory rules, organisations and policies across several European countries, why these changes have taken place, and their consequences.

E Calabrese and L Baldwin, “Toxicology rethinks its central belief” (2003) 421 Nature 691-692. Regulatory agencies for OHS, environment, public health and other areas base their decisions and policies on toxicological predictions applying a dose-response model to extrapolate and predict responses to chemical substances, pharmaceuticals and other physical agents. After reviewing a wide range of toxicological experiments, Calabrese and Baldwin identified up to 5,000 examples of an alternative “hormetic response”. They argue that a radical rethink is required of the traditional basis for toxicological risk assessment applying a model of hormesis. If accepted, this approach would have wide ranging implications for standard setting for chemical and other agents. Their commentary can be read at http://www.nature.com/cgi-taf/DynaPage.taf?file=/nature/journal/v421/n6924/full/421691a_fs.html.

T Koukoulaki and S Boy (eds) Globalizing technical standards: Impact and challenges for occupational health and safety, TUTB, 2002. This publication covers recent European developments in developing standards to fill out EU Directives. It sets out the European standardization process in its changing context, where European standards are increasingly being framed at the international level. For further details, see http://www.etuc.org/tutb/uk/publication_resume24.html.

OSHA ergonomics rule

In November 1999, the US federal Occupational Safety and Health Administration (OSHA) proposed a controversial “Ergonomics Program Standard” rule. In March 2001 Congress passed a “Joint Resolution of Disapproval of OSHA’s standard”. The issues and debates that led to the congressional invalidation of the ergonomic standards are analysed (before the event) in a series of articles published in (2001) XXII no 1 Journal of Labour Research. In particular, the standard was deemed to be “too far-reaching and unworkable”, in part because it reflected principles of OHS management considered by some to represent de facto regulation of a wider approach to OHS management. Although referring to events in 2001, the analysis presented in this series of articles has wider and ongoing relevance to standards development processes and decision-making.
International news

Greece - In February 2003, the Greek Ministry of Labour and Social Security issued three new Presidential Decrees aimed at improving OHS for: workers during/after pregnancy; workers exposed to carcinogenic substances; and workers potentially exposed to explosive atmospheres. Summary information is at http://www.eiro.eurofund.eu.int/2003/03/Feature/GR0303102F.html.


EU - On 18 February 2003, European Ministers responsible for economic and financial affairs met as the Economic and Financial Affairs Council of the Council of the European Union and “adopted a Recommendation on the application of health and safety legislation to self-employed workers” which calls on member States to “promote prevention and health and safety actions through, inter alia, awareness-raising campaigns and access to training opportunities and health surveillance.” Minutes of the meeting are at http://ue.eu.int/pressData/en/ecofin/74571.pdf.


US - US OSHA recently identified 14,000 employers with higher than industry average rates of injury and illness and developed an outreach and compliance assistance program that targets them. As part of the program, OSHA sent letters to targeted employers advising them of their poor OHS in relation to their industry, along with a listing of the most frequently violated standards for their industry. The letter encourages employers to take preventive action and to seek assistance from OSHA’s on-site consultation program that is operated separately to OSHA’s inspection program. “The service is free, and there are no fines even if problems are found”. For more information, see http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWSRELEASES&p_id=10078&p_text_version=FALSE.

US - The U.S. Government recently established a web site that allows people to “find, review, and submit comments” on all federal government documents that are open for comment, including OHS related documents. The website is at http://www.regulations.gov/.

New York Times Reports

In January 2003, the New York Times ran a stunning investigative reporting series focusing on workplace safety. The three articles provide a compelling account of the risks to which workers are exposed in the absence of adequate regulatory oversight. The articles document how particular employers routinely cut corners to save money, and as a result, how workers suffered high rates of injury and disease. It also addresses, as one critic put it, “the frustrations, inefficiencies, ineptitudes and other qualities of regulators.”

Links to the series of articles can be found at http://nytimes.com/ref/national/DANGEROUS_BUSINESS.html?pagewanted=all&Position=top.
International news (continued)

Occupational health and safety strategies

New Zealand: An *Health and Safety in Employment Amendment Act 2002* was passed in December 2002. The Act makes a number of changes to the *Health and Safety in Employment Act 1992*. The changes, which will take effect from 5 May 2003, include extending coverage of the Act to crews on board ships and aircraft and placing duties on those who sell or supply equipment to ensure that it is safe. It also increases the range of enforcement tools available to the inspectorate (the Occupational Safety and Health Service (OSH) of the Department of Labour) through the introduction of infringement notices and allowing some flexibility with the limitation period for prosecutions. Fine levels will be increased, and scope allowed for other than the inspectorate to launch prosecutions under certain circumstances. While the Maritime Safety Authority will continue to be the administering authority for the maritime sector, the New Zealand Government is expected to consider in the first half of 2003 whether the Civil Aviation Authority should administer the aviation sector. For details on the changes and other supporting information, visit [http://www.workinfo.govt.nz/](http://www.workinfo.govt.nz/).

EU: A new European Community strategy on health and safety at work was adopted by the European Council last year. Amongst other matters the strategy calls for greater progress on harmonising OHS statistics; more emphasis on the prevention of occupational illness; taking into consideration changes in the labour market and forms of work organisation; attention to OHS in SMEs; integration of a systematic approach to OHS into business management; effective enforcement of Community law, especially effective, equivalent inspection and monitoring in all Member States; and integration of OHS into other EU policies and strategies such as those on employment, public health, research, education, transport, environmental and civil protection. More information about the EU strategy and discussion by different stakeholders can be found online at [http://europe.osha.eu.int/systems/strategies/future/](http://europe.osha.eu.int/systems/strategies/future/+).

North America - under the *North American Agreement on Labor Cooperation*, Canada, Mexico and the US established the government-to-government, Trinational Occupational Safety and Health Working Group to advance cooperation and programs in key OHS areas, including the formulation of technical recommendations that address OHS enforcement practices and cooperation projects. The Working Group established four technical subgroups to address technical issues relating to: hazardous substances; OHS management systems (OHSMS) and voluntary protection programs; training of technical assistance staff; and the development of a tri-national web page to promote information exchanges and good practices. Most recently, the OHSMS technical subgroup met in March 2003 and reached a consensus on the key elements of effective OHSMS. These include: management commitment and responsibility; employee involvement and responsibility; worksite analysis and approaches; hazard/risk prevention and control; and training. They also developed criteria for recognising OHS program best practice, including: application and evaluation processes, participation criteria; and a recognition strategy. Meeting results are expected to be posted on the OSHA TriNational web page at [http://www.osha.gov/TriNational/index.html](http://www.osha.gov/TriNational/index.html). A press release issued by the US’ OSHA on the meeting is at [http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWSRELEASES&p_id=10155&p_text_version=FALSE](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWSRELEASES&p_id=10155&p_text_version=FALSE).
Key cases

Labour Hire and Duty of Care

In *Labour Co-operative Limited v WorkCover Authority of New South Wales (Ins Robins)* [2003] NSWIRComm 51 a Full Bench of the NSW Industrial Relations Commission, consistent with the other labour hire cases, upheld the trial judge’s finding that there was no contractual relationship between the worker and the client, and that the relationship between the worker and labour hire agency was one of employment. It also upheld the trial judge’s finding that it was reasonably practicable for the labour hire company to have ensured protection against the risks to the worker’s safety by “adopting a positive and pro-active approach with [the client] to require steps to be put in place to avoid the risks as a condition of making available the services of the worker. The labour hire company had sufficient control to ensure the adequacy of instruction, training and supervision, and could refuse to supply its employees to the client “until appropriate and sufficient measures to ensure safety were implemented.” It is important to note, however, that the duties of “host employers” and labour hire workers vary under Australian OHS statutes. This case is applicable to NSW.

In *TNT Australia Pty Ltd v Christie*, [2003] NSWCA 47, the plaintiff was employed by an employment agency (Manpower Services (Australia) Pty Ltd), which assigned the plaintiff to work for TNT. The plaintiff was injured by a forklift owned and serviced by Crown Equipment P/L and leased to TNT. The plaintiff sued both Manpower and TNT in negligence. Two of the three judges hearing this appeal in the New South Wales Court of Appeal (Mason P, with Foster APA concurring) held that, in addition to the non-delegable duty of care owed by the agency (Manpower) to its employee (the plaintiff), the client (TNT) and the plaintiff were in a position analogous to that of employer and employee, and that TNT owed a non-delegable duty of care to the plaintiff. In addition, an employer who operates a labour hire business does not abdicate its non-delegable duty to its employees simply because its employees are sent to work for a client.

State authorities and their exercising of their statutory powers

In *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 (5 December 2002) plaintiffs who had contracted Hepatitis A from contaminated oysters sued, inter alia, the State Government in negligence, for breaching its common law duty of care to consumers to take reasonable care to protect them from reasonably foreseeable risks of injury from eating oysters. Various statutory provisions gave the State power over aquaculture, and powers to prevent or mitigate pollution, or to protect the public from threats to health from contaminated waters or food. The State government had decided to adopt a policy of self-regulation for the oyster industry. The allegations were that the State government had not fulfilled its obligations to conduct sanitary surveys to identify and remedy pollution sources; and to close oyster fisheries that presented an unacceptable risk to public safety. Members of the High Court noted that the decision to adopt a policy of self-regulation was essentially a political decision (about the nature and extent of regulation and the allocation of resources) and therefore not an appropriate decision for courts to decide. The government decided not to undertake regular sanitary reviews for budgetary reasons. On the facts there were no factors suggesting that there should be sanitary reviews or a fishing closure, and the court held that the State did not have a common law duty to exercise its statutory powers to order such reviews or closures. The decision confirms that just because a government body has statutory powers, it will not necessarily have a duty of care at common law to exercise them. Note also that the recent Ipp Review recommended that where a statutory authority decides, on grounds of resource allocation, to perform or not perform a public function, that decision is a defence to a negligence claim.

Liability for economic losses arising from accidents

In *Johnson Tiles and Gregory Alan Dean v ESSO Australia Ltd and others* [2003] VSC 27 (20 February 2003) Gillard J gave judgment in proceedings instituted by two plaintiffs (on their own behalf and representing the interests of others) seeking compensation from ESSO and a range of other defendants for damage and loss incurred as a result of the interruption of gas supplies in Victoria after an explosion at ESSO’s Longford plant in 1998. Gillard J found that the ESSO was liable only for the direct property damage it had caused (for example, food that was actually damaged), and not for pure economic loss suffered by gas consumers (who, for example, had to buy electric appliances) and workers stood down (lost wages) as a result of the explosion.
Manslaughter at work: Proposed reforms

One of the vexed issues in OHS regulation in recent years has been the issue of corporate manslaughter. Successful manslaughter prosecutions of Australian companies responsible for the deaths of workers are extremely rare (see, for example *R v Denbo Pty Ltd*, unreported, Supreme Court of Victoria (Teague J) 14 June 1994). Putting aside for the moment issues of enforcement policy, this short note outlines the legal issues inhibiting manslaughter and related prosecutions for workplaces death and injury, and examines recent proposals to remedy these identified problems. Space prevents a discussion of proposed sanctions.

**The Current Law and its Deficiencies**

At common law, to establish the offence of manslaughter there must be proof of a voluntary act or omission causing death (the physical element or *actus reus*) as well as proof of guilty intention or fault (the mental element or *mens rea*). In the context of work-related fatalities, there are two possible categories of manslaughter: manslaughter by unlawful and dangerous act and manslaughter by gross or criminal negligence. The focus of the manslaughter debate has been on manslaughter by gross (or criminal) negligence – at common law “a great falling short of the standard of care” which a reasonable person would have exercised, “involving such high risks that death or grievous bodily harm would follow that the doing of the act merited criminal punishment” (*Nydam v R* [1977] VR 430 at 445). In some jurisdictions (for example Queensland and Western Australia) manslaughter offences or their equivalents are set out in the jurisdiction’s criminal code. For example, the *Queensland Criminal Code* imposes a duty on a person doing a dangerous act (s 288) or in charge of a dangerous thing (s 289), and makes provision for other offences of “grievious bodily harm” (s 320) and “negligent acts causing harm” (s 328). Manslaughter can be committed through criminal negligence.

There are many difficulties with prosecuting for manslaughter where the defendant is the corporation or director of the corporation.

At common law a corporation can be held criminally liable for an offence (such as manslaughter) which requires proof of *mens rea*, but only where that *mens rea* is attributable to an officer of the corporation who was senior enough to be considered a “directing mind” of the corporation and “speaking as the company” (*Tesco Supermarkets Ltd v Nattrass* [1972] AC 153). The case law has established that the only persons whose state of mind and conduct can be attributed to the company were the board of directors, the managing director, or any other person to whom a function of the board had been fully delegated. This is to be contrasted with the position in relation to the absolute liability offences under the OHS statutes, where recent decisions have made it clear that the *Tesco* “directing mind” principle does not apply (see *R v British Steel plc* [1995] 1 WLR 1356), that duty holders are personally and directly (rather than vicariously) liable, and that the duties are non-delegable (*R v Associated Octel Ltd* [1996] 4 All ER 846).

Critics argue that the *Tesco* principle fails to reflect the concept of organisational blameworthiness. It assumes that only top-level managers are responsible for corporate decision-making, whereas in practice corporate decision making is not confined to the highest level of the organisation, but is diffused throughout the organisation. Consequently prosecutions for industrial manslaughter tend to focus on smaller corporations (as in the *Denbo* case, above), because it is easier to prove fault on the part of a top manager of a small company.

It is also difficult to prosecute senior company officers (such as chief executive officers, directors and senior managers) for manslaughter, for two main reasons. First, in order to establish liability it must be shown that the director owed a “civil law duty of care” to the deceased (*R v Adomako* [1995] 1 AC 171). Once this is established, it must be demonstrated that the duty was grossly breached and that the breach caused the death (*R v Adomako*). Difficulties arise in establishing that a senior officer owed a duty of care to the deceased. In most cases it is the company not the officer who has a duty towards employees and others. There are exceptions to this rule.
Manslaughter at work: Proposed reforms (continued)

An officer will be found to have a duty of care when:

- the officer personally “procured, directed or authorised” the company to commit the unlawful act in question which resulted in the harm; and
- the officer had acted in such a way towards the person who had suffered injuries so that it could be said that the officer had “assumed” a personal responsibility towards the injured person so to create between them “a special relationship” (The Centre for Corporate Accountability, Response to Home Office Consultation Document: “Reforming the Law on Involuntary Manslaughter: The Government’s Proposals”, 2000 at 3.27).

It is extremely difficult to establish both of these conditions.

The second legal hurdle that must be overcome in order to prosecute an officer is establishing that an act of the officer caused the death. An omission or failure to act will not establish criminal liability for a death or serious bodily injury under common law, unless “the law imposes a duty to act” (Centre for Corporate Accountability at 3.31). In most cases where it is alleged that an officer should be liable for manslaughter the allegations tend to focus on an omission by the officer.

Various proposals have been put forward to remedy these problems concerning the liability of corporations and officers for manslaughter.

Proposed Reforms

(i) The offences

Some of the new proposals not only recommend reform of the attribution principle (see below), but go further to suggest that new offences be created, rather than rely on the common law rules for manslaughter by gross negligence outlined above.

For example, the Crimes (Industrial Manslaughter) Amendment Bill 2002 (ACT) creates new offences for employers (defined very broadly and including corporate employers) and “senior officers” (as defined in the Corporations Act 2001 (Cth)). The offence will be created if a worker (see below) employed or engaged by the employer (i) dies in the course of employment or while providing services to the employer; (ii) the employer or senior officer’s conduct causes the death; and (iii) the employer or senior officer is (a) reckless about causing harm to the employer or any other worker of the employer or (b) negligent about causing the death of the worker, or any other worker of the employer (see ss 49C and 49D). “Conduct” includes omissions to perform a duty to avoid or prevent danger to the life, safety or health of a worker if the danger arises from an act of the employer or officer, anything in the employer’s or officer’s possession or control, or any undertaking of the employer or officer.

In a 2000 Discussion Paper, Dangerous Industrial Conduct, the Queensland Department of Justice and Attorney-General recommended a new offence of “dangerous industrial conduct” where a person behaves “dangerously in a workplace (that is, in a way that was unlawful or fell far below what would reasonably be accepted)” and the behaviour results “in death or grievous bodily harm.” (See p 11 of the Discussion Paper).

The Victorian Crimes (Workplace Deaths and Serious Injuries) Bill 2001 created two new crimes, “corporate manslaughter” and “negligently causing serious injury by a body corporate”. “Corporate manslaughter” involved “a corporate body which by negligence kills a worker in the course of the worker’s employment” (s 13). The elements of the negligently causing serious injury offence were similar (see s 14). For the purposes of these two offences, conduct was “negligent” if it “involves such a great falling short of the standard of care that a reasonable body corporate would exercise in the circumstances and such a high risk of death or really serious injury [or high risk of serious injury] that the conduct merits criminal punishment” (ss 14B(1) and (2)). In determining whether a body corporate was negligent, “the relevant duty of care is that owed by a body corporate to the person killed or seriously injured” (s 14B(3)). In short, the elements of the corporate manslaughter offence codified the common law discussed earlier in this paper. See further the discussion of s 14B(6) below.
n 2000 the British Home Office proposed two new offences: reckless killing; and killing by gross carelessness.

- “Reckless killing” occurs when a person’s conduct causes the death of another, and the person is:
  (a) aware of the risk that the person’s conduct will cause death or serious injury; and (b) it is unreasonable for the person to take that risk having regard to the circumstances as the person knows or believes them to be (at 2.3).

- “Killing by gross carelessness” takes place where a person’s conduct causes the death of another and (a) a risk that this conduct will cause death or serious injury would be obvious to a reasonable person in the person’s position; (b) the person is capable of appreciating that risk at the material time; and (c) either (i) the person’s conduct falls far below what can reasonably be expected of the person in the circumstances; or (ii) the person intends by the person’s conduct to cause some injury or is aware of, and unreasonably takes, the risk that it may do so (at 2.4). There shall be attributed to the person, knowledge of any relevant facts which the person is known to have at the material time, and any skill or experience professed by the person. Further, in determining what can be expected of the person regard should be had to the circumstances of which the person could be expected to be aware, to any circumstances shown to be within the person’s knowledge and to any other matter relevant for assessing the person’s conduct at the material time.

Some of the new offences restrict the scope of the offences to fatalities to certain people.

For example, the ACT Bill provides that only fatalities to “workers” (who include “employees”, “independent contractors”, “outworkers”, “apprentices”, “trainees” and “volunteers”), and excludes fatalities caused to members of the public and persons who are not covered by the broad definition of “worker”. Likewise the Victorian provisions only covered the death or serious injury of “workers”, defined in s 11 to include employees (including senior officers), persons deemed by legislation to be employees, persons (including independent contractors) engaged by the employer or by another person on behalf of the employer, outworkers, apprentices and trainees, and self-employed persons. The Queensland and British proposals appear not to impose such restrictions, and appear to cover members of the public.

Some of these new offences cover not only manslaughter-type crimes, but crimes for causing serious injury. For example, as noted earlier in this section, the proposed Victorian reforms created the offences of corporate manslaughter for workplace fatalities (s 13) and also the offence of negligently causing serious injury (s 14). The Queensland reform proposals covered deaths and “grievous bodily harm” (Department of Justice and Attorney-General, 2000 at 11). The British proposals and the ACT Bill only focus on workplace fatalities.

(ii) New attribution principles

As noted above, the most significant issue in the reform of corporate manslaughter concerns the appropriate attribution principle. One suggestion is that the “aggregation principle” replace the Tesco principle as the relevant common law attribution rule. This would allow the prosecutor to show that, even though it was not possible to establish any one individual within the company had the requisite mens rea which could be attributed to the company, combining the fault of a number of different individuals within the corporation would satisfy the high degree of fault (gross negligence) required for a company to be convicted of manslaughter.
Manslaughter at work: Proposed reforms (continued)

The aggregation principle has been adopted in the *Commonwealth Criminal Code Act 1995* (Cth) for crimes involving negligence, such as manslaughter by gross negligence. Section 12.4 provides that:

(2) If
   
   (a) negligence is a fault element in relation to a physical element of an offence; and
   (b) no individual employee, agent or officer of that body corporate has that fault element;

   that fault element may exist on the part of the body corporate if the body corporate’s conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).

(3) Negligence may be established by the fact that the prohibited conduct was substantially attributable to:
   
   (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
   (b) failure to provide adequate systems for conveying information to relevant persons in the body corporate.

Readers should also note that section 12.3 provides for the establishment of *mens rea* in corporations where the fault element requires intention, knowledge or recklessness rather than negligence.

Identical provisions to those in the Commonwealth Code discussed above have been incorporated in the ACT *Criminal Code 2002* in sections 51 (fault elements other than negligence) and 52 (negligence).

The Queensland Discussion Paper essentially proposed that Queensland incorporate the Commonwealth *Criminal Code* provisions. A corporation and its management would be criminally responsible for criminally negligent behaviour (see the crime of dangerous industrial conduct above) that results in death or injury to persons affected by the activities of the corporation where the behaviour was that of an officer, agent or employee of the corporation acting within the actual or apparent scope of their employment or within their actual or apparent authority. The Discussion Paper also proposed adopting the provisions of the Commonwealth *Criminal Code* in relation to intentional or reckless behaviour (p.11).

The Victorian Bill also contained an aggregation principle, but took a slightly different path. It allowed for “the conduct of the body corporate as a whole to be considered” (s 14B(4)) and provided (see s 14A(2)) that the conduct of an employee, agent (defined in s 11, and see also s 14A(1)) or senior officer of a body corporate acting within the actual scope of their employment, or within the actual authority, “be attributed to the body corporate”. This meant that “the conduct of any number of employees, agents or senior officers of the body corporate may be aggregated (s 14B(5)), except that the negligence of an agent “in the provision of services” could be taken into consideration but may not be attributed to the corporation (section 14B(5) (b)). Sub-section 14B(6) provided that the “negligence of a body corporate may be evidenced by the failure of the body corporate (a) adequately to manage, control or supervise the conduct of one or more of its employees, agents or senior officers; or (b) to engage as an agent a person reasonably capable of providing contracted services; or (c) to provide adequate systems for conveying relevant information to relevant persons in the body corporate; or (d) to take reasonable action to remedy a dangerous situation of which a senior officer has actual knowledge; or (e) to take reasonable action to remedy a dangerous situation identified in a written notice served on the body corporate by or under an Act.”

None of the other Australian jurisdictions have shown any interest in adopting the new attribution principles.

The British Home Office took a different approach to the issue of corporate liability and recommended that a corporation be guilty of the crime of “corporate killing” if “(a) management failure by the corporation is the cause or one of the causes of a person’s death; and (b) that failure constitutes conduct falling far below what can reasonably be expected of the corporation in the circumstances” (at 3.1.8). There is a management failure by a corporation if the way in which its activities are managed or organised fails to ensure the health and safety of persons employed in or affected by those activities. Such a failure may be regarded as a cause of a person’s death even though the immediate cause is the act or omission of an individual.
Manslaughter at work: Proposed reforms (continued)

(iii) New provisions for the liability of senior officers

One of the significant themes in the manslaughter reform proposals focuses on the liability of senior officers. The proposals discussed in this section pertain to criminal liability over and above the corporate officer offences in the OHS statutes (for these see R Johnstone, *Occupational Health and Safety Law and Policy*, 1997, 391-393).

The Victorian Bill attempted to build the liability of “senior officers” onto the corporate offences outlined above. Sub-sections 14C(1) and (2) provided that if it was proven the body corporate committed the crimes of corporate manslaughter or of negligently causing serious injury (see above), a senior officer of the body corporate could also be found liable for an indictable offence. These crimes would be committed if: (a)(i) the senior officer was “organisationally responsible” for the conduct, or part of the conduct, of the corporation in relation to the commission of the offence by the corporation (see also ss 14D(3)(a)-(c)); (ii) in performing or failing to perform her or his organisational responsibilities, the officer “contributed materially” to the commission of the offence; (iii) the officer knew, as a consequence of her or his conduct, that there was a substantial risk that the body corporate would engage in conduct that involved a high risk of death or really serious injury (or serious injury), and (b) having regard to the circumstances known to the senior officer, it was unjustifiable to allow the substantial risk to exist. Senior officers acting without any fee, gain or reward could not be liable for these offences.

As noted above, the ACT Bill creates two new offences of industrial manslaughter by recklessness and by negligence (s 49D), which are applicable to senior officers.

The recent Laing Report in Western Australia (*Review of Occupational Safety and Health Act 1984: Final Report*, 2002) discussed at length the existing liability of senior officers under the Western Australian *Criminal Code* and *Occupational Safety and Health Act* (see Laing Report, 2002, pp 122-132). It recommended (recommendation 34) that the *Occupational Safety and Health Act* be amended to make senior officers liable for the death or serious injury of employees if the deceased or injured was owed a duty of care by the corporation, the senior officer breached this duty and the breach was one of gross negligence. This recommendation would lapse in “the event that investigation procedures under the Criminal Code and/or amendment of the criminal code provide an effective alternative process.”

The Queensland Discussion Paper recommended a new offence for individuals of “dangerous industrial conduct” where they “behave dangerously in a workplace (that is, in a way that was unlawful or fell far below what would reasonably be accepted)” and the behaviour results “in death or grievous bodily harm.” While this recommendation would appear to overcome the “duty” issue discussed earlier in this paper, it might still not address the “omissions” issue.

Again, as noted above, the British Home Office proposed two new crimes of reckless killing and killing by gross negligence, and these crimes are applicable to senior officers. The important point about these proposals is that it would no longer be required to prove that a “duty of care” existed between the senior officer and the deceased. On the other hand the proposals fail to recognise the difficulty of finding a positive “duty to act”, and did not impose OHS duties upon directors (see Centre for Corporate Accountability, 2000, paras 3.39-3.40). The proposals also suggested that company directors be able to be disqualified if it is found that their conduct has “contributed” to the corporation committing the offence of “corporate killing”.

Conclusion

In 2002, in the face of opposition in the Victorian Legislative Council, the Victorian government withdrew the 2001 Bill, and the Queensland government announced that it would not be implementing the Dangerous Industrial Conduct proposals for the time being. The British proposals have not yet been implemented, and in 2002 the Home Office sought further consultations with employers. The recent South Australian Review appears to have sidestepped the issues. Nevertheless, this brief overview of the rules of involuntary manslaughter and the issues involved in their implementation and reform suggests that the debate over the use of manslaughter prosecutions for workplace deaths is likely to preoccupy governments for some time to come. The debate in the ACT is underway, and Western Australia has begun to consider some of the issues.
Workshop report: Auditing in perspective: Regulatory tool, moribund remedy or democratic champion?

In February, the Regulatory Institutions Network at the Australian National University (of which the Centre is a part) conducted a workshop on Auditing in perspective: Regulatory tool, moribund remedy or democratic champion?

The workshop brought together leading regulatory practitioners, policy makers and academics, and was led by Professor Michael Power of the Centre for the Analysis of Risk and Regulation (CARR) at the London School of Economics. The workshop explored a number of areas where audits have been used as a regulatory tool, including in social, democratic, human rights, corporate, environmental, clinical, and public sector areas. Many of the themes discussed have direct implications for OHS, where audits, be they formal or informal, are becoming increasingly important.

Amongst the themes to emerge were:

- in principle, audits, especially third party audits, can play an important de facto regulatory role. They promise to compensate for a lack of public sector regulatory resources, and to provide independent, transparent oversight of organisational behaviour. However, in practice, they sometimes fall far short of this ideal, as the Enron collapse graphically illustrates;
- the emphasis on making activities amenable to measurement, marginalising those aspects of activity which are not measurable;
- audits may be viewed as part of the armoury of meta-regulation (the regulation of self-regulation), stimulating auditees to take greater responsibility for devising and monitoring compliance with their own self-regulatory standards; and
- corporate compliance audits which seek to provide assurance of compliance system performance, do act as a management review and induce better compliance. However, there is a danger that the review aspect will be captured by management concerns.

Michael Power encapsulated many of the issues explored in the workshop in his summing up. As he put it:

… the auditee is a complex being; simultaneously devious and depressed, she is skilled at games of compliance but exhausted and cynical about them too, she is nervous about the empty certificates of comfort that get produced but she also colludes in amplifying audit mandates in local settings; she fears the mediocrity of the auditors at the same time as she regrets their powerlessness to discipline the ‘really bad guys’; she loathes the time wasted in rituals of inspection but accepts that this is probably what ‘we deserve’; she sees the competent and excellent suffer as they attempt to deal with the demands of quality assurance, at the same time as the incompetent and idle manage to escape its worst excesses; she hears the rhetorics of excellence in official documents but lives a reality of decline; she takes notes after meetings with colleagues, ‘just in case’, and has more filing cabinets than she did a few years ago; she knows the past was far from being a golden age, but despairs of an iron cage of auditing; she knows public accountability and stakeholder dialogue are good things but wonders why no-one trusts her, after all her training, any more.

Name change - agricultural and veterinary chemicals regulator

The National Registration Authority for Agricultural and Veterinary Chemicals (the NRA) changed its name to the Australian Pesticides and Veterinary Medicines Authority (the APVMA) in March 2003. A press release from Senator Troeth’s office that outlines the rationale behind the name change is at http://www.affa.gov.au/ministers/troeth/releases/03/03007t.html. The Australian Pesticides and Veterinary Medicines Authority’s website is at http://www.apvma.gov.au/.