NATIONAL RESEARCH CENTRE FOR
OCCUPATIONAL HEALTH AND SAFETY REGULATION

REGULATION AT WORK

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News from the Centre

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This is the sixteenth edition of the Centre's Newsletter which is produced as part of its mission to monitor and report on developments in OHS regulation. This edition includes the regular updates on OHS regulatory developments, important new research and reports, and significant recent cases.

The feature article in this edition, 'Shaping the Regulatory Response to Industrial Disasters and Other Catastrophes' is a précis based on a new Centre working paper, number 46, by Associate Professor Fiona Haines of Melbourne University, who is a member of the Centre's OHS Regulation Research Consortium. The feature article and working paper explore some conditions under which regulatory responses to industrial disasters and catastrophes, including 'safety case' regimes, have the best chance of success. The working paper which is titled *Safety, Security Politics and Fact: Shaping the Regulatory Solution,* is online at:
http://ohs.anu.edu.au/publications/index.php

A second working paper from another Consortium member is number 45, titled *Is the Australian Mining Industry Ready for a Safety Case Regime?* by Kathryn Heiler. This working paper explores the rationale for the safety case regime in the mining industry, the available evidence concerning the benefits and disadvantages of safety case regimes, and the characteristics for successful implementation of a safety case regime in the Australian mining industry. This working paper is online at:
http://ohs.anu.edu.au/publications/index.php.

Further information about the Centre and this newsletter

As always we welcome readers' suggestions on articles, books and reports that might be included in forthcoming newsletters. If you have any suggestions, please email us at nrcohsr@anu.edu.au.

You can find further information about the Centre at: http://www.ohs.anu.edu.au/

If you are not a subscriber to this newsletter, you can subscribe on http://www.ohs.anu.edu.au/publications/subscribe.php

Readers interested in the Regulatory Institutions Network, of which this Centre is part, can explore the RegNet website at http://regnet.anu.edu.au.

Developments in regulation

International - The ILO's general conference has adopted a convention, *Promotional framework convention for occupational safety and health,* which calls for members to develop a national policy, system and program for continuous improvement of OHS, including public awareness through national campaigns, promoting mechanisms for delivery of OHS education and training, introducing OHS concepts in educational and vocational training programs, facilitating exchange of OHS statistics and data, providing advice to employers and workers on eliminating or reducing hazards, and promoting workplace establishment of OHS policies, committees and the designation of workers' safety representatives. The measures are based on the ILO's *Global Strategy on Occupational Safety and Health* adopted in 2003 by the International Labour Conference. The convention is online at: http://www.ilo.org

Canada – The federal government has enacted *Hazard Prevention Program Regulations, requiring* workplaces to identify, assess and control OHS hazards and submit a report to the Minister of Labour, at least every three years, evaluating the effectiveness of their hazard prevention program. The requirement was introduced under the *Canada Labour Code.* More information is online at:
http://www.ccohs.ca/newsletters/hsreport/issues/2006/04/ezine.html

Europe – The new *Machinery Directive 2006/42/EC* was adopted by the European Parliament and is published in the Official Journal of the EU (OJ L 157) on 9 June 2006. The Directive must be implemented by member states by June 2008. The Directive is online at: http://europa.eu.int/eur-lex/lex/JOHtml.do?uri=OJ:L:2006:157:SOM:EN:HTML

Also in Europe - The European Parliament's legislative observatory (OEIL) reports that REACH is set to have its second reading on 24 October 2006. REACH is the regulation on the registration, evaluation, and authorisation of chemicals. It had its first parliamentary reading in November 2005 and although political agreement was then reached in the Competitiveness Council in December 2005 the common position is still to be reached in the EU's Parliament.

Australia – In early April the federal Minister for Employment and Workplace Relations announced a review of the *Commonwealth Occupational Health and Safety (Commonwealth Employment) Act 1991 (the OHS(CE)Act),* to be undertaken by the Department of Employment and Workplace Relations. Comments were sought by the end of April on 43 matters including: the level of guidance on reasonably practicable and risk management, coverage of upstream duty holders, employee duties, and health and safety representative (HSR) training and powers. The latter includes removal of the power to issue provisional improvement notices and new provisions allowing employers to seek compensation or damages for loss caused by the action of HSRs. The OHS(CE) Act covers employees working in Commonwealth government departments, statutory authorities and Government Business Enterprises. There is also a bill currently before the Australian Parliament to provide coverage to private sector corporations under the OHS(CE) Act if they are also licensed to self insure under the Commonwealth's *Safety, Rehabilitation and Compensation Act 1988,* the Commonwealth's workers' compensation legislation. The issues paper for the review of the Commonwealth Act is online at:
http://www.workplace.gov.au/workplace/Category/PolicyReviews/ReviewOfCommonwealthOHSAct.htm

Australia - The federal government accepted most of the recommendations of the *Taskforce on Reducing the Regulatory Burden on Business,* five of which relate to OHS. The first OHS recommendation asks the Council of Australian Governments (COAG) to implement nationally consistent OHS standards and apply a test whereby jurisdictions must demonstrate a net public benefit if they want to vary a national OHS standard or code. (As reported in the March 2006 issue of *Regulation at Work,* COAG referred the issue of improving the development and uptake of national OHS standards to the Australian Safety and Compensation Council (ASCC) following COAG's February 2006 meeting). A second taskforce recommendation asks the ASCC to examine duty of care provisions in principal OHS Acts as a priority area for harmonisation (also agreed by COAG in February). Other taskforce recommendations deal with developing national OHS training, the capacity of OHS regulators to respond to requests for advice, and establishing a high level representative group to oversee the National Mine Safety Network. The taskforce's report and the government's response to its recommendations are online at: http://www.regulationtaskforce.gov.au/index.html

Developments in regulation (continued)

Australia – The ASCC's Business Plan for 2006-2007 includes the national standards and legislation review matters referred from the regulation taskforce report (as above) and as taken up by COAG. The business plan includes: developing strategies to improve the timely and consistent adoption of national standards and codes; reviewing OHS legislation to identify priority areas for harmonisation; and developing nationally consistent approaches on various workers' compensation arrangements and definitional issues; as well as reviewing and revising national standards and codes for plant, major hazards facilities, licensing for high risk work (stage 2), panel erection, demolition and mobile plant for construction, and manual handling. The ASCC's April 2006 meeting referred the business plan to the 73rd Workplace Relations Ministers Council (WRMC) in May 2006 for endorsement. However, a communiqué from state and territory industrial relations Ministers, arising from the WRMC's May meeting expressed concern about de-regulation of OHS standards and indicated that the state and territory Ministers would only agree that COAG recommendations relating to harmonising and adopting nationally consistent OHS and workers' compensation standards be considered by the ASCC subject to certain conditions. These conditions require a tripartite approach, consideration of compliance and resource implications, and ensuring that existing protections are not reduced. The ASCC's draft business plan is online at: http://www.nohsc.gov.au/NewsAndWhatsNew/MediaReleases/FinalMediarelease-communiqueAAPmedianet.pdf and the state/territory communiqué can be found at: http://www.fairgo.nsw.gov.au/MinistersNewsroom/ releases/WRMC_MinistersStatement.pdf

Also from the ASCC – the ASCC's April meeting pursued various other national regulatory developments. These include:

- Implementation of the Globally Harmonised System of Classification and Labelling of Chemicals (GHS) which is to be completed by 2008. This will involve developing a national OHS standard and associated codes to adopt the GHS classification and hazard communication elements.
- Declaration of the *National Standard for Licensing Persons Performing High Risk Work.*
- Approval of a national *Guideline on Principles of Safe Design for Work.* The guideline addresses the design or modification of products, buildings, structures and processes for use at work.

The ASCC has also launched a resource package on safe design for engineering students. More information on ASCC developments is online at: http://www.ascc.gov.au

Australia – A Federal Senate Committee, asked to inquire into the health impacts of workplace exposure to toxic dust, including silica and the emerging field of nanotechnology, has made a series of recommendations in relation to the need for reliable data on disease associated with toxic dust, surveillance of respiratory disease, improved mechanisms for health surveillance, improvements in testing regimes for lung disease, enforcement of hazardous substances regulations, as well as mechanisms for nationally consistent compensation, amongst other matters. The committee's report is online at: http://www.aph.gov.au/Senate/committee/clac_ctte/toxic_dust/index.htm

Australia – The National Industrial Chemicals Notification and Assessment Scheme (NICNAS) is reviewing its existing chemicals program. Matters under consideration include: the selection of chemicals for review, information gathering, options for new types of assessment, enhanced controls, and improved uptake of recommendations. A discussion paper and other supporting materials are online at: http://www.nicnas.gov.au/Industry/Existing_Chemicals/Review_Of_The_Existing_Chemicals_Program.asp

Also in Australia – In May, the Australian Transport Council (ATC) released new policy and research papers aimed at addressing outstanding questions in its 2004 preliminary *Heavy Vehicle Driver Fatigue Policy Proposal.* After industry consultation on a new draft proposal, the National Transport Commission (NTC) plans to release a package of revised policy papers, regulatory impact statement and draft legislation in the third quarter of 2006 for a six week period. Formal comment will be sought and considered at that stage and a final package will be sent to the ATC for endorsement in December 2006. The draft policy proposal is online at: http://www.ntc.gov.au/FileView.aspx?page=A02311408400230020/

Australian Capital Territory – ACT WorkCover has used its powers in relation to court enforceable undertakings to accept undertakings from Construction Control Limited, a firm charged in relation to OHS breaches leading up to a hangar collapse in May 2003. The accepted undertakings include a comprehensive, independent auditing process for the firm's OHS management system, accredited safety and induction training for workers on the firm's sites and reporting to WorkCover on OHS issues identified in the independent audits. More information is online at: http://www.workcover.act.gov.au

Developments in regulation (continued)

Australian Capital Territory – the *Asbestos Legislation Amendment Act 2006,* which will commence on 1 July 2006, gives effect to the ACT Government's response to the *Asbestos Taskforce Report.* The Act amends seven existing laws to establish new asbestos management regimes for the residential sector and occupations handling asbestos. The Act provides for Ministerial recognition of codes of practice for building work involving the use, handling or disposal of asbestos; exemptions from building approval for minor maintenance and other minor works by prescribed trade, service and maintenance occupations; training for building certifiers and prescribed occupations; licensing regimes for asbestos assessors and asbestos removalists; asbestos building work to be undertaken by asbestos removalists; asbestos assessment reports to be made available by owners with a building approval application, when leasing or selling a property, or when engaging a tradesperson to do work on the premises; and, where an asbestos assessment report hasn't been obtained, the owners of premises will be required to provide generic asbestos advice. The Act is online at: http://www.legislation.act.gov.au/a/2006-16/default.asp

Also in the ACT – The Minister has approved a revised approved code of practice for *First Aid in the Workplace.* The revised code, which will come into effect on 1 July 2006, aligns workplace classifications with New South Wales, groups previously scattered information under appropriate headings, simplifies definitions, and revises first aid kit content lists to reflect current industry practice. The code of practice is online at: http://www.workcover.act.gov.au/pdfs/guides_cop/first-aid_cofp.pdf

New South Wales – the *Occupational Health and Safety Act 2000* has been reviewed and a number of amendments are proposed in a draft Bill, which is available for public comment until July 6, 2006. The amendments include: incorporating *reasonably practicable* in the general duties rather than this being a defence for duty holders in the event of prosecution; providing an explanation of *ensuring health and safety so far as is reasonably practicable;* adopting the Victorian OHS Act provision imposing *liability on directors and managers* of corporations; adding an *advisory role* to WorkCover's statutory functions and allowing WorkCover to issue *guidelines* on particular legislative provisions or how discretion will be exercised; providing OHS protection for *outworkers;* allowing WorkCover to enter into *enforceable undertakings* as an alternative to prosecution; allowing WorkCover to resolve disputes about *consultation arrangements;* clarifying the *employee's duty* of care, and giving OHS committee chairs and OHS representatives the right to issue a *safety recommendation notice;* providing for *reinstatement* for unlawful dismissal because of an OHS issue; extending powers of authorised employee representatives to include *entry to a workplace* to discuss OHS; and various matters relating to *investigations and prosecutions.* The draft Bill and report of the Act review are online at: http://www.workcover.nsw.gov.au/OHS/OHSAct2000Review/default.htm

New South Wales – To address the problem of firms defaulting on fines under the state's OHS Act, the NSW Office of State Revenue (OSR) will be naming and shaming companies that fail to pay fines for serious breaches. Company names will be published in newspapers and on the OSR website where they will remain until a fine is paid. The process of referring fines from courts to OSR is also to be streamlined to reduce the opportunity for firms to rearrange their affairs to avoid paying fines and OSR will disclose information about outstanding fines to ASIC and credit agencies to alert other creditors and employees. More information is online at: http://www.osr.nsw.gov.au/portal/page?_pageid=33,1&_dad=portal&_schema=OSRPTLT

New South Wales – The *Occupational Health and Safety Amendment (Electrical Equipment) Regulation 2006* was gazetted in April. This amends clauses 64 and 65 of the *Occupational Health and Safety Regulation 2001* by identifying workplace environments where testing and tagging of electrical equipment is warranted, such as construction sites and other hostile operating environments where damage to electrical equipment might arise in normal use through exposure to mechanical damage, moisture, heat, vibration, corrosive substances or dust. More information is at: http://www.workcover.nsw.gov.au/Publications/Industry/Electrical/occupational_health_safety_amendment_electrical_equipment_regulation_2006.htm

Also in New South Wales – WorkCover sought comment on a revised *Code of practice for tunnels under construction.* The proposed code will replace the 1990 code of practice on this topic. Particular issues addressed in the draft code are site investigation, tunnel design, ventilation systems, inspection plans and addressing common hazards and risks that are likely to be experienced in tunnel construction in NSW. More information is at: http://www.workcover.nsw.gov.au/Publications/LawAndPolicy/CodesofPractice/public_comment_code_practice_tunnels_under_construction.htm

Developments in regulation (continued)

Queensland – Owners, crane crews, principal contractors and other users have new OHS obligations explained in two new approved codes of practice. These are the *Mobile crane code of practice* and the *Tower crane code of practice.* The codes address general issues of risk management as well design registration, specific risks, documentation, planning and coordinating of operations, risk of collision, erecting and dismantling, operational issues, training, and inspection, testing, maintenance and repair issues. The codes are online at: http://www.dir.qld.gov.au/workplace/index.htm

Queensland – The government has passed legislation allowing authorised representatives of unions to enter workplaces on OHS grounds. The legislation provides that union members will have to hold both a federal permit issued under the WorkChoices legislation, and a state permit under the *Workplace Health and Safety Act.* It also identifies the powers of representatives and limits to their powers. The legislation is online at: http://www.legislation.qld.gov.au/

Also in Queensland – The Premier has announced the government will introduce laws to protect child workers, including limiting working hours, a minimum working age of 13, reduced to 11 for some forms of supervised work, and prohibited forms of employment for children under the age of 18. In addition, there will be a code of practice for child and young workers under the *Workplace Health and Safety Act 1995.* More information is online at: http://www.childcomm.qld.gov.au

Tasmania – The Premier announced an independent investigation into the Beaconsfield Mine rock fall. The investigation is to report on the cause of the April 25 mine collapse which killed one worker and trapped two others, and will examine the adequacy of processes and procedures at the mine, and steps required to prevent a similar incident in the future. Headed by Mr. Greg Melick as special investigator, the investigation will be supported by Professor Michael Quinlan from the University of New South Wales and Mr Paul Raftery who has experience in the mining industry and mining accident investigation. The full report will be provided to the Coroner and the Director of Public Prosecutions. More information is at: http://www.media.tas.gov.au/release.php?id=17910

Victoria - The Victorian Parliament's Rural and Regional Services and Development Committee released the report of its inquiry into the causes of fatalities and injuries on Victorian farms. The report makes 32 recommendations in relation to: farm safety education and research; machinery, plant, vehicles and equipment; farm environment, management and culture; legislative and regulatory issues; the roles of government and industry; and specific recommendations in relation to forestry and commercial fishing. A government response to this was also released, accepting wholly, in part or in principle, 25 of the committee's 32 recommendations. The inquiry report is online at: http://www.parliament.vic.gov.au/rrsdc/inquiries/farminjuries/report/report.pdf. The government's response is online at: http://www.workcover.vic.gov.au/vwa/media.nsf/docsbyUNID/EF1C986D05F32F9BCA2571400014F7C2?Open

Western Australia – A discussion paper on possible changes to the state's OHS legislation was released in April for comment by May 2006. Issues canvassed in the discussion paper include: the issue of 'control' and other aspects of the general duty provisions; the scope of regulations; the place and process for trying prosecutions (including the potential role for a jury); the impact of the federal *Work Choices* legislation on OHS legislation; relationship of the state's regulatory authorities to the Australian Safety and Compensation Council, and adoption of national standards; expansion of rights to initiate prosecution (to include unions); the operation of provisional improvement, improvement and prohibition notices; and the status of codes of practice. The discussion paper is online at: http://www.docep.wa.gov.au/Corporate/Content//Reviews/OSH/overview.html

Also in WA – A discussion paper about a proposal to amend the bonded asbestos licensing threshold is available for public comment. The discussion paper is online at: http://www.worksafe.wa.gov.au/newsite/worksafe/pages/wswanews0001.html

International news

Ruling on annual leave for health and safety – According to the *Working Time Directive,* EU Member States must take measures to ensure that every worker is entitled to paid annual leave of at least four weeks. The Court of Justice of the European Communities has ruled that the minimum period of paid annual leave may not be replaced by an allowance in lieu. The Court noted that workers must be entitled to actual rest, with a view to ensuring effective protection of their health and safety. It is only where the employment relationship is terminated that payment of an allowance in lieu of paid annual leave is permitted. Moreover, the Court considered that the positive effect that leave has for health and safety is deployed fully if it is taken in the prescribed year and it is immaterial whether financial compensation for paid annual leave is or is not based on a contractual arrangement. The full text of the judgment is online at:
http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-124/05

Health and safety representatives research - A new research project has been launched by the OHS department of the EU union confederation, ETUI-REHS, with the support of the Swedish SALTSA program. The project, EPSARE, is analysing the role and effectiveness of OHS reps in improving work environment at the workplace level. The project is also exploring the support structure needed for effective action, including training, information, legal rights, support by public authorities, union support, and so on. More information about the research project is online at: http://hesa.etui-rehs.org/uk/dossiers/dossier.asp?dos_pk=15

Key research & reports

Standards setting and regulatory impact

C Sunstein, *Misfearing: a reply*, John M. Olin Law and Economics Working Paper no. 274, The Law School, University of Chicago, 2006. Cass Sunstein's *Laws of fear* stimulated considerable debate for its critique of the precautionary principle and offer of an alternative framework (see *Regulation at Work*, December 2005). This article is a further contribution, by Sunstein, to the ongoing debate about how human beings are prone to 'misfearing', in the sense that they are sometimes fearful when significant danger is absent, and sometimes neglect serious risks. In this article, Sunstein responds to some of his critics who suggested that peoples' fears are best explained by 'cultural cognition', that is, their different perceptions derived through cultural differences. The current article argues that cultural cognition is itself a product of social influences on judgements (the influence of the actual or apparent views of others), and 'normative bias' by which people's factual judgements are influenced by their moral and political commitments. Thus, he suggests, governments do not need to respond to people's fears but to their values. The article is online at:
http://www.law.uchicago.edu/Lawecon/index.html

And for a further reply to Sunstein see D Kahan and P Slovic, 'Cultural evaluation of risk: "values" or "blunders" (2006) *Harvard Law Review* 119 (forthcoming).

W Viscusi, *Regulation of health, safety and environmental risks,* National Bureau of Economic Research working paper no. 11934, NBER, Cambridge Massachusetts, 2006. This paper provides a review of the role of economic analysis in setting targets for regulatory action, the modes of intervention and the stringency of regulation, as it applies to health, safety and environmental regulation. The paper discusses the theoretical and empirical methodologies developed to analyse economic issues in this area. The paper is online at: http://www.nber.org/papers/w11934

W Viscusi and J Aldy, *Labor market estimates of the senior discount for the value of statistical life,* Resources for the Future discussion paper, Washington, 2006. This paper is concerned with statistical estimates of value for life and, in particular, variation of this with age. The paper suggests US values for younger workers (US $6.4 million, workers aged 35 to 44 (US$9 million) and workers aged 55 to 62 (US$3.7 million). The paper is online at: http://www.rff.org/rff/Publications/Discussion_Papers.cfm

Key research & reports (continued)

N Sadaleer, 'The precautionary principle in EC health and environmental law' (2006) *European Law Journal* 12(2), 139-172). The precautionary principle represents an important milestone in determining preventive action in response to uncertainty. However, applying a principle of precaution necessarily gives rise to conflict and this article explores some of these issues arising in cases brought before the Tribunal of First Instance and the European Court of Justice.

Regulation and enforcement

R Johnstone and T Wilson, 'OHS liability, corporate officers and corporate groups' (2006) *Journal of Occupational Health and Safety – Australia and New Zealand* 22(3), 219-225. An area of increasing complexity is the structure of corporations and corporate groups, and this impacts on the liability for OHS offences raising, in particular, issues concerning how those with real control and influence over decisions that impact upon OHS can be made legally responsible for them. This article examines the extent to which corporate officers can and should be held liable for corporate offences against the OHS statutes. The article examines the directors' duties in corporations' law to show why specific provisions are required in OHS statutes to impose liability on corporate officers for OHS offences committed by corporations. A recent development in corporate officer liability under the Victorian *Occupational Health and Safety Act* 2004 is discussed, which has the potential to address the extent to which responsibility for OHS offences extends beyond a corporate duty holder to other members of a corporate group.

R Johnstone and T Wilson, 'Take me to your employer: the organisational reach of occupational health and safety regulation' (2006) *Australian Journal of Labour Law* 19(1), 59-80. This article examines the way in which the general duties in the OHS statutes operate when the employer (or self-employed person) is not a sole proprietor or a single corporate entity: for example, in contractual chains or networks; partnerships, unincorporated associations or joint ventures; entities within larger corporate or organisational structures; or where the person or entity responsible for engaging or employing workers is different from those with control over assets and decision-making concerning OHS. The article examines provisions in the OHS statutes that extend the reach of an employer's duty beyond the employer's employees and also shows how the new Victorian 'shadow officer' provisions can be applied to remove difficulties and doubt as to liability in the arrangements outlined above.

K Richardson, '"No case to answer" submissions in occupational health and safety prosecutions' (2006) *Australian Journal of Labour Law* 19(1), 81-84. Queensland is the most recent state to confirm that the criminal law principles relating to a "no case to answer" submission apply to OHS prosecutions. This practice and procedure note discusses the criminal law principles of a "no case to answer" submission and the application of those principles in the OHS jurisdiction using the Queensland Industrial Court decision of *Savage v Lund as an example.*

A Polinsky and S Shavell, *Public enforcement of law,* John M. Olin Program in Law and Economics working paper no. 322, Stanford Law School, 2006. This paper discusses the economic analysis of public enforcement of law by inspectors, auditors, police and prosecutors who detect and sanction violators of legal rules. The paper discusses elements of enforcement: the probability of imposition of sanctions, the magnitude and form of sanctions, and the rule of liability. It then considers the costs of imposing fines, mistake, marginal deterrence, settlement, self-reporting, repeat offences and incapacitation. The working paper is online at: http://ssrn.com/abstract=901512

B Hutter, *The role of non-state actors in regulation*, The Centre for Analysis of Risk and Regulation Discussion Paper No. 37, London School of Economics, 2006. This paper examines the ways in which a variety of economic and civil society actors contribute to the information gathering, standard setting and behavioural modification aspects of regulatory control. The paper is online at: http://www.lse.ac.uk/collections/CARR/

G Halfteck, *Legislative threats*, John M. Olin Center for Law, Economics, and Business, Harvard University, Boston, 2006. Using case studies in different areas of law and policy, this article examines legislative threats and the legal system as a regulatory institution, and more generally as a mechanism of social governance. The legal threat may be explicit, implicit or anticipatory. Using non-cooperative game-theory, the Article models the strategic interaction between legislators and threat-recipients and generates predic-

Key research & reports (continued)

tions concerning the inducement effect of legislative threats on behaviour. Specifically, the analysis considers conditions that may render threats credible, including (i) legislators' pre-game commitment; (ii) legislators' reputation; and (iii) legislators' emotional motivations. The analysis also examines (i) the effects of the probabilistic nature of legislative threats; (ii) the effects of imperfect and asymmetric information on the threat's inducement effects; (iii) the effects of legislative threats on the properties of regulatory bargaining in the shadow of the threat (e.g., the magnitude of transaction costs, information revelation, and degree of contractual incompleteness); and (iv) the effects of strategic interaction within homogenous and heterogeneous as well as organized and unorganized groups on threat-induced compliance. The article is online at: http://ssrn.com/abstract=887729

The role of OHS professionals

D Borys, D Else, P Pryor and N Sawyer, 'Profile of an OHS professional in Australia in 2005' (2006) *Journal of Occupational Health and Safety – Australia and New Zealand* 22(2), 175-192. This article presents the results of an Australian survey into the role of OHS professionals. The study provides information about the tasks performed, the industries and types of organisations serviced, and the hazards and workplace issues addressed. The study has important implications for the national effort to achieve particular outcomes through the *National OHS Strategy*, and the need to engage OHS professionals and harness their efforts to pursuing national priorities.

E Bluff, 'Improving the provision of OHS support in Australia' (2006) *Journal of Occupational Health and Safety – Australia and New Zealand* 22(3), 227-236. This article considers the need for organisations to have access to sufficient OHS knowledge, capability and expertise in order to effectively protect OHS, and the fact that OHS support is largely a resource for larger firms. The article questions the adequacy of Australian OHS regulation in this area and draws on overseas' experience, as a basis for considering the potential role of OHS regulation to enhance access to and provision of quality OHS support. The role and functions, organisation and funding, professional competence, quality and effectiveness of providers of OHS support are discussed.

Mining safety regulation

N Gunningham, 'Best practice mine safety regulation: are we there yet?' (2006) *Journal of Occupational Health and Safety – Australia and New Zealand* 22(3), 237-249. The mining industry, the subject of specific OHS legislation and enforcement in a number of Australian states, provides an interesting case study of developments in OHS regulation. This article examines the new approach in mining safety regulation in the state of Queensland, which involves 'goal setting', risk management and requirements to adopt hazard management plans integrated with holistic health and safety management systems. The article then asks whether OHS regulation in that state is approaching 'best practice' or whether further changes are needed to provide different strategies for duty holders with a variety of motivations and levels of sophistication.

N Gunningham, 'Safety, regulation and the mining industry' (2006) *Australian Journal of Labour Law* 19(1), 30-58. This article discusses reforms in mining safety regulation in the principal mining states in Australia. These reforms are now, in some respects, substantially more advanced than other OHS legislation. The article provides an overview of the traditional approach to mine safety regulation and its limitations; describes the main features of the new generation of mine safety legislation; and critically evaluates contemporary arrangements and identifies what further reforms may be desirable.

Transport safety

L Strahilevitz, *"How's my driving?" For everyone (and everything)*, John M. Olin Law and Economics working paper n. 290, The Law School, University of Chicago, 2006. This paper explores existing data on "How's my driving?" programs for commercial fleets which use placards in commercial vehicles to encourage

Key research & reports (continued)

reporting by other road users of dangerous driving. Such programs are associated with accident reductions between 20 and 53%. The paper also discusses the extension of such programs using technologies that aggregate dispersed information in various settings. The paper is online at: http://www.law.uchicago.edu/Lawecon/index.html

J van den Berg, *Indicators and predictors of sleepiness*, National Institute for Working Life, Umea, 2006. This research thesis finds that short sleep and poor sleep quality are the greatest risk factors for commercial drivers at work, being more hazardous than long driving times and work hours, age or experience. The research is based on interviews with more than 150 commercial drivers about their sleeping habits, work conditions, and individual factors such as age, experience, and smoking. More information is online at: http://www.arbetslivsinstitutet.se/articles/060327_2.asp

Precarious employment

M McNamara, *The hidden health and safety costs of casual employment - Key findings and recommendations*, Industrial Relations Research Centre, University of NSW, Sydney, 2006. This report reviews the research literature on casual employment and adverse OHS outcomes, and makes recommendations for improving the OHS of these workers in the areas of induction and training, worker participation and representation, awareness of duties and responsibilities, risk assessment of activities, attention to psychosocial issues, communication, awareness of at-risk groups and compliance with OHS policies and legislation. The report can be requested from: sdebrett@bartier.com.au

Occupational disasters

E Tucker (ed), *Working disasters: the politics of recognition and response*, Baywood, New York, 2006. This book brings together work from law, sociology, history, criminology and industrial relations, from five countries, to examine how governments identify, understand, and react to dangers and disasters at work. The book challenges the process that determines what gets recognised as a disaster, in case studies including the long-haul trucking industry, repetitive strain injuries, and lung disease in miners, as well as a factory fire, the loss of an offshore oil rig and a mine explosion.

Young workers

The April 2006 issue of the *Journal of Occupational Health and Safety – Australia and New Zealand* 22 (2) is a special issue focused on OHS and young workers. In 'Regulating the health and safety of young workers in Australia', M Mourell and C Allan identify that child labour is growing in Australia and examine the somewhat piecemeal regulatory regime for child and adolescent OHS, arguing for an alternative approach. A historical perspective is offered by B Bowden and B Penrose in 'The origins of child labour in Australia, 1880-1907'. The article 'Brain development during adolescence: some implications for risk-taking and injury liability' by I Glendon looks behind the well-documented over-representation of young people, especially males, in serious injuries and outlines some contemporary research into neurological, cognition and brain function development which have important implications for injury prevention. In 'Fatal injury of young workers in Australia', T Driscoll identifies occupations with significant risks for young people and, in the article 'Chemicals and young workers', C Winder discusses the physiological, toxicological and psychological differences between young workers and adults which have the potential to cause immediate, short term and long term health problems where chemical exposures occur.

Major hazards

N Fenning and M Boath, *Impact evaluation of the Control of Major Accident Hazards (COMAH) Regulations 1999*, Health and Safety Executive Research Report RR-343, HSE, Sudbury, 2006. This project aimed to carry out an impact evaluation of the UK COMAH Regulations which implement the Seveso Directive. The specific objectives of the study were to: estimate the costs and benefits of the COMAH Regulations, compare these with the estimates made in the Regulatory Impact Assessment (RIA), and identify additional work that may be required to establish further the impact of COMAH. The report is online at: http://www.hse.gov.uk/research/rrhtm/rr343.htm

Key research & reports (continued)

Occupational disease

Australian Safety and Compensation Council, *Report on indicators for occupational disease,* Commonwealth of Australia, Canberra, 2006. This report provides indicators of occupational disease for the purpose of identifying long term trends. It also reports on trends in respiratory disease, dermatitis, cardio-vascular disease, mental disorders, occupational cancers, infectious and parasitic disease, musculoskeletal disorders and noise induced hearing loss. The report is online at: http://www.ascc.gov.au

Work stress

A LaMontagne, A Louie, T Keegel, A Ostrey and A Shaw, *Workplace stress in Victoria: developing a systems approach*, Victorian Health Promotion Foundation, Melbourne, 2006. This research, which was undertaken as part of VicHealth's Mental Health and Wellbeing Plan 2005-2007, explores the links between work, stress and broader health outcomes to gauge the extent of the problem and identify ways of addressing it. The research investigates the effectiveness of using a 'systems' rather than an 'individualistic' approach to address the issue. The research offers compelling evidence that job stress is a substantial contributor to the burden of mental illness, cardio-vascular disease and other physical and mental health problems, and outlines ways forward to address these issues. The full report and a summary of it are online at: http://www.vichealth.vic.gov.au/workplacestress

C Höckertin and A Härenstam, 'The impact of ownership on psychosocial working conditions: a multilevel analysis of 60 workplaces' (2006) *Economic and Industrial Democracy* 27(2), 245-284. This article reports on research into the impact of organisational ownership and type of operation (work performed) on psychosocial working conditions in Sweden. The forms of ownership examined are public sector, public enterprises, private enterprises and co-operatives. Based on a study involving 1384 employees, in 60 workplaces, within 25 establishments, the study finds that variance in psychosocial working conditions is associated with ownership and type of operation. Specifically, the ownership forms of cooperatives and public enterprises, and the operations of teaching, labour intensive service and caring are significant in psychosocial outcomes.

Working conditions and health

European Foundation for the Improvement of Living and Working Conditions, *Annual review of working conditions in the EU: 2005-2006,* European Foundation for the Improvement of Living and Working Conditions, Dublin, 2006. This report is the third annual review of conditions in Europe covering the period from January to December 2005. It looks at four dimensions: employment, health and well-being, skills development and work-life balance. The report outlines relevant legislative and policy developments, and examines trends in the workplace. The report finds that musculoskeletal disorders remain the most widespread work-related health problem in the European Union and also looks at recent developments in well-being at work with the start of social partner negotiations on violence and harassment in the workplace. The report is online at: http://www.eurofound.eu.int/ewco/reports/EU0603AR01/EU0603AR01.htm

A Riedmann, H Bielenski, T Szczurowska and A Wagner, *Working time and work life balance in European countries,* European Foundation for Living and Working Conditions, Dublin, 2006. This report presents an overview of the Foundation's *Establishment Survey on Working Time and Work–Life Balance 2004–2005* which set out to map the use of a variety of working time arrangements in companies, to assess the reasons for their introduction and their impact. The report focuses on aspects such as flexible time arrangements in general, overtime, part-time work, non-standard working hours, childcare leave and other forms of long-term leave, phased and early retirement and company policies to support work-life balance. The report is online at: http://www.eurofound.eu.int/publications/htmlfiles/ef0627.htm

R Bird and N Mirtorabi, 'Shiftwork and the law' (2006) *Berkeley Journal of Employment and Labor Law* (forthcoming). This article examines the legal aspects of employing shift workers, in view of its contribution to major industrial accidents, fatigue, depression, heart disease and other health problems. Focusing on

Key research & reports (continued)

the United States, the article finds there are few legal protections for shiftworkers under current employment law. It examines case law and discusses strategies for plaintiffs to maximise their likelihood of a successful legal action.

Bullying

J Beswick, J Gore and D Palferman, *Bullying at work: a review of the literature,* Health and Safety Laboratory report WPS/06/04, Derbyshire, 2006. This report reviews the literature on workplace bullying, discussing definitions, methods of investigating, behaviours constituting bullying and the literature on effective interventions. The report is online at: http://www.hse.gov.uk/new/index.htm

Organisational culture and OHS management

D Parker, M Lawrie and P Hudson, 'A framework for understanding the development of organisational safety culture' (2006) *Safety Science* 44, 551-562. This article discusses the development of a framework for considering the maturation of organisational safety culture in the oil and gas industry. For each five levels of safety culture maturity (pathological, reactive, calculative, proactive and generative) the framework provides a short description of development in relation to a series of concrete organisational aspects (for example, incident reporting and investigation, hazard and unsafe act reports, contractor management etc) and abstract organisational aspects (such as management view of who causes accidents, balance between health, safety and environment, and profitability, and so on).

A Hopkins, 'A corporate dilemma: to be a learning organisation or to minimise liability' (2006) *Journal of Occupational Health and Safety – Australia and New Zealand* 22(3), 251-259. Within organisations, competing and conflicting interests can pose dilemmas for those making decisions that impact upon OHS. One such dilemma concerns an organisation's response to information about recognised safety problems. This article asks whether organisations should seek out such information and learn from it, so as to reduce the risk of accidents, or should they suppress such information, in the hope that this may reduce the risk of litigation? The article argues that suppressing 'guilty knowledge' creates organisational learning disabilities, does not provide protection from fines or compensation claims, at least in the Australian legal context, and may also be damaging to a firm's public profile.

Greenstreet Berman, *Case studies that identify and exemplify boards of directors who provide leadership and direction on occupational health and safety*, Health and Safety Executive Research Report RR-450, HSE Books, Sudbury, 2006. This report presents case study material of effective business leadership in OHS, describing what boards of directors do to provide leadership and direction in OHS. The report is online at: http://www.hse.gov.uk/research/rrhtm/rr450.htm

A Makin and C Winder, 'Do self-assessment tools assist the effectiveness of performance-based OHS legislation?' (2006) *Journal of Occupational Health and Safety – Australia and New Zealand* 22(3), 261-267. This article takes up the challenge of supporting organisations through the complexities of the OHS legislative and enforcement environment. The authors argue that the OHS management needed to implement contemporary OHS legislation could be usefully underpinned by a self-assessment tool to focus organisational attention on 'the real issue', identifying and effectively addressing all of the significant hazards arising from the organisation's activities.

A Hopkins, 'What are we to make of safe behaviour programs?' (2006) *Safety Science*, forthcoming. This paper provides a critical look at the assumptions that underlie safe behaviour programs and identifies some of their limitations, challenging the assumption that safe behaviour is the only cause of accidents worth focusing on, rather than merely the last link in a causal chain and not necessarily the most effective link to focus on, for the purposes of prevention.

Small business

R Gervais, *An evaluation of successful communication with small and medium sized enterprises (SMEs),* Health and Safety Laboratory report HSL/2006/32, Derbyshire, 2006. This report examines different approaches to communicating OHS to small firms, what works and what doesn't. The report is online at http://www.hse.gov.uk/new/index.htm

Key research & reports (continued)

Financial incentives

S Shavell, *Economics and liability for accidents*, John M. Olin Center for Law, Economics, and Business, Harvard University, Boston, 2006. This paper discusses the effects of liability on incentives to reduce risk, as well as the effects on risk-bearing and insurance. The value of liability as an incentive is also compared to other methods of controlling harmful activities, in particular, regulation and corrective taxation. The paper is online at: http://www.law.harvard.edu/programs/olin_center/

Workers' compensation

D Neumark, P Barth and R Victor, *The impact of provider choice on workers' compensation costs and outcomes,* National Bureau of Economic Research working paper no. 11855, Cambridge Massachusetts, 2005. This working paper reports on the results of a US study to examine whether the choice of provider impacts upon return to work outcomes and costs of workers' compensation. The study finds that provider choice does affect outcomes and costs. Outcomes are poorer and costs are higher when an employee chooses the provider and chooses a provider with whom the employee did not have a pre-existing relationship. The working paper is online at: http://www.nber.org/papers/w11855

Other developments

OHS research terms - A thesaurus is under development to facilitate searching for research related to injury prevention and safety promotion (IPSP) across 30 disciplines. The IPSP thesaurus will be an indexing and search tool for users to conduct complete online searches with a minimum of irrelevant material. The IPSP thesaurus is discussed in D Lawrence, A Guard, A Meier and L Laflamme, 'Developing the injury prevention and safety promotion thesaurus, international English edition' (2006) *Safety Science* 44, 279-296.

Oral drug testing – Standards Australia is reviewing comment on a draft standard, DR 05591 on *Procedures for the collection, detection and quantitation of drugs in oral fluid*. The draft standard concerns the collection, on-site initial testing, storage, handling and dispatch of oral fluid specimens, as well as the training of personnel carrying out these tasks. The procedures are intended for the workplace, as well as roadside detection of recent use of opiates, amphetamine-type stimulants, cannabis, and cocaine and its metabolites. The draft standard is online at: http://www.saiglobal.com

Key cases

ABC Developmental Learning Centres Pty Ltd v Wallace [2006] VCS 171

A complex issue in OHS regulation is the manner in which criminal liability is attributed to a corporation. Where criminal liability is based on requirements of intention or mens rea, the courts have required attribution of liability to the corporation by requiring evidence of criminal fault in a senior officer of a corporation acting as a 'directing mind and will' of that corporation (*Tesco Supermarkets Limited v Nattrass* [1972] 2 WLR 1166; *R v A C Hattrick Chemicals Pty Ltd*, unreported, Supreme Court of Victoria Criminal Division (Hampel J) 8 December 1995. In relation to absolute or strict liability offences in the OHS statutes, UK and New Zealand courts have held that specific duties are owed by the corporation itself, and are personal and non-delegable: *Linework Limited v Department of Labour* [2001] 2 NZLR 639, and the United Kingdom cases, *R v British Steel Plc* [1995] 1 WLR 1356, *R v Associated Octel Co Ltd* [1996] 4 All ER 846, *R v Gateway Foodmarkets Ltd* [1997] 3 All ER 78. See also WorkCover *Authority of New South Wales (Inspector Patton) v Fletcher Constructions Australia Ltd* (2002) NSWIRComm 31. There is little doubt that Australian courts would take a similar approach to the Australian OHS statutes, particularly after the recent decision in *ABC Developmental Learning Centres Pty Ltd v Wallace* [2006] VCS 171.

Key cases (continued)

In this case a three year old child escaped from a child care centre, and the child care centre was prosecuted for contravening sections 26 and 27 of the *Children's Services Act* 1996 (Vic), which, respectively, required the proprietor of the Centre and its staff to ensure that every reasonable precaution was taken to protect the child from any hazard likely to cause injury; and to ensure that the child was adequately supervised. The issue before the Victorian Supreme Court was whether the failures of the Centre's staff should be attributed to the company itself.

The Victorian Supreme Court (at para [8]) adopted the reasoning of the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, namely "there is no one answer to the question of whether the criminal actions of employees (or directors or contractors) of a company can be counted as the actions of the company. In some cases it is necessary to fashion a special rule of attribution. Depending on the scope of the rule, the actions of the employees may or may not be attributed to the company. The scope of the rule will depend on the court's interpretation of the terms of the offence and the policy enabling the statute". Bell J at paragraphs [13]-[15] remarked that:

> 13. … In *Linework* [the New Zealand OHS case discussed above], the legislation was designed to prevent workers being injured at work. In the present case, as we shall see, the legislation was designed to ensure that children were properly cared for in children's services.
>
> 14 This feature is important because, where legislation lays down a standard of action or behaviour in the public interest, a company, being an abstract legal entity, can observe the standard only through human agents. … [T]he company must have employees or similar persons to make full and frank disclosure, to record taxable transactions, to protect the safety of workers at work and, I might add, to properly take care of children. If the persons appointed by the company to observe the standard do not do so, it would frustrate the objectives of the legislation if the company could not be held criminally liable. The imposition of criminal liability is one important way by which persons, including companies, are held accountable for breaching regulatory standards which, on pain of such liability, they are obliged to observe. Therefore, where appropriate, the courts will fashion a rule of attribution that counts, as a company's, the actions of employees, of whatever level, whose work involves the performance of a regulatory obligation on the company's behalf.
>
> 15 It may be said on behalf of defendant companies, as ABC says here, that they should not be held liable if they had good systems in place, if they did not know the standard was being breached or if the employee was acting contrary to instructions. The company may say, "what more could have been done?" In many cases, unless relevant to a specific statutory defence, circumstances such as these will not be to the point. The legislation will simply expect the standard to be performed because it serves important public interests such as those illustrated above. If the legislature wants to include a defence of good systems, lack of knowledge or ignoring instructions, it can do so. Often it will not. Then, whether or not these circumstances are present, and depending upon the nature of the offence and the policy of the enabling legislation, the company may be found liable because an employee, acting within the scope of his or her work, has failed to perform a regulatory obligation that binds the company. As the Court of Appeal of New Zealand said in *Linework* [[2001] 2 NZLR 639 at 645]:
>
> > "To ask, as the appellant's counsel did, what more the employer could have done, is to beg the question: whose acts and omissions are to be attributed to the employer?"

Rick Lafrenais v Estate of Nicholas Heaton-Harris & Others [2006] ACTSC 22

A worker tripped on scaffolding stairs that had no safety barrier and fell nine metres to the ground, suffering a series of injuries. He had begun working as a general construction labourer at a building project at the Croatia Deakin Soccer Club premises near the end of 1993. Initially he was engaged by the project manager, Landmarques Pty Limited, but he was paid by cheque by the soccer club. A few weeks later the club decided to pay on a monthly basis, and a scaffolder working at the site offered to put the worker on his books and pay him on a weekly basis. The worker from that time took instructions from the scaffolder. A week before the incident the worker had been instructed to erect stairs to the scaffolding. He undertook this task with the scaffolder but due to a shortage of fencing they only erected the bottom level.

The worker sued in negligence and for breach of statutory duty (ie a civil action for damages arising from a contravention of the ACT OHS Act and regulations). In the ACT Supreme Court Connolly J determined that the incident occurred because of "an appalling breach of safety standards" (Para 3). The first issue for the court to decide was who was the worker's employer. Connolly J found that the scaffolder was the employer, because the worker "accepted directions from [the scaffolder] and, importantly, he was paid by him" (para [20]). Connolly J also found, however, that both the project manager, and the club, as occupiers, had

Key cases (continued)

breached their occupier's duties to the worker. Each of the club, project manager and scaffolder were held to be equally culpable for failing to ensure the worker's safety.

Connolly J also found that the worker was not contributorily negligent. It had been argued that as the worker had assisted the scaffolder in the erection of the dangerous scaffolding and had advised the project manager of the danger, he was fully aware of the danger and therefore was himself negligent in continuing to work on the site. At paragraph 64 Connolly J held that:

> It seems to me that this is quite an unrealistic submission, and contrary to long authority which accepts that the duty on an employer to provide a safe work site is a stringent one, and that momentary inadvertence by an employee does not amount to contributory negligence (*Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301, *Podrebersek v Australian Iron and Steel* (1985) 59 ALR 529). Counsel for *[the scaffolder]*, made the submission that *[he]*, as a mere contractor to Landmarques or the Club, would not have been in an economic position to say, "we have run out of safety fencing, the scaffolding is dangerous, no workers should use the scaffolding until it is made safe". I do not accept that proposition, but it does seem to me that this is a good answer to a claim of contributory negligence by the plaintiff. As a mere labourer, engaged on a casual basis, what could he have done if he wanted to keep a job, but to do as he was told.

Daly Smith Corporation (Aust) Pty limited and Anor v WorkCover Austhority of New South Wales (Inspector Mansell) [2006] NSWIRComm 111

This was an appeal against a decision of Staunton J noted in *Regulation at Work* Volume 4 Issue 1 March 2005. In dismissing the appeal the Full Bench of the Industrial Relations Commission of New South Wales (Wright P, Walton J and Backman J) the Full Bench discussed the responsibility of labour hire agencies to provide training to its workers placed with a host employer. At para 40 the Full Bench noted that the issue in the case was not the training given to the worker by the host employer, which was the issue in the case against the labour hire agency, but rather it was "the adequacy of the training provided to *[the worker]* by the corporate appellant *[the labour hire agency]* that was at issue" in the case. The Full Bench (at para 49) then noted that:

> Her Honour *[Staunton J]* found that, if the evidence led against the *[labour hire agency]* had disclosed that *[the host employer's]* training for example had been adequate, which her Honour did not find, and, if the *[labour hire agency]* had taken the necessary steps to ensure that the training provided was, in fact, adequate, then it would have been appropriate to have relied on that training. It inevitably followed from this finding that the time, cost and trouble involved in providing training and assessing risks would not have been relevant to the issue of the provision of training by the host employer and the attendant obligation of a labour hire company to ensure that that training was adequate. It was not the prosecutor's case, as we apprehend it, that the corporate appellant breached the Act because it did not engage its own trainers, supervisors and assessors.

Victorian WorkCover Authority v Carrier Air Conditioning Pty ltd [2006] VSCA 63

A worker was employed by a labour hire company and on-hired to Carrier Air Conditioning, where he fell after he climbed onto a stack of hessian sacks to ensure that the contents of a skip he was loading were distributed evenly. The worker received compensation from the VWA, which then took a recovery action under section 138 of the *Accident Compensation Act* 1985 (Vic). The County Court found against the VWA on the grounds that it was not foreseeable that the worker would use a pile of hessian bags as a platform to look into the skip. On appeal, Ashley J (with whom Chernov JA and Mandie AJA agreed) held that looking into the skip to ensure that it was evenly loaded was an inherent part of the task. It could not be done from ground level, and the host (Carrier) had not provided a ladder. The worker had not been given adequate instruction or warning, and (para 44):

> Simple though the task was, in the absence of any described system of work, provision of equipment, or warnings, there was a real risk that the worker would improvise, and in so doing expose himself to risk of injury. In the event, the worker selected a manner of doing the job which he thought would be safe. It was a way of performing the job which Carrier's safety rules prohibited. But the worker did not know that, for it followed from the evidence that he had not been apprised of those rules. The fact that the worker had in the past, in connection with other employments, been instructed, let it be supposed many times, about health and safety matters, did not relieve Carrier of its obligations. It was not absolved of such obligations by the circumstance that the worker made an assessment of risk in respect of a particular method of performing part of a job which he had been told to do. The fact that, in a sense, the worker had two employers did not relieve Carrier of the duty of care …

Key cases (continued)

As for the conduct of the labour hire agency, Ashley JA considered (paras 64 and 65) that it:

> was considerably blameworthy. So far as the evidence revealed the situation, it probably took a phone call from Carrier, and then sent the man on site; no more. There was no evidence that it – by contrast with other labour hire companies – had ever made a site assessment as would have revealed, particularly, the adequacy or otherwise of Carrier's induction process, and its safety regime. There was no evidence that it had any idea, or that it enquired, what work its employee would be put to do; or where, or with what equipment. In essence, so far as the evidence revealed the situation, it sent its employee to work at Carrier without showing any interest or concern for his safety.
>
> What then becomes significant is that steps which it should reasonably have taken, but failed to take, did bear upon the worker sustaining injury. At the very least it should reasonably have insisted that Carrier give adequate instructions to its employee about the duties he was to perform, and equipment which he should use in performing the same; and should have insisted that he be fully instructed about the details of Carrier's occupational health and safety regime before he began work. Had *[the labour hire agency]* have insisted upon such matters, there must be real prospect that the serious omissions in what Carrier conveyed to the worker would not have occurred.

Ashley JA rejected the argument that the worker had been contributorily negligent (see para 66). Ashley J determined that the host's responsibility for the incident was 65% and the agency's was 35%.

Inspector Singh v ABB Australia Pty Limited [2006] NSWIRComm 68

WorkCover New South Wales prosecuted ABB Australia Pty limited for a contravention of section 8(2) of the OHS Act 2000 (NSW) (the employer's duty to ensure that persons who are not employees are not exposed to OHS risks) and, in the alternative, section 10(1) (the duty of persons in control of premises to ensure that the premises are safe). Each charge had identical particulars. ABB argued that: (i) there was limited capacity at common law for charges to be laid in the alternative; or alternatively that there was no common law principle that provided this capacity in all criminal jurisdictions; and (ii) that there was no acceptable custom or practice in the Industrial Relations Commission of charging offences in the alternative; and (iii) that section 31 of the OHS Act precluded the charging of offences in the alternative. Section 31 provides that:

1. More than one contravention … by a person that arise out of the same factual circumstances may be charged as a single offence or as separate offences.
2. This section does not authorise contraventions of 2 or more of those provisions to be charged as a single offence.
3. A single penalty only may be imposed in respect of more than one contravention of any such provision that is charged as a single offence.

The Full Bench of the industrial Relations Commission held that there was nothing in the Act which precluded offences being charged in the alternative, and that there was no duplicity, unfairness or prejudice to ABB in allowing the matter to proceed on the basis of alternative charges. Further, both the common law and section 246 of the *Criminal Procedure Act* 1986 permitted charges being laid in the alternative.

Consortium members – profiles

The Centre facilitates and promotes groups of collaborating researchers conducting research into aspects of OHS regulation. In this issue we profile consortium members Christine Baker and Neil Foster.

Christine Baker has been lecturing law to business students at the University of Ballarat for nearly 20 years. Her main areas of interest are OHS and trade practices law although she also teaches in the areas of commercial and corporate law. She is currently enrolled in a PhD with the Department of Criminology at the University of Melbourne. Her research will use a form of grounded theory to explore how regional/rural recreational service providers experience their complex legal environment following the negligence and OHS Act reforms that occurred in 2001-2004 in Victoria. She is interested in exploring the relationship between compliance with multiple laws and the technical and social resources (including social norms) of small businesses, in the context of the broader political and economic environment in which law reforms occur.

Neil Foster has an undergraduate degree in law from the University of New South Wales and has been teaching a course in OHS law at the University of Newcastle since 1996. He also has a research Master of Laws degree from the University of Newcastle. His thesis related to the individual legal responsibility of company officers for OHS breaches committed by companies (in civil law, general criminal law such as manslaughter, and specific OHS laws.) He is continuing research on the interaction between tort law and OHS responsibilities, particularly the impact of newer models of OHS regulation on the classic workplace injury tort remedy provided by the tort of 'breach of statutory duty'. He has published on the personal liability of company officers for corporate OHS offences, breach of statutory duty and risk management in OHS law, psychiatric injury following workplace trauma or death, and OHS obligations more generally.

Further details on members of the Consortium, are at the Centre's website at http://www.ohs.anu.edu.au/consortium/index.php

Shaping the Regulatory Response to Industrial Disasters and Other Catastrophes

Industrial disasters and other catastrophic events, such as terrorist attacks, that generate public dread typically initiate a regulatory response designed to reduce the risk of such events re-occurring. One type of regulatory response is the increased use of the co-regulatory 'safety case' approach where regulators require that sites develop and undertake broad, detailed and systematic risk management as the foundation for regulatory approval. This approval, coupled with ongoing monitoring of implementation of the safety case plan, are intended to assure regulators that sites both understand the nature of the risks they are addressing and take their responsibilities seriously. Such a model is now used for major hazards and has also been invoked to reduce the risk of terrorist attack to critical infrastructure. The safety case approach is considered especially appropriate in circumstances involving complex intersecting hazards, where the probability of a particular set of circumstances arising is low, but the potential impact is high. However, such regimes are resource intensive, and may also be highly technical and 'expert intensive' as safety case relies on sufficient scientific and engineering expertise, as well as a robust process of communication and negotiation with workers and the community in order to devise a plan that is both effective and seen to be effective. As such it is important to be certain that such initiatives are warranted.

Shaping the Regulatory Response to Industrial Disasters and Catastrophes (continued)

In her working paper, *Safety, Security Politics and Fact: Shaping the Regulatory Solution*, Dr Fiona Haines explores the regulatory response to disaster and catastrophe, and discusses some conditions under which regulatory initiatives have the best chance of success. Applying an analysis based on 'regulatory character' she suggests that the success of regulatory responses is influenced both by the political context of the regulation and policy making process, as well as the norms and practices of the regulated organisations themselves, which shape their understanding of and attitude to regulation. It is therefore necessary to understand these impacts in order to work out whether regulatory solutions can be effective, or whether some other form of public, political or policy response is necessary.

This article is a précis based on Dr Haines' paper. The working paper (number 46), which is online at: http://ohs.anu.edu.au/publications/index.php should be read for a full appreciation of Dr Haines' argument and supporting references.

Regulatory character

'Regulatory character' provides a lens for exploring the gap between practice and compliance (the 'compliance-practice gap') in different regulatory arenas and in different settings. On the one hand, regulatory character is concerned with the content of a regulatory framework as well as the legislative and policy-making process which moulds regulatory content through economic, political and legitimacy concerns. On the other hand regulatory character is concerned with the development of authoritative norms and practices of a given company, organisation (or other place), because how these norms develop challenges compliance. Thus, in terms of understanding compliance in a particular setting, regulatory character explores a given regime, in that setting. There are three key questions: (1) How do various individuals relate to authoritative norms in this setting? (2) How do individuals relate to the regulatory regime, including various mechanisms for alerting management to hazards, obtaining action or redress and being heard? (3) How do authoritative norms within the setting relate to the formal regulatory regime, and are the values of the organisation in its everyday actions reflected in the regulatory framework?

Thus, regulatory character invites scrutiny of the political, cultural and economic histories of a particular setting that give rise to what gets rewarded and what is sanctioned as inappropriate or 'unhelpful'. Such norms can reflect a variety of values such as competitiveness or group achievement, deference to authority, visionary thinking, innovation and so on, which are moulded and shaped by time and place. They are expressive of values as well as being strategies for advancement. Regulatory character thus looks to the 'group' dimension of social relations, of how values of reciprocity and 'good behaviour' are framed in particular settings.

However, regulatory character also looks to the 'grid' dimension of formal laws or regulatory regimes and from the perspective regulatory character, the ideal regulatory regime is one where the 'group' dimension (the social norms and interpersonal relationships in a given setting) is consistent with the 'grid' dimension (what the regulations state should be happening in order to reduce risk), and vice versa such that risk is minimised. The purposes and goals of the regulatory regime are thus 'lived out' by the organisation in both its norms and everyday activities. Ideally, the regulatory framework ensures that the norms of the organisation are reflected in the framework developed, and further that individuals relate through the formal processes, as a living document that shapes their behaviour.

Formalisation of processes

In examining this subject, Haines draws on the work of Weber, Stinchcome and Habermas. Weber's central thesis was that values, when institutionalised in formal laws, inevitably fall prey to the problem that the spirit of the law is lost in the letter of the law. For Weber, subversion of values is inextricably bound up with the development of the law itself. The rules created (the means) gain dominance over the ends to be achieved so that the values become lost in the process of adherence to the rules.

Stinchcome, on the other hand, says this is an unnecessarily pessimistic view of formal laws or rules which, if properly devised, can and do work, and are central to the creative capacity of complex contemporary societies. He says that bad outcomes simply result from bad formalisation and that well thought out rules are able to order activity and facilitate organisational processes in a manner that secures desired goals. Stinchcome lays down three criteria for good formalisation: (1) the nature of the problem must be accurately,

Shaping the Regulatory Response to Industrial Disasters and Other Catastrophes (continued)

clearly and concisely portrayed (*cognitive adequacy*); the conceptualisation of the problem must be clearly articulated to those with a responsibility or interest to act on it (*communicability*); and the formal process must contain within it a trajectory of improvement (*a trajectory of cognitive improvement over time*). For Stinchcome, formal processes that are devised with these three elements in mind can claim authoritative worth and justify their capacity to guide behaviour. If these criteria are met, it is not inevitable that values of the system become lost in the process of adherence to the rules - those with the authority to work with particular rules can make sense of them so that the rules are used when appropriate. Rule-users can interpret rules in order to create good outcomes.

Clearly, however, this is not always the case as rules may be misused or strategically manipulated to subvert the values or outcomes for which they were created. Haines draws on Habermas to help resolve this problem of pathological formalisation. Habermas' particular interest is in the way communication develops and what gets communicated. Habermas points out that it is the strategic use of the means (law or other rules) for alternative ends which often undermines the integrity of a formal system and threatens the relationship between law and values. In this situation, communication is distorted. The prevention of this problem requires that there is a common understanding and a common purpose developed before the rules are put in place. Drawing from Habermas, what is missing in the current proliferation of instrumental law is debate about what values should underpin the law. The key to resolving this is a form of debate and conversation to create consensus about valaues. Such communication, Habermas argues, allows judgements to be made in terms of what should happen and what values should hold in what context.

Implications for regulation

There are important conclusions from all of this for regulation. First, neither legislation nor regulations have ultimate authority in and of themselves. The authority of law stems from its connection to shared values expressed by the broader society and, it could be added, the organisation charged with complying with legislation. Regulation researchers have highlighted the importance of commitment to particular values for a regulatory regime to succeed, whether a commitment to safety or corporate ethics of another kind. Further, many conflicts around regulation relate to the mistrust of one party that legislation is being used strategically by others in the pursuit of other (unshared) values. Mistrust is generated when one side views recourse to regulation as a 'strategy' in pursuit of ulterior 'ideological' or 'self interested' purposes. Thus, there must be a discussion and agreement about the legitimacy of the value to be pursued, before the formal process can be effective. Haines concludes this requires a genuine exchange to take place about the values to be pursued by a regulatory regime, and only once these values are agreed should there be debate about the appropriate means by which such values can be enshrined in regulation.

Second, regulatory character highlights the independent pressures (economic, political and so on) that shape development of a regulatory regime. Thus, the development process is not simply a matter of attempting to make regulation match organisational norms or vice versa. Regulatory character helps us understand that the 'group' (organisational norms) and 'grid' (regulatory) dimensions are influenced independently. Furthermore, if the influences on group and grid are pushing in different directions, then the gap between the 'group' and 'grid' of regulatory character is going to widen, irrespective of attempts at the regulatory or organisational level to bring them together. Unless these tensions and pressures are resolved, then individuals within an organisation are placed in positions that make it impossible to comply with both the demands of workplace norms and the requirements of the law. Overcoming these tensions requires a separate analysis of the development and nature of authority in a particular organisation and the way individuals relate to that authority (the 'group' dimension), as well as an understanding of how particular social goals develop in law as a product of political debate and catalytic events (the 'grid' dimension).

In terms of the grid dimension, the type of event that drives reform can be central to the outcome. In particular, in cases of events that evoke fear or dread (disasters and catastrophes), people cease to take account of the (low) probability of a given impact occurring. This can lead to accountability measures such as the proclamation of more law 'just in case' a further problem might arise. However, this can oversimplify the underlying complexity of the choices being made and the consequences of this are not necessarily positive, even in safety terms. Regulation may bring about benefits by reducing the likelihood of one type of risk but at the same time may increase the likelihood that another will occur. For an informed decision to be made the

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complexity needs to be unravelled and the choices made explicit, not hidden behind an exclusive emphasis on the particular harm in question.

However, this is not easy either. Scientific evidence provides a basis for identifying risk factors and measuring their impacts, and for clarifying the benefits and costs of a particular regulation. Thus, it can provide a mechanism for reflecting rather than simply reacting, and can help to inform policy-making. However, the approach to gathering and analysing such information can be more or less rigorous and, even if perfectly adequate, it can be difficult in practice to neatly separate the science underpinning regulation from political demands, particularly when spurred on by public fears. Regulation may end up aimed more at placating particular audiences, rather than genuinely reducing risk.

Moreover, as discussed, equal consideration also needs to be made of the 'group' dimension of regulatory character, of how authoritative norms develop within organisations and in industries more broadly. These norms are the basis upon which individual members of an organisation will chart their success and advancement or simple survival. The way individuals relate to the norms and the regulatory regime, critically affect how risk will, or will not, be minimised in a particular setting. Norms change over time, as definitions of success shift from one set of values (for example engineering excellence) to another (productivity or 'value for money'). Furthermore, the interaction between the structure of an industry, the culture of its member organisations and the nature of competition in an industry can shape the norms expressed by individual organisations. Thus, over-simplistic ideas that diverse industries, or the same industry over time, will reflect similar or even identical guiding norms are unhelpful.

In summary, there is a need, through the concept of 'regulatory character', to take account of both the processes of regulatory development, and the development of industry norms and problems of compliance at the site level. Regulatory initiatives have the best chance of success where they capture the nature of the problem comprehensively, communicate it well and generate continuous improvement in risk reduction measures. However, political response to catastrophic events may trigger reactive regulation and policy making which, combined with a lack of trust, a lack of strategic approach to the content of the regulatory framework, and a lack of understanding of the norms moulding everyday practices in organisations, all detract from regulatory decisions. Thus, for regulators the issue should not only be the gap between regulation and practice, but the wider issue of the broader societal influences that shape both 'group' (organisational norms) and 'grid' (the regulatory regime). This task is considerable, but the increasingly complex requirements for regulatory compliance by organisations faced with multiple and occasionally competing regimes, means that addressing the problem of compliance *with what*, *for what purpose* and *for what cost (and to whom)* need continual attention. While in some cases a regulatory solution, such as safety case, is entirely appropriate in other cases, alternative action such as public discussion and debate, prohibition of particular services or products or some other action might be more appropriate.

The working paper

Readers are reminded that this article is a précis based on Dr Haines' paper and that the working paper (number 46), should be read for a full appreciation of Dr Haines' argument and details of supporting references. The paper is online at: http://ohs.anu.edu.au/publications/index.php