News from the Centre

This is the nineteenth 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 of the Newsletter draws on Centre working paper number 52, titled *Organisational Restructuring/Downsizing, OHS Regulation, and Worker Health and Wellbeing*, by OHS Regulation Research Consortium member Professor Michael Quinlan of the University of New South Wales. The article and working paper discuss the adverse effects on worker health, safety and well-being of downsizing and related forms of organisational restructuring. These OHS consequences are considered in the context of Australian OHS legislation which imposes obligations on employers to ensure OHS, including minimising adverse OHS impacts arising from changes at the workplace. The article and working paper also discuss the responses of OHS regulators, employers and unions to the OHS aspects of restructuring and downsizing.

Another new working paper is *The Problem of Defining High Reliability Organisations* by Centre Professor Andrew Hopkins. This working paper examines research about high reliability organisations (HROs), asking how they can be identified, what are the criteria by which we can decide whether an organisation is a high reliability one and how do HROs differ from non-HROs? The working paper is number 51 and is online at: [http://ohs.anu.edu.au/publications/index.php](http://ohs.anu.edu.au/publications/index.php)

OHS regulation research colloquium

Of particular importance in the Centre’s work is its support for a National OHS Regulatory Research Consortium. The aim of the Consortium is 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-informed and policy focused research into OHS regulation. Current OHS regulation research was presented at the Centre’s annual colloquium held in February 2007, including 20 presentations from regulation researchers and five from OHS regulators in Queensland, New South Wales and Victoria. The Colloquium was also attended by representatives of the Office of the Australian Safety and Compensation Council, SafeWork SA, ACT WorkCover, the ACT Office of Industrial Relations, and the Resources and Energy group of Department of Industry, Tourism and Resources.


**News from the Centre**


Topics addressed in presentations available online include:

- The nexus of science, politics and public pressure in regulatory reform
- The administration and enforcement of enforceable undertakings in Queensland
- Victorian WorkSafe’s approaches to building capacity and motivation for addressing OHS
- NSW WorkCover initiatives to identify a set of key drivers for compliance and the Target-safe program applying these in small businesses
- Building capacity for safe design
- Personal civil liability of company officers for workplace death and injury
- Returning injured workers to work
- Overcoming mistrust to enhance safety in mining
- The NSW mine safety review
- A comparison of the US Sago and Queensland Moura mine disasters
- Fatigue and stimulant drug use by long distance truck drivers
- Risk and protective factors for occupational light vehicle use
- Fatigue and injury among light/short haul transport drivers
- The implementation of OHS process standards in Australia
- A systems approach to workplace stress
- Nuclear safety – experience from power plants
- Worker participation in OHS in theory, policy and practice
- Proposed changes to the NSW OHS Act
- Casual and permanent hotel workers and their knowledge of OHS regulations in Ireland and Australia
- The Future Inquiry technique for participation in decision making

**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/](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](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/](http://regnet.anu.edu.au/)

**Developments in regulation**

**Europe** – The European Parliament adopted the draft reform of EU legislation on trade in chemicals, the REACH regulations, in December 2006. The regulation is expected to be applied in mid-2007 in EU Member States. More information is online at: [http://www.europarl.europa.eu/](http://www.europarl.europa.eu/)
UK - The *Construction (Design and Management) Regulations 2007* (CDM 2007) are in force from 6 April 2007 and a new approved code of practice provides practical guidance on complying with the duties set out in the regulations. Information about the revised regulations and code is online at [http://www.hse.gov.uk](http://www.hse.gov.uk).

Also in the UK – the *Corporate Manslaughter and Homicide Bill 2006* has passed through all stages of the House of Commons and is going through the House of Lords. Matters addressed in the Bill include a senior management test, exclusion of unincorporated bodies, requirement for a breach of the civil law duty of care (rather than a statutory duty of care), exemption of public bodies and sentencing powers. The Bill and a discussion of it are online at: [http://www.corporateaccountability.org/manslaughter/reformprops/main.htm](http://www.corporateaccountability.org/manslaughter/reformprops/main.htm).

Australia - The former *Occupational Health and Safety (Commonwealth Employment) Act 1991* has been renamed the *Occupational Health and Safety Act 1991* to reflect its expanded application to private sector organisations that hold a license to self-insure under the *Safety, Rehabilitation and Compensation Act 1988*. State and territory OHS legislation no longer applies to organisations covered by the Commonwealth OHS Act unless prescribed in regulations made under that Act. Amendments to the Act, which received Royal Assent in October 2006, commenced in March. A key change to the OHS Act 1991 is to section 16 which has been amended to require employees to develop Health and Safety Management Arrangements (HSMAs) in consultation with their employees. HSMAs will replace the current requirement to develop an OHS policy and agreement. They may include but are not limited to: a written OHS policy; risk management arrangements; the making of agreements between the employer, employees and their employee representatives about continuing consultation on OHS or other matters as agreed; and OHS training.


Stop press: in a recent appeal the High Court rejected a constitutional challenge to Comcare licensing employers under the Commonwealth *Safety, Rehabilitation and Compensation Act*. The case arose out of a challenge by the state of Victoria to the licensing of Optus, initially heard in the Federal Court and appealed to the High Court. The case is *Attorney-General (Vic) v Andrews [2007] HCA 9*, 21 March 2007.

The Commonwealth regulations have also been retitled. They are now the *Occupational Health and Safety (Safety Arrangements) Regulations 1991* and the *Occupational Health and Safety (Safety Standards) Regulations 1994* respectively. In other changes employees now have the right to participate directly in OHS consultative arrangements, as well as nominating and selecting health and safety representatives (HSRs), varying designated work groups (DWGs), setting up OHS committees (HSCs) and requesting investigations. They can also choose to be represented (anonymously) in these processes rather than participating directly. Other changes to regulations include: requirements for election of health and safety representatives; giving effect to the national standard for the control of major hazard facilities; outlining specific duties relating to the use of electricity; regulating storage and handling of dangerous goods; aiming to control fatigue among drivers of heavy vehicles; and giving partial legislative effect to the *National Standard for Construction Work*, and requiring fall protection for work at heights of two metres and above.


Australia – The Productivity Commission report, *Performance Benchmarking of Australian Business Regulation*, recommends a program to benchmark the quantity and quality of regulation, and compliance costs for key regulatory areas. The report suggests, in the first year of the benchmarking program, focusing on a single area of regulation with progressively more regulation to be benchmarked in subsequent years. The suggested priorities for inclusion in the review, based on “the likely significance of compliance burdens and other criteria” are: OHS, land development assessments, environmental approvals, stamp duty and payroll tax, business registration, financial services regulation and food safety. Data would be drawn from published sources and governments, as well as face-to-face surveys of targeted “reference businesses with appropriate attributes”. The report is online at: [http://www.pc.gov.au/](http://www.pc.gov.au/).
Developments in regulation (continued)

**Australia** - As part of the Australian Government's regulatory reform agenda the Office of Regulation Review, which is part of the Productivity Commission, has had its role and responsibilities changed and has become the Office of Best Practice Regulation. A draft *Best Practice Regulation Handbook* sets out the requirements of the Government's New Regulatory Framework. This covers the rationale for regulatory assessment processes, best practice regulation requirements, regulatory impact statements (RIS) and criteria for adequacy, preparation of RISs, reasons for government intervention (market failure and otherwise), forms of regulation, cost benefit analysis, risk analysis and a business cost calculator. The handbook is online at: [http://www.pc.gov.au/](http://www.pc.gov.au/)

**Australia** – the Heads of Australian and New Zealand Workplace Safety Authorities (HWSA) have agreed on three new campaigns to be pursued. These are prevention of falls in construction; manual handling and slips/trips/falls in hospitals; and guarded machinery in manufacturing. These are in addition to three ongoing campaigns on large mobile plant in civil construction, manual handling in manufacturing and labour hire in the food industry. A news release is online at: [http://www.safework.sa.gov.au](http://www.safework.sa.gov.au)

**Australia** – The post implementation report *Agricultural Plant Designer, Manufacturer, Supplier and Importer Program* presents the outcomes of a national program by OHS regulators in the six Australian states, focusing on tractors, tractor attachments, grain augers and attachments for All Terrain Vehicles (ATVs). The campaign conducted more than 50 information sessions nationally for designers, manufacturers, importers and suppliers of these items, followed by 672 worksite visits to collect data on plant risk assessment, to educate suppliers of legal obligations and to determine plant safety compliance. The report makes recommendations in relation to risk assessment and control, product safety information, guarding, maintenance records and safety signage; further work by OHS regulators to address grain auger safety and tractor attachment safety; and the development of a model for regulators to work in partnership with manufacturers and peak industry organisations to identify practical solutions to agricultural plant risks. The report is online at: [http://www.worksafe.wa.gov.au/newsite/worksafe/content/topics/plant_machinery/pltmrprt0001.html](http://www.worksafe.wa.gov.au/newsite/worksafe/content/topics/plant_machinery/pltmrprt0001.html)

**Australia** – The National Transport Commission (NTC) has released for public comment a suite of six draft national rail safety guidelines. The guidelines include: National Guideline for Accreditation; National Guideline for Establishing a Rail Safety Management System; National Guideline on the Meaning of So Far As Is Reasonably Practicable (SFAIRP); National Compliance and Enforcement Policy for Rail Safety; National Business Rules for Uniform Administration of Accreditation; and National Guideline for Fatigue Management for Rail Safety Workers. The guidelines are administrative documents intended to provide practical advice to rail safety regulators, rail transport operators and other parties to whom legislative duties apply. They state how rail safety regulators will behave when undertaking their functions to ensure their processes are transparent to duty holders, provide nationally consistent and/or integrated processes by which rail safety regulators will make decisions, assist duty holders with the interpretation of legislative provisions and provide practical guidance for satisfying these requirements. The draft guidelines are online at: [http://www.ntc.gov.au/Default.aspx?page=A02209228301080020](http://www.ntc.gov.au/Default.aspx?page=A02209228301080020)

**Australia** – In February, Transport Ministers approved new measures to address driver fatigue, including safer working practices and stronger powers to prosecute companies who push heavy vehicle drivers to work illegal schedules. Operators who work long hours and night shifts will be required to reduce driver fatigue risks through an audited accreditation scheme which means planning trips and rest breaks and checking records, as well as providing training and education. Everyone in the supply chain will be required to take reasonable steps to prevent driver fatigue. Penalties will escalate for offences which pose a serious road safety risk, including court-imposed fines of up to $50,000 and demerit points. Customers will be held accountable for dangerous work schedules and long truck queues, which are major causes of fatigue. The proposed Council of Australian Governments (COAG) deadline for implementing the reforms is February 2008. More information is online at: [http://www.ntc.gov.au](http://www.ntc.gov.au)

**Australia** – The National Industrial Notification and Assessment Scheme (NICNAS) has imposed an interim ban on import and manufacture of the flame retardant Pentabromodiphenyl ether (PentaBDE), a flame retardant used in furnishings and electronics. An assessment report and information about the ban is online at: [http://www.nicnas.gov.au](http://www.nicnas.gov.au)
NICNAS has also reported on the use of nanomaterials in Australia, based on a call for information in 2006. The report indicates the chemical name, use and volume of usage of nanomaterials used in Australia. Uses include: some surface coatings, printing, water treatment, cosmetics and domestic products. An information sheet is online at: http://www.nicnas.gov.au

Also in Australia – the Heads of Workers’ Compensation Authorities (HWCA) is undertaking a number of harmonisation initiatives. With regard to OHS prevention, HWCA’s National Self Insurance Working Group (NSIWG) is developing a standard OHS audit tool for use in organisations which operate in more than one state/territory jurisdiction. HWCA has also agreed to develop a nationally consistent framework for the accreditation of rehabilitation providers which, among other matters, will address standards and conditions of accreditation, a service model with measurable indicators and minimum qualifications for providers. A communiqué outlining these and other initiatives is online at: http://www.hwca.org.au/

New South Wales – WorkCover has established a $5 million safety rebate program for small businesses. Firms are eligible for a rebate of up to $500 if they install safety equipment, make safety modifications to their workplaces, attend a WorkCover safety workshop or develop and implement an action plan adopting a solution to an identified safety problem. Other initiatives are: additional WorkCover business advisory officers to present workshops and provide one-on-one advice to firms; a confirmation of advice system so businesses will receive specific written advice from inspectors on how to improve OHS in their workplace; an expansion of WorkCover’s program of industry mentoring of small businesses; and working with industry to develop practical solutions to safety issues previously considered to be in the ‘too hard basket’. More information on the Small Business Safety Program is online at: http://www.workcover.nsw.gov.au

Queensland – Workplace Health and Safety has issued a new edition of the Forestry Harvesting Code of Practice which replaces the 2000 edition. The code addresses OHS in various harvesting operations as well as plant safety, manual tasks, chemicals, fatigue, and information and training in forestry. The code is online at: http://www.dir.qld.gov.au

Also in Queensland – The report of the Industrial Relations Commission Inquiry Into the Impact of Work Choices on Queensland Workplaces, Employees and Employers found that employees have become extremely apprehensive about job security with the result that many are refraining from raising normal industrial relations issues such as OHS issues, with the impact being most felt by less skilled and vulnerable workers. The Inquiry recommended the establishment of a separate statutory body to monitor the impact of Work Choices, and to assist employees and employers in understanding their industrial relations rights and obligations. Amongst a range of proposed functions this body would regularly monitor health and safety considerations in the workplace, and the impact of any changes since the commencement of Work Choices and other related regimes on the health and safety of workers. The Inquiry’s report is online at: http://www.qirc.qld.gov.au

Tasmania – The report Safety From Injury and Risks to Health, the interim report of the review of the Workplace Health and Safety Act was released for public comment until May 26, 2007. The report highlights concerns that there is a predominant focus on safety and traditional physical hazards, with less attention to occupational health, and that the risk management methodology is not easily applicable in all workplaces or to all contemporary hazards. A low level of awareness of OHS legislation is also perceived. The report recommends the need to clarify and strengthen OHS legislation, increased efforts at awareness raising, work more effectively in partnership with industry, emphasise good management involving workers to achieve OHS outcomes and avoid the proliferation of statutory material. It recommends the establishment of a workplace health and safety council to enable Workplace Standards, as the OHS regulator, to actively engage with industry in a strategic partnership. It also recommends the creation of an impartial disputes or workplace conflict resolution function within the Tasmanian Industrial Commission to ‘de-fuse’ and assist in resolving situations which may otherwise give rise to stress, and has initiated a 6 month trial of right of entry for third parties to workplaces. It suggests changing the statutory functions of inspectors to enable them to take on a greater role in providing direct advice and information to workplaces, and suggests careful consideration of the level of penalties with further work to be done to determine criteria for benchmarking penalties. The report is online at: http://www.justice.tas.gov.au

Developments in regulation (continued)
Developments in regulation (continued)

Victoria - 13 existing OHS regulations are being reviewed and consolidated into a single regulation. The draft regulation was released for public comment from 20 January to 28 February 2007. The draft regulation requires identification and control of risks. The intention is to emphasise risk control rather than assessment with the latter only mandated for some high risk situations. The regulation also aligns Victorian requirements with various national standards including adoption of the national standard for licensing high-risk work and the national standard for construction work. The draft regulation is online at: http://www.worksafe.vic.gov.au/wps/wcm/connect/WorkSafe/SiteTools/About+WorkSafe/Public+Comment/D_Public+Comment

Key research and reports

Constitutional matters

S Evans et al, ‘The Work Choices case: analysis and implications’ in S Evans et al (eds) Work Choices: the High Court Challenge 2006, Law Book Company, Sydney, 2007, pp 1-78. On 14 November 2006, the High Court handed down its decision in New South Wales v Commonwealth (2006) 156 IR 1; 81 ALJR 34; [2006] HCA 52 (Work Choices case). The decision was eagerly anticipated, both for its potential to affect federal government policy on industrial relations, and for its bearing on constitutional law. This commentary explains the substance of the decision and explores its implications, with frequent reference to paragraphs (eg [142]) of the judgment which is reproduced in its entirety later in this work. Part 1 of the commentary summarises the facts of the case, the issues that arose for decision and the reasoning that led the majority and the two dissenting judges to their conclusions. Part 2 explores the constitutional dimensions of the decision, including its importance for establishing the reach of Commonwealth powers and for federalism in Australia, its approach to constitutional interpretation, and its engagement with principles of the rule of law. Part 3 examines the impact of the decision on industrial relations and labour law in Australia, particularly the uncertain reach of the new legislation, how it bears on practical workplace issues such as rights of entry, and what the Work Choices decision means for the future of labour regulation in Australia. The working paper version of this chapter is online at: http://ssrn.com/abstract=969258

Standards development

C Parker, ‘Meta-regulation: legal accountability for corporate social responsibility’ chapter 8 in D McBarnet, A Voiculescu and T Campbell (eds) The new corporate accountability: corporate social responsibility and the law, Cambridge University Press, 2007. Traditional legal regulation of business is primarily concerned with accountability, that is “holding people to threshold criteria of good conduct and performance”. In contrast, responsibility goes beyond accountability to ask how much people “care about their duties” and is concerned with ideals as well as obligations, values as well as rules. Recently, law and regulatory enforcement action used to encourage and enforce corporate economic, social and environmental responsibility, are requiring companies to implement governance measures which build values that transcend narrow self-interest into the practice and structure of the enterprise – the self-regulation of responsibility. This paper sets out and examines the character of meta-regulating innovations in the use of law, and asks whether they can meet their aspirations to make companies accountable for responsibility, by teaching businesses to become responsible for themselves (to ethically self-regulate within the framework of the law). Concern is expressed that meta-regulating law faces the danger of lacking substance, and that legal regulation that seeks to encourage corporate responsibility often does little more than requiring businesses to put in place window-dressing that makes business appear more legitimate while avoiding fundamental social change to improve responsibility. The chapter is online at: http://ssrn.com/abstract=942157

Enforcement

Key research and reports (continued)

M Wright et al, Evaluation of EPS and enforcement action, Health and Safety Executive Research Report RR 519, HMSO, Norwich, 2006. This report discusses research commissioned by the UK Health and Safety Executive (HSE) to evaluate enforcement and its effectiveness following the revised Enforcement Policy Statement (EPS), and to explore the mechanisms by which enforcement works. The research was based on a postal questionnaire with duty holders (only 13% response) and inspectors (high response rate). A second phase included a literature review, discussions with a small sample of duty holders and victims’ representatives, and focus groups with employees. Matters discussed in the report include acceptance of enforcement principles, taking account of duty holder history, notification of senior officers, informing workers and victims, disqualification of directors, publicity, targeting, and matters for review in the enforcement principles and enforcement model.

B Anders, ‘The inspector's dilemma under regulated self-regulation’ (2006) Policy and Practice in Health and Safety 4(2) pp 3-23. This article argues that regulated self-regulation (RSR) of the OHS field, together with the expansion of the work environment concept to include work organisation and psychosocial health, require that inspection authorities re-evaluate their old methods of inspection and develop new ones. The author suggests there is a need for a shift from the traditional choice between ‘command and control’ on the one hand, and advice and persuasion on the other, to negotiation, guiding and tutoring. This in turn demands further development of professional competence and a higher degree of discretion for individual inspectors, to apply the right tactics adjusted to local conditions.

D Weil, Crafting a progressive workplace regulatory policy: why enforcement matters, Boston University School of Management, Boston, 2007. Writing from a US perspective, this essay discusses the potential for workplace regulatory policy objectives (including OHS, hours of work, child employment and other matters) to be progressed through enhancements to enforcement and institutional arrangements, rather than purely focusing on legislative reforms. The essay is online at: http://ssrn.com/abstract=960987.

R Glickman and D Earnhart, ‘Depiction of the regulator-regulated entity relationship in the chemical industry: deterrence-based v cooperative enforcement’ (2007) William and Mary Environmental Law and Policy Review 31 (3). This article reports research examining the compliance outcomes of coercive (or deterrence-based) and cooperative approaches to enforcement. The study is based on a survey of chemical manufacturing facilities regulated under the US federal Clean Water Act. The study finds that firms’ relationships with regulators are multifaceted such that some aspects of their relationships are more consistent with coercion, while other aspects are more consistent with cooperation. The results suggest the need to recognise the nuanced nature of firms’ relationships with regulators, and identify some components of the regulator-regulated entity. The article is online at: http://ssrn.com/abstract=952778.

K Bamberger, ‘Regulation as delegation: private firms, decision making, and accountability in the administrative state’ (2006) Duke Law Journal 56(2), p 377. This article argues that the dominant paradigm of administrative enforcement, monitoring and threats of punishment, is ill-suited to oversee regulation requiring the identification and reduction of risk, which accords regulated parties wide discretion in deciding how to interpret and achieve risk reduction. Drawing from the literature on judgment and decision making in organisations, the author suggests that the structure of profit-making firms may systemically blind decision makers to the types of risk that regulation is intended to address, and lead to unaccountable regulatory decisions. Thus, the author suggests, regulators might learn from recent research on organisational learning that examines how decision making in firms can be structured more effectively so as to incorporate additional accountability tools through regulatory design, third-party relationships, and relations between administrative agencies and those they regulate. The article is online at: http://ssrn.com/abstract=947632.

Safe design

(2007) Safety Science 45. This special issue of the journal is concerned with safe design. A series of articles explore a range of topics including: the case for design as an important contributor to operational safety; the way in which designers tackle the process of design; how design changes through conception, installation and use stages, and how this introduces activities which are unsafe; accounts of organisations’ attempts to address safety early in design; and the regulatory framework for design.
Key research and reports (continued)

OHS management


‘Right to know’ and risk communication

E Fauchart ‘Moral hazard and the role of users in learning from accidents’ (2006) Journal of Contingencies and Crisis Management 14(2), pp 97-106. While most technological accidents studied in the literature consist of a single event occurring in a single location (Challenger, Chernobyl, Bhopal, etc.), a significant number of accidents comprise a series of incidents taking place in multiple and unconnected locations, as a given technology is used by multiple decentralised users. In this paper, the authors argue that such a structural characteristic raises specific problems and issues in terms of learning from accidents. Information asymmetries arise between the users and the manufacturer in favour of the manufacturer and induce the risk of moral hazard. Thus, for users to monitor manufacturers’ behaviour with a view to learning from accidents, it is necessary to ensure communication among users of risky technologies. However, since communication among decentralised users is unlikely to arise spontaneously in most cases, the authors argue there is a need for public intervention in the form of publicly sponsored user groups. The article is online at: http://ssrn.com/abstract=904426

Health and safety representation

A Hall et al, ‘Making the difference. Knowledge activism and worker representation in joint OHS committees’ (2006) Relations Industrielles 61(3), pp 408-434. This article discusses research based on interviews with health and safety representatives in Canadian vehicle component and vehicle manufacturing firms. The study identified two broad forms of OHS representation: technical-legal representation which relies on rules and procedures to identify and correct hazards; and politically-active representation which challenges claims and constraints imposed by management. Within the latter group a more effective sub-group is identified whose activities involve the strategic collection, use and deployment of knowledge through self-training and accessing wide-ranging sources of information, in order to legitimate and act on workers’ knowledge of unsafe and unhealthy conditions. This group were more effective in presenting solutions and implementing change.

Risk management

R Cummings, N Healey and D Greaves, A review of consistency of references to risk management frameworks in HSE guidance, HSL/2007/13, Health and Safety Laboratory, Buxton, UK, 2007. This report presents the findings of a review of Health and Safety Executive (HSE) guidance on risk management. The review finds limited consistency in the information across HSE guidance, including differences in terminology. The report is online at: http://www.hse.gov.uk

Occupational injury and ill-health experience

European Foundation for the Improvement of Living and Working Conditions, Fourth European Working Conditions Surveys (2005), European Foundation for the Improvement of Living and Working Conditions, Dublin, 2007. The Foundation has published the full version of its fourth survey which reports the views of around 30,000 workers in 31 European countries on a wide range of issues that include work organisation, working time, equal opportunities, training, health and safety, and job satisfaction. The survey was conducted in 2005 and is based on face-to-face interviews with workers. The report is online at: http://www.eurofound.eu.int/ewco/surveys/EWCS2005/index.htm

Hazardous substances

C Hey, K Jacob and A Volkery, Better regulation by new governance hybrids? Governance models and the reform of European chemicals policy, Environmental Policy Research Centre, Berlin, 2006. This paper discusses the transition from legislation to other forms of governance in the context of the European Union’s REACH regime for chemicals regulation. The paper assesses the effects and the interplay of the combination of different modes of governance, with particular emphasis on how far the representation of interests may change with the new modes of governance. The paper is online at: http://ssrn.com/abstract=926980
Key research and reports (continued)

A Pettersson-Strömbäck et al, ‘When and why do experts perform exposure measurements? An exploratory study of safety engineers, work environment inspectors, and occupational hygienists’ (2006) *Journal of Occupational and Environmental Hygiene* 3, pp 713-717. This article reports on a study examining the triggers and criteria for measuring occupational chemical exposure. The study found that the triggers were respectively: for safety engineers, a request from an employer; for inspectors, legal demands; and for occupational hygienists, symptoms reported amongst workers. All groups reported that they key criterion for deciding to monitor was ‘expecting sufficiently high levels’. The authors suggest these findings indicate the assessment of chemical exposure may be biased.

Nanotechnology

R Wilson, *Nanotechnology: the challenge of regulating known unknowns*, Washington and Lee Public Legal Studies Research Paper Series, Washington and Lee University, 2007. This paper discusses the emerging knowledge base about the hazards of nano-sized particles (NSPs) and examines the inadequacies of current regulatory frameworks to respond to these risks. The paper suggests there is a significant role for the private insurance market but that regulators should support this in tangible ways. The paper is online at: [http://ssrn.com/abstract=959616](http://ssrn.com/abstract=959616)

K Abbott, G Marchant and D Sylvester, ‘A framework convention for nanotechnology?’ (2006) *Environmental Law Reporter* 36. This article argues that any solution to the regulation of nanotechnology must have four basic characteristics: the solution must be flexible, innovative, international, and official. They advocate a framework convention on nanotechnology as a regulatory tool and use a series of case studies to reveal framework convention best practices. The article is online at: [http://ssrn.com/abstract=946777](http://ssrn.com/abstract=946777)

**Occupational stress**

(2006) *Safety Science* 32(6). This special issue of the journal focuses on work-related stress risks and countermeasures. A series of articles discuss: new systems of work organisation and workers’ health; a systematic review of research which indicates an excess risk of coronary heart disease associated with work stress; the relationship between job strain, low decision latitude, low social support, high psychological demands, effort-reward imbalance and high job insecurity, and common mental health disorders; the effects of working hours on health; and job stress interventions and the organisation of work.


**Shiftwork**

R Bird and N Mirtorabi, ‘Shiftwork and the law’ (2007) *Berkeley Journal of Employment and Labor Law*, forthcoming. This article discusses the risks of shiftwork and examines the legal aspects of employing workers in evening and overnight shifts in the United States. It examines *Americans with Disabilities Act* claims, constructive discharge cases, and other actions that are relevant to shiftwork plaintiffs. Specific strategies are presented for shiftwork plaintiffs to maximise the likelihood of a successful legal action.
Key research and reports (continued)

Work life balance

F Jones, R Burke and M Westman (eds), *Work-life balance: a psychological perspective*, Psychology Press, Taylor and Francis Group, Hove and New York, 2006. This book presents an overview of recent research on work-life balance with an emphasis on the psychological interface. It covers social and legal issues, theoretical underpinnings of work-life research, measures used to assess work-life (im)balance, positive effects of work-life interaction, practices to improve work-life balance (including the need for these to extend across workforces, not only catering for mothers of young children), and organisational best practices.

Precarious employment

A Louie et al, ‘Empirical study of employment arrangements and precariousness in Australia’ 61(3), pp 465-486. Based on a cross-sectional population-based survey of 1,101 working Australians, this article proposes a method of defining current employment characteristics and identifies eight employment categories. The authors suggest these categories may provide a guide for government agencies, policy makers and researchers in OHS as well as other labour and industrial relations areas.

Workers’ compensation

R Klein and G Krohm, ‘Alternative funding mechanisms for workers’ compensation: an international comparison’ (2006) *International Social Security Review*, 59 (4), pp 3-28. This article examines different approaches to funding workers’ compensation systems in terms of the sources of funds, the mechanisms used and the allocation of system costs among employers and others. These different funding approaches can have significant implications for system performance, including employers’ incentives to promote OHS. Thus, of interest are the underpinning rationales for different funding arrangements, and their administrative and behavioural consequences. The article is online at: [http://ssrn.com/abstract=934598](http://ssrn.com/abstract=934598)

Evaluation of preventive interventions

P Nilsen, ‘The how and why of community-based injury prevention. A conceptual and evaluation model’ (2007) *Safety Science* 45, pp 501-521. This article discusses a model for evaluating community-based injury prevention programs. The approach has the objective of both establishing whether a program works as well as how and why it works. It offers a structure and indicators for evaluating programs, which use both quantitative and qualitative data.

Mining safety regulation


Other developments

Incident investigation – the Health and Safety Executive (HSE) has issued general guidance on how it selects incidents for investigation under breaches of section 3 (the general duties) of the *Health and Safety at Work Act* 1974. The guidance is online at: [http://www.hse.gov.uk](http://www.hse.gov.uk)

Musculoskeletal guidelines – The OHS Council of Ontario, Canada, has issued a guideline and resource manual on musculoskeletal disorders (MSDs). The guideline describes a recommended framework for MSD prevention, while the resource manual contains information on implementing the process described in the guideline, understanding and recognising MSD hazards, risk assessment, and hazard controls. These resources are online at: [http://www.iwh.on.ca/products/msd_guideline.php](http://www.iwh.on.ca/products/msd_guideline.php)
Other developments (continued)

Nanotechnology – The National Institute for Occupational Safety and Health (NIOSH) has released a new progress report, Progress Toward Safe Nanotechnology in the Workplace. This new report details the advancements made by NIOSH, through its internal, multidisciplinary Nanotechnology Research Center, in advancing the scientific knowledge in understanding the OHS implications of engineered nanoparticles. The report is online at: http://www.cdc.gov/niosh/docs/2007-123/ and further information about NIOSH nanotechnology research is online at: http://www.cdc.gov/niosh/topics/nanotech/

Key cases

Telstra Corporation Limited and Comcare Australia Pty Ltd [2007] AIRC 136 (23 February 2007)

An employee of an air-conditioning contractor was injured on an unguarded machine at a Telstra network facility. The contractor had been engaged by a joint venture, which in turn had been engaged by Telstra under a Facilities Management and Telepower Services Agreement. Comcare issued an improvement notice against Telstra. The notice alleged that Telstra had contravened the employer’s general duty under section 16(1) of the Occupational Health and Safety (Commonwealth Employment) Act 1991 “by failing to take all reasonably practicable steps in accordance with section 16(2) to maintain a working environment (including plant and systems of work) for contractors that is safe and without risk to their health”. Telstra appealed against the notice on the basis that under section 14 of the Occupational Health and Safety (Commonwealth Employment) Act 1991, a joint venture operation it had engaged “controlled” the maintenance and operation of the site. Section 14 provides that:

1. Despite anything in this Act, if a workplace is controlled by a contractor for construction or maintenance purposes:
   (a) this Act, other than section 20, does not apply to that workplace while it is so controlled; and
   (b) this Act, other than section 20, does not apply to work performed by contractors at that workplace while it is so controlled; and
   (c) this Act, other than Parts 1 and 2 and section 82, applies to work performed by employees at that workplace while it is so controlled:
      (i) only if the regulations so provide; and
      (ii) subject to such modifications and adaptation (if any) as are set out in the regulations.

2. For the purposes of subsection (1), a workplace is not taken not to be controlled by a contractor simply because of the presence at the workplace of a Commonwealth employee if that employee has no right to direct the work of the persons working for the contractor.

Lawler VP said that the central issue in this case was the degree of control signified by the word “controlled” under s14(1) of the Act - if the joint venture “controlled” the site for maintenance purposes, Telstra's appeal must succeed. At paras [18]-[19] he said that:

[18] On the evidence there can be no doubt that:
   (a) the joint venturers had some measure of control over the Lidcombe facility at the relevant time; and
   (b) if the joint venturers controlled the Lidcombe facility within the meaning of s.14(1), then they controlled that facility for “maintenance purposes”.

International news

National Institute for Working Life – The world-renowned Swedish National Institute for Working Life is to be closed down from July 2007, as a result of a decision in the Swedish Parliament, the Riksdag, in December 2006. The Institute has for many years been a centre of knowledge development and dissemination covering the whole field of working life, including the labour market, work organisation and work environment. Its ground breaking research has been widely used internationally. More information about the Institute and international reactions to its closing is online at: http://www.arbetslivsinstitutet.se/en/
Key cases (continued)

[19] The real issue is the degree of control signified by the word “controlled” in s.14(1). In particular, the issue is whether that term refers to ultimate control, exclusive control or merely to some measure of control over the workplace, whether shared with, or subject to, another or not.

Lawler VP concluded that:

[33] Adopting a purposive approach to the construction of s.14(1), it seems to me that, read in the context of the OHS(CE) Act as a whole, the expression “controlled” in s.14(1) is concerned with ultimate control in the sense of “directing action” or “command” and does not refer to control that is shared with the Commonwealth or a Commonwealth Authority unless it also carries with it the ultimate right to control in the sense of “directing action” or “command.

He held that the contract between Telstra and the joint venturers gave Telstra the right to issue “orders” to perform certain tasks. Consequently, it had ultimate control over the work to be performed at the site. He further decided that the only instance where a contractor would have control of a site under the Act was if Commonwealth employees did not have the right to direct employees of the contractor. The proper guarding of the machine in this instance was a matter over which Telstra had “control”, and therefore, the improvement notice was properly issued.

Roche v Malavoca Pty Ltd [2007] WASC 1

A bulldozer operator instructed a scraper operator to reverse the scraper, which ran over the bulldozer operator, causing his death. WorkSafe WA prosecuted the company in charge of the project for contravening section 19 of the Occupational Safety and Health Act 1984 (WA), for failing to provide a working environment which, so far as was practicable, did not expose employees to hazards. WorkSafe argued that the employer could have adopted a range of practicable measures to minimise the risk of contact between the employee and mobile plant including exclusion zones that prohibited workers from being within a certain distance of operating mobile plant, radio communication between workers on the ground and operating the plant, and reversing alarms on all mobile plant. A magistrate dismissed the charge, and accepted that the bulldozer operator’s actions could not have been foreseen by the defendant as they were “inexplicable” and “against all common sense and logic”.

On appeal, Simmonds J in the Western Australian Supreme Court noted that the employer had recognised the risk because the scraper had a reversing alarm (which did not work on the day of the incident) and the employer’s OHS procedures adverted to the need to be aware of reversing plant. He observed that the court needed to take a “balancing approach” to assess the severity of any potential injury or harm and the degree of risk of it occurring, the effectiveness or suitability of the measures to address such a risk, and the practicality of such measures. Simmonds J did not accept WorkSafe’s arguments about the practicability of two-way radios and reversing alarms, but did accept that the evidence suggested that exclusion zones would be effective, and that it was practicable to implement them. He therefore allowed WorkSafe’s appeal.

Markos v Dinko Tuna Farmers Pty Ltd [2006] SAIRC 89

A majority of judges in the South Australian Industrial Court (Hannon and Farrell JJ, with Jennings J dissenting) upheld an appeal against a single judge decision to quash a conviction under the employer’s general duty provision in section 19 of the Occupational Health, Safety and Welfare Act 1986 (SA). An employee deckhand fell overboard while working alone cleaning the deck of the defendant’s boat. Hannon and Farrell JJ held that the defendant had no system in place to require that its crew wear life jackets, except in extreme weather conditions. The defendant argued that it was not accepted industry practice for tuna fishermen to wear life jackets because the risk of falling overboard was “real and foreseeable”: the vessel was unstable, the worker was inexperienced, the protective bulwark on the vessel was too low, the worker was working alone, the sea door was open and the worker was cleaning the vessel while it was moving. A reasonable employer would have done more than the defendant did. To hold otherwise would perpetuate unsafe standards in the industry. The court reinstated the original conviction and penalty.

Aerospace Engineering Services Pty Ltd v Ibrahim [2007] WASCA 33

The Supreme Court of Western Australia upheld the trial judge’s ruling that an employer had been negligent in failing to provide handrails to a platform, and that this had contributed to a worker’s fall. The defendant had argued that the handrails would not have prevented the fall, and that they were not required by the OHS regulations or by Australian Standards. The Supreme Court held that the employer was negligent in the circumstances, even though the platform conformed with industry standards, because they were cheap and easy to fit, and would have lowered the risk of a fall.
Key cases (continued)

**Leichhardt Municipal Council v Montgomery [2007] HCA 6**

The NSW Court of Appeal had upheld a decision of the NSW District Court that a City Council owed a pedestrian a non-delegable duty of care, so that the Council was liable in negligence for the negligence of a contractor's employee. A Full Bench of the High Court unanimously overruled the decision. It held that the Council did not owe a non-delegable duty of care when an independent contractor was engaged, and that the Council's ordinary general duty to take reasonable care to prevent injury did not require it to ensure reasonable care was taken by an independent contractor and the contractor's employees. The Council's duty was to act reasonably in exercising prudent oversight of the contractor's activities.

**Ian Cornwell v Mark Curran [2006] ACTSC 119**

A builder was convicted on two charges under sections 29 (the duty of a person who has, to any extent, control of a workplace) and 79 (failing to comply with an improvement notice) of the *Occupational Health and Safety Act* 1989 (ACT). Crispin J found that the section 29 charge did not disclose an offence as it did not identify whether the defendant builder had control of the workplace, and therefore the charge was invalid. The section 79 charge had failed to identify whether the builder had been given the improvement notice, and whether he had control of the workplace.

**Inspector May v Andrew Steward t/as ASB Constructions [2006] NSWIRComm 406**

A principal contractor engaged a contractor to carry out roofing works in a residential construction project. An employee of the contractor fell from a ladder and suffered serious injury. The principal contractor pleaded guilty to a charge under section 8(2) of the *Occupational Health and Safety Act* 2000 (NSW) (the employer's duty to non-employees). In mitigation of penalty, the principal contractor stated that three days before the incident he had left a safety program with the owner of the property, asked for it to be placed in a prominent place for the foreman to access when work resumed after the weekend, and spoke to the site foreman about the safety program on the day of the incident resulting in the injury.

The New South Wales Industrial Commission acknowledged that the principal contractor had taken some OHS measures but said the OHS program it had prepared had not been implemented, and that the principal contractor had not undertaken a proper risk assessment as required by section 8(2). The principal contractor had not provided fall equipment. The Commission imposed a fine of $10,0000 on the principal contractor.

**WorkCover Authority of NSW (Inspector Mark Stothard) v Manildra Park Pty Ltd; WorkCover Authority of NSW (Inspector Mark Stothard) v Leslie Ronald Fletcher [2007] NSWIRComm 35**

Two employees were injured in an explosion during welding next to a tank that contained ethanol. The defendant entered guilty pleas to charges under the employer's duty to employees under section 8(1) of the *Occupational Health and Safety Act* 2000 (NSW) and to a charge under section 8(2) (the duty to non-employees, which was contravened because contractors were at the site at the time of the explosion). The welder was not qualified for the task, and had not been appropriately trained for the task in the four months he had worked for the defendant company. The tank was not designed to store ethanol. When the explosion occurred, the director of the defendant and other senior management members were attending a funeral, and there had been no formal arrangements for supervision in their absence. The Commission also found that the employee undertook the welding task next to the tank, rather than away from it, because of "laziness, stupidity or inattentiveness" (para 7).

Nevertheless, the Commission found that the defendant company's contravention was serious because no risk assessment of the task had been undertaken, the worker was not properly qualified, the supervisor at the time was not properly trained and potentially dangerous plant items were allowed in the hazardous area. The defendant company was fined $80,000 for the contravention of section 8(1) and a further $80,000 for the contravention of section 8(2). The director was fined $8,000 under section 26 of the Act for each offence.
Organisational restructuring, downsizing and OHS

Over the past two decades there have been significant shifts in working arrangements in developed countries, away from permanent full-time (direct hire employee) jobs and to flexible or contingent work arrangements, including part-time, temporary (both direct hire and agency labour), remote/home-based work, multiple job-holding and own-account, self-employment. Restructuring, downsizing and associated outsourcing by larger private and public sector employers have both facilitated the growth of more flexible/precarious employment arrangements and contributed to increased job insecurity, even amongst those workers who have “survived” restructuring.

In Centre working paper no. 52, titled Organisational Restructuring/Downsizing, OHS Regulation, and Worker Health and Wellbeing, OHS Regulation Research Consortium member Professor Michael Quinnlan reviews the growing body of international evidence of adverse effects on worker health, safety and well-being, current responses to these by OHS regulators, employers and unions, and suggests policy interventions and new strategies for regulatory agencies to more effectively address restructuring and downsizing.

The working paper draws data from a research project undertaken in 2001-2002 for the WorkCover Authority of New South Wales (NSW) on the prevention and workers’ compensation challenges posed by changing work arrangements in Australia. This project covered state, territory and federal OHS jurisdictions and involved meetings with tripartite industry reference groups, focus groups and individual interviews with 63 OHS regulatory staff, and 40 senior employer/industry and union representatives. Interview material was augmented by a review of Australian OHS statutes and government agency codes, guidance material and reports, as well as international research and government agency material. The working paper also draws information from a search and analysis of industrial tribunal and court proceedings, undertaken from 2004 to 2006, to identify cases where organisational restructuring or downsizing (or related issues of staffing levels) were involved. The earlier search of government agency codes and guidance material was updated and a number of relevant incidents involving union/employer negotiations were also investigated. Finally, information was drawn from detailed interviews and workplace visits with over 40 government OHS inspectors undertaken in three state jurisdictions between 2004-2006.

This article outlines some of the key information presented and ideas developed in the working paper. Readers should refer to the working paper for full details, supporting references and case law. Working paper 52 is online at http://www.ohs.anu.edu.au

Adverse impacts on worker health, safety and well-being

There is now an extensive body of international research indicating that job insecurity and contingent work arrangements are associated with significant adverse effects on worker health, safety and mental well-being including an increased risk of work-related injury, occupational violence, cardiovascular disease and psychological distress or mental illness, as well as common infections and health complaints. Various studies have found adverse effects on mental and physical health attributable to: restructuring and downsizing, and the associated job insecurity; over-employment or excessive, often unpaid hours (at work or work taken home); and failure to take leave. Also documented are adverse impacts on collaboration and other working relationships, work/family conflict and burnout, and reduced participation in workplace OHS arrangements.

The negative health effects of restructuring and downsizing appear to arise not only from the job insecurity experienced (especially in the context of often repeated episodes of restructuring) and overt changes to task load/work intensity, but also from the deleterious effects of organisational change itself. These effects include multi-tasking, and changes in supervisory or training responsibilities, management behaviour or expectations, and changes to client/customer behaviour. Restructuring and downsizing can also result in the loss of key technical expertise and experienced personnel that places remaining staff under additional pressure as well as, in some cases, involving direct loss of OHS knowledge and experience. Particular effects on mental and physical health are attributable to bullying, abuse and other forms of occupational violence emanating from more “hard-nosed” human resource management and supervisory practices, working in isolation and dealing with disgruntled clients or other workers under pressure.

Provisions of OHS legislation relevant to restructuring and downsizing

OHS legislation in Australia contains wide-ranging general duty provisions and participation/consultation requirements relevant to employers undertaking downsizing and restructuring where these decisions entail changes to staffing levels/workloads, task structures and work processes. In particular, the employers’ general duties under Australian federal, state and territory OHS statutes typically require the employer to ensure the health, safety and welfare at work of employees, qualified by (reasonably) practicable.
Organisational restructuring, downsizing and OHS
(continued)

This includes ensuring that premises, plant and substances, systems of work and the working environment are safe and without risks to health; providing information, instruction, training and supervision to ensure employees’ health and safety at work; and providing adequate facilities for the welfare of the employees at work. Employers are also required to consult with employees and their representatives (which may include OHS representatives and joint OHS committees) when changes are proposed which may impact on OHS, including changes to work premises, to systems or methods of work, or to the plant or substances used for work. Regulations may also establish requirements in relation to consultation.

In all jurisdictions, except Victoria and the ACT, the relevant OHS regulations also require employers to identify hazards, assess and control risks, which may arise from a wide range of hazards. In Queensland the Workplace Health and Safety Act invokes these risk management principles as a means for employers (and others conducting a business or undertaking) to comply with the statutory general duties and an approved code of practice explains the risk management approach. In the states of Queensland, NSW, WA and Tasmania at least, the risk management principles potentially extend to psychosocial and physical risks arising from any work-related source, including restructuring and downsizing. In the SA and Commonwealth regulations the risk management provisions are more circumscribed as they relate to the implementation of the regulations. As such they would only apply to restructuring or downsizing to the extent these give rise to risks addressed in the regulations (for example isolated work is covered). The NSW regulation most clearly embraces work practices and work systems (and changes to these), as well as shiftworking arrangements, hazardous processes, psychological hazards, fatigue related hazards and the potential for workplace violence as matters to be assessed.

Taken as a whole, it is clear that various duties and provisions under the OHS statutes and regulations apply to restructuring and downsizing situations, and the changes to work processes and systems of work ensuing from these, including the reallocation of task loads to a smaller pool of staff, changes to job descriptions, multi-skilling or multi-tasking, changes to training and supervision arrangements, and the like. Thus, to comply with OHS legislation an employer anticipating a major change to work processes that may affect OHS should assess the OHS consequences of the change, consult with workers and their representatives, and take steps to manage any risks identified so as not to compromise existing OHS standards. It is important to note that the employer’s duties require proactive steps to control risks to employees and others who may be affected. It is not enough to respond after the event when adverse OHS impacts are experienced.

Implementation of relevant OHS obligations

Interviews with Australian OHS regulators undertaken in 2001-2002 indicated they were aware that restructuring and downsizing could compromise OHS, for example through deteriorating workers’ compensation claim performance. However, the OHS agencies had not produced guidance material for employers on these matters or established protocols for inspectors to check on employer compliance with relevant obligations. Nonetheless, there were several initiatives in relation to psychosocial risks and occupational violence (guidance material and inspector training or specialisation), which have the potential to be adapted to address restructuring and downsizing situations. Agencies have also produced analyses of stress-claim data which, notwithstanding the difficulties in making a claim and the disincentive of job insecurity, have sometimes identified an association between downsizing or restructuring by particular organisations and an increase in stress-related claims.

While guidance material and data analysis on stress, violence and bullying are useful, more explicit guidance on the need for management to address the consequences of changes to staffing levels and work reorganisation, prior to these actions being implemented, and taking appropriate remedial measures, would seem essential to changing actual practices. Moreover, the production of guidance material, however well designed, is only a first step. Implementation requires an adequately trained and resourced inspectorate. Here there are serious challenges since investigation of these matters may be time consuming and inspectorates have many competing priorities.

Despite the difficulties there have been a limited number of prosecutions of employers (including government agencies) where downsizing has led to an unambiguous breach of OHS legislation, such as serious injuries to health and community service workers, working in isolation due to reduced staffing levels. There have also been some prosecutions where, as a result of downsizing, organisations have made increased use of contingent workers (such as contractors and directly hired or agency-based temporary workers) or less-qualified workers, and this has exacerbated the risk of occupational violence and resulted in serious incidents. There is also some prosecutorial activity in relation to staffing levels and stress.
Organisational restructuring, downsizing and OHS (continued)

Management and union responses

In workplaces, it seems clear most employers don’t recognise a connection between organisational restructuring, downsizing and OHS risks. The extent of risk assessment and worker consultation, if any, is often cursory, does not address all the critical issues, fails to deal with “after effects” (such as extra tasks only becoming apparent after the event) and, if risks have been identified and control measures put in place, there is frequently a failure to follow this up with an assessment of the effectiveness of the measures. Moreover, like OHS inspectorates, employer interventions have focused on particular problem areas, notably bullying and stress, rather than investigating and addressing the organisational context in which these and other problems are occurring. Likewise, responses have tended to focus on technological or physical measures (such as alarms or barriers), behavioural measures (training and discipline) and organisational culture, while attention to staffing levels and workloads appear to be a lower order option or last resort, despite the fact that downsizing and work intensification have been clearly recognised as a significant causal factor. At peak council level employers have resisted government initiatives in relation to bullying, stress and other psychosocial aspects of work, in part due to concern about increased litigation and in part due to perceived interference with business functioning and management prerogative.

Amongst unions there has been some concern about the OHS implications of restructuring and downsizing, which is stronger amongst service sector unions. The focus has been on understaffing/workloads, long hours, burnout, stress and bullying with some linkages made to organisational stress. The willingness to raise concerns or take industrial action in support of claims about inadequate staffing appears most apparent when it has been seen to involve an increased risk of occupational violence, as with prison officers, community service workers, nurses and staff in the education sector. A proactive initiative by one union involved training HSRs and encouraging them to become involved in restructuring and downsizing exercises in order that they might exert some influence on the process, including trying to ensure that some risk assessment was done in relation to the changes.

In NSW unions have the capacity to initiate a prosecution under the OHS Act. Although the option is only used on a relatively infrequent basis because of the expense, time and other resources needed to mount cases, it has been used for some situations relating to staffing arrangements. In one case the Nurses Union successfully prosecuted a government regional health service for placing a nurse with an existing back injury in a situation where she could be required to do an emergency lift unaided. In a second case the Maritime Union successfully prosecuted a stevedoring company in relation to workload related OHS risks following the implementation of a new work system. As yet there have been no union-initiated prosecutions based on the impact of restructuring changes on the mental health and wellbeing of workers.

A further option is attempts by unions to negotiate the terms and conditions of downsizing and restructuring, in order to better protect the health and well-being of workers, in the industrial relations sphere, through direct negotiation with employers or through the intervention of a state or federal industrial relations tribunal. Although unions have often contested restructuring and downsizing in an effort to maintain jobs or minimise job losses, attempts to reshape the process to avoid adverse OHS outcomes are much less common. However, there are some exceptions. One was a successful challenge by the Communications, Electrical and Plumbing Union (CEPU) to action by Australia Post to alter work practices so postal delivery officers (PDOs) would undertake eight hour shifts delivering mail on motor bikes, rather than a mix of delivery and exchange work. A number of other unions, such as those dealing with staff reductions or restructuring in manufacturing, nursing homes or the education sector, have raised OHS as part of the negotiating process – in some instances achieving favourable outcomes without having to go before industrial tribunals, while in other cases having the matters denied.

The capacity of unions to use the industrial relations sphere to safeguard the health and well-being of members experiencing restructuring or downsizing depends on the entitlements to negotiate in industrial relations laws and obligations placed on employers by OHS laws. The Australian federal government’s 2006 Work Choices industrial relations legislation diminished the role of the Australian Industrial Relations Commission, collective determinations (awards), and union rights to collectively negotiate (including a prohibition on negotiating over agency work or contracting out). It also increased the scope for employers to dismiss workers without the latter having recourse to an unfair dismissal claim. Thus, the option of unions negotiating on the OHS effects of restructuring and downsizing is circumscribed and, although limited in the past, may be less in the future.
Conclusion

Although there is substantial evidence that downsizing and organisational restructuring pose serious risks to the physical and mental health and well-being of workers, there has thus far been a limited response from OHS regulators, employers and unions. However, the general duty, risk assessment and consultation provisions in Australian OHS legislation impose a number of obligations on employers which may extend to risks arising from restructuring, downsizing and associated changes to work processes, tasks and workloads. Interviews with and recent actions by OHS regulators indicate there is an increased willingness to address these issues.

Professor Quinlan makes a number of recommendations to assist regulators meet these challenges. These include: (1) amending the present general duty provisions in OHS legislation to more explicitly enunciate employer responsibilities with regard to major workplace restructuring, downsizing and contingent work arrangements; (2) government OHS agencies developing guidance material on organisational restructuring and downsizing to elaborate these obligations and how they can be met, as well as revising other codes and guidance materials to make reference to restructuring and downsizing; (3) developing protocols for inspectors to monitor compliance by employers with their duties when undertaking restructuring and downsizing, and providing a basis for enforcement through failure to take action to comply or keep records demonstrating compliance, thereby focusing on proactive steps to minimise risks rather than taking action based on illness or injury arising after the event; and (4) workers’ compensation agencies devoting more attention to analysing the effect of restructuring and downsizing on claims statistics and the information used to modify interventions by both compensation and prevention authorities.