# Update:

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# Introduction

Since the publication of *OHS in Australia – a management introduction* in 2005, workplace health and safety has been affected by further deregulation of the labour market. The Federal WorkChoices legislation challenges unions and their role in the workplace. Whereas in the past there was an acceptance that unions could represent workers, the Howard Government has made it plain that it wishes to remove them from the workplace to allow employers and workers to deal directly with each other on matters such as wages, conditions and occupational health and safety. The argument has been that with the resulting flexibility, productivity will increase and so will jobs. Others, however, see it as an attempt to boost the share of profits for business-owners at the expense of workers. (See p.5 for an article by Ross Gittins, the Economics Editor of the *Sydney Morning Herald*.)

In this Update, we look at the implications for workers' health and safety of WorkChoices, very little of which looks positive. As it is early days, more research will come in and lessons will be learned about how WorkChoices may be addressed, particularly by organisations wishing to improve their health and safety performance, in an increasingly deregulated workplace and with union membership in decline. Increased effort will be needed by organisations to ensure that changes brought about by WorkChoices do not result in the failure to meet the requirements set by OHS law and company policy.

WorkChoices is also expected to accelerate the expansion of precarious or non-standard employment. Full-time employees, people in so-called standard employment, form only part of the workforce while a significant number work as part-timers, casuals, contractors and other forms of non-standard employment.[1] For many in

[1] The proportion of standard or full-time employment to forms of non-standard employment, for example, contractors, can fluctuate in response to labour market conditions. See the Forms of Employment Surveys produced by the Australian Bureau of Statistics.

precarious employment, income is determined by commercial contract, often a fee-for-service arrangement, whereas those in standard employment are covered by employment law and receive their income as wages. While the flexibility of precarious employment can benefit employers and workers, it can also work to the disadvantage of those with little bargaining power in the labour market. The Update highlights the implications for health and safety, and explores the (difficult) approach OHS managers will need to take to remove or reduce the risks posed by such non-standard employment.

At the same time, there is continued pressure on – mainly – female workers to find a balance between the demands of paid work and the demands of caring either for children, the sick, disabled or the elderly. Failure to manage the balance can result in fatigue, stress, guilt, strained relationships and a general sense of emotional ill-health not just for workers but their partners and dependants. In the book, this topic was briefly touched on as the 'work/life balance', an OHS issue affecting everyone, employers as well as governments, partners and the community. The debate has developed, with more research and reports being published. (For example, see *It's About Time – Women, men, work and family*, Human Rights and Equal Opportunity Commission, Sydney, 2007.) We summarise some practical ideas for dealing with these issues.

As the workforce continues to age and more retire, the need to increase labour participation rates gains ground. Proportionally fewer workers could lead to a decline in output and productivity threatening our standard of living. While measures such as delaying the retirement age, increasing immigration and improving labour productivity through training may offset this to some extent, more employers are looking to retain their older workers. At the same time, many older workers are looking for continued employment but under more flexible arrangements. An older workforce can present specific OHS issues. The Update discusses some of these issues, continuing the theme of making the workplace fit the worker and not the worker to the workplace.

2007 marked the final agreement in the James Hardie asbestos saga with a compensation package agreed to by all the parties. The whole episode represents the

saddest tale in Australia's OHS history with asbestos related cancers projected to match World War II fatalities. (See Gideon Haigh's account in *Asbestos House: the secret history of James Hardie Industries,* Scribe, Melbourne, 2006.) Despite this, lessons can be learned particularly about avoiding occupational diseases. Not only must there be rigorous technical assessment of any new substances entering the workplace, there must be *institutions* – inspectorates, unions and businesses – with the ability to make sure that only the safest substances are used. The Update tells of the tragic consequences when these conditions are not met.

We also look at the emerging trend towards federalisation of health and safety. Until recently, we have seen the 10 jurisdictions (six States, two Territories and one each for Commonwealth employees and the maritime industry) working side by side and cooperating at the Federal level to set the National Strategy, develop National Standards and harmonise their various laws. However, with national employers, such as Optus, eligible to self-insure under the Commonwealth insurance scheme, such firms are also moving under the Commonwealth OHS jurisdiction. There appears to be an increasing number of large firms following the Optus route and leaving the other jurisdictions behind – often with little or no prior consultation with their workforce. Interestingly, this follows the same pattern of increased federalisation of industrial relations law under WorkChoices. The Update looks at this development as it could affect the great majority of organisations expected to remain under State and Territory OHS and compensation law.[2]

We finish with an overview of recent changes in OHS and workers' compensation law as well as the introduction of industrial manslaughter legislation. The new institutions of the Australian Safety and Compensation Council and the Office of the Federal Safety Commissioner are also highlighted.

[2] It is noteworthy that with WorkChoices an estimated 80% of the workforce will come under Federal industrial relations law, but the large majority of workers will remain under State and Territory OHS and compensation law – even with the early moves to federalisation. The implications of this remain to be seen. In the meantime, if WorkChoices results in a decline in OHS performance, then the States and Territories will bear the risk and cost of a change they actively resisted.

# Work Choices blue is class warfare

Don’t let all the high-sounding talk of ‘flexibility’ and ‘productivity’ deceive you – the fight over industrial relations is more about class warfare than economics. It's about how the pie is shared, not about growing it.

The class struggle has become deeply unfashionable. We've been there and done that.

As Mark Latham discovered to his cost, the public has no taste for rhetoric intended to incite resentment of the rich.

The old practice of people voting in accord with class loyalties broke down a long time ago. These days, plenty of workers vote Liberal and plenty of well-educated, well-paid professionals vote Labor (especially if they're employed in the public sector). In any case, these days almost everyone identifies themselves as middle class.

But the disaffection with class consciousness is not symmetric. The unions have always been accorded less legitimacy than employers and business.

I suppose this is mainly because the bosses have money and power, and all societies pay greater respect to the rich and powerful. But another factor is the nation's indelible memory of the way the unions abused their power when they were on top.

By now this has become almost a race memory. The unions haven't much misbehaved since the start of the Accord period in 1983, and it's been more than 20 years since the public was greatly inconvenienced by strikes, but still the very word ‘union’ carries overwhelmingly negative connotations in the public’s mind.

For more evidence of asymmetry, try this. Last week sections of the media took up with gusto the employers' complaint that Labor had failed to adequately consult them over its industrial relations policy but when the Government never dreamt of consulting the ACTU over the formulation of Work Choices, no one saw anything amiss.

Mr Howard will make abusing the unions, and the claim that Kevin Rudd is their pawn, a central part of his election rhetoric. But Mr Rudd will not reciprocate. He'll never claim Mr Howard is hand in glove with rapacious employers because he doesn't want to be accused of class warfare and because he's so anxious to prove he's ‘pro-business’.

But here's the point: it suits Mr Howard down to the ground to have people thinking class war is a thing of the past while he quietly attempts to use Work Choices to deal a death blow to the institution to which he's been bitterly opposed from the moment he started taking an interest in politics, the unions.

Work Choices has brought the old alliances back into stark relief. The old stereotypes of Australian politics – Labor is the party of the workers and their unions; the Liberals are the party of the bosses – will be the truth in the coming campaign.

Fundamentally, Work Choices is about phasing out collective bargaining – almost all of it facilitated by unions – and moving to the special form of individual contract known as the Australian Workplace Agreement.

Now, AWAs may well offer employers more flexibility and less red tape. But that's incidental to the broader truth: the one, overwhelming reason you want employees to bargain with their employer individually rather than collectively is to reduce the employees' bargaining power.

An individual employer – even a small business employer – has far more bargaining power than an individual employee. Unless the employee has particularly scarce skills to offer, it's no contest.

That's the whole point of allowing employees to bargain collectively: to even up the bargaining power between the two sides. The power you give the collected workers is to threaten to disrupt the employer's business by withdrawing their labour.

(It's because the disruption and inconvenience is always seen by the public – and hence by the media – as having been caused by the union rather than by the employer's intransigence that the unions invariably get a bad name.)

Thus the overriding objective of Work Choices is to bias bargaining power in favour of employers. That makes it extreme legislation, for which there's no international precedent except maybe Jim Bolger's New Zealand (since toned down by Helen Clark).

So unbalanced does it leave the bargaining power between an employer and his employee that most of the Government's claims about AWAs are implausible. Since many individual workers have next to no bargaining power, it's hard to imagine the 'flexibility' going anything but the employer's way.

In practice, there *is* no bargaining. Employers don't tailor agreements to the peculiar requirements of individual workers. Rather, they present individual employees with a one-size-fits-all contract, drawn up by their lawyers to be quite one-sided.

And the extreme imbalance in bargaining power laughs at Mr Howard's claim to have prohibited employers from using force to get employees to sign AWAs. Individuals are commonly presented with take-it-or-leave-it offers, which they don't feel in any position to decline.

Until last week, it's been the lack of genuine bargaining and the lack of proper Government scrutiny that's made AWAs so flexible and lacking in red tape from an employer's perspective…

The conventional economic model is built on the assumption that the parties to contracts have roughly equal bargaining power. Where that assumption is violated, there can be no presumption that outcomes will be satisfactory to both parties.

This is why Mr Howard's refusal to give Australian workers a right to bargain collectively if a majority of them choose makes Work Choices more extreme than anything that exists in the United States or other developed economies.

This is why most of the world's economists accept collective bargaining as legitimate and don't imagine that moving to individual contracts would lead us to economic nirvana.

And it's why Work Choices is more likely to fatten profits at the expense of wages – to recarve the national pie in favour of capital at the expense of labour – than to make the pie bigger.

In this undeclared return to class warfare, it's not surprising employers are fighting to hang on to their newly conferred advantage. Who wouldn't? You only get one John Howard in your life.

What's surprising is that so few members of the opinion-forming elite – in contrast to Howard's Battlers – see it for the blatant try-on it is.

Source: Ross Gittins, *Sydney Morning Herald*, 7 May 2007

# 1. The impact of WorkChoices on occupational health and safety

The 2007 Queensland *Inquiry into the Impact of Work Choices on Queensland Workplaces, Employees and Employers* has found that WorkChoices has made workers 'extremely apprehensive' about job security, leading many employees to refrain from raising occupational health and safety issues. [3, 4]

This comes as no surprise as improvements in occupational health and safety performance are largely driven by unions and require their active partnership. The union movement has been critical in raising awareness of OHS, enforcing greater commitment by management to accident prevention, leading struggles to improve the law, and demanding that the costs of workplace death, injury and disease are taken up by the employer. In every way, unions play a key role.

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[3] 'WorkChoices' is the term used to refer to the 2006 amendments to the Federal *Workplace Relations Act 1996*. It also includes extensive regulations.

[4] Issued by the Queensland Industrial Relations Commission, 29 January 2007. 'With restrictions placed upon the right of entry of Union officials to worksites, the Inquiry is concerned that many workplace health and safety requirements will not be met by some employers. Much of the workplace health and safety training undertaken by employees has been shown to have occurred as a result of Union encouragement and provisions contained within awards and pre Work Choices agreements. There has been evidence before the Inquiry to show that serious workplace health and safety problems would have continued but for the scrutiny and active involvement in the workplace of Union officials.', p120. The Queensland Inquiry was one of a number of investigations by the States into the effects of WorkChoices.

WorkChoices attacks unions principally by undermining the right to collective bargaining and promoting individual contracts (AWAs). Under WorkChoices, large businesses have been specifically given the power to:

- refuse to collectively bargain with workers even when that is what is wanted by a majority of the workers in the workplace;
- refuse to employ any worker who won't sign an AWA in terms dictated solely by the employer; and
- refuse to increase the pay or promote any worker who won't sign an AWA individual contract.

Furthermore, employer 'Greenfield Agreements' introduced by the Federal Government as part of its new industrial relations legislation allow employers to set work conditions in any new business, part business or project without reference or negotiation with affected employees or unions.

This tilts any balance between workers and employers towards the employers' side by weakening the role of the unions. While it is far too early to collect substantial data on the impact, experience teaches us that it is likely that OHS performance will decline noticeably:

- Workers are less likely to raise OHS issues for fear of losing their job, particularly when there are no rights to appeal against unfair dismissal in enterprises of less than 100 employees;
- Health and safety representatives will be less effective as they will receive less union back-up;
- Precarious employment and greater job insecurity will increase with adverse consequences for OHS;
- 'Presenteeism' – the situation where workers become afraid to refuse work or take sick leave in case they lose their job – will also increase;
- Dangerous work disorganisation, such as insufficient induction, training and supervision associated with greater 'flexibility' and turnover, will grow.

Importantly, workers, particularly women, will face additional stress associated with poor work/life balance. The impact will be greatest on those who hold more than one job.

## Prohibited content

Besides the general impacts outlined above, specific provisions of WorkChoices will also have adverse impacts on workers. For one, WorkChoices can increase unsafe work practices formerly ruled out in awards such as understaffing and work intensification, the potentially unsafe engagement of independent contractors and labour-hire and any loss of rest or meal breaks (Pt8 Div7). It also prohibits other content in workplace agreements such as receiving paid leave to attend meetings (however described) conducted by or made up of trade union members – which could include OHS training (Pt8 Div7 s356 Reg8.5).

WorkChoices also allows for the averaging of hours of work over a maximum 12 month period, effectively overriding the 38 hour week cap and leading to increased problems for an already overworked labour force (Pt7 Div3).

Where right of entry currently exists under State or Territory law such as NSW and WA, WorkChoices requires organisers to have a permit with strict conditions governing its use and to provide 24 hour notice if seeking to inspect employment records (Pt15 Div 5). Further restrictions on the right of entry mean less support for workers facing urgent OHS matters.

Coupled with WorkChoices are a number of other changes to Federal law that have an impact on workers' health and safety. These include the Federal *Independent Contractors Act* that prevents access to award protection and encourages bogus contractor arrangements and the *Building and Construction Industry Improvement Act 2005* that provides for the loss of the right to silence when questioned by the Australian Building and Construction Commission (the penalty being up to six months in jail).

Both are clear attacks on unions and could have the same negative effects on OHS as the WorkChoices legislation.[5]

The capacity of organisations to adapt to the new environment created by WorkChoices *and* meet their OHS obligations is certain to be tested. The next chapter on precarious employment looks at these implications in more detail and the response management must make.

**Exhibit 1.1**

## The Ritter report into AWAs

A scathing 2004 report into WA mine safety has exposed the human cost of federal government's individual contracts. The five-month inquiry found BHP Billiton's industrial relations practices, built on the aggressive use of AWAs, had compromised workplace safety. The $17 billion industry faces an overhaul after Perth barrister, Mark Ritter, confirmed safety shortcomings had contributed to the loss of 20 lives in the past year. He described the introduction of individual contracts at BHP Billiton's operations, since November 1999, as 'a factor which has impacted and continues to impact on the successful implementation of safety systems'.

The report is titled '*Ministerial Inquiry. Occupational health and safety systems and practices of BHP Billiton Iron Ore and Boodarie Iron Sites in Western Australia and related matters November 2004*' Department of Industry and Resources, Western Australia

[5] The NSW Transport Workers Union Secretary Tony Sheldon said the *Independent Contractors Act* would destroy truck driver's minimum safe rate of pay and further increase their already excessive driving hours. ('Unions warn of more road deaths if contractors' law passed', *Workplace OHS*, 2 May 2006)

**Exhibit 1.2**

# Secret AWA figures reveal breaches of OHS laws, says Vic Council

Leaked Federal Government figures on Australian Workplace Agreements have revealed widespread breaches of OHS law, according to the Victorian Trades Hall Council (VTHC).

Fairfax media reports yesterday that revealed 45% of AWAs have stripped away award conditions the Federal Government had promised would be protected by law under WorkChoices.

Statistics collected by the Office of Employment Advocate (OEA) from a sample of 5,250 AWAs lodged between April and September last year, and which the Government has been refusing to release, reportedly show 30% of all AWAs that have been examined reveal that workers get no rest breaks during their scheduled hours of work.

Secretary of the VTHC, Brian Boyd, said the removal of rest breaks is not only ‘harsh’ and ‘unfair’ but is breaking workplace safety law.

‘Workers are protected by occupational health and safety law. Our Victorian law says that the employer has to provide a safe system of work – and that includes decent rest breaks. It's not good for us to work without any break. We aren't machines and employers shouldn't treat us as such,’ Boyd said.

Boyd said the figures are another example of how 'harsh and unjust' the Federal Government's workplace laws are.

‘Howard isn’t content with helping employers slash the family pay packet and time with our families. Now he is encouraging employers to break health and safety law,’ he said. ‘Employers think they can do what they want under Howard’s laws, but they are forgetting that State-based OHS laws still call them to account.’

Boyd called on WorkSafe Victoria to prosecute any employer found to have taken away this safety condition under the Victorian OHS Act.

Reports today say three-quarters of AWAs do not include family-friendly work provisions, such as flexible working hours and job-sharing arrangements.

Reportedly, the figures also revealed conditions were stripped from the 'vast majority' of the agreements examined and these included shift loadings (removed in 76% of the AWAs), annual leave loading (59%), incentive payments and bonuses (70%) and declared public holidays (22.5%).

The OEA had identified 1,457 agreements (27.8% of the 5,250) as containing provisions that potentially do not comply with the *Workplace Relations Act*'s pay and conditions standard, the report says.

Source: *WorkplaceOHS*, 18 April 2007

## Questions and activities

1. Identify ways in which the impact of WorkChoices on OHS in a workplace can be measured over a 12 month period.
2. How is right of entry under OHS law affected by WorkChoices? (Refer to the 2006 amendments to the Federal *Workplace Relations Act 1996* and regulations. See also the DEWR website, https://www.workchoices.gov.au/ourplan/publications/html/Factsheets.htm for the fact sheet *WorkChoices and occupational health and safety*.)
3. Under WorkChoices, the Australian Fair Pay and Conditions Standard provides that a person cannot be required or requested to work more than 38 hours per week *plus reasonable additional hours.* Can this be interpreted and applied in the workplace in ways that may adversely affect a worker's health? (Refer to the 2006 amendments to the Federal *Workplace Relations Act 1996* and regulations. See also the DEWR website, https://www.workchoices.gov.au/ourplan/publications/html/Factsheets.htm for the fact sheet *WorkChoices and ordinary hours*.)

# 2. The risks of precarious employment

Precarious employment refers to non-standard employment contracts such as part-time work, casual or temporary work, outsourcing or subcontracting and home-based work.[6] It is also marked by limited benefits and legal entitlements, poor working conditions, job insecurity, low wages and, as might be expected, increased risk to health and safety. Precarious employment has being growing in recent years and will probably accelerate with WorkChoices.

In 2005, Professors Michael Quinlan and Philip Bohle (UNSW) reviewed 106 studies published between 1966-2005 measuring the OHS effects of job insecurity and workplace change using a variety of indices including injury, disease, hazard exposure, stress, compliance with OHS laws and management systems. The results were compelling. Of 61 studies of job insecurity/downsizing, 53 or 87% found adverse OHS effects. Amongst 23 studies of outsourcing/subcontracting and home-based work all 23 or 100% found an adverse effect on OHS, and of 22 studies of casual work/labour hire15 or 68% found worse OHS compared to permanent workers.[7]

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[6] For an analysis of precarious employment in Australia, see Watson I, Buchanan J, Campbell I, Briggs J, *Fragmented Futures – New Challenges in Working Life,* Federation Press, Sydney, 2003.

[7] Quoted from the paper *WorkChoices: How it will affect workers' health and safety* presented by Prof Michael Quinlan to ACTU Choose Unions for a Cleaner, Safer, Healthier Workplace Seminar, Melbourne, 11 May 2006.

# Poor information

'Ironically, the very nature of the new forms of work will make it harder to gather reliable information about workplace health', Professor Quinlan said.[8]

'The rapid job churning associated with temporary employment in some industries (like hospitality, road transport or food processing) will make cohort studies virtually impossible...epidemiological studies very difficult and is likely to render official data sources (like workers compensation claims, death certificates and like) less accurate.' 'Control groups may be difficult to establish where, for example, an industry is largely casualised and permanent workers undertake different tasks.'

Quinlan said we do, however, know that precarious employment is associated with poorer knowledge of, and compliance with, legislative requirements amongst subcontractors. 'Temporary workers and those engaging them [are also] less willing to raise OHS issues or access entitlements (like workers compensation)', he said.

Quinlan acknowledged that Australian OHS statutes establish a 'hierarchy of responsibility' (such as between the principal and a subcontractor) 'as well as a web of multiple or shared responsibilities (as in the case of labour leasing firm and its host and on multi-employer worksites).'

# Unclear responsibilities

But he said while these sorts of systems of responsibility would seem well-suited to the new forms of working arrangements, his research shows that precarious employment tends to undermine these legislative responsibilities.

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[8] The following contains extracts from 'The flexible workforce - negative affect on OHS', *WorkplaceOHS*, 25 July 2003

‘Subcontracting (especially multi-tiered or pyramid subcontracting), labour leasing and much home-based work (where self-employment or subcontracting is entailed) introduce third parties into the work arrangement as opposed to the relatively simple and direct employer/employee relationship that have been the overwhelming focus of OHS regulatory regimes in the past.’

In addition, introducing third parties ‘creates more complicated and potentially attenuated webs of legal responsibility that place heavier logistical demands on the inspectorate’, he said.

‘Monitoring to see if there is an integrated OHS management system becomes more difficult on multi-employer sites or those making extensive use of subcontractors or home-based workers.’

Conducting workplace inspections is ‘nothing short of a logistical nightmare’ in the case of mobile workers, or workplaces like telecall centres established for the duration of a short sales campaign, he added.

Where a breach is detected, identifying the parties to prosecute, their legal status, or the precise employment status of the worker can be extremely difficult. ‘The existence of third parties makes determining the share of responsibility and who to pursue in legal proceedings (more than one party can be prosecuted) more time-consuming’, Quinlan said.

## Drop in union membership

The decline in union density also has implications for OHS regimes that presume a certain level of employee involvement in implementing OHS systems as well as employer consultation with workers about OHS issues.

The ‘existing laws and guidance material on worker involvement largely presume a permanent work arrangement between employer and employees and, as such, take little or no account of the presence of subcontractors, leased or temporary workers,’ Quinlan said.

## Management response

The fact remains that the increased risk associated with precarious employment does not alter the employer's duty of care. It simply makes it more difficult to fulfil that duty. OHS managers need to identify the risks posed by precarious employment in consultation with the workers affected and, just as dealing with other hazards, use the hierarchy of controls to remove them or reduce their impact. That means taking all reasonably practicable steps to ensure that practices like subcontracting, using labour hire, part-time workers, telecommuters do not pose an unacceptable risk. Specific risk management strategies need to be developed for each of these non-standard practices and monitored for their effectiveness. Anything less could result in a breach of the law or company policy and, most importantly, death, injury and disease.

For the OHS manager, it means reminding management at all levels of *their* legal and corporate responsibilities and assisting them with suitable risk management programs. There are models that can be applied, say, to the use of subcontractors which senior and line managers as well as supervisors need to be aware of. There may also be situations in which a practice such as subcontracting presents unacceptable risk and alternate forms of employment, possibly standard employment, need to be used.

It will be difficult to show why precautions and possible changes are needed as such arrangements are often introduced to save money. The fact that the law may be broken, the consequences for the organisation and particular individuals will need to be spelt out clearly.

**Exhibit 2.1**

## Hidden costs of casual employment

Employers who hire casual workers in the hope of cutting costs could be in for an unpleasant surprise, according to new research by PhD student Maria McNamara.

The study, *The hidden health and safety costs of casual employment*, finds that casual workers are at much greater risk of being injured compared to permanent employees,

creating significant costs for employers.

‘There is a growing body of international research linking casual employment with an increased risk of occupational injury and illness as well as other adverse outcomes,’ says Ms McNamara, who completed her report at UNSW’s Industrial Relations Research Centre. ‘These adverse outcomes include increased staff turnover, lower motivation and job satisfaction, lower productivity and higher costs to companies.’

‘Companies that want to lessen the risks associated with a temporary workforce should pay attention to ensuring that all casual employees get appropriate levels of induction training and on-the-job supervision,’ she says. ‘There have been many recent court cases where inadequate supervision of casual workers has been cited as contributing to increased accidents and injuries.’

Ms McNamara says companies should also encourage casual staff to be part of any company health and safety committees to ensure that the special requirements of this group of workers were tackled.

(Her research was sponsored by Sydney law firm Bartier Perry.)

Source: Media Release, University of New South Wales, 19 May 2006

**Exhibit 2.2**

## Drive-in drive-out workforce

‘Extended work shifts (more than 8 hours) and a marked increase in the use of a contractor workforce has resulted in significant productivity gains for employers. These developments we argue have resulted in an unanticipated outcome that has OHS implications: the emergence of a drive-in drive-out workforce (DIDOW) – in the case we studied, a workforce that is permanently based outside Queensland's Bowen Basin but travels to and from their place of work. The concern with a DIDOW is that

the workers are at greater risk of driver sleepiness as a function of the work schedule compounded by a long-distance commute. These factors place the driver and the community at a greater accident risk. The results suggested some drivers commenced travel at 0200 and drove up to 1300 km to work. Driving in the early morning and traveling longer distances were associated with significantly higher levels of self-reported sleepiness. Some 13% of drivers reported falling asleep when driving to commence day shift compared to 23% following night shift. Driver sleepiness is a significant safety risk factor in a DIDOW. We anticipate that the planned expansion of the coal industry will result in more employees joining the DIDOW, putting more people at risk of accident.' (Abstract)

Lee Di Milia, Bradley Bowden, *Unanticipated safety outcomes: Shiftwork and drive-in, drive-out workforce in Queensland's Bowen Basin*, Australia Asia Pacific Journal of Human Resources, Vol. 45, No. 1, 100–12 (2007)

## Questions and activities

1. What are the main forms of precarious employment and which ones can be found in your organisation?
2. What are the health and safety benefits to employees of specific forms of precarious employment? What are the risks?
3. Does your organisation have a policy on health and safety of sub-contractors? What should be included in such policies in order to comply with OHS law?

# 3. Work/care and OHS[9]

While work has moved from standard male full-time 9-to-5 employment to include a range of employment patterns, caring has not. Individual caring for the needs of children, dependants, the elderly and the sick has not changed in form.

Such domestic caring is in addition to institutionalised care. In Australia and many other countries, it is done voluntarily and for no pay. Yet caring for others is vital.

Those doing such caring work are overwhelmingly women. While men may actively care for others, their number and the amount of caring work they do remains small compared to women.

For women in the paid work-force – full-time, part-time or casual – this has often meant a clash between working and caring. Meeting both demands is hard without support from partners, the community, government and employers.

Additional risk factors such as a longer working week, multiple job-holdings, unpaid overtime and work intensification only make things worse. For many, the so-called flexible workplace adapted to the needs of workers is a myth, particularly for women workers trying to juggle their caring duties with their jobs. The result is often fatigue and stress-related illnesses affecting not only the worker, their families, friends and the community but the organisation itself.

While everyone including governments and partners have a role to play, employers can make an immediate contribution towards solving this problem – depending on the

[9] We focus here on striking a balance between the demands of paid work and caring as it lies at the core of the 'work/life collision'. (The contrast between 'work' and 'life' is misleading but, for many, reflects their experience.) 'Work/life collision' or 'balance' has a wider scope and can include the competition between paid work and other needs such as participating in the community, socialising, finding and developing relationships or simply following various interests.

situation – at little upfront cost to the organisation.  Some employers have developed effective programs that may be used as models. There is also a growing body of consultants that have knowledge of successful programs, in particular industries who can advise on planning and assist with implementation. Industry associations may be of some assistance and government industrial relations departments provide information.

## Basic steps

Every organisation should have a policy that addresses work/care balance. Without a specific commitment by management, there is little hope of gaining the required support. As a minimum, the policy should include the right for workers with carer responsibilities to request flexible work arrangements with a duty on the part of management to reasonably consider these requests.

Organisations then need to know what exactly the problem is. This is often a mixture of identification and analysis. Who is affected? When? Where? How? If work/care is a problem for some, what are the factors preventing individuals getting the balance right in the present circumstances?

The next stage is asking the question what can be done about those factors. What needs to be changed? What can the organisation do to assist workers? If unsure, which options can be trialled and how can they be assessed? What the risks of failure and how can they be minimised?

Depending on the analysis, solutions could include:

- reducing full-time working weeks – long hours do not necessarily increase performance or productivity;
- control of overtime – no unpaid overtime;
- certainty of working hours;
- flexible rostering and work scheduling self-administered by workers;
- job-sharing and appropriate staffing levels;
- secure, quality part-time jobs at all levels, not just the lower levels;

- paid and unpaid leave;
- providing or facilitating on-site and off-site childcare;
- career planning and counselling services; and
- family-friendly culture building.

Some of these solutions may require reviewing and modifying the internal composition of jobs themselves or the larger division of labour itself.

Finally come implementation, monitoring and reviewing. A senior manager ought to own the project with overall responsibility for its marketing and the reporting of outcomes. Success stories and senior management modelling in such stories can play an important part.

Throughout the course of planning and implementing, the understanding of everyone involved will be required preferably with some experienced guidance. Consultation with workers and their representatives will be essential. Someone to facilitate and possibly provide third-party assessment could also be useful.

**Exhibit 3.1**

## Australia should follow UK right to request flexible work law

Human Rights and Equal Opportunity Commission (HREOC) President and Acting Sex Discrimination Commissioner, John von Doussa QC, has again called on the Australian Government to introduce legislation enabling parents and other family carers the right to request flexible work arrangements.

Mr von Doussa made the call on the eve of an extension to the United Kingdom's flexible working law which, from tomorrow, will be extended to working carers of adults.

‘This UK law has enabled parents to request flexible work arrangements since 2003, but from tomorrow working carers of adults will also be able to use the law,’ Mr von Doussa said.

‘The success of the UK legislation in providing a new right for working families to balance their paid work and their family responsibilities should be welcomed, and followed, in Australia.

‘The UK experience shows that after the Act came into force, over 80 per cent of employee requests for flexible working practices have been either fully or partially accepted by employers.

‘It’s about time the Australian Government considered similar legislation to support Australian workers with family and carer responsibilities.’

*It’s About Time: Women, men, work and family*, the final paper in HREOC’s two-year investigation into this issue, recommends that a *Family Responsibilities and Carers’ Rights Act* be introduced…

Source: Media Release, Human Rights and Equal Opportunity Commission, 5 April 2007

**Exhibit 3.2**

## Workers get increased access to paid parental leave

The Minister for Employment and Workplace Relations, the Hon Joe Hockey MP, has welcomed ABS figures that show paid maternity, paternity and parental leave for Australian workers continues to grow strongly. According to the ABS annual *Employee Earnings, Benefits and Trade Union Membership* survey released today, 43.7 per cent of women now have paid maternity leave entitlements, an increase from 30.3 per cent in 2002.

While only 18.8 per cent of men had paid paternity leave entitlements in 2002, that figure has risen to 34.5 per cent of men in 2006.

This is at its highest level since the data was first included in the ABS survey in 2002. Under the Coalition Government, 56 per cent of women now have access to paid maternity leave provisions under federal collective agreements, an increase from 32 per cent of women in 1998.

'The ABS statistics make a mockery of ACTU boss Sharan Burrow's claims that this Government risks high participation rates for women,' Minister Hockey said.

'Female participation is at a near-record high of 57.5%. More women are working than any time in Australia's history. More than one million women have joined the workforce since 1996.'

'The Government's workplace relations reforms are giving parents choice and flexibility to balance work and family responsibilities,' Minister Hockey said.

In 1996 there were 279,800 women who gave 'family reasons' as the main reason for not actively looking for work.

In 2006, this number dropped to 200,900. The largest single reason for the decline was the child care component which fell from 192,000 to 129,200.

In 2006-07, the Howard Government will spend around $28 billion to assist women and families.

Family friendly initiatives include the $4100 Maternity Payment, available to all mothers regardless of their workforce status, Family Tax Benefit and child care assistance.

Source: Media release, Department of Employment and Workplace Relations,
3 April 2007

**Exhibit 3.3**

## Long working hours linked to family breakdown

Australia's dominant work culture is placing enormous strain on relationships, particularly in families, according to the results of a new report, *An Unexpected Tragedy: Evidence for the connection between working hours and family breakdown in Australia*, released today.

'Our report reveals that the past three decades of prosperity experienced by Australia have come at an unexpected price,' Paul Shepanski, co-author of the report, said today.

'The cost of this material success for Australians has not just been a more onerous burden of work but the effect of this work on relationships, especially in families,' he said.

Thirty years ago, average Australian workers spent less than forty hours a week at work, and this was predictably between the hours of 8am and 6pm. This gave them time for leisure activities away from work, and regular time with family and friends. Over the last three decades, working patterns in Australia have altered so dramatically that Australia is now the only high-income country in the world that combines very long average working hours with a high level of work at unsocial times – during weeknights and weekends – and a significant proportion of casual employment.

'The study shows that the balance between work and family life in Australia is severely out of kilter today, a deterioration that has occurred over many years, beyond the term of any particular government. Research has helped us to draw the link between working patterns and the quality of relationships. The cold statistics provide vital clues to the thousands of relationships in crisis across our country. Long and atypical working patterns are associated with dysfunctional family environments,' Mr Shepanski said.

‘The findings are a loud wake-up call for Federal and State governments, business and families. A significant majority of Australians see this as a problem. Until now, policymakers have lacked the coherent arguments and the right tools, to take action to support strong relationships in families and in the wider community.

‘The disturbing results of this report compel governments to sit up and take stock. Strong family and community relationships need to be at the top of our national agenda,’ Mr Shepanski said.

Source: Media release, Relationships Forum Australia, 6 March 2007

## Questions and activities

1. Does your organisation have a policy addressing the work/care or work/life balance? What is the practice? You may wish to interview some workers with carer responsibilities.
2. What is the connection between work/care and OHS?
3. What are the provisions under WorkChoices that affect work/care?

# 4. An ageing workforce

The ageing workforce and the skills shortage facing many organisations mean that many organisations have little choice but to employ increasing numbers of older workers.

While nine out of ten males and three quarters of females in the 45-54 age group are in the workforce, the participation rate drops dramatically to less than seven out of ten males and fewer than half of the females in the 55-64 age group. Some estimate that all of the growth in the workforce will be among people aged 45 years or over.[10]

In a Surveillance Report, *OHS and Ageing Surveillance Alert 2005,* produced by the former National Occupational Health and Safety Commission (May 2005), the authors concluded ‘Older workers learn to incorporate different strategies to compensate for their physical decline and those who work tend to maintain the level of physical skill required to complete tasks.’

The report notes there are a number of benefits to employing older workers.

## Reliability

‘In general, older workers are also more reliable, committed, flexible, and dedicated to their work’, the report notes. Their extensive work history means they have strong people skills and they can help develop and mentor younger workers.

## Retention

Additionally ‘older workers are more likely to stay in the organisation compared to younger workers, which means their knowledge, skills and experience can be retained by the organisation’.

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[10] ‘The scarcest resource – labour’, *Australian Financial Review*, 19-20 May 2007, pp22–3.

## Productivity

A study of the Australian Mining Industry showed older workers were more productive, had fewer accidents and less absenteeism, the report notes. ‘The greater the employee’s skills, competence and experience, the smaller the decline in productivity with advancing age.’

The authors acknowledge that cognitive abilities are the greatest between 30 to 40 years of age and start to decline in the late 50s or early 60s. However, they point out that within each age group there are wide variations in cognitive ability. ‘Weakening of precision and slower speed of perception is age related… However, some cognitive functions, such as control of language or the ability to process complex problems, improve with age.’

The authors also acknowledge risks.

## Decrease in shiftwork tolerance

Older workers are more likely to experience sleep disturbances and gastrointestinal symptoms associated with decreased shiftwork tolerance. This is due to age-related changes in circadian rhythms and preferred timing of sleep, as well as reduced flexibility in sleep patterns.

## Greater susceptibility to fatigue

The ageing worker is more susceptible to fatigue and other adverse symptoms. Together with the increased potential for chronic disease, this decreases the safety margin which protects the worker against injury and work-related disease.

## Inability to cope with intense bursts of physical work

Changes in flexibility and postural system make it difficult to adopt certain working positions. Older workers' lower aerobic capacity reduces their ability to exert concentrated intense effort over a short period. Although the ageing body retains significant abilities to carry out fairly sustained work, if it is exposed to sudden heavy loads, the consequences can be serious.

## Poor coping with multiple stresses

As people age, it becomes increasingly difficult to bear two types of physical stresses simultaneously. A 50-year-old worker can carry out medium physical work; his heart rate remains moderate and similar to that of a 25-year-old worker. However, if the older worker is in a hot atmosphere (30°-50°C in a humid environment), his heart rate increases far more than that of a younger worker, and can reach dangerous levels.

## Higher risk of falls

'Falls are a leading cause of injury among older adults and, as the population ages, occupational falls must be addressed', the authors say. The majority of falls (66 %) for workers over 55 are same level falls.

## Possible greater susceptibility to chemical exposures

Although there are no studies examining the issue, ‘it is speculated that ageing increases the worker’s susceptibility to the effects of chemical exposure’, the authors say. ‘This is due to the effect on the body of cumulative substances such as heavy metals and mineral fibres, the decline in liver and kidney functions associated with the normal ageing process, changes in nervous and immune systems and the long latency periods of carcinogens.’

## Hearing difficulties

Hearing deteriorates with age and affects certain lower frequencies [that can] impact on normal everyday speech’, the report says. Consequently, ‘older workers are more likely to have difficulty hearing speech in noisy environments… Even low levels of noise can make it more difficult for older workers to concentrate on complex tasks and can cause stress and related health problems.’

The report goes on to look at strategies to reduce the risks to older workers.

## Tailored ergonomics

Poor ergonomics is the main work-related cause of premature decline in work ability, the authors say.

‘Since ageing is an individual process, ergonomics for older workers should be individualised in order to accommodate for the worker’s limitations and utilise their strengths. Therefore, assessing the work ability of employees so that no mismatch of work capacities occurs for the ageing worker will be an important part of an ergonomic strategy for the ageing worker.’

## Job design

‘Job and work task design should be improved by avoiding … excessive work rates and production workload targets.’ With research indicating that employees experience lower anxiety and depression and higher job satisfaction when they have higher control over the timing of their work, self-paced work is preferable to machine-paced work or time limits imposed for handling call centre based inquiries, for example.

‘Adequate control can [also] enable older workers to adopt performance strategies to minimise problems that may be associated with age-related reductions in processing and response speed.’

## Noise reduction

Using partitions to reduce noise, along with regular testing of workplace noise levels, is recommended to compensate for the reduction in hearing experienced with ageing.

## Improved lighting

Improved lighting can compensate for the impaired sight associated with ageing. Increased susceptibility to glare in older workers can be accommodated by providing anti-glare screens for computer monitors, and using non-reflective surfaces for office furniture.

## Health promotion

Memory aids such as calendars and lists can be used to accommodate a decline in cognitive abilities. ‘In addition, encouraging older workers to have a healthy lifestyle, including regular exercise, proper diet and nutrition can also help in reducing cognitive decline’, the report notes.

## Tailored training

'As updating skills and knowledge is becoming a necessity in the majority of the jobs, this can cause a significant amount of concern and stress for the ageing worker', the authors say. 'Training courses should be adjusted for older workers as learning is not dependent on age but on method and delivery.'

For the full report and many useful suggestions, go to the ASCC website at www.ascc.gov.au/ascc/HealthSafety/EmergingIssues/

**Exhibit 4.1**

## Few reasons to stop older workers working: occupational physician

Making OHS improvements to accommodate an ageing workforce will result in a safer workplace for all employers, according to a leading occupational physician.

The Federal Government's call this week for older Australians to delay retirement and stay at work longer raises the question: 'do older workers have special OHS needs?'

WorkplaceOHS spoke to occupational physician, Dr Ian Gardner, who said the main point employers need to remember is that any improvement aimed at older workers - such as non-slip surfaces and increased automation - will benefit workers of all ages.

Dr Gardner, the past president of the Australasian Faculty of Occupational Medicine, said employers often had many misconceptions about older workers that 'need to be addressed'.

These include the notion that 'you can't teach an old dog new tricks'. Older workers can take longer to learn new skills, Dr Gardner said, but once they've learnt them they 'are very good at applying them'.

When training older workers, employers should try different approaches and include lots of hands-on activities. Trainers should allow plenty of time for workers to ‘play’ and make mistakes while learning new skills, he said.

## Older workers don't have higher rates of sickness

The belief that older workers have higher rates of sickness absences is also wrong, Dr Gardner said.

‘Healthy older workers have lower rates of absenteeism than most other workers’, according to Dr Gardner.

Apart from being healthy, these workers’ children are usually grown up, and so they ‘usually don’t have the same family responsibilities that are the cause of most so-called sickness absences’.

Older workers who stay working longer also tend to stay healthier for longer, Dr Gardener said.

## More accidents, but workplaces should be safe anyway

There is some evidence to suggest that older workers can be involved in more accidents such as slips and trips, Dr Gardner said. And when they are injured, the consequences can be more serious for older people.

But if you ‘make a workplace safer for older workers, you are making a workplace safer for everyone’, he said. A safer workplace is a more cost-effective workplace in the long-run.

## Jobs older workers should do

There aren’t too many jobs that older people should be excluded from, Dr Gardner said. However, those that may not be particularly well suited to older people include:

- Jobs where very fast reaction times are required;
- Jobs that are safety critical;

- Jobs that might interact negatively with any medication the older person is taking;
- Jobs that might be difficult to do if the worker has a particular health condition: for example, diabetics might find it difficult to manage their condition if they do shiftwork;
- Jobs that require fine colour judgements;
- Jobs that require fine distance judgements; and
- Jobs that require high levels of lifting and manual handling, such as storing and packing positions.

But Dr Gardner emphasised that older people can still effectively carry out many jobs if any ailments are appropriately treated, such as with appropriate glasses that correct vision impairments.

Glasses can also help older workers with any problems they may have using visual display screens.

### Don't judge a worker by their birthday

Although it's important to consider factors that can impact on workers' health and safety as they age, employers should remember that chronological age is often a 'very poor indicator of capacity or incapacity', Dr Gardner said.
Employers should 'assess the job and assess the person and come up with the best fit'.

Source: *WorkplaceOHS,* 26 February 2004

## Questions and activities

1. Does your organisation have a policy addressing older workers? What is the practice? For example, do risk assessments consider the issues of older workers? You may wish to interview some older workers to see if there are OHS issues.
2. What are the provisions under WorkChoices that affect older workers?

# 5. Asbestos – the James Hardie settlement[11]

Most people have heard of the dangers of asbestos but not as many know that it is probably the biggest peace-time disaster in Australian history. It is expected that 30,000 – 40,000 Australians will have contracted an asbestos related cancer by 2020. This compares with the total of 40,500 military deaths suffered by Australia in World War II.

The mining and manufacture of asbestos and asbestos-related products took place in Australia for most of last century and was widespread until the 1980's. From 1950's to 1970's Australia was the highest per capita user of asbestos in the world.
Every third domestic dwelling built before 1982 is thought to contain asbestos. Asbestos was used in asbestos cement sheet or 'fibro' until the mid 1980's. Asbestos was only finally banned in Australian workplaces in January 2004.

## Asbestos related diseases

Mesothelioma is a cancer caused by exposure to asbestos commonly occurring in the lining of the lung. It causes extreme pain and breathlessness as the lung is crushed by tumour. It is fatal within about 9-12 months of diagnosis. Time of first exposure to the onset of mesothelioma averages 37 years. There are currently no cures for the disease. It is estimated about 18,000 Australians will die from mesothelioma by 2020.

In addition there is asbestosis and asbestos-related pleural disease. Both are severely disabling respiratory diseases for which there are currently no effective treatments or cure. Finally, there is lung cancer and other malignancies that have been implicated in asbestos exposure.

[11] This chapter uses material from the ACTU James Hardie Fact Sheet. See www.actu.asn.au

# James Hardie

James Hardie was Australia's largest manufacturer of asbestos containing products throughout the twentieth century including asbestos containing insulation products, asbestos cement sheet or 'fibro', pipes and friction materials particularly brake and clutch linings.

Evidence presented at the Jackson Inquiry suggests James Hardie had knowledge of the dangers of asbestos as early as the 1930's. No warnings or directions were placed on Hardie fibro until 1978 and the company continued to use asbestos in the manufacture of cement sheet until the mid 1980's.

# Liabilities

The Hardies Group structured its operations so that the manufacture and supply of asbestos products was undertaken by subsidiary companies.

In October 2001 the NSW Supreme Court approved an application from James Hardie to move to the Netherlands and set up as a Dutch company taking with it $1.9 billion in assets from its former Australian companies. The court was assured these assets would be available if needed to meet the claims of Australian creditors including asbestos victims. The Netherlands is one of only two countries with which Australia does not have a treaty for the enforcement of civil court judgements.

In March 2003 the Dutch based James Hardie severed its final links with its former Australian asbestos producing entities and cancelled the capacity for them to call on the $1.9 billion to pay asbestos victims should this be required. It did not advise the NSW Supreme Court, the NSW Government or the ASX of this.

# The Jackson Inquiry

Following campaigning by unions and asbestos groups in NSW, in February 2004 the NSW Premier authorise Mr David Jackson to conduct a Special Commission of Inquiry into a compensation fund set up by James Hardie to cover any asbestos-related liabilities.

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On 14 July 2004 having previously steadfastly maintained it had no obligation, legal or otherwise, to make payments to asbestos victims James Hardie indicated they may be prepared to recommend to shareholders that additional funds be contributed on the basis of the introduction of a new statutory asbestos compensation scheme.

In August 2004, construction unions and some local council authorities announce their intention to ban the use of James Hardie products.

During August unions lobbied institutional investors in James Hardie to vote against the acceptance of the company's accounts on the basis that they make no provision for the future funding of the company's asbestos liabilities.

In September, US unions rally in support of Australian asbestos victims outside James Hardie US headquarters in California taking union protests into the US market where James Hardie earns more than 80% of its income.

On September 15 tens of thousands of Australian unionists hold rallies in capital cities around Australian to coincide with the company's Australian shareholder briefing meeting in Sydney. James Hardie chair woman Meredith Hellicar uses her address at the 2004 Sydney shareholders meeting to apologise to asbestos victims

On September 17, international and Australian unionists protest outside the James Hardie annual general meeting in the Netherlands.

## Findings

On September 21 2004 the Report of the Jackson Inquiry found:

- James Hardie’s Australian asbestos liabilities to be between $1.5 and $2.24 billion and that the company had under-funded its compensation fund by about $2 billion.
- That having pocketed the profits made from dealing in asbestos James Hardie had the capacity and moral obligation to provide funding to compensate current and future asbestos victims.
- James Hardie made misleading and deceptive statement in relation to the establishment of the compensation fund.
- Commonwealth authorities including ASIC should investigate the conduct of the company and in particular its CEO Peter Macdonald and CFO Peter Shafron.
- Serious questions about the conduct of several professional services and law firms in relation to the establishment of James Hardie’s asbestos compensation arrangements.

On receipt of the Jackson Report NSW Premier Bob Carr called on James Hardie to negotiate a settlement to their asbestos compensation liabilities with unions and asbestos groups.

## Heads of Agreement

Under pressure from all sides, James Hardie agreed to settle. The ACTU, Unions NSW, asbestos groups represented by Bernie Banton, and the NSW Government signed a Heads of Agreement with former asbestos products manufacturer James Hardie for what is believed to be the largest personal injury settlement in Australia's history on 21 December 2004.

The Heads of Agreement provides for:

- An open ended funding commitment – i.e. no cap on the overall funding;
- No cap on payments to victims;
- The creation of a Special Purpose Fund, which may be the MRCF, which will receive funding from James Hardie and make payments to claimants;
- The payment of an up-front cash ‘buffer’ equivalent to two years of claims plus the payment of a further year of claims in advance – this buffer will be approximately $250 million;
- Additional annual payments from James Hardie based on an annual actuarial assessment of the liability for asbestos claims;
- A maximum amount, or cap, on the annual James Hardie payment will be set at 35% of the company’s free cash flow. In the first year of the agreement this cap is equivalent to over $70 million;
- A minimum term of the funding arrangement of 40 years. The term of the agreement will be extended indefinitely if this is required; and
- Funding from James Hardie for asbestos education and medical research.

The Heads of Agreement also deals with other important details such as how funding for asbestos compensation will be secured, how the arrangements entered into will be made legally binding on the company and how the company can ensure, that with this episode behind it, it can get on with business.

## Final victory

Throughout 2005 and much of 2006, asbestos victims and unions waited for completion of the final compensation package and on critical taxation rulings.
The final condition before the money flowed was James Hardie shareholder approval. This has been achieved at an extraordinary general meeting in the Netherlands on 7 February 2007 with 99.6% of shareholders approving the compensation package.

Following the approval of James Hardie shareholders the first payment into the new Fund of $184.3 million took place on 7 February 2007.

The estimated nominal value of compensation costs (after insurance & other recoveries) is $3,17 billion.

## Questions and activities

1. In terms of your own organisation and workplace, what are the key lessons of the James Hardie case?
2. Nanotechnology could provide a similar threat to the workforce. Using the lessons of James Hardie and asbestos, what should be the response to this new industry? See the report produced by the ASCC in July 2006 – *A Review of the Potential Occupational Health & Safety Implications of Nanotechnology* available from their website, www.ascc.gov.au.

# 6. The growing federalisation of OHS and workers compensation

The 2004 Productivity Commission Inquiry Report on *National Workers' Compensation and Occupational Health and Safety Frameworks* pointed to the 'compliance burdens, costs and inefficiencies' for multi-state employers of having 10 principal workers compensation schemes and OHS regimes. It made a number of recommendations including an alternative national self-insurance scheme in addition to the Federal Comcare. This proposal was not accepted by the Federal Government.

Despite this, there is growing evidence of a Federal Government initiative to federalise much of OHS and workers' compensation. Recent and proposed changes to the Commonwealth OHS and workers' compensation legislation make the Federal jurisdiction more attractive to employers, than those of the States and Territories.

- The *OHS (Commonwealth Employment) Amendment Act 2005* reduces the need for employers to consult with unions over the appointment of Health and Safety (H&S) representatives.
- The *OHS (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2005* invalidates the industrial manslaughter provisions of the ACT's OHS Act or 'any similar industrial manslaughter laws enacted by a State or Territory' affecting Federal employers and employees covered by the Commonwealth *OHS (CE) Act*. (Industrial manslaughter laws allow for the jailing of managers without applying normal criminal processes.)
- The *OHS (CE) Act* is being reviewed, possibly to reduce the role of unions and the powers of H&S reps, while exposing H&S reps to damage claims.
- The *OHS and SRC Legislation Amendment Bill 2005* allows multi-state employers self-insured under the Commonwealth workers' compensation scheme (Comcare) to come under the *OHS (CE) Act*, the very same Act that the Federal government is trying to undermine. Companies such as Optus, Toll, LinFox, John Holland and NAB have left or are applying to leave State compensation schemes to be granted licenses to self-insure under Comcare.

(In March 2007, the High Court confirmed the right of corporations to self-insure under the Commonwealth SRC Act.)

- Under the *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2007 (SRCOLA)*, the Federal government is watering down the Commonwealth's *Safety, Rehabilitation and Compensation Act* – for example, dropping journey and recess claims, restricting claims for psychological injuries and reducing incapacity payments by redefining the employment contribution test for an injury or disease from 'material' to 'significant' overturning years of case law − thereby making them more employer-friendly.

In effect, we are facing the prospect of an enlarged Federal OHS and workers' compensation system complementing a Federal IR system in which both would offer diminished protection of workers while weakening the remaining alternatives at the State and Territory level.

For the moment, the Federal Government does not want a comprehensive national OHS or workers' compensation scheme with all its administrative responsibilities and funding liabilities. The Federal Government is content to pursue harmonisation of State and Territory legislation. For the moment, it will continue to cherry-pick the bigger self-insurers and see what develops while pursuing the main game of IR 'reform'.

At the same time, there are clear benefits for multi-state employers such as Optus that deal with different jurisdictions (see Exhibit 6.1).

**Exhibit 6.1**

## 'Optus scores "enormous" OHS improvements with self-insurance'

Speaking at the Australian Self Insurance Summit 2007 in Sydney, national health and safety manager with Singtel Optus, Elizabeth Wotherspoon, said its long self-

insurance journey began because the organisation wanted to reduce its escalating workers compensation premiums, which had topped $7.3m in 2005.

She told delegate's self-insurance was also the solution to 'inconsistent, differing benefits' for its 9,500 workers nationally.

Wortherspoon said she was 'very proud' of the outcomes Optus has achieved since it began self insuring on 30 March 2005 which include:

- Significant financial savings – end of first year $4m and are on track to make similar savings in their second year.
- 26% reduction in lost time injuries – largely due to prevention programs put in place which are 'starting to kick in'. Again, on track to meet Commission's targets on lost time and severity rates in the next six months.
- Improvement in internal processes – streamlined and tightened after reviews.
- Removal of duplication in processes and policy – now one legislation in OHS and workers compensation.
- Closure of tail claims – 80% of all tail claims now closed off.
- National OHS scheme – has brought consistency across the company.

Source: *WorkplaceOHS,* 3 April 2007

There are also benefits for workers in the same firm being treated equally no matter where one works. Unions too do not have to understand differing pieces of legislation. In general, a single, national OHS and workers compensation scheme has obvious attractions for everyone.

It is the process and outcomes that present the big problems. Often workers are not consulted over the change from State and Territory legislation to Federal legislation. It is difficult to assess whether one is better or worse off. How do you weigh the benefits and costs of one scheme against those of another? For example, how do you assess restrictions on access to common law that come with the move to the Federal workers compensation scheme?

In the spirit of proper consultation, workers should have the right to independent and professional assessments of the benefits and costs of any move in order to make an informed decision.

## Questions and activities

1. What are the benefits and costs of a single national OHS and compensation scheme?
2. If your firm was eligible to self-insure under Comcare and come under the Commonwealth OHS Act, what would you consider to be the major issues and how would you propose to deal with them?

# 7. Other developments

## Australian Safety and Compensation Council (ASCC)

The ASCC succeeded the former National Occupational Health and Safety Commission (NOHSC) on 7 February 2005. The ASCC is an Office in the Federal Department of Employment and Workplace Relations. Its first meeting was held on October 20, 2005.

The ASCC is tripartite with representatives from the Governments, industry and the unions. The Chairman is Bill Scales, a former head of the Productivity Commission and Group Managing Director of Regulatory, Corporate and Human Relations at Telstra.

The ASCC's role is to:

- advise on the development of policies relating to occupational health and safety and workers compensation;
- lead and coordinate national efforts to prevent workplace death, injury and disease – National Occupational Health and Safety Strategy (2002-2012) and endorsement of ILO Convention 155; and
- develop national standards and promote national consistency.

'Promoting national consistency' means that the ASCC has also been given the task of helping to harmonise OHS regulation across the nation.

While it is early days for the ASCC, some have criticised the length of time taken to develop national standards, a possible disproportionate time on workers compensation – something NOHSC did not deal with, and loss of expertise in standards development with the additional offices of the Australian Building and Construction Committee and Federal Safety Commissioner (see p.47).

# Federal Safety Commissioner

In response to the Cole Royal Commission into the Building and Construction Industry, the Federal Government passed the *Building and Construction Industry Improvement Act 2005* and the *Building and Construction Industry Improvement (Consequential and Transitional) Act 2005*. These provide for:

- the establishment of a statutory office – the Australian Building and Construction Commissioner to enforce Commonwealth workplace relations law in the building industry;
- the appointment of a Federal Safety Commissioner (FSC) in the Department of Employment and Workplace Relations, including the establishment of an occupational health and safety accreditation scheme in relation to persons that contract with the Commonwealth; and
- provisions dealing with unlawful industrial action, coercion in relation to certified agreements and discrimination in relation to the kind of industrial instrument.

The functions of the Federal Safety Commissioner include:

- promotion of best practice OHS on Australian Government building and construction projects;
- development and administration of the Australian Government Building and Construction OHS Accreditation Scheme;
- promotion of the adoption of safe design on Australian Government construction projects with the aim to eliminate and/or minimise OHS risk during the construction phase; and
- working with industry stakeholders to identify initiatives that will lead to an improved OHS performance in the industry.

Provisional accreditation involves a two stage assessment process, comprising of a desktop assessment and onsite auditing. Overseen by the FSC, the application stage will require contractors to provide evidence against the following criteria:

- evidence of a certified OHS management system, for example Australian Standard 4801, SafetyMap (4th edition) or equivalent;

- demonstrated senior management commitment to OHS;
- demonstrated effective sub contractor OHS management arrangements across building and construction projects;
- demonstrated ability to manage construction hazards and high risk activities; and past OHS history.

Full accreditation is now mandatory.

Criticism of the ASCC concerns its linking of health and safety with enforcement of restrictive industrial relations law. Unions such as the CFMEU have called for its abolition.

## Commonwealth

As mentioned earlier in this update, in 2006, the Commonwealth reviewed its *Occupational Health and Safety (Commonwealth Employment) Act 1991.* This is in addition to a number of amendments found in:

- the *Occupational Health and Safety (Commonwealth Employment) Amendment Act* enabling employers to avoid negotiations with unions over workplace representation and consultative arrangements;
- the *OHS and SRC Legislation Amendment Act* providing coverage under the Commonwealth OHS (CE) Act for those corporations which obtain a workers' compensation self-insurance licence under the Safety, Rehabilitation and Compensation Act 1988 and their employees;
- the *Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Act* ensuring that employers covered under the Commonwealth OHS Act are not liable for prosecution for the industrial manslaughter offences introduced by States or Territories such as the Australian Capital Territory; and
- Under the *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2007 (SRCOLA)*, the Federal government has watered down the Commonwealth's *Safety, Rehabilitation and Compensation Act* – for example, dropping journey and recess claims, restricting claims for psychological injuries and reducing incapacity payments by redefining the

employment contribution test for an injury or disease from ‘material’ to ‘significant’ overturning years of case law – thereby making them more employer-friendly.

## Victoria

New OHS regulations were released in January 2007 for comment. Employers must consult with reps before making workplace changes. Unions’ right of entry has been further enshrined.

## NSW

In June 2005, a 5-year statutory review of the *Occupational Health and Safety Act 2000* commenced ‘to determine whether the Act’s objectives remain valid and whether the provisions of the Act remain appropriate for securing those objectives.’

The *Report on the Review of the Occupational Health and Safety Act 2000* was tabled in Parliament in May 2006 and at the same time the draft *Occupational Health and Safety Amendment Bill 2006* was released for public comment.

A fact sheet summarising the proposals made in the Report can be found on the NSW WorkCover website. A key element is the clarification of the duties and obligations of duty holders under the Act and the ability to make directors and managers of corporations liable. It also attempts to improve the protection of clothing outworkers.

In 2006, a further Inquiry was instigated:

1. To review the proposals arising from the *Report on the Review of the Occupational Health and Safety Act 2000*, tabled in the NSW Parliament on the 2 May 2006 and consider whether these, or any changes, are required to the occupational health and safety legislation to better secure the health, safety and welfare of people at work.

2. Consider the impacts of the above proposals, having regard to best practice solutions that will remove unnecessary regulatory burdens on business, without compromising safety.

Paul Stein, QC, will be analysing the issues raised through the public consultation process and providing a report on 30 April 2007.

In New South Wales provisions for industrial manslaughter were demanded by the trade union movement after the adolescent building industry worker Joel Exter fell off a domestic roof and died. Joel's union, the CFMEU conducted a significant campaign around his death. However, NSW has resisted calls for the introduction of industrial manslaughter legislation.

Instead, the *Occupational Health and Safety Amendment (Workplace Deaths) Act 2005* was passed enabling prosecution of ‘people with duties’ under the NSW *Occupational Health and Safety Act 2000* whose reckless indifference to OHS results in a workplace death. A company director or manager can be charged only if they are personally reckless as to the risk of serious injury or death of another person.

The maximum penalty for the offence is $165,000 for individuals and/or up to five years’ imprisonment. Corporations face maximum penalties of $1.65 million.

The new provision allows a person to use the defence of a reasonable excuse. That is, their actions were justified given all the facts and circumstances of the incident. The current defences under the *Occupational Health and Safety Act 2000* will also continue to apply; that is, it was not reasonably practicable or the commission of the offence was due to causes over which the person had no control and it was impracticable for the person to make provision.

A prosecutor will still need to prove a breach of the law to the criminal standard of proof, that is, beyond reasonable doubt.

# WA

In 2006, Western Australia reviewed its *Occupational Health and Safety Act 1984*. In the report of December 2006, the Hooker Review made 25 recommendations that included clarifying the definition of ‘employers’ and ‘employees’ and the role of the Occupational Safety and Health Tribunal as well as giving further emphasis on workplace consultation.

The outcome of the evaluation of the new workers compensation legislation will be completed in early 2007, to be followed by a full legislative review and development process due to commence in April.

# SA

The South Australian Government will introduce a ‘reckless endangerment’ law as an alternative to industrial manslaughter with its higher standard of proof in 2007.

In March 2007, the SA Government initiated an inquiry into the impact of WorkChoices on the State's workforce, including the ability of employees to balance work/life commitments. The State Government has appointed the President of the South Australian Industrial Relations Commission, Judge Peter Hannon, to conduct the inquiry.

In April 2007, the Government announced it is reviewing its compensation scheme to reduce premiums and its growing unfunded liability which has increased ‘dramatically’ over five years – from $67 million to approximately $694 million in 2006. New laws are expected in 2008.

# Queensland

In April 2006, the Queensland Government passed the *Workplace Health and Safety and Other Acts Amendment Act 2006* giving unions the right to enter workplaces on

health and safety grounds in a move to circumvent the Federal WorkChoices legislation.

# Tasmania

An interim report of the review of the *Workplace Health and Safety Act 1995* was completed in February 2007. It made recommendations to:

- make stronger efforts to raise awareness;
- work more effectively in partnership with industry;
- place legislative and administrative emphasis upon good management and involving workpeople to achieve the outcomes; and
- avoid the proliferation of statutory material; and achieving vertical and horizontal agreement and co-operation in relation to certain aspects of workplace health and safety, such as training in health and safety matters and the application of health promotion in workplaces to more effectively control the hazards and risks that are known contributory factors to chronic disease.

The Government will not be addressing the issue of industrial manslaughter. However, a report by The Tasmanian Law Reform Institute in April 2007 has recommended introducing specialised principles of criminal responsibility for organisations into the State's criminal code, rather than reforming the OHS Act.

The review of the state's workers compensation scheme will be finalised in 2007.

# ACT

A report on review into ACT's workers compensation scheme is due by 30 June 2007.

# Industrial manslaughter

By amending the ACT *Crimes Act 1900*, the ACT became the first territory or state to impose the concept of industrial manslaughter on a corporation.

Prior to amendment, it was hard to prosecute a company for manslaughter due to common law principles required to attribute criminal liability to a company. Essentially the person whose reckless or negligent conduct caused the death of a worker must be proven to be the 'directing mind and will' of the company for the company to be held liable.

This test is difficult to establish against large companies which often have many levels of management between the directors and the day-to-day managers implementing the policies. The position in the ACT now provides that, where the director's policies and decisions cause the death of a worker, or the director allows a corporate culture to develop that disregards workers' safety and results in a death, the company and the director could be convicted of 'industrial manslaughter'.

Under State and Territory *Crimes Acts*, individuals can be charged with manslaughter when they contribute to the death of another person. The crime of manslaughter does not carry a monetary penalty, only a prison sentence. You cannot send a corporation to jail. The ACT legislation ensures that an employer can be held responsible where the employer 'reckless about causing serious harm to the worker … or is negligent about causing the death of the worker, by its conduct.' 'Conduct' includes omissions, so failing to do something in a criminally reckless or criminally negligent manner will also fall within the definition.

The ACT law creates the same offence against the employer's 'senior officers'. For government employers, this includes the relevant Minister, the chief executive officer or other executive position. For private employers, this includes the officers of a corporation such as directors and people who make decisions that affect the whole of the business – managers.

The ACT law provides for maximum fines of $1.25 million for companies but its biggest stick is a maximum jail sentence of 20 years for the employer's officers who are convicted of industrial manslaughter.