



# fatigue and the **law**

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# **FATIGUE AND THE LAW\***

## **ABSTRACT**

In recent years changes in the workplace have led to increases in the incidence of fatigue and fatigue related accidents. The legal response to this has been fragmented. This paper discusses the primary statutory instruments that impact on the area: Occupational Health and Safety legislation and Regulations made for the road transport and aviation industries. Other statutes are in place that do not directly address fatigue issues, but nevertheless must be considered when managing fatigue. These include legislation directed towards equal opportunity, industrial relations and workers' compensation. In addition to legislation, the role of fatigue in the criminal law and civil law is considered. Also, the scope of corporate and directors' responsibility for accidents are discussed. Finally, the paper discusses some possible future directions both in regard to the statutory and the common law spheres.

\* This document is for information purposes only and should not be relied upon for decision making. If the reader has any concerns about the matters raised in this document, they should contact a legal professional.

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## EXECUTIVE SUMMARY

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This report is designed not only to act as a survey of the relationship between fatigue and the law, but also to provide managers with clarification of their legal responsibilities in this area. As the body of the report may be technical, the appendices are written to help the reader to contextualise the concepts presented.

Fatigue does not occupy a discrete position in the law. It is addressed by many statutes and principles. This report will consider how it is treated in:

- Occupational Health and Safety (OHS) statutes
- Transport Regulations
- Criminal Law (death by dangerous driving and manslaughter)
- Corporations Law (directors' duties)
- Negligence (including vicarious liability)

In addition, when complying with the provisions of the above legislation, there are potential interactions with other areas of law. This report will consider interactions with:

- Industrial Relations Law
- Discrimination Law

### *OHS*

OHS statutes place a general duty on employers to maintain a safe work place. The legislation also identifies specific areas that must be addressed as elements of the general duty. These include duties of record keeping, provision of training and information,

and notification of any proposed change to work practice. In addition, there is a separate duty to consult workers on issues of workplace safety. The legislation imposes strict liability on employers. Thus, breaches of the duty/unsafe practices are actionable even if employers are unaware of them.

OHS Acts are supported by regulations and codes of practice. Currently, there are no regulations or codes of practice that directly address fatigue to supplement the general provisions of the legislation. However, there are some moves to incorporate fatigue management principles in a national occupational health and safety code of practice.

The emphasis of OHS legislation is on achieving a stated safety outcome, rather than adherence to fixed rules (i.e. an outcomes approach, rather than a prescriptive approach). Consequently, the onus is upon each employer to identify the health and safety issues in their workplace, and to create structures and practices that address these issues.

### *Transport*

In addition to OHS duties, each mode of transport has its own legislative framework for fatigue management.

Rail transport is the least active in this area. There are no legislative instruments that detail additional responsibilities for fatigue management. However, there are initiatives in place to include fatigue

management into a national code of practice.

Unless an exemption is gained, the aviation industry must comply with 'hours of duty' regulations made under the *Civil Aviation Act*. These regulations were not designed with fatigue as a direct focus, and are therefore somewhat ineffective in this respect. Currently, only operators who request a specific exemption to the regulations, rather than adopting a standard industry exemption, are required to adhere to a fatigue management program. The Civil Aviation Safety Authority (CASA) that administers the Act, is currently planning to introduce fatigue management requirements to all operators. In the longer term, CASA are looking to change the approach from prescriptive hours of service regulations to regulations that focus on safety outcomes.

Regulatory reform has taken place most actively in the road transport industry. Indeed, road transport is the only industry with a legislative instrument containing the word fatigue. There are two new concepts recently introduced that impact on fatigue management:

- (transitional) fatigue management schemes
- extended offences (chain of responsibility offences)

The transitional fatigue management scheme allows operators a certain amount of leeway to modify traditional hours of service regulations in accordance with general fatigue management principles. In other words, transitional schemes constitute a

halfway house between a prescriptive and non-prescriptive approach.

Currently, a fully non-prescriptive approach is being trialed in Queensland. This allows each operator to adopt their own company-specific, auditable fatigue management scheme. If this is successful, the intention is that it will be adopted in other states.

It is important to note that the previously discussed regulations do not apply in Western Australia and the Northern Territory. These jurisdictions do not have any specific fatigue management regulations made under road transport legislation. Rather, fatigue is solely managed by OHS mechanisms.

The other feature of the new road transport regulations is that they introduce extended offences (also referred to as chain of responsibility offences). Extended offences are committed when anyone in the transport chain directly or indirectly places pressure on another to breach the regulations. For example, a freight forwarder requires produce to be delivered within a specified timeframe. However, if it is impossible to meet the imposed deadline without breaching regulations, the forwarder will be liable. It is submitted that this principle will have a substantial impact in the industry when its implications are fully understood.

#### *Criminal law*

If a breach of the law is serious, the prosecutor may decide that charges under the general criminal law are appropriate. To date, the charge utilised

most frequently is culpable driving (or its equivalent in the different states). This charge is a very serious sanction of the criminal law. Although the financial penalty may be lower than those imposed for other branches of law, the collateral damage consequences (e.g. criminal record, negative publicity) are often more damaging to a company. Recent cases have established that in addition to company liability, directors and managers may have individual liability, and thus may be separately prosecuted. In the most extreme cases, a charge of manslaughter can be brought against a company or director.

#### *Corporations Law*

Recent changes in the Corporations Law have made it easier to prosecute directors for a failure of due care and diligence. This may prove to be quite expensive for directors, as the court can impose fines of up to \$200,000. Directors cannot indemnify themselves from these fines.

#### *Civil Law*

An individual who commits a negligent act must compensate anyone who suffers damage due to their act. Fatigued is associated with performance impairment, notably, slower reaction times, an increased error rate and frequent lapses in attention. Therefore, it is foreseeable that a fatigued individual would more likely to perform tasks negligently. Negligence claims can be very expensive to defend, as damages awards can be very large if the negligently caused accident involves personal injuries.

Employers may be liable for the negligent acts of their employees under the principle of vicarious liability. As long as the employee is doing something in the course of their employment, this principle will apply. The practical outcome of the principle of vicarious liability is that injured parties will often sue an employer, rather than the employee, as the employer is more likely to be able to pay the damages claim.

#### *Industrial Relations*

Fatigue management issues may form a proper subject matter for negotiation in award or workplace agreements. Technically, this could lead to a lowering of standards as employees bargain away their rights. However, negotiation in these areas does not often take place. More often, a default solution relying on OHS standards is adopted. There are two flashpoints between industrial relations and fatigue management. One area of difficulty encompasses the provisions relating to unfair dismissal, in particular, whether or not it is unfair to dismiss workers asleep on the job. The other is the question of whether workers compensation schemes cover the fatigued worker driving to or from work.

#### *Discrimination Law*

When implementing fatigue management strategies in relation to any of the above fields of law, the employer needs to be aware of the potential conflict with the indirect discrimination provisions of the law. An

employer may unintentionally breach these laws by introducing a policy that on its surface may appear neutral, but which has a discriminatory effect.

### *Conclusion*

As has been mentioned there are continuing moves for reform in the transport sector. These are both at the level of regulatory body, state and federal governments. One of the main issues being confronted is the question of how to raise industry awareness of fatigue issues.

Additionally, it is submitted that the law may be changing the way it views fatigue, towards an understanding that the fatigue levels of an individual can be accurately predicted with the aid of research and newly developed technologies. Furthermore, with a greater understanding of the performance decrement and safety risks associated with fatigue, there is a move towards more structured legal implications surrounding fatigue, similar to those currently in place for alcohol intoxication.

## 1.0 INTRODUCTION

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Business today runs around-the-clock. Increasing demands for goods and services, coupled with the desire of corporations to enhance profitability often results in a situation where existing employees carry an increased workload. Hence, a paradoxical situation arises, with high unemployment yet overwork for those who have a job. This requirement for work outside the traditional 9 to 5 day, during time traditionally reserved for rest or recreation places strain on workers. One of the costs involved is the increase of the incidence of fatigue. Fatigue is most noticeable in those industries most heavily reliant on 24-hour operating systems such as transport and manufacturing. It is also in these industries that the consequences of fatigue can be the most lethal and destructive. Fatigue is often cited as a contributing factor when transport accidents are investigated.

The increasing recognition of the prevalence of fatigue has been accompanied by an increase in scientific understanding. Research has focused not only on the causes of fatigue, but also the performance impairment, and subsequent increased accident risk that fatigue produces. Consequently, the law has begun to include fatigue into its calculations of liability and actionable fact patterns.

At present, there is a separate approach to fatigue issues within each individual area of law. This approach is neither consistent nor coherent. This

report will canvass some of the major fields of law in which there is a legal response to fatigue. The report will focus on Occupational Health and Safety legislation and more specific regulations directed towards fatigue management (e.g. National Road Rule (Fatigue management)). Indeed, these constitute the two most important pieces of legislation in the area. The report will also consider the impact of workplace fatigue on the legal liability of directors under the new amendments to the Corporations law, and the interaction of OHS legislation with Equal Opportunity legislation. Consideration will also be given to the interaction of the Industrial Relations mechanisms in Australia with all of these areas of law. In addition to its implications for statutory law, fatigue impacts on the civil and criminal law spheres. Relevant aspects of civil law include negligence and vicarious liability. Relevant aspects of criminal law include culpable driving and manslaughter. These concepts will be discussed in turn.

Following discussion of the law as it currently stands, a 'continuum of fatigue' approach will be proposed. This approach contends that fatigue may be conceptualised as producing an increasing level of impairment with increasing fatigue. This will allow sanctions to be applied consistent with a fatigue level, rather than the existing fatigued/non-fatigued dichotomy. The aim of this approach is to provide a more coherent framework than currently exists.

Finally, future trends will be discussed, including the recommendations of the Commonwealth House of Representatives Standing Committee on Communications, Transport and the Arts report into managing fatigue in transport.<sup>1</sup>

## 2.0 OCCUPATIONAL HEALTH AND SAFETY INTRODUCTION

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OHS legislation imposes a general duty on an employer to manage workplace safety, including fatigue. In a ground breaking case, in 1994, WorkCover Victoria successfully prosecuted a major trucking company for unsafe acts in relation to driving hours<sup>2</sup>. The company and the manager responsible were both fined – the company \$12 000 and the manager \$3000. The judge remarked that the fines imposed relating to practices today would be much higher than when these offences occurred (1994), as awareness of the effects and prevalence of fatigue has increased in the community.

Due to the division of powers in the Constitution<sup>3</sup>, the Commonwealth, each state and territory has separate pieces of OHS legislation. However, in most important respects, they are similar<sup>4</sup>.

In South Australia, the *Occupational Health, Safety and Welfare Act 1986* is the primary piece of OHS legislation, administered by the Workcover Corporation<sup>5</sup>. The legislative scheme works in a three tiered process. Firstly, the legislation provides that a general duty is placed on the employer to take reasonable care for the health and safety of employees (s19)<sup>6</sup>. This primary duty is then supplemented on the second tier by regulations made under the act (*Occupational Health, Safety and Welfare Act Regulations 1995*) which particularise the duty for individual industries. The third tier outlines standards and codes of practice produced by industry groups and organisations such as Standards

Australia. These provide a rule of thumb by which employers can measure their performance when executing their general duty.

The duties imposed under the OHSWA are designed to be preventative, rather than retributive. Therefore, an unsafe practice (i.e. a failure to comply with the general duty) may be determined as a matter of fact, and may be prosecuted even in the absence of accident or injury.

This legislation takes an outcomes based approach. In other words, legislation and regulations set out a general standard that must be reached by an employer. The specific way in which this general outcome is attained rests with the employer. This approach is in apposition to a prescriptive approach which details a single process by which compliance must be achieved. For example, an outcomes based regulation might state that employees must not be exposed to asbestos, leaving the employer free to determine how that will occur. A prescriptive approach to the same issue might state that every employee working with asbestos must be equipped with a mask, gloves and a hard hat. Interestingly, this trend towards an outcomes approach is paralleled by Road Transport legislation.

The adoption of the outcomes system has introduced some uncertainties in the law as to the relationship between the general duty and specific regulation. Indeed, it is possible for an employer to comply with the specific

regulations, while failing to achieve the general duty requirements. Thus, a difficult situation is created. One possible solution may be provided by a rule of statutory interpretation, stating that by implication, any newer piece of law supercede any earlier, directly inconsistent law. Thus the current 1995 specific regulations will supercede the earlier 1985 legislation detailing general duty. A second possible solution to the problem is provided by a common law rule stating that if a person complies with a regulation that overlaps with a general duty provision, that person is deemed to have complied with the general duty. This rule has been codified in some of the states' legislation, but not in South Australia. However, it is still likely to be applied because of a rule of statutory interpretation stating that if a statute is silent in a matter, the common law rule is still in place.

Box 1 - Example of a conflict between the general duty and specific regulation.

A trucking company rosters its drivers according to the Road Transport Driving Hours Regulations, and strictly enforces its employees driving hours. However, while returning to Adelaide from Sydney having a driver falls asleep at 5 am in the morning and crashes his truck into oncoming traffic.

The driver (and company) had complied with the Regulations, but the company had failed to provide a safe working environment, as required under s19.

Conversely, problems arise when an employer complies with the general duty but fails to comply with all specific regulations. To address this, the legislation has created a process whereby an employer can apply to have themselves exempted from the regulations<sup>7</sup>. Rozen<sup>8</sup> noted that to be consistent with the approach of placing greater responsibility on the employer, it may be that an alternate approach should be taken: Regardless of complying with regulations, employers have an all encompassing duty to control safety and the only question to be asked is whether the action taken was "reasonable" (to be discussed in more detail below). The matter is as yet unresolved.

Another possible problem may arise when conflicting duties are imposed by other legislation (e.g. anti-discrimination, industrial relations). Section 6 of the *OHSWA* provides that compliance of the act does not derogate from any liability or right conferred by other legislation. Therefore, a charge derived from another piece of legislation could not be defended on the grounds that the action or omission was undertaken in order to comply with the *OHSWA*.

The rights and obligations of the parties as stated in OHS legislation are defined and differentiated by the use of certain key words. There is a distinction made between "employee" and "self-employed worker" (also referred to as subcontractor or independent contractor). The concept of a "workplace" is also defined. These

issues are particularly important for the trucking industry as it consists of many independent contractors whose legal relationship to the contracting party may vary depending on the statutory context, and the particulars of their relationship. Additionally, when considering whether a roster sufficiently manages fatigue, the issue of what constitutes "work" is important as employers are only liable for "work". These issues will be discussed in more detail in the following sections.

2.1 KEYWORDS "EMPLOYEE" AND "CONTRACTOR"

The courts have adopted the common law position when considering how to interpret this distinction. The leading case in this area explaining the basis on which the employment relationship is categorised is *Stevens and Gray v Brodribb Sawmilling Co Ltd* (1986) 160 CLR 16. The High Court endorsed a multiple factor test in which there are a number of indicia as to which category the relationship falls. Per *Mason J* at 24-25,

"A prominent factor in determining the nature of the relationship between a person who engages another to perform work and the person so engaged is the degree of control which the former can exercise over the latter. ... But the existence of control, whilst significant, is not the sole criterion by which to gauge whether a relationship is one of employment. The approach of this Court has been to regard it as one of a number of indicia which must be considered in the determination of that question ... Other relevant matters

include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee."

Therefore, it is important to note that no matter what the employees call themselves, a court will look to various factors in order to objectively determine the category of the relationship.

2.2 KEYWORD "WORKPLACE"

Workplace has been defined fairly broadly in the legislation, and interpreted broadly in the courts. Section 4 (1) of the OHSWA in South Australia states that a workplace is any place (including an aircraft or ship) where an employee or self employed person works, and includes a place where such a person goes while at work. According to Lord Denning in *Gough v National Coal Board* (1959) 2 All ER 164 at 174, " 'working place' means, I think, every place where men (sic) are working or may be expected to work".

Additionally in *TTS Pty Ltd v Griffiths* (1991) 105 FLR 255 at 272, Asche CJ explained, "Indeed I would go further and suggest that, if a truck driver is driving his truck in the course of his employment, that a moving vehicle is a 'workplace' for the purposes of the Act." Thus, the term "workplace" would most probably also include places where loading and unloading of vehicles

occurs, as well as cockpits in aeroplanes and driver cabs in trains.

### 2.3 THE GENERAL DUTY OF THE EMPLOYER TO EMPLOYEES

Section 19(1) of the OHSWA (SA) (*supra*) details the general duty of the employer to employees in South Australia and section 19(3) of the act provides more detail about the general duty imposed in s19(1), and particularises specific duties that are important elements of the general duty. These include duties to monitor the health of the employee (ss 3(a)), keep records of workplace safety (ss 3(b)), provide appropriate information (ss 3(c)), make sure that new employees or employees that are carrying out hazardous duties are informed of those hazards (ss 3(d)&(e)), to inform employees of any change in practice and provide them with appropriate supervision (ss 3(f)&(g)) and keep any ancilliary facilities (eg recreation facilities) in a safe condition. In addition, The Supreme Court of Victoria, in *Chugg v Dunlop*,<sup>9</sup> explained that although an employer may have complied with all of the specific duties, they may not have exhausted the general duty. In other words, complying with all of the individual duties does not absolve an employer from the general duty. However, the fact that an employer did comply with the specific duties may be used as strong evidence that they had complied with the general duty.

The general duty of the employer is very wide, requiring the maintenance of

an ongoing system that prevents injury to workers. Thus, an employer may still be found to have breached the provision, even if there was negligence on behalf of the worker. An example of this can be found in the judgements of Cahill VP and Sweeney J in *Cullen v State Rail Authority (NSW)*, in which the defendant was found to have breached the equivalent of s 19 by failing to install an adequate safety system to prevent injury of the type that occurred. This decision was reached regardless of the fact that the employee did not follow the safety procedures in place at the time.

However, it must be noted that there is a duty on the part of the employee to take reasonable care to protect their own health. However, this duty is independent of the duty of the employer. That is, the safety of the work situation is judged independently of the actions of the employee.

The duty imposed by s19 is an offence of strict liability. Therefore, unlike crimes such as murder, where the accused must know what they were doing was illegal (*mens rea*), a conviction under OHS legislation does not require that the offender know that their action or omission (*actus reus*) failed to comply with the requirements of the act. The only qualification to this is that, at the very least, the employer is required to do what is 'reasonably practicable'.

'Reasonably practicable' involves a balancing procedure whereby the cost of mitigating the risk in question is weighed against its severity, the

current state of knowledge about it and the availability and suitability of countermeasures. The nature of the general duty and its qualification are discussed in *Holmes v R E Spence & Co Pty Ltd* (1993) 5 VIR 119 per Harper J:

The [OHS Act] does not require employers to ensure that accidents never happen. It requires them to take such steps as are practicable to provide and maintain a safe working environment ... In the main, such a responsibility can only be discharged by taking an active, imaginative and flexible approach to the potential dangers in the knowledge that human frailty is an ever present reality. ... One must then weigh the chances of spontaneous stupidity, or a fall, or the like, against the practicability of guarding the machine so as to maintain its function while preventing the human factor from resulting in injury. If the danger is slight and the installation of a guard would be impossibly expensive, or render the machine unduly difficult to operate, then it may be that the installation of the guard is properly to be regarded as impracticable.

It must be noted that community knowledge about fatigue and fatigue related incidents is now well established. It would be very difficult for any employer to claim that fatigue research was "an esoteric field of scientific knowledge"<sup>10</sup> and escape liability by pleading ignorance. Additionally, it has been established that, although persuasive, a universal practice is not conclusive evidence that a safer method was not reasonably practicable<sup>11</sup>.

#### Box 2 - Reasonably practicable

Measures that are reasonable to combat fatigue maybe such initiatives as rostering practices that take into account fatigue management principles. Another possibility is simple fitness for work tests administered to high risk groups before they commence work. These processes have the advantage of being proactive rather than reactive which is a factor that courts may take into account when determining reasonableness.

As a company is merely a legal fiction, it must *act* through its agents or employees<sup>12</sup>. However it can not delegate the *responsibility* to those people. Although not specified in the SA Act, it is likely that the state of mind of its agent (i.e employee etc) will be attributed to the company rendering it liable. This again reinforces the concept that a company cannot simply delegate the responsibility to even senior employees<sup>13</sup> (personal liability of responsible employees and directors will be covered below for OHS legislation, and in section 3.4 for the Corporations Law).

The company must not only create a safe system of work, it must enforce it, even in the case of experienced employees. Importantly, it has also been established that a company cannot argue that the reason an accident occurred was not that the system was inadequate, but that employees were fatigued.<sup>14</sup> In these

situations, documentation of the company's practices with regards to safety is vital for the company to prove its efforts were reasonable.

2.3.1 Liability of Directors and Managers under the general duty

As mentioned above, although the company must act through employees or agents, the responsibility still remains with the company and the directors of the company. A decision under the New South Wales legislation serves as an example.<sup>15</sup> In this case an employee died as the result of injuries sustained at work and, even though the company had no prior convictions, the judge fined the company \$80 000 and the managing director \$10 000. Directors cannot seek to be indemnified by the company for any breach where a penalty is imposed. It is a Corporations Law principle (s 199) that it would be against public policy to allow directors to be indemnified for their breach of a such a duty.

2.4 THE GENERAL DUTY OF EMPLOYERS TO NON-EMPLOYEES

OHS legislation is not limited solely to the protection of workers at a workplace, this would not make sense as it is not only employees that can be hurt by accidents at workplaces. Indeed, the general duty of the employer can extend to cover independent contractors who would otherwise not be defined as an employee by the objective indicia previously described. The case of *R v Swan Hunter Shipbuilders* [1982] 1 All

ER 264, provides an example of how, under English legislation (upon which most of the Australian legislation is based), an employer must ensure that the independent contractor does not pose a threat to the safety of their own workers. In this way, the employer is bound to maintain a safe workplace for the independent contractor.

Furthermore, although the legislation provides that contractors are to be treated as employees for the purposes of the act, it does not extend to employees of the contractor. Section 22 of the OHSWA (SA) act provides that the duty of the employer is to take reasonable care to avoid adversely affecting the health and safety of others by an act or omission at work. For example, it has been held that exposure of the general public to legionnaire's disease bacteria due to ineffective cleaning procedures at air conditioning towers<sup>16</sup>, and a failure to maintain a safe working environment for an employee of a contractor<sup>17</sup> constituted breaches of the equivalent English legislation.

Once again, this is a non delegable duty, and as emphasised in *R v Associated Otcel*<sup>18</sup>, a company cannot say that it delegated its responsibility to an employee and is thus exculpated.

2.5 CIVIL ACTIONS ON STATUTORY BREACH

Primarily, the OHS legislation is designed for a statutory body (WorkCover in SA) to bring prosecutions for breaches. However, the OHSWA (SA) s 6(2) also allows injured

employees to sue their employer for breach of statutory duty. This may be an alternative approach to a workers compensation claim. This action is available in South Australia, Western Australia, Queensland and Tasmania, but not the other 5 jurisdictions. It should however be noted that there may be other statutory provisions barring any actions, even if this act does allow it.

## 2.6 THE APPROACH OF WESTERN AUSTRALIA AND THE NORTHERN TERRITORY TO FATIGUE MANAGEMENT IN ROAD TRANSPORT

Currently, the eastern states and South Australia have or are in the process of adopting the *Road Transport Reform (Driving Hours) Regulations*. In contrast, Western Australia and the Northern Territory have adopted regimes that specifically require employers to manage fatigue in road transport as part of their general OHS duty of care. These jurisdictions have adopted a *Code of Practice for Commercial Vehicle Drivers*. This code is not mandatory, but it does provide the Courts and administrators with a guide as to what constitutes safe practice. If a breach of the *Code* is proven, the company may defend themselves on the basis that they had an equally good or better system in place. There is divergence of opinion on this approach to road fatigue management. For example, The Neville Report states that:

'We recognise that the occupational health and safety code of practice developed in Western Australia and

the Northern Territory is a valid alternative to the regulatory regime employed in the eastern States.

...

It is also possible that [both a prescriptive and outcomes] approach can be developed in a way that fosters a national consistency approach to fatigue management. The means of delivering the message might be different, but ultimately the substance of the message can be the same.<sup>19</sup>

However, in the inquest of the Coroner of South Australia into the fatal accident near Blanchetown on the 3<sup>rd</sup> of August, 1996, the coroner came to a different, stating that:

'Unfortunately, the Northern Territory and Western Australia have not joined [Road Transport Reform (Driving Hours) Regulations] scheme, so the legislation will still not be uniform throughout Australia. Indeed in Western Australia, the Government has decided to use the Occupational Health and Safety legislation in order to try and regulate the industry.<sup>20</sup>

## 2.7 EQUAL OPPORTUNITY LAWS AND OHS

Employers often face seemingly contradictory requirements when trying to comply with both OHS requirements, and anti-discrimination laws.

Discrimination can take two forms: direct and indirect. Direct discrimination is relatively well understood. For example, refusing to allow someone to migrate to Australia due to a physical disability constitutes direct discrimination. However, in this report,

discussion will focus on indirect discrimination, which is a more subtle concept. Indirect discrimination involves the implementation of a neutral standard that has a discriminatory outcome.<sup>21</sup> To give a fatigue management example, an employer might be engaging in actionable indirect discrimination, if in changing from an 8-hour to a 12-hour shift system, a disproportionately large number of women with families were not able to remain in work. This particular example was chosen because the issue of workers with family responsibilities is now especially relevant. The ILO Convention concerning Equal Opportunities and Equal treatment for Men and Women Workers (ILO Convention No. 156) now forms part of the *Workplace Relations Act 1996* (Cth) (WRA) and must be considered in industrial relations.

The anti-discrimination acts provide employers with a general defense against liability that operates in a similar way to the reasonably practicable defense in the OHS legislation. However, in the anti-discrimination legislation the question is whether the alleged discriminatory acts were reasonable in all of the circumstances.

A claim for indirect discrimination has to satisfy 4 requirements<sup>22</sup> :

- (i) there is a requirement or condition, which
- (ii) is able to be satisfied by a substantially higher proportion of persons of a different status than the applicant, and which

(iii) cannot be satisfied by the applicant, and

(iv) is unreasonable in all the circumstances

It is on the fourth element of reasonableness that employers would most likely be able to avail themselves. The High court has decided that reasonable should be given an expansive interpretation<sup>23</sup> : "reasonable in all circumstances of the case." Brennan J gave a range of factors as relevant (at 365):

"Effectiveness, efficiency and convenience in performing the activity or completing the transaction and the cost of not imposing the discriminatory requirement or condition or of substituting another requirement are relevant factors in considering what is reasonable."

Dawson J and Toohey J also considered that "the maintenance of good industrial relations, the observation of health and safety requirements, the existence of competitors and the like"<sup>24</sup> were relevant factors.

Caution must be exercised in the application of foreign jurisprudence, as in state legislation and in most federal legislation<sup>25</sup> , the burden of proof lies with the complainant. The reverse is true in most overseas jurisdictions.

The legislation also provides for a series of set exemptions. For example, s48 of the South Australian *Equal Opportunity Act 1984* (EOA) allows discrimination on the basis of sex in sport. It also allows for discrimination on the basis of sex in education where the institution is founded primarily for one sex.

Unlike other jurisdictions, the EOA (SA) does not provide that an act done to comply with another statutory instrument (such as OHS legislation) will automatically constitute a defense to a claim of indirect discrimination. In contrast, a Victorian court found that an employer was not liable under anti-discrimination legislation as its conduct was authorised under the Victorian OHS act<sup>26</sup>. It must be emphasised that this defense could not be run in SA.

The final complication in consideration of indirect discrimination is the interplay between the state and federal jurisdictions. When the federal Industrial Relations Commission reviews an industrial agreement, although it is required by s 93 of the *Workplace Relations Act 1996* (Cth) (WRA) to take account of discrimination issues, it is not required to enforce them. Notably, one of the statutory provisions in the *WRA* is that acts done in compliance with the Act are exempt from the provisions of other Acts. This was confirmed in *Gibbs v Commonwealth Bank of Australia*<sup>27</sup>. Therefore, in these situations, as s109 of the constitution confirms that federal legislation overrules state legislation when there is an inconsistency between the two, employers may be able to engage in indirect discrimination contrary to state law without the possibility of prosecution.

## 3.0 INDUSTRIAL RELATIONS

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Working hours<sup>28</sup>, staffing levels and rostering are all matters that can be included in industrial award negotiations. For example, the Industrial Relations Commission recently held<sup>29</sup> that a union could apply to trial a 12-hour shift pattern for, amongst other reasons, greater physical and mental recovery time and establishing better sleep patterns.

The first point that must be made, is that it is not possible to contract out of obligations imposed by statute. Therefore the duties imposed by OHS legislation (i.e. to create and maintain a safe environment) would still be in existence, even if a workplace agreement or award waived or provided for unsafe conditions<sup>30</sup>. As the question of fault is not an issue, it does not matter if an industrial agreement was reached which deliberately or inadvertently circumvented the duties. Likewise, the employee cannot bargain away their own duty to conduct themselves in a safe manner.

Unions and other representative parties to the negotiations act as agents of individual employees<sup>31</sup> and are required to negotiate using due skill and diligence. Indeed, if they do so, they will not be held liable for any faults or shortcomings in any agreement. However, if an agent presents themselves as an expert, or as having expert knowledge, they will be held to a higher standard<sup>32</sup>.

All jurisdictions have enacted OHS legislation that provides for employee health and safety representatives. In

most cases, when an organisation reaches a certain size it is mandatory to have such a representative. These representatives have the power to issue default or stop work notices, and have the right to be consulted on any matter regarding changes to work practices that affect OHS. Health and safety representatives are legislatively indemnified from civil or criminal liability and vilification on the basis of their OHS activities, provided that their actions are not taken improperly. Acting improperly includes abuse of power, for example issuing a work prohibition notice for the purpose of economically damaging an employer.

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### 3.1 UNFAIR DISMISSAL

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Falling asleep at work will often lead to dismissal. However, a dismissed employee can claim for reinstatement or damages if the dismissal is "harsh, unjust or unreasonable"<sup>33</sup>. Note also that dismissal may allow for a discrimination claim which may be pursued concurrently with any unfair dismissal claim (subject to a bar on double recovery).

A determination of this issue will turn on the facts, with the stated aim of the legislation that "a fair go all round for employer and employee"<sup>34</sup> should occur. A court must consider both the situation of the employee and the employer in arriving at a decision. Matters of safety where fatigued employees could operate dangerous machinery are a valid consideration<sup>35</sup>.

Simply showing that the employee was acting dangerously is not enough. The company must firstly show that safety concerns were an integral part to the dismissal. Secondly, they must provide evidence that active processes were in place to monitor and combat fatigue. Finally, they need to demonstrate that the employee was ignoring these processes. Additionally, a company should not try to 'catch out' the sleeping employee, but attempt to assist them to manage their tiredness<sup>36</sup>.

Another consideration that has appeared frequently in the decisions of the courts is the appropriateness of the dismissal rather than the reassignment of an employee. If a company has reason to believe that an employee might fall asleep or is fatigued then it would be 'reasonable' for them to have a reassignment procedure in place. This procedure would allow the employee to be assigned alternate duties. Indeed, dismissal should only be considered as a final option.

One final aspect of 'reasonableness' is the work and rostering practices of a company. It is submitted that, if an employee is required to work shifts that put them at greater risk of fatigue, and consequently, they fell asleep or their performance was impaired, it would be difficult to claim that the termination of employment was justified.

## 3.2 WORKERS' COMPENSATION

All Australian jurisdictions have compulsory workers' compensation schemes. Each piece of legislation differs in the detail of its approach, but all follow a common principle. This report will again focus on the South Australian legislation<sup>37</sup>. The main consideration for workers compensation schemes is the question of whether they cover the fatigued worker driving to or from work. Before looking at this question, another must be considered, the threshold question of "Who is a worker?"

A worker is less expansively defined in the *Workers Rehabilitation and Compensation Act 1986 (SA) (WRC)* than in OHS legislation. An employee is defined as an individual who is part of the traditional employment relationship (as discussed above in 2.1), as well as a limited range of individuals who are 'deemed' to be employees for the purposes of the act (For example, volunteers). Therefore, in contrast to the coverage provided by OHS legislation, contractors, outworkers and other categories of people who do not fall within the scope of the traditional arrangement, are not covered by the scope of workers' compensation. This results in a significant limitation of the scope of the legislation in the modern employment climate in Australia.

In the case of the tired worker who is involved in a car accident, after establishing whether the person is a worker for the purposes of the act, it must be established whether the injury "[arose] out of, or in the course of

employment<sup>38</sup>. In the context of journeys, the legislation has set out particular requirements that must be met before compensation will be awarded. These are contained in s 30(5):

"Compensation is payable for a disability sustained

...

(b)(i) if the journey is between the worker's place of residence and place of employment and there is a real and substantial connection between the employment and the accident out of which the disability arises.

..."

The statutory formulation does not exclude the possibility that a worker may be fatigued due to long working hours and that this would constitute the necessary substantial connection between the employment and the accident. However, the difficulty faced by the worker is proving this connection. In *Workcover Corporation / Mercantile Mutual Insurance (SA) (Quality Staff Pty Ltd) v Andrew Paul Davies* [1997] SAWCAT 91<sup>39</sup>, on the basis of evidence given by experts on fatigue, the tribunal held that a particular work pattern would cause substantial levels of fatigue. However, they did not allow that this caused the inattention which led to the crash. For a claim of this type to be successful, it would seem that there would have to be objective and direct proof that (a) the worker was fatigued, and (b) that the work environment was the sole cause of this fatigue. In practice, this would be difficult to show. The difficulty

of proving fatigue may not be fatal to a worker's case, if they can otherwise prove that there is a substantial connection between employment and the journey to work. For example, the fact that an employer makes special arrangements for transport to a remote workplace<sup>40</sup>, has held to be sufficient.

## 4.0 TRANSPORT

Separate legislation is in place to regulate road, rail and aviation transportation. While road and rail transport are primarily state matters, aviation is essentially managed within the federal sphere. There is substantial variation between road legislation provisions for each state, notwithstanding the recent attempt to harmonise them.

### 4.1 ROAD TRANSPORT

Traditionally fatigue has been managed by a prescriptive 'Regulated Hours Regime' monitored in log books. As with OHS, a three tiered approach has been taken. The main piece of road transport legislation in South Australia is governed by *Road Traffic Act 1961* (SA). At the second tier are the regulations created under the main act. The regulations are specific to certain areas of road transport and have the force of law and the *Road Traffic (Driving Hours) Regulations 1999* will be considered in this paper. Thirdly, there are the codes of practice. Codes have no force in law, unless legislation specifically include them, however they can provide companies with a way of complying with the different forms of legislation and regulations that applies to them, or describe a industry 'best practice'.

Recently, the part of the tri-level scheme that has received the most attention in the eastern states and South Australia is the regulations level. These states have begun to implement

the *Road Transport Reform (Driving Hours) Regulations* (known in South Australia as the *Road Traffic (Driving Hours) Regulations 1999*) which is intended to achieve national consistency. However, this is unlikely to happen in the foreseeable future, due to the differing approach in the Northern Territory and Western Australia (see above). In addition to greater consistency, the new regulations introduce two new concepts into the regulatory approach to combat fatigue in drivers. These are the Fatigue Management Schemes (and Transitional Fatigue Management Schemes) and the notion of a 'chain of responsibility'.

#### 4.1.1 Fatigue Management Schemes (FMS)

Essentially, an FMS allows an accredited company to be excused from the prescriptive Regulated Hours Regime, if they can establish that they have implemented their own auditable fatigue awareness and management scheme. It must cover areas such as rostering, scheduling, time on job, sleep hygiene and health of drivers. The main advantage of such an approach is that each company can devise a system that suits its own conditions and is not hampered by inflexible prescriptive regulations.

Queensland is the only state that is operating a Fatigue Management Scheme (FMS), and currently is in the process of reviewing and evaluating it. However, if it is approved by the

Australian Transport Council, it is likely that other states will follow and adopt the system.

The Transitional Fatigue Management Scheme is essentially a hybrid of prescriptive and non-prescriptive approaches, and is a temporary measure until approval of the FMS.

#### 4.1.2 Chain of Responsibility

A key feature of the new regulations is the concept of a 'chain of responsibility'. Traditionally, Anglo-Australian law has developed looking only to redress the loss caused to a person by the one who directly caused it, and looked no further to antecedent causes. However, law makers have begun to realise that it is not just the truck driver who has the responsibility to manage fatigue and bear the burden of defending fatigue related incidents. In reality it extends to those in the company responsible for rostering and delivery schedules, directors and senior management, as well as those outside the company e.g. freight forwarders, consignors, and ultimately customers - parties who traditionally do not see themselves as having any part to play in the problem. To address this, Part 5 (Regulations 74 -78) has been inserted into the regulations which makes it an offence to require a driver to commit an offence against the regulations, including the provisions regarding fatigue.

#### Box 3 General extended offence regulation

##### **Certain requests etc prohibited**

**75.** A person must not ask, direct or require, directly or indirectly, a driver to do something if the person knows, or reasonably ought to know, that by complying the driver would, or would be likely to commit-

- (a) a core driving hours offence; or
- (b) a driving record offence; or
- (c) a speeding offence.

Maximum Penalty : \$2,500

The fine suggested in the draft national legislation was \$1500, but the South Australian parliament considered the matter more serious. A body corporate may be fined up to 5 times the amount otherwise specified (Reg. 129).

#### 4.2 RAIL

Unlike Road Transport, there are no instruments that deal directly with fatigue and fatigue management in rail legislation. Each of the state regulatory authorities have agreed to base their accreditation of rail operators on the *Australian Standard for Rail Safety, AS 4292*. However, this Standard does not directly deal with fatigue issues. Therefore at present, rail operators need only consider their duties under general law and the statutes discussed in part 2, above.

### 4.3 AVIATION

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Aviation in Australia is a federal responsibility, regulated under the *Civil Aviation Act* 1988. This act provides for the establishment of the Civil Aviation Safety Authority (CASA) which regulates the industry. CASA has established regulations detailing the industry's responsibilities for flight and duty times under Civil Aviation Order Part 48 (CAO 48). These regulations are prescriptive, and to cope with the widely differing nature of aviation in Australia, CASA has introduced 10 industry wide exemptions. In addition, CASA is able to issue individual exemptions to cover specific operators. Therefore, operators have the choice of strictly obeying the limitations in CAO 48, complying with one of the standard industry exemptions or applying for an individual exemption. To qualify for a specific exemption, CASA requires that an operator provide an auditable fatigue management system<sup>41</sup>. If this system is found to be inadequate, it can result in the specific exemption not being granted.

A breach of CAO 48 constitutes a breach of Regulation 5.55(2) and is subject to a fine of \$2750. Additionally, under the powers granted to it under s 28 of the act, CASA has the power to "take appropriate regulatory action" for breaches of regulations. This can ultimately mean varying, suspending, or canceling an operator's license.

## 5.0 CORPORATIONS LAW

The Corporations Law Economic Reform Program (CLERP) Act (1999) introduced significant changes to the area of directors' duties in the Corporations law. These duties parallel and often overlap with the duties of OHS legislation. The existence of overlap is acknowledged by s185, which states that the provisions for directors duties are to have effect in addition to any other duty owed by a person in their capacity as an officer or employee of a corporation. While the regulatory body for corporations (ASIC) is not likely to bring any action against directors for fatigue related matters, the new amendments introduce the possibility of shareholder derivative actions<sup>42</sup>. Again, it is unlikely that most shareholders will want to bring an action against the directors for a fatigue related incident, but there are two groups of shareholders who could foreseeably wish to take action. Firstly, some activist groups attempt to influence corporate action by buying shares. Secondly, employees who are shareholders through employee share bonus schemes are able to take action. Actions are most likely to be brought for the breach of s180(1), the due diligence clause. In *Daniels v Anderson*<sup>43</sup> the court held that a director in a modern company is under a duty to familiarise themselves with the company's business and how it is run. The court also said that directors cannot be willfully blind, claiming that they were unaware of any misconduct.

A fatigue example of a situation in which this could occur is contained in Appendix 2.

Another of the reforms introduced in the CLERP Act allows a director to delegate responsibility (s 198D), and to rely on any information received (s189) without incurring liability. This amendment appears to be in conflict with the strict position of the OHS legislation. That is, directors may not delegate and merely rely on employee reports. As the amendments are only recent, there is no case law on this question yet.

Before commencing a corporations law action, the remedies that may be attained should be considered. Corporations law remedies are usually enforced against directors on behalf of the company, so a successful plaintiff will not receive anything in their own name. This may be suitable for the shareholder activist whose goal is to heighten corporate responsibility. However, such action is of little use to an injured employee who seeks compensation for medical costs. A further consideration involved when contemplating a corporations law action is that upon declaration of contravention by s1317E(1)(a), an order of penalty may be made under s1317G of up to \$200,000, a substantially greater figure than may be available for other causes of action.

## 6.0 CRIMINAL LAW

If conduct is considered to be serious or grave enough, the relevant authority may launch general criminal law charges on behalf of the public. This report will consider personal liability for death by dangerous driving (also known as culpable driving in other jurisdictions) as well as personal and corporate liability for manslaughter.

### 6.1 DEATH BY DANGEROUS DRIVING

There is currently no offence on the statute books that makes it illegal to drive while fatigued<sup>44</sup>. If a driver falls asleep at the wheel and causes an accident, the authorities must attempt to express their prosecution in terms of causing death by dangerous driving. In this case, driving while fatigued was the manner in which the driving was dangerous. The leading high court case in the area is *Jiminez v The Queen*<sup>45</sup> in which the majority of the court delivered a broadly concurring judgement that covered many of the points in this field. The majority described the nature of culpable driving as,

[having] some feature which is identified not as a want of care but which subjects the public to some risk over and above that associated with the driving of a motor vehicle, including driving by persons who may, on occasion, drive with less than due care and attention.<sup>46</sup>

The majority pointed out that being asleep at the wheel does not of itself constitute culpable driving. In law,

being asleep at the wheel is considered equivalent to being unconscious and therefore any action is treated as involuntary. Acts that are not voluntary cannot attract criminal liability in our legal system.

However in *Kroon v The Queen*<sup>47</sup> King CJ (approved in *Jiminez*) pointed out that,

“Every act of falling asleep is preceded by a period during which the driver is driving while awake and therefore, assuming the absence of involuntariness arising from other causes, responsible for his actions. If a driver, who knows or ought to know that there is a significant risk of falling asleep at the wheel, continues to drive the vehicle, he is plainly driving without due care and may be driving in a manner dangerous to the public. ... The cases must be rare in which a driver who falls asleep can be exonerated of driving without due care at least, in the moments preceding sleep.”

Therefore, driving while fatigued will constitute dangerous driving if the driver is aware that they are tired, and as a result of this tiredness (1) the driver falls asleep, or (2) the driver performs another dangerous action. Some examples of dangerous actions in the case law are: failing to keep a proper look out<sup>48</sup>; drifting onto the incorrect side of the road<sup>49,50</sup>; failing to stop at a stop sign<sup>51</sup> and failure to negotiate a roundabout at speed<sup>52</sup>.

## 6.2 MANSLAUGHTER

While in most cases the charge of causing death by dangerous driving would be prosecuted, it is not unreasonable to say that a charge of manslaughter could be brought if the situation warranted. The difference between charges of dangerous driving and manslaughter is that a charge of manslaughter is reserved for those situations that are so serious that they call for the fullest sanction of the criminal law<sup>53</sup>. The components of manslaughter have been recently restated as: the defendant caused the death of the deceased, the act was performed consciously and voluntarily and that the acts were criminally or grossly negligent<sup>54</sup>.

In recent years there have been calls for directors and managers to be held more accountable for industrial deaths<sup>55</sup>. There is a policy element to these calls that has two aspects. The first aspect questions why a corporation, manager or director can avoid the full force of the law in a serious accident that leads to death. The second aspect comes from an acknowledgment that public perception of OHS is fortified by high profile prosecutions for manslaughter. Equally, the adverse publicity and penalties that can be imposed personally on a manager or director can provide a significant stimulus to manage fatigue.

To date, there has been one successful prosecution of a corporation being held liable for manslaughter<sup>56</sup> but no cases have yet held directors personally liable. Corporate liability is only

possible due to the legal fiction of separate corporate identity that underpins our law. As a corporation can only act through human agents, the key question is which human agent's guilty intention can be attributed to the corporation. The common law position of attribution in this situation is described in the British case *Tesco Supermarkets Ltd v Natrass*<sup>57</sup> per Lord Reid

"A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his instructions. A corporation has none of those: it must act through living persons, though not always one or the same person. Then the company who acts is not speaking or acting for the company. He is speaking as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as servant, representative, agent or delegate... It must be a question of law whether... a person in doing particular things is to be regarded as the company or merely as the company's servant or agent."

The *Tesco* principle states that the requisite knowledge required for a criminal prosecution can only be held by senior officers, the board of directors or people to whom responsibility had been delegated by the board. If this principle is followed, for a body corporate to be held liable, a senior officer must be shown to have held the requisite intention. The *Tesco* principle has been criticised<sup>58</sup> and it doesn't necessarily fit with the other principles of individual and corporate

responsibility that have been described above (e.g. OHS legislation and the CLERP amendments). However, it still operative law. There have been legislative attempts to alter the criminal liability of companies in the *Criminal Code Act (CCA) 1995* (Cth) so that the focus is on corporate intent rather than individual intent. The CCA came into force in 2000, but as it is Commonwealth legislation, it only has effect in federal criminal matters. As yet, South Australia has not adopted the CCA. Additionally, currently in SA there are an additional offences contained in s29 of the *Criminal Law Consolidation Act* for "Acts endangering life or creating risk of grievous bodily harm" which require the *mens rea* element to be determined in accordance with the *Tesco* principle.

## 7.0 CIVIL LAW

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The law of torts (wrongs) allows someone who has suffered a physical injury to claim against those who caused it in the tort of negligence. The claim will only succeed if the plaintiff can show that they had a duty owed to them by the alleged tortfeasor, that the duty was breached, and that damage followed as a consequence of that breach<sup>59</sup>. Additionally, in certain circumstances, the law of torts allows for a person to recover from another for the actions of a third. This is called vicarious liability. In this report, vicarious liability will be considered in the context of the employers' vicarious liability for the acts of employees.

### 7.1 NEGLIGENCE

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The law of negligence assumes that people who operate dangerous machinery such as a motor vehicle owe a duty to others around them. In most cases the existence of a duty to others is not in question. However, the question of whether the duty has been breached may give rise to argument. In negligence cases, individuals are judged against the standard of a hypothetical average driver who is reasonably awake and alert. Usually, courts will not allow an individual to claim fatigue as a factor that lowers the standard by which they are judged. That is, individuals cannot argue that special consideration should be given to them because they were tired. Moreover, there are lines of authority in Canada<sup>60</sup> and New Zealand<sup>61</sup> that an individual who was aware of a danger

owes a duty higher than the normal standard. Therefore, a driver who is fatigued or who knows that they are likely to be fatigued (e.g. because they have just worked a night shift, haven't slept in 24 hours or they have been warned about fatigue in their workplace) will find it difficult to avoid a negligence claim.

Another area of negligence that is increasingly in the public eye is medical negligence. Younger doctors in public hospitals regularly work very long hours, leading to high levels of fatigue in potentially life threatening situations<sup>62</sup>. As a further example, the anaesthetics literature has identified fatigue as an error issue<sup>63,64,65</sup>.

(Patients may also be able to sue doctors for breach of contract, and doctors may also be criminally liable if the circumstance is serious enough).

### 7.2 VICARIOUS LIABILITY OF EMPLOYERS

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Provided that an employee is not "going on a frolic of his own"<sup>66</sup> and is within the scope of their employment, an employer is liable for the illegal or negligent acts of its employee. This principle may be applied in the field of fatigue, as the potential exists to attribute responsibility to the employer in almost any fatigue-related accident. One such situation, proposed in O'Keefe<sup>67</sup>, describes a fatigued quality control inspector who fails to notice a fault in a can of fish. Consequently, many people experience food

poisoning. In this case, the only way in which the manufacturer could escape liability for vicarious negligence would be to show that the employee was acting outside the scope of his/her employment. Indeed, this could be achieved by showing that the employer had procedures in place to monitor fatigue and to reassign fatigued workers to non-critical duties. Additionally, the employer would be required to show that the employee had ignored or deliberately circumvented these procedures in order to continue work while fatigued.

It should be noted that the fact pattern described above could equally give rise to liability under the *Trade Practices Act, 1974* (Cth)<sup>68</sup>

## 8.0 FUTURE TRENDS

### 8.1 THE NEVILLE REPORT

Fatigue is an issue receiving increasing attention from governments, regulatory bodies and ultimately the courts. The House of Representatives Standing Committee on Communications, Transport and the Arts recently published the findings of its enquiry into fatigue in transport named, "Beyond the Midnight Oil: Managing Fatigue in Transport". In this report, the committee discusses recent changes in the law and proposes recommendations for future action. While the report is not binding on government or agency, its conclusions and arguments have significant persuasive power. For the purposes of this discussion, the recommendations of the report will be divided into three main categories.

- a proposal that driving while fatigued should become an offence (Recommendation 34)
- a raft of proposals seeking to include fatigue management principles into the road, rail and aviation industries (Recommendations 33, 2, 4, 7, 12, 13 and 31 are flagged as priorities).
- a proposal that there be a national OHS standard and code of practice on workplace fatigue (Recommendation 30) will be considered.

Additionally, it is recommended in the report that fatigue be explicitly addressed in industrial relations negotiations (Recommendations 27 and

28), where currently it is only an area that may be considered, for example, as an OHS issue.

If the recommendation that driving while being fatigued is taken up by state and territory parliaments, it will place fatigue in a similar position as offences of drink driving. Therefore there will also need to be development of fatigue level measuring devices, and establishment of types of evidence that can be used to prove fatigued driving. The parliaments will have the choice of creating a general offence (such as driving while under the influence of alcohol), or an offence making it illegal to drive when fatigued over a certain level (equivalent to the offence of having greater than the proscribed level of alcohol in the bloodstream), or both (As is the case with alcohol and driving currently). The current situation may be usefully compared to the position of drink driving before the introduction of specific statutory provisions directed to driving while under the influence of alcohol. At that point in history, the only offence was that of a general nature – driving without due care, in particular because the person was drunk and therefore not able to safely control a vehicle. Parliaments have subsequently introduced specific legislation making it an offence to drive with a certain amount of alcohol in a person's bloodstream. They have made a value judgement, stating that the level of impairment induced when there is a concentration of alcohol in the blood a person must not drive a

vehicle. The important point here is that in this situation the law is not interested in how the level of alcohol affects the individual driver – no doubt many people are perfectly capable of safely driving at higher concentrations, but it has drawn a ‘bright line’ at a particular concentration of alcohol. This is not the case with fatigue currently, the only offence is the general offence. This leads to the conclusion that there is no point trying to formulate a bright line based on hours of sleep (I.e. You will be negligent if you drive only after 4 hours of sleep). For example in a negligence action, the question of the courts will be whether the sleep obtained lead to a reasonably foreseeable chance of an accident.

The recommendations of the Neville report for the transport industry generally refer to the incorporation of fatigue management principles into codes of practice and regulations. Some of these recommendations are already being acted upon. For example, CASA is currently looking to introduce a fatigue management component into the civil aviation regulations in mid 2002(Recommendation 4)<sup>69</sup>. If all recommendations for the transport sector are implemented, auditable fatigue management schemes will become a compulsory part of accreditation and regulatory processes.

The third grouping of recommendations (30 and 40) suggest that fatigue should be specifically included in OHS legislation, regulations and codes of practice. Arguably, as fatigue is already a workplace safety issue, this is not

necessary. However, the additional clarity would highlight employers’ legal responsibilities and provide them with information on best practice.

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## 8.2 OCCUPATIONAL HEALTH AND SAFETY

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One recent article described previous prosecutions for breaches of health and safety obligations as largely symbolic, sending a signal that “neglect of health and safety duties by employers will not be tolerated”<sup>70</sup>. Furthermore, South Australia has the highest average fine per successful prosecution in the country<sup>71</sup>, and investigations are usually only launched by authorities after an accident occurs. Thus, it may be concluded that employers must not wait for an accident to happen, but instead must manage workplace safety. It is suggested that the number of fatigue-related prosecutions will increase as awareness both within the community and regulatory bodies increases.

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## 8.3 THE LEGAL UNDERSTANDING OF FATIGUE

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As discussed, fatigue is a concept that is currently dealt with in an inconsistent manner by the courts and legislature. In *Jiminez*, the High Court seemed to discuss fatigue as if it was an all or nothing condition. The approach was that if people are fatigued, then they should be aware that they cannot perform functions with due care, resulting in liability.

Possibly because the facts of the case did not require it, the High Court did

not recognise that fatigue is a cumulative process, different levels of fatigue lead to different levels of impairment. To illustrate this point, it is perhaps useful to again compare fatigue and alcohol impairment. The law recognises that there are different levels of alcohol intoxication, and that these levels produce different levels of impairment. The government has decided that at a certain level of intoxication (i.e. 0.05%), a person may not drive a vehicle (or perform a number of other activities) due to the risk posed. Currently, driving while fatigued (at any level) is not illegal. However, some judges have begun to recognise the nature and impact of fatigue<sup>72</sup>, and government has introduced the requirement for fatigue management in certain circumstances. Indeed, the term fatigue management itself implies that there are levels of fatigue, and these can be measured and different levels require different responses.

The majority of legislation currently does not deal with fatigue as a distinct issue. Instead, it is concerned to limit the hours that an employer can force an employee to work. In this sense, the issue was probably thought of as an industrial relations question rather than a safety issue.

Unfortunately, legislative reforms are at the moment piecemeal and incomplete, and judicial recognition of a scale of fatigue has only been indirectly accepted in lower courts. It should be noted that *Jiminez* was decided in the early 1990s, but much of the legislative

reform has taken place only recently. Therefore, based on the understanding of fatigue reached in the more recent enactments, it may be suggested that the conceptualisation of fatigue has changed. Perhaps *Jiminez* can be distinguished as turning on its own facts, and a new paradigm for fatigue established.

## APPENDIX 1.

### SCENARIO 1 – NEW TRANSPORT ROUTE

In this scenario, the 'preventative' measures required by a company will be examined in a practical context.

BigTruck Pty Ltd, a small family business, has recently won a lucrative contract to supply a large supermarket chain with fresh produce. The contract requires BigTruck to take the produce from market farms in the Virginia district to distribution centres in Adelaide, Melbourne and Darwin. What steps must the company take to comply with fatigue related legislation?

#### *OHS*

There are four principles that should be considered when considering occupational health and safety<sup>73</sup>. They are: (1) a commitment from the top to managing safety; (2) a culture that includes safety in all its actions; (3) realistic goals; and (4) a recognition that each company has a different situation.

A comprehensive OHS management system should encompass the following:

- A written policy that sets out the responsibility of senior management to improve safety issues.
- Written procedures.
- Identification of relevant codes and regulations. Ideally, these will be incorporated in the policy. Awareness must be maintained

about changes and updates in the law and research.

- A corporate structure that includes board, management and employee responsibility. These responsibilities must be clearly delineated.
- A documentary system that allows risks to be identified and monitored, including instances of non compliance and what was done.
- Training and instruction at all levels (possibly including independent contractors if they do not have their own system) that is included as part of operating procedure, not as a tacked-on issue. Completion and details must be documented.
- Auditing. (External auditing may be appropriate)
- Board level review. This is crucial, given the individual liabilities that directors are exposed to.
- Documentation. A reliable and accurate paper trail will provide evidence of the actions taken by the company to comply with the legislation.

#### *RTA*

When scheduling the rosters, the company will need to decide whether it will use the prescriptive hours of service road regulations, or whether it will apply to use a Transitional Fatigue Management Scheme. Additionally, in the future they will have the option of

choosing to create their own Fatigue Management Scheme.

#### *SA/Vic Route*

As the hours of service and transitional fatigue management scheme regulations do not greatly differ between South Australia and Victoria, no special interstate issues will need to be considered for the SA/Vic route.

#### *SA/NT Route*

This is not the case for the SA/NT route, as the NT requires fatigue to be managed according to OHS principles. The simplest way to do this is to conform the Code of Practice while in the NT (although the company can develop its own system, if it can show that its system is as safe as that described in the NT code).

The company will have to comply with both the SA and NT systems during this trip, as each jurisdiction does not recognise the system of the other. The company may apply for an exemption for this route from one of the systems on the grounds that it is complying with the other.

#### *Other Matters*

In addition, the company may voluntarily adopt an auditable fatigue management system, over and above the current regulatory requirements. If it does this, the company will be able to show that it has taken all reasonable steps to prevent against injury caused by fatigued drivers. Therefore, it will be in a strong position to defend itself against negligence actions based on fatigue, and its directors will be in a

stronger position to defend against Corporations Law due diligence claims.

Following implementation, the company must continue to be active in monitoring and reinforcement of the system it has created. The courts have regularly stated that only an actively enforced system will suffice. In addition, the company must ensure that its employees are aware of fatigue management principles, in order to comply with RTA regulations, and s19 of the OHSWA. The company must ensure that its foremen do not directly or indirectly cause drivers to drive while fatigued. The company can also point out that the RTA provisions apply to others in the supply chain if they feel pressure on them to compromise their system.

The company must also ensure that any changes set up do not conflict with requirements of the industrial system within which they are working, and be aware of the possibility of indirect discrimination. In most cases, if the company consults with the relevant interest groups (e.g. union delegate, worker representative, OHS representative) and affords them a say in the process of arranging the new work practices, they will have discharged their duty.

## APPENDIX 2.

### SCENARIO 2 – POST-ACCIDENT LIABILITY

In this scenario, an accident has occurred and the focus will be on what the company may be liable for and what they may be able to do to mitigate damages. To simplify issues, in this scenario, the driver has no alcohol or drugs in her bloodstream.

Fjols Ltd, a large public transport company has been put under financial pressure due to increased competition by smaller competitors in the market. It has been forced to promise delivery on a 'just in time' basis and significant penalty provisions have been written into the contracts. If these were incurred they would threaten the financial survival of the company. Senior management has made it generally known that there are no margins allowable for lateness in the schedule. Apart from vague statements to "Stop if you are tired", no consideration is given to fatigue. Logbooks are rarely inspected, and are widely understood to be largely incorrect.

Due to circumstances out of her control, one driver is delayed 2 hours due to vehicle repairs and, to arrive on time attempts to drive direct from Sydney to Adelaide without a break. Consequently, the driver falls asleep at the wheel in the Riverland, fails to negotiate a bend and crashes into an oncoming school bus. Ten children are fatally injured.

Fjols is potentially liable to be prosecuted for:

- Breaches of the OHS Act. (Both the general s19 duty, and several of the particularised sub duties and the general duty to non employees). Note that although s 6(2) would allow an employer to be sued by an employee, common law claims against employers by employees for damage have been abolished by the *WRC act*. This may leave independent contractors without a remedy, as they are not covered by worker's compensation, but would have been under the OHSWA.
- The person responsible for OHS implementation, and if none were appointed, all officers of the company, may be personally liable.
- Breaches of the RTA regulations, specifically
  - the hours of service regulations
  - the extended offences (chain of responsibility) regulations. (It may also be that the contractor is also guilty of a breach of these regulations)
  - Negligence (Vicariously)
- Manslaughter
- Director's breach of duties of due diligence (the action would need to be brought under the derivative standing sections, perhaps by disgruntled shareholders – see section 3.4)

## APPENDIX 3

### OCCUPATIONAL HEALTH AND SAFETY – EXAMPLE

s19 – duty to provide a safe working environment for employees.

A motor vehicle manufacturer engages employees to work in its plant on a 24 hour basis. Employees are rostered on to shifts and when extra work is available, it is offered to existing staff as the opportunity to work overtime before the company considers hiring new staff. The regular rosters are vetted by a computer program which monitors the fatigue levels of employees, and indicates when fatigue is considered to be too high to work with processes that are designated as dangerous. However, when extra work is offered, there is no process in place to make sure that the employee accepting the extra shift falls within acceptable fatigue levels. When the new normal rosters are considered, the extra work is however factored in. This could be considered an unsafe work practice under s 19, as it is possible for an employee to be working dangerous machinery when they are too tired to do so without danger of injuring themselves.

s22 – duty to maintain a safe workplace for others.

The same situation as presented above, with a few alterations can provide an example of a breach of s 22. This time the company manufactures petrochemicals, again on a 24 hour schedule. If a fatigued employee made a mistake, there is the potential for

harmful chemicals to be released into the environment, harming third parties. This would constitute a failure to maintain a workplace so that it didn't harm others.

Note too, that in both these examples, no actual damage has occurred. The potential for harm is sufficient for the operation of the provisions of the Act.

## APPENDIX 4

### INDUSTRIAL RELATIONS – UNFAIR DISMISSAL AND WORKERS COMPENSATION EXAMPLES

#### Unfair dismissal –Workplace Relations Act 1996 (Cth) s170 CE(1)

An electricity generating plant operates with a relatively large number of employees at night, so that if there is an emergency, there is a sufficient workforce available. The shifts are popular with the staff as they offer the possibility to earn extra money from penalty loadings, and all staff that work overnight have requested to do so. The rosters are monitored by computer analysis to ensure employees are not fatigued. However often there is not much work for the employees to do, as most of the issues surrounding the national electricity grid have been worked out. At about 4am, some employees have started getting into the habit of sneaking away into a quiet part of the plant and sleeping for an hour or two. Management is aware of this and has warned the guilty employees individually that the practice is not allowed. In addition, they have sent a number of employees to have medical checkups to see if there is a medical reason for their sleeping. Where necessary, these tests have included overnight sleep studies to determine if any of them were suffering from sleep apnoea. Those employees with medical conditions were assigned to different work schedules and the remainder informed that if they were caught again that they would be dismissed, but that they did have the option of returning to

day work if they wished. If management were to catch any of the employees sleeping again, they would probably have a strong case to put to the court if the employee sued under s 170CE(1).

#### Journeys - Workers Rehabilitation and Compensation Act s 30(5)

A university student is employed by a firm on a part time basis to perform research. Occasionally, this includes writing reports on fairly short notice. The firm gets her to do this one day, and she is up until 3 am finishing the report before returning to work the next morning at 8am. By mid afternoon, it becomes obvious that the student is too tired to be of much use at the office, and she is sent home. However, she agrees to drop off some documents at the company's solicitors on the way home. As she is on her way to drop off the package, she momentarily falls asleep and has an accident by crashing into the back of a vehicle. The question here is whether the journey was work related or not. As explained above (at 3.2) normally, a journey to and from work does not suffice for workers compensation claims. However, the facts of this example might fall within the scope of the legislation, as the student was delivering a package as part of her employment. On the other hand, the court may say ask what the main purpose of the trip was. If it decided that the main purpose was to return home, then this fact pattern would fall outside the scope of the legislation.

## APPENDIX 5

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### ROAD TRANSPORT REGULATIONS – EXTENDED OFFENCES AND TFMS EXAMPLES

A company conducts a freighting operation between all of the capital cities in Australia. It has not applied to conduct its operations under the TFMS, and therefore comes under the jurisdiction of the prescriptive hours of service regulations. It rosters a driver to take a load from Sydney to Perth via Adelaide. They state that the driver is required to be in Perth within 3 days. (The trip should take about 5 days to keep within the strict limits of the driving hours regulations and speed limits.) The organisation with whom they have created the contract is a company that organises transport for a number of large chain stores, and has been given time limits by the chain. If the driver were to complete the trip within three days, the employer, the freight forwarder and the company would be liable to fines under the extended offences of the Road Transport (Driving Hours) Regulations. As these organisations are bodies corporate, they would be liable to a maximum fine of \$12, 500 (In SA). The driver would be liable to be prosecuted for breaching the maximum driving hours regulations.

If however, the driver did not complete the trip within three days, and stayed within the regulated driving hours, the employer, forwarder and chain would still be liable for penalty, as the regulations state that the offence is committed by requiring or asking the driver to do something that would breach the regulations.

## APPENDIX 6

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### CRIMINAL LAW – DEATH BY DANGEROUS DRIVING EXAMPLE

At about 7 am, at the completion of a night shift at a hotel and over 24 hours of wakefulness, a young man commences his journey home. About half a hour later, while driving on a major road he fails to negotiate a bend and drifts onto the other side of the road, into the path of incoming traffic. He crashes into a car travelling in the opposite direction, killing the passenger and severely injuring the driver. It is established that the young man fell asleep just before the road started to curve, which explains why the vehicles brakes were not applied and why no evasive manoeuvres were taken. Additionally, it appears that about a kilometer from the accident, the young man had wound down his window to refresh himself. In this situation, the young man would be liable to a charge of death by dangerous driving, and driving causing grievous bodily harm. In particular, the evidence that the young man took steps to refresh himself indicates that he was aware of the potential that he might fall asleep, an essential belief according to *Jiminez*. For further discussion of this issue, see *R v Pellow*, Supreme Court of New South Wales, Court of Criminal Appeal, Matter number 60144 of 1997.

NEGLIGENCE – VICARIOUS LIABILITY  
EXAMPLE

A council in the country awards a company a contract to provide transport so that the council's engineers can examine the electricity transmission lines within the council's patrol area. The company employs a pilot to carry out the contract. Between flights the helicopter is stored on the property of one of the council's engineers. The council's engineer explains the lay of the land at the start of the survey period, but only once mentions a low height low voltage transmission wire that is partially obscured by trees running across the paddock near where the helicopter is stored at night. Later that week, the pilot having flown 130 hours in the month preceding, (The contract and flying hours legislation limited this figure to 100 hours per month) flies into the low voltage transmission line and crashes the helicopter injuring himself and his observer. The pilot has a valid claim in negligence against the council on the basis that it owed the pilot a duty to warn of hazards. This liability would be owed on behalf of the council by its agents, the engineers. The earlier warning would not be sufficient to absolve the council of its duty. The pilot may be guilty of contributory negligence if it can be shown that he was excessively tired due to his workload. For a detailed discussion of a similar fact scenario, see *Petts v Northern Riverina County Council* [2000] NSWSC 360.

## APPENDIX 8

### DUTIES IMPOSED BY LAW

#### DUTIES IMPOSED BY LAW – EMPLOYERS

##### *Occupational Health and Safety\**

- The employer has a duty to provide and maintain a safe workplace. This includes, but is not limited to:
  - Keeping records of the safety process, including such items as accident reports, preventative maintenance records, when and by whom safety checks were conducted and responses to accidents.
  - Providing information, training and supervision to employees
  - Monitoring health of employees
  - Ensuring that middle management has adequate information to supervise etc employees

##### *Driving Hours Regulations extended offences\**

- Employers must not directly or indirectly force employees to contravene the driving hours regulations.

##### *Civil Aviation Orders*

- Employers must comply with either the hours of service regulations provided in Civil Aviation Order Part 48 (or a standard industry exemptions provisions) when rostering employees.

### *Industrial Relations*

- Employers must be aware if their industrial award provides for any changes in OHS requirements.
- Employers must be aware if they wish to dismiss an employee that they must do so without being 'harsh, unjust or unreasonable'. This may include employee training or counseling and employee reassignment. The employer must, within reason, afford the employee an opportunity to address any performance issues.

### *Discrimination / Equal Opportunity*

- Employers must not include any practices in the workplace that would have the effect of restricting the ability of a minority group to perform those tasks satisfactorily. However, the employer need only do what is reasonable in the circumstances.

### *Reasonable foreseeability*

- Employers must not do anything that they know or should know would cause injury to another.

\* In NT/WA there are no driving hours regulations, rather employers should comply with the *Code of Practice for Commercial Vehicle Drivers*

### DUTIES IMPOSED BY LAW – EMPLOYEES

- Occupational Health and Safety. Employees have a duty under s21 of the act to perform their duties in

a manner so as not to cause harm to other workers or themselves. A part of this duty is the requirement to use any equipment provided for safety purposes and comply with any relevant policies.

- Driving Hours Regulations. Employees are required to drive in accordance with the Road Transport Regulations with regard to driving and resting times.
- Employees are required to conduct themselves carefully and take countermeasures if they suspect that something they do may cause injury to another. (Negligence)

#### DUTIES IMPOSED BY LAW – DIRECTORS

In addition to the duties that directors have as employers, directors have duties imposed on them by the corporations law. The duty relevant to the question of managing fatigue is provided in s 180 (1) of the Corporations Law

s180 (1) – A director or other officer of a corporation must exercise their powers and

discharge their duties with the degree of care and diligence that a reasonable person would exercise.

Also, a director has the duty to find out what is happening in a corporation and act accordingly.

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<sup>1</sup> House of Representatives Standing Committee on Transport, Communications and the Arts, *Beyond the Midnight Oil, Managing Fatigue in Transport* (2000) (*hereinafter* The Neville Report)

<sup>2</sup>Workcover Authority of Victoria, "Transport company fined \$12,000" *News Release* 12 August 1999.

<sup>3</sup> The Commonwealth only has power to legislate over specific heads of power set out in s 51 of the Constitution, of which OHS is not included. However, it does have power under s 52(i) and (ii) to legislate for places owned by the Commonwealth and the federal public service. Note too, that s 109 provides that if there be any inconsistency between a federal and a state statute, the federal statute will prevail to the extent of the inconsistency.

<sup>4</sup> See Johnstone, *Occupational Health and Safety Law and Policy*, 1997, Sydney, LBC Information Services, for a detailed comparison of the differences.

<sup>5</sup> This legislation covers most industries, but not all, for example mining.

<sup>6</sup> s 19(1) "An employer shall, in respect of each employee employed or engaged by the employer, ensure so far as reasonably practicable that the employee is, while at work, safe from injury and risks to health."

The definition of health in the legislation is the World Health Organisation's 1946 definition, "Health is a state of complete physical, mental and social well-being, not merely the absence of disease or infirmity."

<sup>7</sup> *Occupational Health, Safety and Welfare Act*, 1985 (SA) s67.

<sup>8</sup> Rozen, P "The New Regulatory Framework" *Law Institute Journal*, 1996, 70(10);36-37

<sup>9</sup> *Chugg v Dunlop* [1988] VR 411 at 414 per Fullagar J

<sup>10</sup> *Softwood Holdings Pty Ltd v Stevenson*, unreported, Industrial Relations Court of SA, Jennings SJ, Cawthorne and Parsons JJ, No 489nof 1993, 24 November 1995, quoting Glass, McHugh and Douglas (1979) at 15.

<sup>11</sup> *Martin v Boulton and Paul (Steel Construction) Ltd* [1982] ICR 366

<sup>12</sup> In South Australia, each corporation must specify one or more responsible persons to have personal responsibility for OHS – s61.

<sup>13</sup> *R v British Steel plc* [1995] 24 IR 428

<sup>14</sup> *McLean v Tedman and Brambles Holding Ltd* <sup>REFERENCES</sup> (1984) 155 CLR 306

<sup>15</sup> From Bell, J and Vass, S "Liability of Employers, Directors and Managers for Workplace Safety" *Australian Construction Law Newsletter*, 70 (March/April 2000) 29-31

<sup>16</sup> *R v Board of Trustees of the Science Museum* [1993] ICR 876

<sup>17</sup> *R v Associated Octel Co Ltd* [1996] 4 All ER 846

<sup>18</sup> *R v Associated Octel Co Ltd* [1996] 4 all ER 846 at 848

<sup>19</sup> House of Representatives Standing Committee on Communications, Transport and the Arts, "Beyond the Midnight Oil: Managing Fatigue in Transport" Parliament of the Commonwealth of Australia, October 2000 at 2.58-2.60.

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- <sup>20</sup> Coroners Report Number 39 of 1998, 17<sup>th</sup> March, 1999 at 9.8
- <sup>21</sup> For a more complete discussion of indirect discrimination see Hunter, *Indirect Discrimination in the Workplace*, Federation Press, Sydney, 1992.
- <sup>22</sup> This formulation is common to all Australian legislation, except the *Racial Discrimination Act* (Cth), as amended, which differs slightly in a manner not relevant to the current discussion.
- <sup>23</sup> *Waters v Public Transport Corporation (Waters' case)*(1991) 173 CLR 349 at 365.
- <sup>24</sup> (1991) 173 CLR 349
- <sup>25</sup> *Disability Discrimination Act* 1992, *Race Discrimination Act* 1975, but strangely not the *Sex Discrimination Act* 1984 which specifically reverses the onus to the discriminator to prove that an action was reasonable.
- <sup>26</sup> Unreported, *H J Heinz Company (Australia) Limited v Turner*, Anti-discrimination Tribunal of Victoria, 1998.
- <sup>27</sup> (1997) EOC ¶92-877
- <sup>28</sup> Including spread of hours, *Scott v Sun Alliance* (1993) 178 CLR 1
- <sup>29</sup> The Federated Engine Drivers' and Firemen's Association of Australasia, WORSLEY ALUMINA AWARD, 1982(1), [1992] 325 IRCommA
- <sup>30</sup> This is confirmed in s 170 LZ and 170 VR which state that industrial agreements are subject to state OHS laws.
- <sup>31</sup> *Mining Misc. Award (Public Interest) Award Case* (1975) 42 SAIR 497
- <sup>32</sup> *Commonwealth Portland Cement Co Ltd v Weber Hohmann & Co Ltd* [1905] AC 66
- <sup>33</sup> *Workplace Relations Act*, 1996, s 170CE(1)
- <sup>34</sup> *Workplace Relations Act*, 1996, s 170CA
- <sup>35</sup> Unreported, *Australian Industrial Relations Commission*, 23<sup>rd</sup> March, 1998, *O'Conner C*
- <sup>36</sup> *David Edwin Barber v MSS Security and Mayne Nickless Limited ACN 004073410* Industrial Relations Court of Western Australia, 29<sup>th</sup> September, 1995, McIlwaine JR
- <sup>37</sup> *Workers Rehabilitation and Compensation Act*, 1986 (SA)
- <sup>38</sup> *WRC Act*, ss 30-31.
- <sup>39</sup> Affirmed in *Davies v WRCC* [1998] SASC 6757
- <sup>40</sup> *Mark Dry v Workcover Corporation (Bardrill Corporation Ltd)* [1996] SAWCAT 126
- <sup>41</sup> Civil Aviation Safety Regulations Part 119
- <sup>42</sup> *Corporations Law*, s 236.

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- <sup>43</sup> (1995) 13 ACLC 614
- <sup>44</sup> However, see recommendations of the Neville report, section 8.1 below
- <sup>45</sup> (1992) 173 CLR 572
- <sup>46</sup> Majority at 579
- <sup>47</sup> 55 SASR 476 at 480
- <sup>48</sup> *The Queen v Franks* [1998] VSCA 100
- <sup>49</sup> *R v Rowson* 67 SASR 96; [1996] SASC 5791
- <sup>50</sup> *Regina v Pellow* (Unreported, Supreme Court of New South Wales Court of Criminal Appeal Newman J, Levine J, Barr J, 1 August 1997)
- <sup>51</sup> *Plenty v Bargain* [1999] WASCA 67
- <sup>52</sup> *The Queen v Rudebeck* [1999] VSCA 155
- <sup>53</sup> Death by dangerous driving is an alternative verdict to manslaughter (s19B(3)).
- <sup>54</sup> *The Queen v Osip* [2000] VSCA 237 per Batt J.A.
- <sup>55</sup> See references p423 OHS book
- <sup>56</sup> *R v Denbo Pty Ltd.* Unreported, Supreme Court of Victoria, 8<sup>th</sup> June, 1994 per Teague J
- <sup>57</sup> [1972] AC 153
- <sup>58</sup> For example see Johnstone, *Occupational Health and Safety Law and Policy* (LBC Information Services, Sydney, 1997) p425-426.
- <sup>59</sup> Luntz, H and Hambly, D *Torts Cases and Commentary* (Butterworths, Sydney, 4<sup>th</sup> Ed, 1995) p117
- <sup>60</sup> *Boomer v Penn* (1965) 52 DLR (2d) 673
- <sup>61</sup> *Billy Higgs and Sond Ltd v Baddeley* [1950] NZLR 605, affirmed in *Robinson v Glover* [1952] NZLR 669 at 671.
- <sup>62</sup> See for example, *Brotherston & Brotherston v Royal Perth Hospital*, unreported, 20 December 1995, Library number 4744, per French J.
- <sup>63</sup> Currie, M., Mackay, P., Morgan, C., Runciman, W.B., Russell, J., Sellen, A., Webb, R.K. and Williamson, J.A. "The 'Wrong Drug' Problem in Anaesthesia: An analysis of 2000 Incident Reports" *Anaesthesia and Intensive Care* (1993) 21: 596-601
- <sup>64</sup> Williamson, J.A., Webb, R.K., Sellen, A., Runciman, W.B., Van Der Walt, J.H. "Human Failure: An Analysis of 2000 Incident Reports" *Anaesthesia and Intensive Care* (1993) 21: 678-683
- <sup>65</sup> Cooper, J.B., Newbower, R.S., Long, C.D., McPeck, B. "Preventable Anesthesia Mishaps: A study of Human Factors" *Anesthesiology* (1978) 49:399-406

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<sup>66</sup> *Joel v Morison* (1834) 6 Car & P 502 per Parke, B.

<sup>67</sup> O'Keefe, R "Sleep Disorders in the Law of Torts" *Journal of Law and Medicine* 3(3) 283-295

<sup>68</sup> Under *Trade Practices Act* 1974 (Cth), proof of fault is not required, only proof of damage. In this respect, the regime set up by the legislation is one of strict liability, the same as in OHS legislation.

<sup>69</sup> Personal communication, March 9, 2001.

<sup>70</sup> Haines, F. "Prosecution and the changing regulatory context" *Law Institute Journal*, 70(10) 52-53.

<sup>71</sup> Johnstone, p413

<sup>72</sup> *Dredge v State of South Australia* (1994) 62 SASR 374 per Bollen J. The headnote states that the claim for negligence was brought on the basis that the defendant sent the plaintiff out when they knew he had had insufficient sleep.

<sup>73</sup> Adapted from Crabtree, M "Health and safety management: A three tier defence to prosecution" *Law Institute Journal* 70(10) 44-46