

Part 6 Effectiveness of current regulatory option for managing extended shift

6.1 The context for regulating hours¹

At present in Tasmania, there are two main ways to regulate working hours – occupational health and safety legislation and the industrial relations legislation (both state and federal). Here we refer broadly to the structure and limitations of the regulatory framework and revisit the issue again in the final section of the report when we examine options for addressing the identified issues.

a) Industrial relations regulation

No caps on excessive hours

The limitations of industrial relations legislation for regulating excessive working hours is now well established (ACTU, 2001, AIRC, 2001; ACIRRT, 2001, Campbell, 2001, Heiler, 2001). Unlike many other OECD countries, Australia has never had statutory limits on hours of work. Historically Australia has relied principally on industry awards to provide detailed codification for how working time arrangements - including shiftwork and rosters – were remunerated, structured and implemented. The assumption was that the system of compensating overtime (“penalty” rates and loadings) would operate to regulate hours and effectively control excessive hours. It was meant to act as a financial disincentive for employers who would find the hours in excess of standard hours uneconomical and would thereby be encouraged to hire more staff. This form of regulation was (more or less) effective while industry and occupational awards were the principle form of regulation and while industry standards prevailed.

There is little question that this system has now become so dispersed that it is no longer broadly effective in controlling excessive hours of work, especially in some industries such as mining. All other things being equal, when the cost of working existing employees longer hours is cheaper than the cost of hiring new employees, overtime rates will not act to control excessive hours. At present, this is being facilitated by the great employment contract flexibility open to employers.

Increased fragmentation of conditions

Conditions that underpin hours of work are now very fragmented; industry “standards” are rare and increasingly outcomes are left to the vicissitudes of workplace “bargaining”. There is now a range of different forms of employment contracts that supplement and/or replace awards. These include federal and state collective union and non-union, individual state and federal and common law agreements and they render any standardisation provided by industry awards largely redundant. Unless the parties stipulate maximum hours of work or limit overtime in an agreement, there is no other effective trigger that specifies what maximum hours should be. Federal awards have been simplified and the stipulation of other than ordinary hours is non-allowable. The recent decision by the AIRC, despite the fact that the evidence that the ACTU put forward was accepted, went against the stipulation of numerical caps on hours. Instead, the AIRC

¹ This section will not assess in detail the overall effectiveness of the regulatory framework for the mining industry; this will be dealt with in detail in stage two of the review. We examine the framework purely with respect to the management and regulation of working hours and roster-related factors.

accepted that employees did have a right to refuse “unreasonable” overtime, taking into account certain factors, including: family responsibilities, health and safety, due notice and the needs of the company. So federally at least, whilst we are still left without actual limits in hours, the Commission made it clear that family issues and health and safety issues need to be taken very seriously indeed.

Reaching agreement about working hours and rosters

There is no overarching requirement to reach agreement about working time arrangements. This means that outcomes will be variable and fragmented, shaped by the industrial conditions and bargaining relationship at a workplace level. The effectiveness of industrial relations law acting as an effective trigger for regulating the most excessive hours of work is also limited. Where unions are considered legitimate stakeholders at the workplace, or where management is committed to reaching agreement with their workforce, there is some capacity to consult and codify these arrangements, even to reach agreement. However, if employers wish to impose conditions without reaching agreement they can, depending on the way employment conditions are regulated, have considerable scope to do so.

In summary, industrial relations legislation currently provides little regulation of maximum hours. There are few limits on overall hours or any other aspect of the roster system other than that which is negotiated between the industrial parties, determined by limited intervention of tribunals or imposed unilaterally by management.

The scope of industrial relations legislation

Employment conditions can be regulated by State or Federal industrial relations law, or under common law. Industrial awards, employment contracts and agreements can be registered in the State or Federal jurisdiction. Changes to state industrial relations law cover only awards and agreements registered in the State jurisdiction. Similarly, changes made to federal industrial relations legislation applies to awards and agreements registered in the Federal arena. Employers can also opt in and out of the two systems. The effect of this is that any initiatives aimed at regulating hours of work in the Tasmanian mining industry would be potentially limited in scope. This is not the case with State OHS legislation which has coverage of all workplaces in Tasmania, irrespective of the employment arrangements in place.

b) Occupational health and safety regulation

The Tasmanian *Workplace Health and Safety Act 1995* has coverage across all industries. Unlike some other jurisdictions such as NSW, Western Australia and Queensland, the Tasmanian mining industry does not have its own specific legislation. The Mines Inspection Act was repealed in 1995 and the Mines Inspection Regulations ceased to have effect in 1998. The mining industry is now controlled with general duty of care and performance-based legislation. There is no specific reference to hours of work, roster arrangements or fatigue management in the legislation. There is no provision for limits on hours of work or specification of particular roster patterns.

This does not mean, however, that there is no overarching requirement to manage the OHS effects of rosters.

Part 3 Section 9(1) of the Act sets out the general duties of employers, which states:

The struggle for time

Unformatted resource information for research purposes

9. (1) An employer must, in respect of each employee employed by the employer, ensure so far as is reasonably practicable that the employee is, while at work, safe from injury and risks to health and, in particular must –

- (a) provide and maintain so far as it reasonably practicable –
 - (i) a safe working environment; and
 - (ii) safe systems of work; and
 - (iii) plant and substances in a safe condition

The legislation also requires employers to provide:

- facilities for the welfare of employees
- receives proper information, instruction and training
- monitor the health of employees and ensure the prevention of work related injuries and illnesses
- keep records relating to injuries and illness suffered by employees
- that employees receive adequate supervision
- monitored working conditions
- eating, accommodation or other facilities

This framework *should* be an effective trigger for regulating the kinds of hazards outlined in section 2 of the report that are also related to the work schedules (dust, heat, vibration, etc). For example it requires effective controls of hazards associated with:

- safe systems of work (e.g. roster systems, work processes and tasks),
- safe work environment (e.g. ventilation control, noise, dust control),
- plant and substances (e.g. chemicals, fumes)
- health monitoring (e.g. lung function tests, hearing tests, medicals, tracking effects of hazards such as dust).

Thus the broad general duty of care provisions - in principle - require pro-active prevention and management of the kinds of hazards we have thus far identified.

The questions to be asked, then, are:

- why has the industry generally not responded in a consistently proactive way to the kinds of hazards identified as is required by the Act?
- what other factors can we identify to explain for this?

We now turn to some of the factors that impact on safe operation and effective management. This will also help us understand the limitations of the existing regulatory framework.

6.2 Why are the existing obligations under the OHS legislation acting as trigger for the control of fatigue and work system hazards.

The Review found that there was a range of inter-related reasons why the existing legislation is proving to be ineffective. Some of these factors were outlined in the previous section and included: the attitude of management, the patchy quality of consultation and the lack of safety resources at a site level which compromising safety outcomes in general. The Review identified some additional factors.

a) Absence of enforceable, codified performance standards

Theoretically, the current requirements under the Tasmanian Act to manage *all* hazards should be a sufficient trigger for compliance by the sites and enforcement by the regulators. However, given the impact of the other factors outlined, the absence of more specific, codified enforceable standards is making it easier for companies to avoid compliance. It also make enforcement very difficult.

It seems that the lack of specific performance standards makes it easier not to comply, easier for the regulators not to enforce and easier for companies to implement the arrangements they want and to justify doing so.

Thus it is the not the absence of legislation alone, but rather its lack of specificity combined with the inability or unwillingness of the industry stakeholders to respond to existing broad obligations.

This situation has left the industry stakeholders unclear about their rights, obligations and responsibilities. This perceived 'vacuum' creates both obstacles and opportunities depending on the motivations of the stakeholders:

- **Employers**

For those companies wishing to meet their responsibilities, the lack of auditable performance standards leaves them unclear about what constitutes 'safe' and 'unsafe' rosters. On the other hand, this lack of clarity suits other employers, who want to be able to have (or have open to them in the future) the ability to have whatever rosters suit their operational needs. The regulatory vacuum allows them to argue that there is no way of 'proving' that their rosters are unsafe, nor of them demonstrating that they are safe.

As one manager argued:

"The risk management system won't work for rosters. What have I got to base my risk management on? There are so many wildly conflicting views out there...but I guess the risk management system is probably perfect because it doesn't show anything. You can prove or disprove anything you like, so that's a good system for management. You can do whatever you like and nobody's going to be able to prove it's unsafe"

Manager

- **The inspectorate**

The inspectorate has stated that they find it difficult to know exactly what 'standards' or 'limits' sites should be working to and so feel hindered in their

ability to provide advice, direction, sanction or enforcement. This is especially difficult for them as the issue of rosters overlaps with issues of managerial discretion and can have cost implications for the sites. The lack of codified performance standards can make it easier for the inspectorate to bypass an issue that is contentious and where it is difficult for them to intervene.

- **Employees**

Many employees expressed considerable frustration about the absence of clear standards or regulatory 'triggers'. Many employees wanted to know what their rights were and what they had a right to be consulted about. Especially in workplaces without structured consultative arrangements and where management had an inflexible approach to the rosters, the lack of guidance and standards left many employees feeling frustrated and disempowered. On the other hand, there are some employees who are keen to realise as much income from the industry as they can; these employees are far less concerned about the absence of limits or standards.

- **Families**

Interviews with family members and comments included in the surveys expressed deep concern about the impact of some of the rosters on the health of their partners, their family relationships and family life. Some expressed disbelief that there were no clear standards or limits on working hours. Many had assumed that there would be some kind of limit on what was allowable, both from a health and safety perspective and from a family perspective.

b) Understanding of how duty of care applies to *all* hazards is inconsistent

The industry appears to understand that duty of care requires demonstrable control of hazards involving structural conditions, machinery and equipment hazards and, to some extent, environmental hazards such as noise and ventilation. This does not appear to be fully extended to all potential health and work system hazards. As was highlighted in section 2, the sites are not managing health hazards (such as dust, vibration, heat, etc), consistently well. With respect to hazards associated with work systems (such as fatigue, repetitive work), or hazards that may be multi-factorial in source and effect, there appears to be even less understanding of how a general duty of care applies.

c) Little evidence of the systematic use of risk management that involves employees

Related to this, we found patchy evidence of the *systematic* utilisation of risk management for assessing and controlling fatigue risks and even less evidence of the involvement of employees in this process. We found that there is not widespread use of this method other than among some managerial technical personnel. Management admits that training and involvement of employees in risk assessment is still in its infancy. Even though risk management is the recommended approach to managing hazards, it is not being used to assess and control fatigue hazards.

As one middle manager noted:

“We’ve only just started looking at risk assessment, only just obtained the information. The familiarisation and training will take at least a year – at the moment the resources and training are not in place to do all the training”

Middle manager

6.3 Institutional factors

We refer here to those factors associated with the application, implementation and enforcement of legislation. These kinds of issues will be explored in more depth in Stage 2 of the Review, but we can comment here on those aspects that impact on the safe operation of the rosters.

As we outlined above, the general duty of care legislation does not at present appear to be acting as an effective trigger across the industry, in part associated with its lack of specificity. However, as we also outlined, the potential is there for the existing legislation to act as a trigger if it were applied and enforced consistently. Again we can ask the question: Why is the potential that exists in the legislation not being realised?

Under the *Workplace Health and Safety Act 1995* the Director of Industry Safety and inspectors have far-reaching powers to inspect, require records and obtain information. An inspector has limited powers to direct a workplace to undertake work or cease activities. The Director of Industry Safety has some power to direct companies in order to prevent injury and risk to health. Significantly, Section 39(1-5) sets out the powers of the Director for the purposes of preventing accidents and risks to health. The director can:

- Direct the employer to undertake necessary tasks
- Require the employer to
 - monitor the health of persons employed or engaged at the workplace
 - keep information and records appropriate to the health and safety of persons
 - employ or engage a suitable person to provide advice
 - monitor any conditions likely to affect the health and safety of any person
 - prepare health and safety policy
 - provide monitoring results to the person whose health is being monitored
 - provide information requested by the employee
 - consult with employees about the development of measures to promote health and safety

These powers potentially cover all of the hazards and risks highlighted in section 2 of the Report. Yet, to date, there has been limited activity (although this has increased in recent times) on the part of the Inspectorate to specifically target these kinds of health and other hazards associated with work systems. How can we explain the reluctance of the inspectorate to intervene over these kinds of work systems and health hazards?

a) Awareness, understanding of the inspectorate is just emerging

By their own admission, the inspectors responsible for the mining industry acknowledge that they are not well informed or skilled up about hazard identification and risk assessment associated with work schedules and rosters. This is a new issue in their environment. The low level of awareness and knowledge of the issues is partly associated with limited resources and time available to skill up, but also associated with unplanned movement of the issue from the industrial relations arena to the health and safety area. This change has raised threshold issues of whether or not the inspectorate accepts that there are OHS hazards associated with rosters and work schedules and whether it is an appropriate issue for them to be involved with.

The inspectors were further confused by the activities of the trade union movement. Even though unions assumed a very public opposition to specific rosters, in the past they had been signatories to them. This appeared to send mixed messages to the Inspectorate and raised questions in their minds about the legitimacy of the concerns.

In addition, the background of the inspectorate is largely technical and engineering. This is highly appropriate given the specific nature of many of the hazards in mining and which requires specialist knowledge, especially in the underground sector. However, this training and background does not necessarily make them knowledgeable about or sensitive to other health hazards, hazards that are multi-factorial in nature, hazards that are associated with work systems and the organisation of work. An increased openness to the seriousness of hazards beyond those that are mechanical, structural and engineering in nature is needed before hazards associated with work systems are likely to be taken seriously.

b) Resources of the inspectorate are stretched

The Review found the resources of the inspectorate were stretched. There are two inspectors for the mining industry based in Hobart who service the West Coast and north mines, and another based in Burnie who has coverage for the North West region. In addition to mines, these inspectors cover quarries and the energy sector. They also have carriage for dangerous goods and industrial relations issues under the State system for this industry sector.

The resources necessary to correct health and safety management deficiencies at many of the West Coast mines are very high since many of the mines are old and operate with limited human resource and inadequate OHS management capacity. Due primarily to these resource limitations and pressure from the union movement, the focus of the inspectorate tends to be on immediate and obvious safety issues at the sites, such as the investigation of accidents and incidents, structural issues, ground conditions, machinery, PPE enforcement and engineering controls. Inspectorate time and human resources are stretched and the West Coast mines in particular consume additional time because of their distance from Hobart and Burnie.

c) Demonstrating non-compliance with work systems can be difficult

It is perhaps not surprising that in an environment of limited time and resources, priority and focus will be given to those issues that are immediate and pressing and for which clear standards enforceable prevail.

This is even more likely because demonstrating non-compliance with safe systems of work, design of work, work processes, adequate consultative arrangements, adequate training and information all require more time, more expertise, detailed investigation and so breaches can be hard to establish. These issues lend themselves much more to claim and counterclaim by employers and employees alike; it is easier to assert compliance or non-compliance than to demonstrate either. This is compounded where there are no clear performance standards.

Finally, in Tasmania, evidence of problems (such as non-compliance) must be put before a general court that has no specific expertise in occupational health and safety. The inspectorate's experience is that the magistrate will find in favour of the defendant where no definitive article exists that the court may use as a benchmark of acceptable behaviour. This makes the Inspectorate loathe to push issues that may expend considerable resources with little chance of success in the courts.

d) Ambiguity about whether work schedules are an OHS or an industrial issue

Historically, workplace disputes over working hours and rosters have been principally dealt with by industrial relations tribunals. Where working hours have been codified, this has occurred within industrial awards and agreements. Until recently, there has not been specific mention in safety legislation of hazards associated with work schedules. This has led to the understandable perception that work schedules are principally issues that are most appropriately determined industrially.

This has shaped the view of the broader community (including the inspectorate) about how issues and disagreements over working hours should be resolved. It remains unclear where the balance lies between rosters as an industrial relations issue, or rosters as a safety issue and this perceived ambiguity seems to make the situation a complicated one for the inspectorate. There is reluctance on the part of the inspectorate to involve themselves in issues that the parties still view primarily as industrial issues. The absence of clear performance standards seems to compound this.

Without clearer direction, there appears to be a lack of legitimacy in the eyes of the inspectorate and a reluctance to intervene. Without this clearer direction, the inspectorate is likely to continue to be wary of 'overstepping its authority' into areas that appear ambiguous or that overlap into areas of perceived management discretion.

e) The nature of the relationship between the inspectorate and mining industry

As we noted earlier, the technical and engineering background of the inspectorate brings with it many positive aspects. These include:

- Intimate knowledge of the history of the mine
- Knowledge of the structural and engineering characteristics of the mines, especially underground
- The sharing of a similar background to many in senior and technical positions in the industry; this means they can 'speak the same language'
- The development of personal relationships with mine management that can contribute to a consultative approach to OHS.

These features, combined with the technical and engineering background of some of the inspectors means that they can be alert to and knowledgeable about many of the hazards and risks unique to the mining industry and to the West Coast mines in particular.

However, there are other aspects to the relationship and behaviour of the inspectorate that can act to compromise the effectiveness of its role. These include:

- The low turnover of inspectors and the small size of the industry which can lead to the relationship between inspectorate and mine personnel being too personal and familiar.
- This can lead to a reluctance to push issues where there may be a level of ambiguity about the inspectorate role, and/or lack of clarity about the level of risk (such as fatigue).
- The need to maintain good ongoing relationships with site management can at times compromise – however subtly - the balance that needs to be maintained by the inspectorate between enforcement and advice.
- There is a perception among employees that the inspectorate deals with management almost exclusively and rarely obtains feedback from employees away from the presence of managers. Employees want an inspectorate that not only is, but is perceived to be, objective and prepared to listen to both management and employees.
- An apparent reluctance to visit sites without notice. This was raised by employees and management alike who believed that there should be a mixture of ‘on the spot’ and planned visits. Employees in particular expressed frustration about what they sometimes observed to be ‘staged’ visits, where inspectors were taken to newly cleaned areas, or areas underground where production and development had only just commenced, thus presenting work areas in their best light (i.e. not hazy, smoky or hot).

One employee recounted what happened when they raised issues with one of the inspectors:

“When we complained to the inspector [about some OHS issues] he said “our hands are tied” and that it was up to us to refuse to work if we thought it was unsafe ... yeah, we’d be real likely to do that here.”

Employee, non-union workplace

The absence of structured consultation and employee representation makes the inspectorate even more reliant solely on management reports of the adequacy of OHS practices. At these sites, management may not be accustomed to, or even welcome, what appears to them to be interference with the way they choose to manage their sites or operations.

6.4 Summary

The current regulatory options for managing extended shifts were found to be inadequate. Under present industrial relations and occupational health and safety law considerable responsibility is left to the workplace parties to manage these issues by agreement and on the basis of consultation.

Industrial relations legislation was found to provide little specific guidance on managing extended hours. This situation was not clarified significantly by the recent AIRC decision

The struggle for time

Unformatted resource information for research purposes

on excessive hours. There is a complex mix of employment contracts and conditions across the mining sector and no overarching requirement for management to reach agreement about working hours. Outcomes are shaped increasing by individual and company specific “bargaining”, resulting in uneven and at times inequitable outcomes.

Occupational health and safety legislation in Tasmania currently provides no specific guidance on extended hours, other than the general duty of care to eliminate or manage all hazards. This should, but does not appear to provide the necessary trigger for regulating the kinds of hazards the Review has identified as arising from extended shifts.

There is a range of reasons why the general duty of care provisions are not acting as an effective trigger:

- There is an absence of enforceable, codified performance standards for extended shifts. This makes the avoidance of compliance easier and enforcement more difficult
- The inspectorate is struggling to define its role. The inspectorate appears reticent to intervene around these issues and is reluctant to be seen to be “overstepping their authority” in the absence of clear standards
- In Tasmania, evidence of problems (such as non-compliance) must be put before a general court that has no specific expertise in occupational health and safety. The inspectorate’s experience is that the magistrate will find in favour of the defendant where no definitive article exists that the court may use as a benchmark of acceptable behaviour
- Understanding how a duty of care approach applies to work system hazards appears to be inadequate. This was the case among both the industry and the inspectorate, whose focus is on safety issues rather than health and work system hazards
- Inspectorate resources are stretched. This is due to inadequate numbers of inspectorate personnel and the high resource needs of the mining industry.

In summary, neither industrial relations nor occupational health and safety law are proving to be effective options for managing the risks associated with extended shifts.

Changes in the industrial relations arena are creating new work systems pressures and hazards that the occupational health and safety law seems unable to effectively deal with.