

12th ANNUAL SIA CONFERENCE
THE HEALTH AND SAFETY OF THE AGEING WORKER

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ABSTRACT

Unless there occurs a major paradigm shift within Australian workplaces, the next decade will bring about an increase in the number of occupational injuries and incidents involving older workers in this country. The reason for this is simple, the age structure of the workforce is changing and there is little evidence that workplace health and safety practice is accommodating this changing demographic.

What is required right now is a partnership at the industry and workplace level that recognises the importance of sustaining an ageing workforce through the promotion of a “fit for life approach” to workplace health and safety.

The fact that a partnership at work is required should come as no surprise, what will be the more difficult transition however, will be in securing the shift of managers and employees alike in responding to this new challenge.

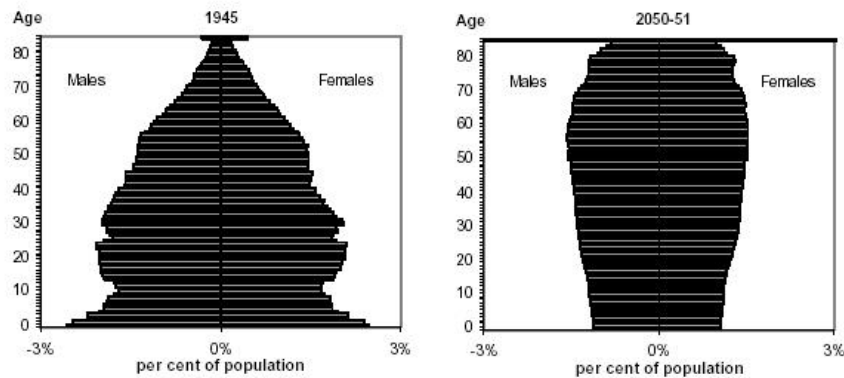
1 INTRODUCTION

It was the French composer Daniel Francois-Espirit Auber who wrote in the 19th Century, that “ageing seems to be the only available way to live a long time”. Yet well before his time and since, people throughout the world have sought to find ways of living longer.

For example, a survey conducted in North Carolina, claimed that people who go to church live longer (Catholic News 2002). The fruit and vegetable industry on the other hand, often said that eating an apple each day would at the very least avoid one’s reliance on the local medic. But to what end? Until recently coinciding with this desire to remain healthy and live longer has been the desire of Australian workers to retire early from the workforce and to maximise their golden years of good health. Although life for the Australian ‘fifty-something’ is just about to change.

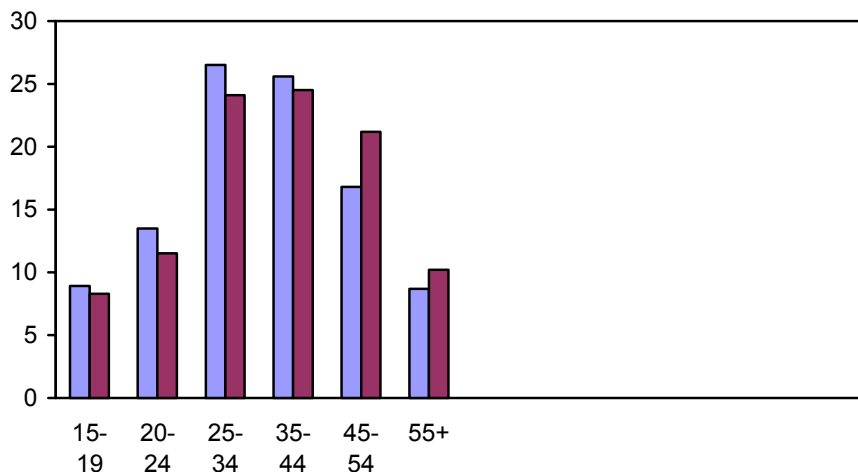
As Figure 1 illustrates, the age structure of our population is changing (Banks 2004) and not only will this bring about an ageing of our workforce, but it is likely to significantly alter the practice of early retirement as we move into the next decade and beyond.

Figure 1 **From pyramid to coffin — the changing age structure of our population**
1945 and 2050-51



To better illustrate the point, Figure 2 provides a 10 year comparison of Australian labour force statistics in the period 1991 to 2001. What is evident is that there has been a marked shift in the composition of the workforce particularly in the case of workers 45 years and above and the trend is likely to continue.

Figure 2
Age profile of Australia's workforce 1991-2001 (%)



Source: Australian Bureau of Statistics Catalogue No 6203.0

This shift in demographic coupled with the fact that the Australian labour force participation rates are traditionally lower than those of our OECD counterparts, presents new demands for industry, not the least of which will be the impact on the workplace health and safety of the older worker.

2 HEALTH AND SAFETY OF THE AGEING WORKFORCE

With some notable exceptions, (Parker & Worringham 2004) there has been little Australian based research that relates to the workplace health and safety needs of an ageing workforce, although clearly the tide in this regard is also turning. Much work has already taken place in the case of the United States and Europe (particularly Finland) and it is against some of those learning frameworks that I now turn to consider the issues.

In a study by Hartley and others looking at occupational fatal injuries for older workers in the United States(2002), as an age group, workers 55 years and older were almost twice as likely to suffer a fatality at work than employees between the range 16 to 54 years.

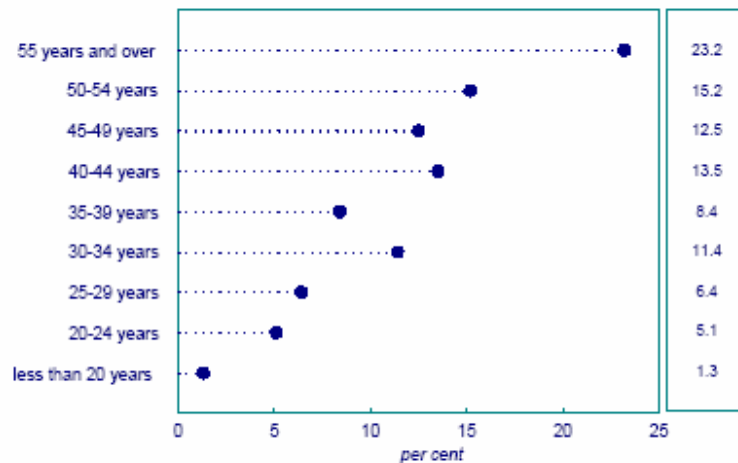
Table 1
Number, Rate and Mean Cost of U.S Occupational Fatal Injuries

Year	Number of Fatalities		Rate per 100,000 workers	
	16-54 years	55 years and older	16-54 years	55 years and older
1980-1984	25,908	6,738	5.6	9.7
1985-1989	22,806	6,176	4.7	8.4
1990-1994	20,819	5,487	4.0	7.7
1995-1997	12,423	3,486	3.7	10.3
All years	81,956	21,887	4.6	8.3

Within Australia, the national statistics for compensated fatalities tells a similar tale, with workers over 55 years, accounting for in excess of 23% of all compensated fatalities in 2001-2002. Given that in 2001, workers over 55 years represented only 10.2% of the workforce, begs the question why the inordinately higher number of fatalities for this group?

Figure 3

Compensated Fatalities in 2001-2002 Occurred at The 55 Years and over age group



(Source: Compendium of Workers Compensation Statistics Australia, 2001-2002)

A similar picture is revealed when one considers occupational injury and disease data.

For example, if we examine the employment injuries that are the result of a single traumatic event, including injuries which are the result of a single exposure to an agent causing an acute toxic effect, than as **Table 2** shows the older workforce experiences a far higher frequency rate of occupational injury than any other age group.

A similar picture is evident in an examination of new disease cases by age as **Table 3** reveals. In that case, what is being measured are all employment injuries that result from repeated or long term exposure to an agent or event and employment injuries that are the result of a single traumatic event where there was a long latency period. Again, when one examines the incidence and frequency rates of workers in the Age 55 years and above category, they represent not only a disproportionately higher percentage of the total cases reported (17.2%), but also the highest incidence and frequency rate for any age group.

Table 2 - Injury and Poisoning Cases by Age 2001-2002

Age Group	Number			% of total claims	Incidence Rate	Frequency Rate
	Fatal	Non-fatal	Total			
55 years and over	30	10 900	10 930	9.5	14.2	8.7
50-54 years	31	11 930	11 960	10.4	15.1	8.5
45-49 years	24	13 230	13 260	11.8	14.2	8.0
40-44 years	28	15 020	15 050	13.1	14.9	8.4
35-39 years	20	14 070	14 090	12.3	14.5	8.3
30-34 years	24	13 940	13 970	12.1	14.2	8.1
25-29 years	17	12 780	12 800	11.1	12.5	7.0
20-24 years	15	11 430	11 440	9.9	11.4	7.2
less than 20 years	1	5 680	5 680	4.9	8.4	8.3
Not stated	8	5 840	5 850	5.1	*	*
TOTAL	198	114 830	115 030	100.0	14.1	8.4

Source: Compendium of Workers' Compensation Statistics Australia 2001-2002

Table 3 – Disease cases by age 2001-2002

Age Group	Number			% of total claims	Incidence Rate	Frequency Rate
	Fatal	Non-fatal	Total			
55 years and over	39	4 050	4 090	17.2	5.3	3.3
50-54 years	14	3 470	3 490	14.6	4.4	2.5
45-49 years	13	3 450	3 460	14.5	3.7	2.1
40-44 years	12	3 310	3 320	14.0	3.3	1.9
35-39 years	5	2 800	2 800	11.8	2.9	1.6
30-34 years	10	2 370	2 380	10.0	2.4	1.4
25-29 years	2	1 850	1 850	7.8	1.8	1.0
20-24 years	0	1 300	1 300	5.5	1.3	0.8
less than 20 years	3	440	450	1.9	0.7	0.7
Not stated	1	640	640	2.7	*	*
TOTAL	99	23 680	23 780	100.0	2.9	1.7

Source: Compendium of Workers' Compensation Statistics Australia 2001-2002

While the conclusions that can be drawn from this brief exposure to the national compensation statistics are illustrative only, they should nonetheless provide warning bells for all stakeholders. Put simply, the older workforce has a far higher proportion of fatalities, injuries and disease reported than coincides with their representation in the labour market. Given that the age spread within the workforce is predicted to shift considerably over the next decade and beyond, the current situation is likely to get worse not better. To that end, obligation holders need to consider what, if any, implications exist in terms of the preventative measures that need to be deployed in the workplace to accommodate the existing and future needs of workers.

3 DUTY OF CARE

Much has been written over time in relation to how the duty of care owed by the various stakeholders at the workplace should be discharged. For example, Section 22 of the *Workplace Health and Safety Act 1995 (Qld)* identifies a four staged risk management process through which workplace health and safety can generally be managed. But is there evidence that the workplace health and safety standards and systems that underpin these processes recognise the special needs of the older worker?

Certainly it is accepted that the ageing process affects individual workers differently. Consider for a moment some of the health issues that may impact on the older worker as they continue to be engaged in the workplace. Issues such as respiratory and cardiovascular disease, musculoskeletal degeneration, vision impairment, noise induced hearing loss, reduced levels of strength and agility, mental and physical stress and reduced perception, responsiveness and alertness.

Should greater attention be placed on these issues within the context of the risks assessments taken by all of the obligation holders and is there a need to modify the workplace and its processes as a consequence of all of this?

We know that under Australian employment law, the rights of the aged and disabled (among others) are protected insofar as they may be discriminated against in employment, because of attributes associated with their age or disability. These rights must nonetheless co-exist and are some times at loggerheads with the inherent requirements of a position or where the requirement to protect the health and safety of people at a place of work become the more important consideration.

But is there a need to review this tension that may exist between the rights of individuals and the responsibilities imposed on the obligation holders, in a way that becomes less responsive to the 'onslaught of old age' but more adapting to the changing physical and mental capabilities of the worker as a consequence of the ageing process?

4 DEVELOPING NEW MODELS FOR IMPROVING THE WORKABILITY AND EMPLOYABILITY OF OUR AGEING WORKFORCE

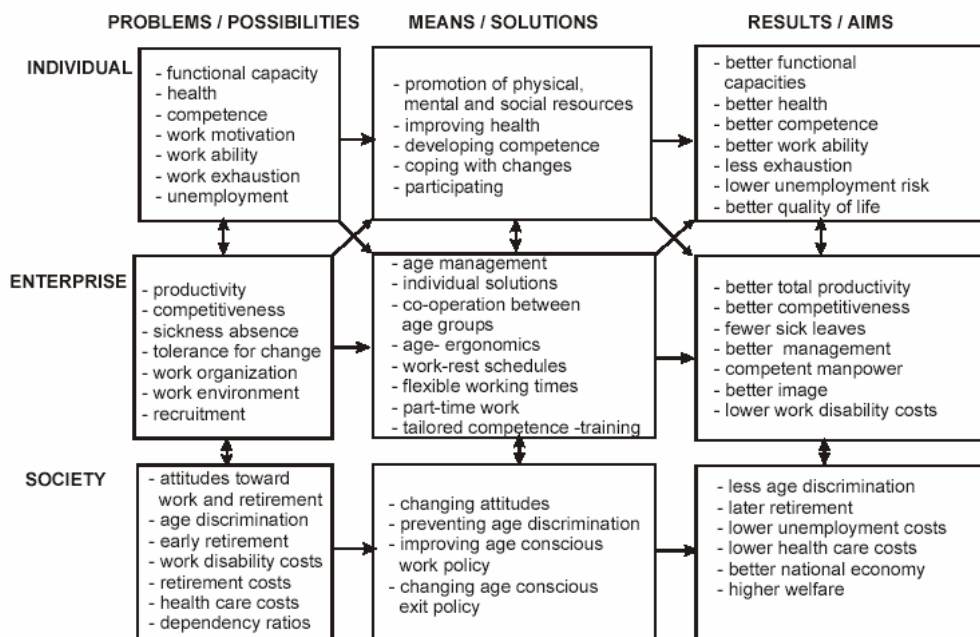
There are many issues to consider in the context of providing an ageing worker with a safe, healthy and productive workplace.

In the context of the overseas experience, particularly as it has been driven by the Finnish and European agenda, much of the focus on sustainability of the workforce, has been concerned with the inter-relationship that exists between the individual, the enterprise and society. This is illustrated in Figure 4 below.

The ability of the worker ('workability') and the capacity to deploy the worker ('the employability') arising from this assessment, are two central drivers within the European model, however placing the jargon to one side for the moment yields a common enough process that we are all familiar with. The health and safety of a worker needs to be considered within a construct of an employee having a job for life. Too often the Australian workplace is characterised by a 'not my problem' culture where responsibilities for the ongoing health of an employee are regarded as transient.

If there is to be a genuine response to these issues, then a far more integrated and embracing approach is required.

Figure 4 – An Integrated Model for Enhancing OHS Issues for Ageing Workers



Source: Ilmarinen J, (2002)

5 ASSESSING THE HEALTH OF THE WORKER

An essential first step in any revised framework for addressing these issues, is in ensuring an appropriate regime of health promotion, evaluation and support are available to all stakeholders.

Nowhere could this be more important than in the case of 'fitness for work' testing, where the importance of critically interrogating work history, understanding exposures to previous hazards and forming a complete picture of the employee's health is essential. Traditionally in the context of medical examinations, where limitations have been imposed on the individual, the emphasis has been placed on the company to subsequently undertake a risk assessment as to what the employee can now do in the context of the medical findings. Perhaps a more proactive approach to the safe deployment of the worker is now required. That is, to understand the workability of the employee, prior to any restrictive declarations being otherwise made.

Needless to say, while such an area is fertile ground for medico-legal challenges, the health professional needs to remain objective and the stakeholders need to respect that requirement.

This requirement to undertake a health assessment fairly and impartially has long been recognised by the industrial tribunals. In *D.T.Lewis v Mobil Oil Australia*, [Print Q0400 24 November 1997], a Full Bench of the Australian Industrial Relations Commission held that when determining whether an employee can be validly terminated because of incapacity, the longer run prognosis cannot be adequately decided by a tribunal unless:-

- *A current functional assessment of the employee's capacity to undertake the duties was undertaken by a qualified expert recommended by (in that case) both medical witnesses; and*
- *A report from a commonly agreed independent expert, as distinct from the consultants retained by either of the parties was considered.*

Such an approach is recommended as it ensures to the greatest extent possible that the decision making process is being undertaken in an objective manner. But the simple conduct of a health assessment is only but the first step. The willingness to integrate an ageing worker into the workplace will require widespread shifts in organisational thinking.

For example, it has been a common practice across many industries at various stages to offer a 'retirement carrot' or voluntary redundancy package to certain workers as a means of thinning out the older employees from the company's ranks. The case law abounds in this area where undue influence and coercion have often in the past coloured the discussions leading to voluntary separation arrangements. An alternative scenario to this is planning for age. That is understanding within the workforce the need to design jobs, allow for employee job succession and to reskill based on the changing requirements of the organisation and the employee alike.

6 DEVELOPING NEW SOLUTIONS AT THE WORKPLACE

One issue that appears high on the agenda is the need to enhance the level of employer, union and worker understanding of the implications of all of these issues, with the hope that as a consequence a more informed and objective response to the issues can take place. According to Ilmarinen, such issues could canvas subject matter such as the basic demographics within the company and the industry, participation rates, work ability and employability, the issues specific to age, productivity and growth; functional capacity of ageing workers, learning techniques for older workers and the like. In the broader context, all of the parties should better understand the underlying and overwhelming evidence in our community at the moment, of the problems confronting older workers with ageism and discrimination.

Notions of gaining jobs for life have taken a heavy blow in Australia over the past 25 years. Nonetheless there would appear to be a need for industry to consider what if any obligation it has in ensuring that even if an employee remains with a company for a short period of time, that there is an obligation beyond the immediate time frame to ensure that the longer term health issues of the worker are also protected. This may not be such an easy commitment to secure, particularly when employees are free to resign from their employment with as little as 2 weeks notice. It would be most difficult for a company to swallow the investments costs of training and nurturing when employee's commitment to remaining within the firm, may not be that easy to maintain. A significant challenge for human resource and workplace health and safety professionals will be in seeking to find ways to accommodate the ageing workers while still ensuring that the inherent requirements of the worker's job are being met. This challenge if approached with fresh eyes will no doubt impact on workplace systems, policies and procedures in a variety of ways. For example, a better understanding of issues of work redesign and currency of employee skills would seem a key requirement. So too would be the reliance on a more sympathetic succession planning scheme.

Finally and probably most importantly would be for greater attention to be directed toward understanding the implications of the occupational hygiene factors that impact on a worker's health and safety, from commencement within an industry through to retirement. Issues such as manual handling, hazardous substances, noise and vibrating machinery, ergonomics and workplace stress, are all issues that need to be considered in terms of the ageing process, particularly where there are high correlations between exposure to the hazards and time in employment.

7 CONCLUSIONS

To conclude, the key question is can we accommodate our ageing workers and ensure the health and safety of the industry is not compromised as a result. What is required is a paradigm shift. An employee must be engaged, trained and deployed at work as if he or she has a job for life. That means all of the life issues of the employee must be considered in the context of his or her employment as a matter of course. Greater education is required across the ranks and Unions too must similarly understand the limitations of the worker in this regard. Nonetheless the challenge remains and a sensible review of the issues for all organisations, unions and employees alike is now timely.

BIBLIOGRAPHY

Anti-Discrimination Tribunal of Queensland, *Flannery v O'Sullivan* [1993] 2 (27 April 1993)

AMA Position Statement - Code of Ethics -2003

Australian Bureau of Statistics, Labour Force Statistics 6203.0, 1991, 2001.

Australian Chamber of Commerce and Industry, *Mature Age Employment Changing Culture*, in ACCI Review, May 2003 Number 99

Banks G, *An Ageing Australia: small beer or big bucks?*, Presentation to the South Australian Centre for Economic Studies, Economic Briefing, Adelaide, 29 April 2004.

Brown T, *The Dirty Words of Corporate Downsizing Impermissible Statements of Intent in Reduction in Force Cases*, Labor Law Journal, April 1997

Finkelstein, Meryl G, *Minimum Physical Standards – Safeguarding the Rights of Protective Service Workers under the Age Discrimination in Employment Act*, Fordham Law Review [1989] Vol 57 1053

Hartley.D., Biddle.E., Grosch.J. & Marsh.S., *'The Burden of Occupational Fatal Injury for Older Workers in the United States'*, Inquiry Insights, National Safety Council, June/July 2002.

High Court of Australia, *Qantas Airways Limited v Christie* [1998] HCA 18 (19 March 1998)

Ilmarinen. J, *What the social partners can do to improve employment opportunities for older workers*, Summary of EU expert presentation on Age Management in the workplace and the role of the social partners at the Ninth EU-Japan Symposium 'Improving Employment Opportunities for Older Workers', 21-22 March 2002, Brussels.

National Occupational Health and Safety Commission, June 1998, *Competencies for Health Surveillance*.

New South Wales Administrative Decisions Tribunal Equal Opportunity Division, *Mooney v Commissioner of Police, New South Wales Police Service* 19 May 2003

Parker, T and Worringham C., *Managing the Ageing Workforce: Issues and Opportunities for the Queensland Coal Mining Industry*. August 2004.

Satola.J.W., *Taking the Early Flight Out to Pasture: The Second Circuit Adds a New Wrinkle to Voluntary Early Retirement Programs Under the Age Discrimination in Employment Act*, Case Western Law Review [1988-1999] Vol 39:577

Vance.K.K., *Fitness or Age As An Occupational Qualification for Protective Service Workers: A Choice Between Bona Fide Criterion or Arbitrary Discrimination*, Marquette Law Review, Volume 69:422

Ziarnik RJ, *A Police Chief Comments: Fitness As A Bona Fide Occupational Qualification at Any Age*, Marquette Law Review Vol 69:451