



# SUBMISSION TO THE NATIONAL OHS REVIEW

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The AusIMM

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## **The AusIMM**

The Australasian Institute of Mining and Metallurgy (The AusIMM) is the leading organization representing minerals sector professionals in the Australasian region. We have 9,000 members, primarily in the disciplines of mining engineering, metallurgy and geosciences. According to our most recent Remuneration and Employment Survey, 10% of our members identify their core professional discipline as management.<sup>1</sup>

Health and safety is the highest priority of our members and is an integral part of both the professional development and representation activities of The AusIMM. As a corollary of their professionalism, all AusIMM members have an ethical duty to work towards eliminating risks to health and safety in the workplace. This duty is expressed in The AusIMM Safety Vision and Principles,<sup>2</sup> which in practical terms requires the "...employment of proper safety systems such as risk management, hazard identification, adequate supervision, safety education and personal responsibility by all in the workplace."<sup>3</sup>

A significant number of our members are statutory duty holders under the various OHS regimes (e.g., as mine managers or directors). Our membership also includes mines inspectors from a number of jurisdictions as well as Health, Safety and Environment Directors from within companies. Thus, as professionals who are engaged in managing risks in the mining industry on a daily basis, our members have particular insight into how Federal and State OHS regulation can be best adapted in order to work towards the goal of zero harm in the minerals sector.

The AusIMM organisational structure includes a Health and Safety Committee comprised of representatives from industry, research and government. The Committee provides guidance on Health and Safety content for conferences, makes nominations for The AusIMM Health and Safety Awards and oversees submissions to Government. This submission was prepared under the auspices of the Committee.

### **Mining Health and Safety and the Challenge of Harmonization: An Overview**

The pitfalls of national inconsistency are well recognised by the minerals sector. At present, companies that work across jurisdictions are required to comply with multiple regimes driven by a variety of compliance philosophies. The various jurisdictions have different approaches to key issues such as the scope of the duty of care, levels of accountability for different duty holders, the role of the inspectorate and the approaches to prosecution. This divergent approach not only makes compliance difficult, but it also compromises the integrity of the concept of best practice health and safety management.

As well as differences in high level approaches to health and safety taken in various jurisdictions, there is significant variation in the details of mine-specific regulation. That is, there are particular hazards which rely on empirical knowledge to designate standards (e.g., mine gas levels) or which have tried and tested management solutions in the sector. Difficulties arise in that these issues are addressed in varying degrees of detail and at different levels in the hierarchy of regulation. In some

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1 The AusIMM, 'The AusIMM 2008 Remuneration and Employment Survey,' (June 2008).

2 The AusIMM, 'The AusIMM Safety Vision and Principles,' (2007) at <http://www.ausimm.com/ohs/vision608.doc>.

3 The AusIMM Safety Vision and Principles, above n 3.

jurisdictions this information is contained in legislation, in others regulation, and in still others, codes of practice. Moreover the exact details of these prescriptive learnings vary (e.g., jurisdictions have specified varying sets of dimensions to define 'a confined space'). This too has presented a compliance burden and undermined health and safety objectives. Resolving the detail differences between these regimes detracts from the real task of putting in place the most effective safety management system possible.

The mining industry has recognised the clear gains that can be had from a unified approach to health and safety philosophy, and common standards that can be relied upon across all jurisdictions. The goal of harmonization and a common approach is currently being undertaken through the mechanism of the National Mines Safety Framework (NMSF), an initiative of the Ministerial Council for Minerals and Petroleum Resources. The NMSF was instituted as a mechanism for delivering a nationally consistent (not necessarily identical) mine health and safety regime across jurisdictions. The NMSF takes a holistic and preventative approach to mine health and safety, and is made up of seven strategies which have been identified as key elements of improving the health and safety record of the Australian mining industry. These are as follows:<sup>4</sup>

1. Nationally consistent legislative framework
2. Continuous skills development and competency in maintaining OHS nationwide
3. National approach to providing advisory information for duty holders
4. Nationally coordinated protocol on enforcement
5. Consistent and reliable mining industry data set which allows analysis across jurisdictions
6. Effective consultation mechanisms between stakeholders and between jurisdictions
7. Appropriate mechanisms for governments to foster effective collaborative research into OHS in the industry

A draft legislative framework for mine health and safety has been developed and gained widespread acceptance by industry; it is now approaching implementation.<sup>5</sup>

Even with the framework in place, the challenges of implementation are significant. That is, the benefits of harmonization have needed to be continually balanced against the risk of loss of health and safety learnings which have been accumulated over many decades of experience in each jurisdiction. Also, any significant change or restructure to Inspectorates and the regulatory regime entails a disruption to modes of interaction established between regulators and industry, and possibly dilutes in-house expertise.

The recent improvements in health and safety performance in the mining industry suggest that the transition in recent years to principles and process based standards is already working well. For example, according to the 9th Comparative Performance Monitoring Report, the incidence rate of serious claims by industry for mining has decreased significantly over the past five years. In 2001-02 mining had the second highest number of 34.2 claims per 1000 workers. In 2005-06 the incidence rate had

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4 See the 'National Mines Safety Framework Implementation Plan', (December 2004) at [http://www.ga.gov.au/image\\_cache/GA6360.pdf](http://www.ga.gov.au/image_cache/GA6360.pdf).

5 See National Mines Safety Framework Implementation Group, 'Draft Strategy 1: Legislative Framework' (2007) at [http://www.innovation.gov.au/Documents/NMSF\\_strategy\\_1\\_web20070613101147.pdf](http://www.innovation.gov.au/Documents/NMSF_strategy_1_web20070613101147.pdf)

decreased by 45.6%, with mining now fifth highest with 18.6 claims per 1000 workers. This compares with a national average of 15.2.<sup>6</sup> The mining industry's decline in claims over the time span is the largest across all industries. It is acknowledged that this is only one indicator of safety performance and there are a range of issues that are not captured; however, it is clear there has been a significant overall improvement in safety outcomes during a particularly challenging period of major expansion.

It can be seen that the transition to risk based safety management systems has been effective in most jurisdictions. It is easy to dismiss the attachment to existing regulations as parochial. However, given that what's at stake is the lives and welfare of people in the industry, the inevitable disruption that comes with change must be approached with utmost caution.

Thus, given the particularly hazardous nature of mining, change is not undertaken lightly. Any further integration of mining standards within a model OHS Act would need to be supported by clear evidence that the transition would improve health and safety outcomes.

## **RESPONSE TO CHAPTER 2 – SCOPE, APPLICATION AND DEFINITIONS**

### **a) Three Tier Regulation – Model OHS Act, Mining Regulation and Codes of Practice**

The AusIMM in principle supports a three tier approach to OHS regulation. However we believe that maintaining the integrity of mine specific regulatory frameworks in various jurisdictions is key, and that the NMSF is the vehicle by which harmonisation can be achieved for our industry.

Mining is subject to very specific hazards that need particular measures to effectively identify and manage them. Apart from the sheer size and magnitude of many operations and equipment, the sector is also a major consumer of hazardous chemicals and products such as fuels, explosives and chemical reagents both for the mining process and beneficiation.

Moreover, as mining operations are technologically heterogeneous, taking place in a dynamic environment that is subject to daily and hourly decision making and changes, management of human factors is critical.<sup>7</sup>

If a model OHS Act were to go forward and apply to the minerals sector, we submit that the Act should set a framework for high level principles around health and safety regulation, whereas the bulk of industry specific measures would be contained in state regulations or legislation. Codes of practice would set out more detailed learnings on how to address specific hazards or implement processes for which tried and true methods were established. This is a process for the states to manage.

In summary, our recommendations for the interface between the model OHS Act and industry specific legislation and regulation are as follows:

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6 Workplace Relations Ministers Council - Comparative Performance Monitoring Reports. CPM Reports. February 2008 (Ninth Report)

7 Heiler, K., 'Is Australia Ready for a Safety Case Regime?', *National Centre For OHS Regulation Working Paper 45* (March 2006), at <http://www.ohs.anu.edu.au/publications/pdf/wp%2045%20-%20Heiler.pdf> , p 9.

- The model OHS Act is limited to high level framework issues: duty of care, the role of the inspectorate, offences etc.
- The model OHS Act would be consistent with principles contained in the draft legislative framework established under the National Mines Safety Framework
- The process of harmonisation would continue to occur through the mechanism of the National Mines Safety Framework
- Mine specific regulations and legislation would be implemented at the State level
- Mine specific regulations and legislation would specify statutory duty holders and competencies for particular roles
- Regulators for mine health and safety are robust, well resourced, technically experienced and well qualified to address the particular hazards and dynamic environment within the mining industry

### **b) Mining Specific Regulations – Risk Based Safety Management**

The high level principles in a model OHS Act must be consistent with the risk based approach to safety management systems that has been embraced in the mining industry. This approach is embedded in the NMSF draft legislative framework as follows:

“5. The legislation shall encompass the principle that the management of safety and health shall be undertaken using risk management practices.

6. All mining operations shall be conducted such that risks are managed using risk management practices so that residual risks are as low as reasonably practicable. The risk management process shall include hazard identification, risk analysis, risk reduction and risk monitoring.

The hierarchy of hazard controls in the order of elimination, substitution, separation, engineering controls, administrative controls and personal protective equipment should be used.

7. Particular attention shall be given to core risks of the industry, ensuring that high consequence/low probability events are addressed.”<sup>8</sup>

This is also in line with The AusIMM Safety Vision and Principles, which state our members’ firm belief as professionals in the industry that, “employment of proper safety systems such as risk management, hazard identification, adequate supervision, safety education and personal responsibility by all in the workplace will minimise the risk of injuries and incidents in the workplace.”<sup>9</sup>

Previously, a raft of prescriptive measures was put in place to manage hazards associated with mining. However in recent times the value of requiring the employer

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8 National Mines Safety Framework Implementation Group, ‘Draft Strategy 1: Legislative Framework’ (2007) at

[http://www.innovation.gov.au/Documents/NMSF\\_strategy\\_1\\_web20070613101147.pdf](http://www.innovation.gov.au/Documents/NMSF_strategy_1_web20070613101147.pdf)

9 The AusIMM, ‘The AusIMM Safety Vision and Principles,’ (2007), at <http://www.ausimm.com/ohs/vision608.doc> .

to undertake particular processes to identify, assess and control risk has been recognised. This has resulted in an approach to safety management that is proactive and flexible, and encourages ongoing participation and ownership by the employer and employees.

Risk based regulation can either mandate processes to deal with particular kinds of risks, or it can go beyond general risk management obligations and require duty holders to establish a detailed safety management plan for the operation.

A number of models have been implemented successfully in various jurisdictions. The recent Hicks Report suggested that the Coal Mining Health and Safety Act 1999 (Qld), represented the most advanced thinking in the mining industry in this respect. It defines a principal hazard as one with the potential to cause multiple fatalities and requires mine operators to develop principal hazard management plans, one for each hazard.<sup>10</sup> Regulations specify certain hazards for which plans must be developed. Further down in the hierarchy of documents are the approved standards which have been developed for the management of principal hazards. Safety management plans under this regulation must identify trigger levels or events and actions response plans. For each hazard there are normally several trigger levels of increasing seriousness with corresponding action plans. These are known as Trigger Action Response Plans. This system is also used in some NSW coal mines, however it is not mandated by legislation.

The AusIMM submits that the principle of risk based safety management, incorporating principles and process based regulation, is appropriate for all industries, and should be embedded in the OHS model Act.

Moreover, in high risk activities such mining, along with aviation, oil and gas and hospitals, reference should be made to alternative approaches to manage risk effectively. The may include safety case regulation, systems of determining competency and for establishing that competency has been maintained.

### **c) Mine Specific Codes of Practice – Information and Learnings**

As previously mentioned, there are some detailed existing standards and rules that have served industry well, and should be maintained, particularly where empirical evidence favours a particular threshold or standard of exposure in order to avert or minimise a risk (e.g., mine gas levels). It is critical that these learnings are retained. However The AusIMM recommends that prescriptive learnings of a highly detailed nature be embodied in an industry code, rather than legislation or regulation.

The advantage of shifting prescriptive details on how to manage hazards to an industry code is that employers have some flexibility in how to address issues, and regulators are encouraged to focus on the effective functioning of safety management systems overall. Conversely, embedding detailed instructions in regulations can result in an excessive focus on highly detailed breaches of regulations rather than the overall effectiveness of a safety management system.

This was found to be the case in Western Australia. The Mines Safety and Health Inspection Regulations in Western Australian run to over 400 pages of minute directions dealing with mine safety and health issues. It has been suggested in numerous reports and submissions to a recent review of the legislation that the highly

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<sup>10</sup> Hicks, S., *'Feasibility Study of Resources Safety in Western Australia'* (the 'Hicks Report'), published by DOCEP, (2006-07)

detailed nature of the regulations has resulted in a diversion of management focus from having safety systems directed at dealing with specific hazards and risks on site, to simply ensuring compliance with the Regulations.<sup>11</sup>

The AusIMM recommends that the model OHS Act embodies the general principle that details on management of hazards of a highly prescriptive nature be set out in industry codes of practice.

A qualification on this recommendation is that harmonisation of these Codes under the auspices of the NMSF must be a priority. Much of the practical inconsistencies in OHS arise at the level of codes and regulations. If consistency is not achieved the overall benefit of harmonisation would be reduced. The objective of the harmonisation initiative should be consistency not just in legal structures but also in regulatory practice.

## **RESPONSE TO CHAPTER 1 – LEGISLATIVE APPROACH**

### **b) Stated Objectives of a National OHS Act**

The AusIMM has supported the objectives stated in the draft legislative framework set out by the NMSF. The objectives in that document are as follows:

- Securing the health and safety of all persons at the mine site
- Continuous improvement and effective implementation of safety and health systems
- Focus on prevention
- Identification and control of all hazards
- Effective consultation

The above listed objectives are appropriate for a model OHS Act, with the word 'workplace' to be substituted for 'mine site.' The objectives are consistent with the general trend towards risk based safety management incorporating hazard identification and with workforce consultation as a cornerstone for all industries.

The principle of 'safety and health systems' does not necessarily refer to a documented and auditable system for all types of workplaces, although this should be a requirement for all industries of a particular scale. It is envisaged under the NMSF that it will also be a requirement for all mining operations, with the level of documentation appropriate for the size of the operation.

## **RESPONSE TO CHAPTER 3 – DUTIES OF CARE – WHO OWES THEM AND TO WHOM; &**

## **RESPONSE TO CHAPTER 4 – 'REASONABLY PRACTICABLE' AND RISK MANAGEMENT**

### **a) Duties of Care and 'Reasonable Practicability' in a model OHS Act**

The embodiment of the duty of care has been expressed in a variety of ways across jurisdictions. The view of The AusIMM is that securing health and safety is the

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11 Department of Premier and Cabinet WA, 'Ministerial Inquiry into Occupational health and safety systems and practices of BHP Billiton Iron Ore and Boodarie Iron Sites in Western Australia and related matters' (aka 'Ritter Report') at [http://www.premier.wa.gov.au/docs/features/BHP\\_Ministerial\\_Inquiry\\_Vol1.pdf](http://www.premier.wa.gov.au/docs/features/BHP_Ministerial_Inquiry_Vol1.pdf)

responsibility of everyone on site, and that this is best achieved through a cooperative approach. The duty should be consistent with:

- a) the goal of zero harm
- b) a risk based approach to safety management

For this reason, The AusIMM supports a duty of care expressed in terms of risk or hazard management. That is, the duty of care of employers should be to provide a workplace that is as free from risk to health and safety as far as is practicable, as is embodied in WA and Victorian legislation.

A duty of care expressed in terms of risk or hazard is more sensible than a duty 'to ensure health and safety of employees', as the management of risk is the means by which the legislation seeks to meet its objective. Ensuring the health and safety of employees, meanwhile, is the key objective of the Act. This should be stated explicitly at the start of the legislation but should not form part of the duty.

The AusIMM is also of the view that the duty must be expressed in terms of reasonable practicability. There has been much discussion in the past on the issue of where the qualification of reasonable practicability should be expressed as part of the duty, or as a defence to the duty. There are a number of reasons why expressing the qualification as a defence is inappropriate. The reason most commonly cited is that expressing the qualification as a defence rather than as part of a duty creates a reverse burden of proof. In some cases this applies to offences that are of the ultimate seriousness (e.g., criminal liability for death) and this is contrary to natural justice.

A further compelling argument against creating an absolute duty without qualification is that this is a duty that no employer could ever meet, theoretically or logically. That is, it is impossible to eliminate all risks from a workplace. For example, one limitation on what can be practicably addressed is the employer's state of knowledge. An employer's state of knowledge will never be perfect; it is the interplay between obtaining knowledge of the existence of risk, and implementing measures to eliminate or reduce risk that constitutes the process of continuous improvement.

An absolute duty not qualified by what is reasonably practicable (i.e., knowledge that an employer could not, in all reasonable practicability, be expected to have) thus suggests that by not having perfect knowledge, employers are theoretically in breach of the duty all the time. Such illogicality in the drafting of the legislation should be avoided as it undermines the credibility of the Act.

A further particularly negative outcome of the unqualified duty is that it creates an assumption of prima facie breach by the employer or senior officers whenever an incident occurs. This has the counter productive effect of introducing an immediate assumption prior to the investigation. It has been suggested by some commentators that the presumption of blame can even influence the shape of the investigation, where the focus is on identifying legalistic chains of causality (often artificial), rather than addressing the broader systemic failures from which real preventative measures could emerge.

In terms of duties of officers and employees, The AusIMM supports the principle, outlined in the draft legislative framework of the NMSF, that "the level of obligation imposed shall be commensurate with the degree of control, accountability and responsibility held." It is also recognised that certain individuals within a corporation have more responsibility for safety outcomes than others.

There are also currently complexities around duties and competencies of key roles in the mining industry. At present, there is national mutual recognition agreement between the States and Territories, when there are equivalent positions under state legislation, for example having first class mine managers in both Coal and Metalliferous in all States. However there are a number of other key roles that are not referred to in State and Territory legislation for which qualifications are idiosyncratic. This includes the qualification or “ticketing” of supervisors, second class mine managers, extractive industry managers, electrical and mechanical managers, mine surveyors and plant (processing) managers. The AusIMM submits that harmonising duties and competencies under the model OHS Act should be a priority. Where the activity in question impacts significantly on the mining industry this must be done in collaboration with the NMSF. Once these are agreed upon they will be embodied in various State regulations.

## **RESPONSE TO CHAPTER 6 – REGULATOR FUNCTIONS, POWERS AND ACCOUNTABILITY**

### **a) Inspector Competencies**

A key challenge for the mining industry is resourcing an adequately qualified and experienced inspectorate, and deploying human capital resources to maximum effectiveness. The AusIMM submits that it is critical that, under a model OHS Act, an adequately staffed and resourced inspectorate with specialist mining knowledge is maintained. The form by which the inspectorate is set up can differ between jurisdictions, however the substance of the skills and knowledge required are non-negotiable.

Skills in mining engineering are essential to understanding safety issues, in particular relating to major mining hazards, for example ground stability, ventilation, ore handling and underground excavation in underground mines, larger open cut mines and quarries. In an industry that is undergoing rapid technological advancement and organisational change, staying up to date with current practice is already a major challenge, even within specialist mining inspectorates.

One response to the challenges of accessing relevant technical experts, suggested in the Hicks Feasibility Study of Resources Safety in Western Australia (hereafter the ‘Hicks Report’) proposed a ‘team’ model of inspecting to ensure that expertise was deployed with maximum effectiveness. That is, a team of Inspectors be allocated to manage a group of sites. Each Inspector would have a balance of work between managing the day to day interactions with their allocated companies and of providing a source of information to their colleagues. For example, a process engineer would have day to day responsibilities for those companies and facilities allocated to his or her team, and would also have some responsibilities for maintaining and developing expertise in their discipline.

The AusIMM recognises that there are benefits to a single inspectorate for all industries, with mining specific divisions. For example, in a recent submission on mine health and safety, the Mines Inspectorate in Western Australia identified the need to: “broaden its skills base to address all mine workplace risks, especially those that have traditionally not been considered ‘mining risks’ e.g. chemical process plant operation; increase its ability to review and assess technological advancements in minerals extraction and processing in terms of the management and reduction of associated risks, increase the capacity to develop regulatory policy and systems,

including more performance-based (safety case) legislation.”<sup>12</sup> The creation of a single inspectorate with specialist divisions would allow economies of scale by which mining inspectorate divisions could access specialists with other kinds of knowledge.

As leading practice in methods of regulation evolves across industries, the creating of a single inspectorate across states also would facilitate intra-organisational learning on the range of skills that will assist an inspector in their complex role. A range of soft and hard skills is required. For example, when the Victorian WorkCover authority undertook an upgrade of its field staff, it sought to recruit, “multi-skilled, adaptable health and safety professionals who can help workplaces create the solutions that will produce sustainable change.”<sup>13</sup>

The membership of The AusIMM has mixed views on whether a single inspectorate in the various States is desirable and for this reason we have abstained from expressing a recommendation on the form. However there is consensus that, in terms of substance, the following are essential for an effective inspectorate:

- Adequate resourcing that allows for salaries compatible with industry and expansion of activities in a climate of growth
- Access to relevant technical skills and experience within the inspectorate for high level understanding of issues in the industry being regulated, in particular a strong mining engineering presence
- Strategies for effective utilisation of experts within the inspectorate

## **RESPONSE TO CHAPTER 7 – COMPLIANCE AND ENFORCEMENT**

### **a) Inspection Strategies and Enforcement Policy**

There is some concern that in recent times, health and safety reviews focus heavily on the form of legislation as a silver bullet to address issues, with inspection strategies and compliance policy being viewed as ancillary issues.

The AusIMM submits that a greater focus on developing systems and guidelines for inspectors to maximise their effectiveness is critical. One of the strengths of the NMSF is that it recognises that in an era where organisations are moving beyond mere adherence to prescriptive rules, a holistic approach to safety and health regulations is needed. Consequently, as well as establishing a draft legislative framework, the seven strategies include the need to develop:

- A national approach to providing advisory information for duty holders
- A nationally coordinated protocol on enforcement
- Consistent and reliable mining industry data set which allows analysis across jurisdictions.
- Appropriate mechanisms for governments to foster effective collaborative research into OHS in the industry.

The industry has recognised that the key challenge is to find more effective ways to deploy the tools we currently have, rather than merely revising combinations and

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12 Laing, R., ‘Final Report: Review of the *Mines Safety and Inspection Act*, (Jan 2003), at [http://www.doir.wa.gov.au/documents/environment/Shed\\_Safety\\_LegRegForm\\_LaingReview.pdf](http://www.doir.wa.gov.au/documents/environment/Shed_Safety_LegRegForm_LaingReview.pdf), p 189.

13 Gunningham, N., ‘Safety Regulation and the Mines Inspectorate, Lessons from WA,’ *National Centre For OHS Regulation Working Paper 33* (April 2005), at <http://www.ohs.anu.edu.au/publications/pdf/wp%2033%20-%20Gunningham.pdf>, p 13

permutations of legislation. Legislation dealing with enforcement measures is important, but it is only the tip of the iceberg.

The AusIMM recommends that a model OHS Act undertake a holistic approach to regulation, recognising the importance of systematic inspection strategies, collecting and utilising data effectively to support inspection strategies, and the evolution of leading practice protocols on enforcement.

## **RESPONSE TO CHAPTER 8 – PROSECUTIONS**

### **a) Prosecution for Criminal Breaches of the OHS Act**

The role of prosecution for criminal breaches of health and safety laws has long been a contentious issue. Clearly there is a role for prosecution. Research has shown that among employers, 26% agreed that the threat of being prosecuted or the fact of another employer being prosecuted encouraged them to make changes to their organised procedures. Of this figure, 46% made changes because fear of prosecution was always on their minds. The remaining 74% said the threat did not encourage them because they felt that they were already meeting adequate standards.<sup>14</sup>

Nonetheless, the exercise of prosecutorial discretion is at the heart of the effectiveness of OHS legislation as a means to stimulate deterrence. Effective application of prosecution measures can stimulate a crisis of conscience within organisations. Meanwhile, unpredictable or haphazard approaches to prosecution can lead to a defensive approach by industry and an overall frustration of the objectives of legislation.

The current approach to prosecution of criminal breaches of the OHS Act has been overly reactive and punitive in its approach. For one thing, criminal prosecutions happen almost exclusively in response to serious injury or death, notwithstanding that it is the creation of risk, rather than the outcome of harm that gives rise to the offence. It has been suggested that this has resulted in a 'split pyramid', with heavy reactive sanctions for breaches resulting in injury or death at one end, and soft approaches for a breach of duty where harm has not resulted.<sup>15</sup>

The most controversial prosecution in recent times was that following the Gretley disaster in NSW. The facts and subsequent judicial findings are well known and can be stated here briefly:<sup>16</sup>

*“Four miners at Gretley colliery punched into old and flooded mine workings. There was an in-rush of water and the miners were drowned. An inquiry into the incident by former Justice James Staunton made recommendations concerning prosecution and charges were subsequently brought in the New South Wales Industrial Commission, both against the two former operating companies and against a number of individuals. Commissioner Justice Patricia Staunton found that the corporate*

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14 Maxwell, C., 'Occupational Health and Safety Act Review,' (Victoria, March 2004) at [http://www.dtf.vic.gov.au/dtf/rwp323.nsf/0/a554a45320f4b8bbca256e6e0013d7e4/\\$FILE/ATT2FQAQ/MaxwellReport\\_06Apr04.pdf](http://www.dtf.vic.gov.au/dtf/rwp323.nsf/0/a554a45320f4b8bbca256e6e0013d7e4/$FILE/ATT2FQAQ/MaxwellReport_06Apr04.pdf) , p 370.

15 Johnstone, R., 'From Fiction to Fact – Rethinking OHS Enforcement,' *National Centre For OHS Regulation Working Paper 11* (July 2003) at [http://www.ohs.anu.edu.au/publications/pdf/working\\_paper\\_11.pdf](http://www.ohs.anu.edu.au/publications/pdf/working_paper_11.pdf) , p 17-20.

16 Gunningham, N., 'Prosecution for OHS Offences: Deterrent or Disincentive?', *Sydney Law Review* [Vol 29, 2007], pp 359-390.

*defendants had failed to ensure the health, safety and welfare of their employees, and two former mine general managers and a mine surveyor were '[d]eemed to have committed the same offences as the corporations, having failed to satisfy the onus placed upon them' to exercise due diligence to protect workers (McMartin v Newcastle Wallsend Coal Company Pty Ltd [2004] NSWIRComm 202 at 979). Although the defendants argued that they were entitled to rely on old plans of the old workings supplied by the relevant government agency, Justice Staunton found that this:*

*'[D]oes not excuse the defendants from their independent statutory obligation ... to ensure a safe system of work. Nor does it relieve the defendants of their obligation to satisfy themselves by way of their own research as to the accuracy of ... [the Department of Minerals and Resources plans which] [o]n any considered view ... were seriously deficient in purporting to depict old coal workings in a way that one could be confident of their accuracy ([2004] NSWIRComm 202 at [806]).'*

*On appeal to the Full Bench of the Industrial Court of New South Wales, the conviction against the two companies was affirmed, as was that against the mine manager and former mine manager. The conviction of the surveyor was overturned on the basis that he was not 'concerned in the management' of either company. His role was 'not managerial, but rather more akin to that of an advisor or consultant to mine management in relation to surveying' (Newcastle Wallsend Coal Company Pty Ltd v McMartin [2006] NSWIRComm 339 at [517])."*

The Gretley decision was controversial for a number of reasons. The first was that the legislation under which the defendants were charged was already deeply flawed in that it contained an absolute duty to ensure health and safety of all workers, with reasonable practicability as a defence. That is, there was a prima facie assumption of culpability and a reverse burden of proof.

The second controversial issue was that the conduct giving rise to the alleged breach was culpable by way of negligence, rather than recklessness or calculated conduct.

The third was that it was unclear whether the mine manager was in fact the most appropriate target for the enforcement action. The view of many commentators was that the mine manager had discharged his obligation to demonstrate due diligence when he relied on the judgement of the surveyor that there was no need to check the plans (the surveyors being exempt from higher level of duty as they were not 'concerned with the management of the company'). Implementing a corporate policy that Government plans dated before a certain time should be subject to risk management measures may more appropriately have been decided at senior management level within the company.

Personal opinions on the culpability of the defendants may vary. However the broader impact of the prosecution of individuals under legislation incorporating a reverse burden of proof, where culpability was low and the enforcement target was not necessarily the most culpable, has been to undermine the perception of the entire OHS regime in that state. Rather than a deterrent effect, it has had a 'chilling' effect.

The AusIMM submits that encouraging criminal prosecutions against individuals whose culpability is low has a counterproductive effect on safety. Research in the US where there is strict liability for workplace incidents has shown that in some cases companies can develop a preoccupation with suppressing evidence of potentially 'guilty knowledge'. In the particular study undertaken, firms were found to discourage technical people from generating written audit reports about unsafe items or a near

miss until they were ready to remedy the item notes or felt that they could generate a credible written report as to why they chose not to take any action.<sup>17</sup>

A situation where prosecutorial policy creates an incentive to avoid exposure to 'guilty knowledge' on the part of senior leaders in industry has a direct and immediate adverse affect on health and safety. This is because the cornerstone of effective risk based management systems is the ability to effectively gather, share and respond to knowledge about risks in the operation.

An additional negative impact from an aggressive prosecutorial policy is that talented people may be discouraged from taking up the position of mine manager in jurisdictions, such as NSW, which favour reactive prosecutions aimed at middle management.

The AusIMM submits that, under the model OHS Act, in order to be an effective deterrent, prosecutions need to be reserved for situations where the behaviour amounted to gross negligence, recklessness, or calculated action.

A reverse burden of proof is not appropriate for a criminal offence. The appropriate duty for employers and officers has been stated elsewhere in this document as: the duty of employers to provide a workplace that is as free from risk to health and safety as far as is practicable.

Finally, a more strategically employed policy of graduated enforcement for breaches regardless of whether or not an injury has occurred, that renders regulation of the industry transparent to the public is needed to reconcile the 'split pyramid'.

#### **b) Union Right to Prosecute**

The AusIMM submits that it is grossly inappropriate to accord unions with a right to prosecute, as is currently the case in NSW. Delegating the power to prosecute undermines the public perception of objectivity of enforcement, the integrity of the criminal law, and the seriousness of criminal prosecution.

Moreover, enabling unions to prosecute further entrenches the concept of an employer-employee dichotomy of responsibility for health and safety. It merely creates adversarialism when the key to a safe workplace is cooperation.

If the inspectorate is inadequately informed to bring prosecution, then more resources should be allocated to the inspectorate. Governments should not be delegating these powers to bodies which have an agenda other than implementation of the Act and its objectives.

### **RESPONSE TO CHAPTER 9 – OTHER ISSUES**

#### **a) Tripartite Mechanisms**

The AusIMM recognizes the effective role that unions play in representing some employees across a range of issues, including health and safety. We support a strong role for union representation to be maintained. However, given recent changes in the industry – consolidation, increasing use of contractors and reduced

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17 Hopkins, A., 'A Corporate Dilemma: To be a Learning Organisation or to Minimise Liability,' *National Centre For OHS Regulation Working Paper 43* (2005) at <http://www.ohs.anu.edu.au/publications/pdf/wp%2043%20-%20Hopkins.pdf> , p 6.

role of unions for some sectors – we do not believe that this should be enshrined in legislation.

The concept of tripartite mechanisms – industry, unions, government – is based on a paradigm where industry is presumed to constitute white-collar managers whose sole preoccupation is profit, whereas union representation ensures altruistic concerns are taken into account. Finally Government arbitrates between the two.

The assumptions underpinning this model are overly simplistic, as white collar staff at various levels of hierarchy are deeply committed to health and safety, and moreover are frequently at risk themselves.

Also, the model creates significant gaps in terms of who is represented. Unions do not represent the entire workforce. Contractors, technical professionals and some para-professionals are omitted from this model. This is particularly the case where consolidation of the industry now means that industry representation constitutes the upper echelons of a highly corporatized management structure. Indeed, industry representatives may not even have a technical background.

For our members, who are both technical professionals and moreover, the most likely to be the holders of statutory duties and thus the subject of a prosecution, the omission of technical professionals from consultative mechanisms is glaring. This is also the case for our members who work for contract firms.

The tripartite model appears to be overly simplistic, and non-representative of a range of interests. It has not kept up with the changing structure of industry or the political landscape.

Our recommendation is that the OHS legislation retains the representative role of unions, but is broad enough to accommodate the range of administrative structures that companies utilize in practice, and to facilitate communication with *all* relevant stakeholders on OHS matters.