

BOARD OF INQUIRY
MINE SAFETY
ENFORCEMENT
POLICY

Report to the Hon. Ian Macdonald MLC
Minister for Mineral Resources

Report by the Hon. Dr James J Macken AM

JULY 2007

Title: Board of Inquiry Mine Safety Enforcement Policy

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Disclaimer

The information contained in this publication is based on knowledge and understanding at the time of writing (July 2007). However, because of advances in knowledge, users are reminded of the need to ensure that information on which they rely is up to date and to check the currency of the information with the appropriate officer of New South Wales Department of Primary Industries or the user's independent advisor.

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1. EXECUTIVE SUMMARY

The NSW Minister for Primary Industries, the Honourable Ian Macdonald MLC, on 14 February 2007 announced the appointment of the Honourable Dr. James J. Macken AM to constitute a Board of Enquiry into Mine Safety Enforcement Policy. Mr. Jim Cox was appointed to act as Assessor for the purposes of the Inquiry.

The need for a Board of Enquiry was identified as a recommendation of the *NSW Mine Safety Review* conducted by the Honourable Neville Wran AC QC of February 2005. Among the terms of reference recommended by the Hon. Neville Wran was the task of reviewing 'the enforcement policy and the processes used by the Department to implement the policy'.

Following the seeking of submissions from stakeholders on the 11th April 2007 the Board of Inquiry began gathering material from the Wran Report, and stakeholders and sought written submissions from the parties which were available for the most part by the 1 June 2007 and oral submissions were made in various conferences through to the end of June.

Each party was asked to comment on the terms of reference separately and this most of them did. The view of Professor Neil Gunningham were also sought to provide an outside expert opinion on each of the terms of reference

It became plain that the strong opposing views of the mining companies and the unions which were commented on by Neville Wran had softened somewhat in the interim since his report. However, there emerged mining company opposition to some of the enforcement policies of NSW Department of Primary Industries (NSW DPI) and the aggressive investigating of some staff.

The recommendations of the Board come to terms with each of the terms of reference and to some extent meet the desires of the parties. The Stein Report and the need to have a further Inquiry into the application of the main statutes at the end of 2007 involve this report in having some of the characteristics of an interim report.

In general the recommendations seek to have the middle range of safety responses strengthened with the addition of some further options for the prosecutors. There has also been an examination of the problems which might arise from the shift from an event focus to a risk assessment focus. This may pose a need for some consultative processes in the immediate future as well as some training for more junior safety officials.

2. INTRODUCTION

The NSW Minister for Primary Industries, the Honourable Ian Macdonald MLC, on 14 February 2007 announced the appointment of the Honourable Dr. James J. Macken AM to constitute a Board of Enquiry into Mine Safety Enforcement Policy. The appointment was made pursuant to Section 113 (1) of the *Coal Mines Health and Safety Act 2002*. Mr. Jim Cox was appointed to act as Assessor for the purposes of the special Inquiry.

The need for a Board of Enquiry was identified as a recommendation of the NSW Mine Safety Review conducted by the Honourable Neville Wran AC QC of February 2005. Among the terms of reference recommended by the Hon. Neville Wran was the task of reviewing ‘the enforcement policy and the processes used to implement the policy’ (Wran 2005, p.47).

The Wran report noted that there was a wide divergence of views regarding the current enforcement policy and processes. One reason for this was the prevalence of a core of distrust and disagreement between the unions and the corporate mining industry which was preventing the stakeholders from agreeing upon an acceptable enforcement policy and process. The disagreement related to the extent and effectiveness of prosecutions launched since the 1997 Mine Safety Review and the Gretley Inquiry Report.

The Wran report also considered there to be a gap between the compliance sanctions in the enforcement practice between the issuing of notices and full scale prosecutions. As the result of the limited examination of the enforcement policy and the adversarial attitude of the stakeholders, no firm conclusions were able to be drawn.

The Hon. Neville Wran concluded, therefore, that there was a need for further investigations of several matters including progress toward prosecution of systemic failures and on making other sanctions available to Inspectors. He illustrated the latter by reference to the issuing of Penalty Infringement Notices (PIN) and the removal of the accreditation of statutory officials for serious breaches.

For these reasons the Hon. Neville Wran recommended that a Board of Inquiry be set up to further examine the matters of enforcement. He set out suggested terms of reference which have been adopted by the Minister to govern the consideration of the Board. The Board of Inquiry was set up pursuant to Section 113(1) of the *Coal Mine Health and Safety Act 2002*. This Act and the *Coal Mine Health and Safety Regulations 2006* repealed the *Coal Mines Regulation Act 1982* and replaced Section 94A with the new Section 113 Boards of Inquiry, in the same terms.

3. STAKEHOLDERS

The NSW Mine Safety Review conducted by the Hon. Neville Wran AC QC was a wide-ranging review of mine safety in New South Wales and it had to consider much material which is not within the terms of reference of the Board of Inquiry. It extended, for example, to metalliferous mines and the range of topics covered went well beyond the limited terms before the Board of Inquiry.

For these reasons the Board has considered the relevant stakeholders before the Board of Inquiry to be confined to the Coal Industry with the range of subject matter being similarly confined to the question of enforcement in that industry. For these reasons the Board has considered the relevant stakeholders as outlined in Table 1 below.

Table 1. Relevant Stakeholders to the Independent Board of Inquiry into Mine Safety Enforcement Policy

Title	Department / Company
National President	The Association of Professional Engineers, Scientists & Managers, Australia (APESMA)
Branch President	APESMA
Director	Collieries Staff Division of APESMA
General President	Construction Forestry Mining and Energy Union (CFMEU) - Mining & Energy Division
General National Vice President	CFMEU Mining & Energy Division
General Secretary	CFMEU Mining & Energy Division
President	Mine Managers Association of Australia
District President - Northern District	Construction Forest Mining & Energy Union
President	Colliery Officials Association NSW
General Vice President	CFMEU Mining & Energy Division
President	Australian Manufacturing Workers Union (AMWU)
National Secretary	Communication Electrical Plumbing Union of Australia (CEPU)
Northern District President	Colliery Officials' Association
Mining Consultant	NSW Coal Mine Managers Association
Director General	NSW Department of Primary Industries
Executive Director, Biosecurity Compliance and Mine Safety	NSW Department of Primary Industries
Director, Mine Safety Operations	NSW Department of Primary Industries
Director, Mine and Forest Safety Performance	NSW Department of Primary Industries
CEO	NSW Minerals Council
Director OHS	NSW Minerals Council
Chief Operating Officer	Xstrata Coal NSW
NSW Occupational Health and Safety Manager	Boral Australian Construction Materials
General Manager, Health Safety and Environment	Rio Tinto
Managing Director	Centennial Coal
Managing Director / CEO	Coal Services
President	Illawarra Coal

4. PUBLIC ADVERTISEMENT

Advertisements seeking submissions to the Board were advertised from 11 April 2007 in the Government Notices in the *Sydney Morning Herald*, *Daily Telegraph*, *Newcastle Herald*, *Maitland Mercury*, *Cessnock Advertiser*, *Lithgow Mercury*, *Namoi Valley Independent* (Gunnedah), and the *Illawarra Mercury*.



NSW DEPARTMENT OF
PRIMARY INDUSTRIES
New South Wales Government

**BOARD OF INQUIRY
MINE SAFETY ENFORCEMENT POLICY
CALL FOR SUBMISSIONS**

The New South Wales Minister for Mineral Resources, the Hon Ian Macdonald MLC, has recently announced a Board of Inquiry under section 113 of the *Coal Mine Health and Safety Act 2002*, convened by the Hon James J Macken AM. The Board will be advised by an Assessor, Mr James Cox.

The Board plans to make a report to the Minister in late July 2007.

Terms of Reference for the Board of Inquiry are as follows:

1. the adequacy of the legislative framework for mine health and safety enforcement policies;
2. the role of the NSW Department of Primary Industries (NSW DPI) inspectorate, including the qualifications and experience of staff, resourcing and training;
3. the implementation of policies, including developing a strategic approach to enforcement with a view to long-term improvement in compliance;
4. the range and application of sanctions available to inspectors, and if inadequate, sanctions that might apply;
5. the role of employers, unions and NSW DPI in enforcement of breaches under the relevant legislation;
6. the adequacy of monitoring and reporting systems;
7. prosecutions, and
8. benchmarking the policies and practices of comparable mine health and safety agencies.

Submissions to the Board (in both hard copy and email) are being sought from interested parties, by close of business Friday 11 May 2007. The Board proposes to meet with major parties during the week commencing Monday 14 May 2007. Submissions are to be made to:

**Board of Inquiry
Attention: Ms Jane Flynn
NSW Department of Primary Industries
PO Box K220
HAYMARKET NSW 1240
e-mail: jane.flynn@dpi.nsw.gov.au**

Inquiries may be made to Ms Jane Flynn on 02 8289 3920 or 0402 415457.

6/2/07

Figure 1: Copy of the Call For Submissions of the Board of Inquiry.

5. NOTICE TO STAKEHOLDERS

Letters were written to stakeholders enclosing the advertisement published in the press and seeking submissions touching the issue of enforcement of coal mine safety legislation. The letter also invited major parties to make appointments to provide oral evidence if necessary.

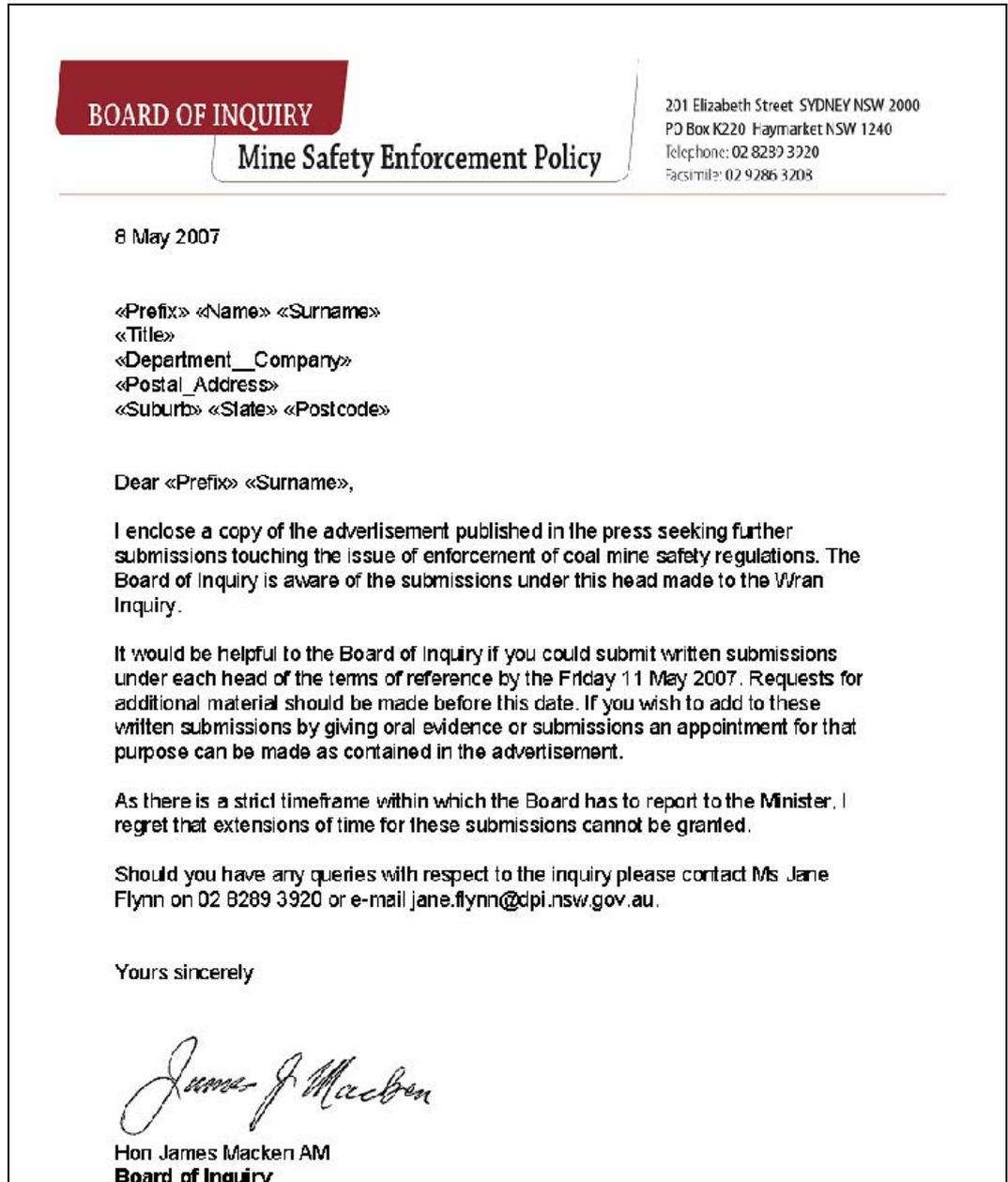


Figure 2: Copy of letter requesting submissions.

Stakeholders were advised by letter sent on the 8 May 2007 that the deadline for the lodging of submissions was extended to the 1 June 2007.

6. PROCEDURAL FAIRNESS

The principles of procedural fairness have been observed in the conduct of the Board of Inquiry. No limitations have been placed on the extent or content of the written submissions sent to the Board. Some of the written submissions canvassed material outside the terms of reference of the Inquiry. This Report is limited as to the terms of reference contained in the Wran report and adopted in the Ministerial Notice (*NSW Government Gazette* No. 33, 23 February 2007, p. 1100).

With respect to oral submissions the Board is satisfied that every opportunity has been provided for interested persons to provide submissions relevant to the terms of reference to the Inquiry.

Confidentiality as to sources of information has been respected where it has been sought. Where contending policy stances have been taken by stakeholders an opportunity has been given whenever practical for relevant stakeholders to reply to such attitudes.

The Inquiry has been careful not to make findings against any individual or to record any adverse comments against individuals. The Board considers that the terms of reference do not extend to an examination of particular cases but rather to the general principles applicable to the terms of reference.

7. ENFORCEMENT POLICIES AT THE TIME OF THE WRAN REPORT

At the time of the Wran report in 2005 the views of the parties as to the enforcement of penalties in the mining industry in New South Wales were diverse and, to a large extent, were expressed in vague and unhelpful terms. The Hon. Neville Wran considered this divergence of views to be a consequence of the 'core of distrust between the unions and the corporate mining industry' on the issue of enforcement (Wran 2005, p. 47). This distrust made any agreement regarding acceptable enforcement policy and process unlikely.

The Wran report also noted that the mining corporations considered the number of prosecutions launched by the NSW Department of Primary Industries (NSW DPI) to be 'unhelpful' while the unions thought that they were 'inadequate'. The review further considered that there was a gap in the compliance sanctions of NSW DPI enforcement practice.

The view of NSW DPI was that the existing enforcement policy was sufficiently 'broad and robust' to remain appropriate. NSW DPI acknowledged that it was in the area of the implementation of the policy that there has been a divergence of views among the principal stakeholders. NSW DPI considered that such a difference in emphasis is inevitable from time to time. The limitations on available resources led the NSW DPI to focus its prosecutions on matters on which a full investigation is appropriate. The Mine Safety Advisory Council (MSAC) also agreed that the existing policy was appropriate.

The Construction Forestry Mining and Energy Union (CFMEU) strongly objected to the then current prosecutorial practices of NSW DPI as did the District Branches of the Union. The Union considered that the concentration of prosecutions at the top end of the scale was a weakening of safety standards. NSW DPI Inspectors of Coal Mines agreed with this Union view and considered that the enforcement policy 'should be extended by the initiation of low to mid range prosecutions'.

The Colliery Officials Association and the Mine Managers Association both objected to the prosecution policy being aimed at the defects of managerial staff, largely ignoring the lower levels of supervision and work.

It may also be fairly said that the Unions did not consider that the Mine Safety Review and the Gretley Report had significantly improved mine safety while the mining corporations

thought that there had been some improvement as a result of the adoption of some of the recommendations.

It is now over two years since the Wran Report was handed down. Wran (2005) outlined the terms of reference for a further enquiry into enforcement policy.

8. THE TERMS OF REFERENCE

The eight terms of reference (TOR) for the Board of Inquiry were:

1. the adequacy of the legislative framework for mine health and safety enforcement policies;
2. the role of NSW Department of Primary Industries (NSW DPI) Inspectorate, including the qualifications and experience of staff, resourcing and training;
3. the implementation of policies, including developing a strategic approach to enforcement with a view to long-term improvement in compliance;
4. the range and application of sanctions available to Inspectors, and if inadequate, sanctions that might apply;
5. the role of employers, Unions and NSW DPI in enforcement of breaches under the relevant legislation;
6. the adequacy of monitoring and reporting systems;
7. prosecutions; and
8. benchmarking the policies and practices of comparable mine health and safety agencies.

The submissions to the Board were required to be in writing at first instance and to be received by 1 June 2007. Following that date (and earlier if necessary) the stakeholders could seek to augment their written submissions by an oral presentation.

It was the view of the Board that the detailed content of the Wran report set out the position of the parties as to enforcement at the time of the Wran Inquiry. It was only if the position of the parties had changed that it was anticipated that further oral or written submissions would be helpful.

8 PRELUDE TO THE INQUIRY

Two events since the Wran Report provide an important background to the considerations of the Board. The first is the influence of the Wran Report itself on the enforcement policies adopted by the NSW DPI and the second is the content of the Report of the Inquiry conducted by the Honourable Paul Stein into proposed amendments to the *Occupational Health and Safety Act 2000* (the OHSA).

9 THE INFLUENCE OF THE WRAN REPORT

It would not seem that the Wran Report itself made any immediate change in the enforcement policies of NSW DPI or the attitude of the parties to enforcement. All parties seemed content to wait on a consideration of the Section 113 Inquiry (formerly known as the Section 94A Inquiry).

Some stakeholders expressed the view that there had been a softening of attitudes all round as a result of the Wran Report. It does appear that there is at least a better understanding of the respective positions of the parties.

The CFMEU was of the view that there had been 'quite significant progress' with respect to safety enforcement policies by the NSW DPI during the period. The Union also acknowledged that it had been critical of the historic performance of NSW DPI since the late 1990's. There is no doubt that this critical stance of the Union had been modified since the Wran Report.

10 THE STEIN REPORT

On 18 October 2006 a number of important amendments to the *Occupational Health and Safety Act 2000* (the OHSA) were referred to the Honourable Paul Stein for him to make a report to Government. The report has not yet been released.

The Stein report was not directly concerned with the coal industry but it examined a number of matters touching the enforcement of penalties for breaches of occupational health and safety in general industry

The Occupational Health and Safety Act 2000 (the OHSA) is the parent Act regulating the health, safety and welfare of people at work and this includes workers in the coal industry. The *Coal Mine Health and Safety Act 2002* (the CMHSA) goes beyond the provisions of the *Occupational Health and Safety Act 2000* (the OHSA) touching industry generally and sets out additional protections, rights and obligations made necessary because of the greater risks associated with coal operations. The provisions of the two Acts are cumulative.

Special provisions relating to coal mines include Section 47A and 47B the OHSA dealing with the appointment of Inspectors in connection with mines and coal workplaces.

The NSW Minerals Council made detailed submissions to the Stein Inquiry, indeed, all stakeholders in the mining industry were alert to the fact that the Report could contain recommendations that would affect the operation of the enforcement provisions in the Mining Acts.

The content of the Stein Report is not known at time of writing . What is known and paramount is the importance of the *Occupational Health and Safety Act 2000* in the field of enforcement of penalties in the mining industry.

11 EXPERT ASSISTANCE

The Board commissioned mining academic Professor Neil Gunningham to provide an objective opinion on the terms of reference.

Professor Neil Gunningham has been a consultant to the mining industry in Western Australia without objection from the parties involved. His *curriculum vitae* is appended to this report (Appendix 1).

Professor Gunningham provided his report to the Board on 4 May 2007. A copy of his report to the Board was sent to each of the stakeholders on 8 May 2007 to allow comment to be made on his views of the terms of reference.

In summary his views on the terms of reference include:

TOR 1 - The adequacy of the legislative framework for mine health and safety enforcement policies

The adequacy of the legislative framework for mine health and safety involved an examination of the *Occupational Health and Safety Act 2000* (the OHSA) and the *Coal Mine Health and Safety Act 2002* (the CMHSA). He expressed favourable views on the use of Improvement and Prohibition Notices and the use of Restorative Orders.

TOR 2 - the role of the NSW Department of Primary Industries (NSW DPI) Inspectorate, including the qualifications and experience of staff, resourcing and training

Professor Gunningham was critical of the role of the NSW DPI Inspectors and the qualifications and experience of staff, resource and training. He supported the views in the Wran Report 'that a clearly focused, better organized, more active Inspectorate with broader skills base; are tools which can be used to achieve real safety improvement' (Wran, 2005, p. 77). His criticism strikes at the level of resources which directly affect the current skills base. He was also critical of the salary levels applicable to the various levels of the Inspectorate.

Professor Gunningham praised the considerable skills of many in the Inspectorate particularly in addressing physical hazards. His main criticism, however, was the slow movement from a prescriptive approach of mine safety to the systems based approach to mine safety. He went further and suggested that NSW DPI Inspectors trained to operate under a prescriptive approach are ill suited to systems based regulation.

Professor Gunningham contributed thoughtful and detailed views on the need for effective implementation of whatever enforcement policies are ultimately adopted to be applied by the Inspectorate or the prosecution branch of the Department. This term of reference not only requires the Board to examine the implementation of enforcement policies but also to 'develop a strategic approach to enforcement with a view to long-term improvement in compliance'. Such an approach has to be effective and efficient, and both cost and community confidence, are necessary ingredients of an efficient policy.

TOR 3 - the implementation of policies, including developing a strategic approach to enforcement with a view to long-term improvement in compliance

Under this term of reference Professor Gunningham reviewed the widely recognised concept of the enforcement pyramid. This concept involves the use of advisory and persuasive measures at the bottom, mild administrative sanctions in the middle and punitive sanctions at the top. These measures are designed to reflect the seriousness of the breach of safety. He contrasts compliance strategy (the use of advice and persuasion) with a deterrent strategy (prosecution and the imposition of substantial legal penalties). He tends

to favour a greater use of a deterrent strategy over a compliance strategy as an effective means of securing compliance. He warns, however, that the indiscriminate use of a deterrent strategy could be counterproductive.

Thus, he suggests, a prosecution policy should be applied sparingly and be carefully targeted. He offers the view that none of the three mining states (NSW, WA and QLD) have managed to steer a middle course between the dangers of extreme compliance and the heavy handed use of deterrence.

TOR 4 - range and application of sanctions available to Inspectors, and if inadequate, sanctions that might apply

Professor Gunningham comes to grips with the range and application of available sanctions and where these are inadequate the sanctions he considers might be applied by Inspectors.

At the lower levels of the enforcement pyramid he envisages penalty infringement notices ('on the spot' fines). These, he suggests get the safety message across at a very modest administrative and legal cost. He also sees administrative penalties and stopwork orders as having valuable deterrent effects at the lower levels of the pyramid.

At the middle levels of the pyramid he suggests a graduated response to fill the gap between the issuing of notices and full scale prosecution. At this point he claims that what is needed are constructive strategies that are applied to those who have failed to respond voluntarily or are demonstrably reluctant to do so but might still respond favourably to action short of criminal sanctions.

In this regard he favours restorative justice, where one requires the offender to put in place mechanisms that will prevent a recurrence of similar behaviour in the future. He refers to enforceable undertakings as a potentially important tool. As an example he said that such could focus on defects in management systems and structures and how these might be overcome with their implementation being subject to third party audit. Mandatory compliance audits conducted by a third party also attracted the attention of Professor Gunningham. These involve a systematic, objective and documented review of a mine's operations and compliance to be undertaken by an independent third party auditor. He suggests that such a course involves the process itself being the punishment as the costs are borne by the regulated enterprise.

The sanctions at the top of the pyramid generally involve prosecutions which may be levied against key individuals and the corporation. Financial penalties and custodial sentences are available in appropriate cases. In this regard he sees publicity orders and other forms of corporate shaming as effective in some cases especially where corporate management is sensitive to a damaged reputation. At this level of the pyramid the question of prosecution of senior management and company officers arise for consideration. He also argues for larger penalties or 'mega-penalties' for reckless behaviour causing death to make up the tip of the pyramid.

TOR 5 – role of employers, Unions and NSW DPI in enforcement of breaches under the relevant legislation

In dealing with the role of employers, the Unions and NSW DPI in the enforcement of breaches under the legislation Professor Gunningham notes that it is very rare that an employer would have a role in the prosecution of an offence. Furthermore, although unions have a theoretic role in the prosecution of offences, it is rare for such prosecutions to take place. The difficulties of proof and the considerable cost of such prosecutions make union prosecutions a rarity.

NSW DPI is, therefore, the main, if not the sole, prosecutorial agency. Professor Gunningham cautions against the risk of regulatory capture which is an expressed fear of the unions in the industry. This refers to the closeness of the Inspectorate to the mining companies. A solution offered to ease the perception is the separation of the powers of the

Inspectorate from a discretionary power of a legal unit to decide whether or not a prosecution is to be undertaken.

TOR 6 – adequacy of monitoring and reporting systems

Professor Gunningham felt that this term of reference fell outside his area of specialisation and he did not provide any comment in his report in regard to this term of reference.

TOR 7 – Prosecutions

With respect to prosecutions the Professor referred to the increase in the number and type of prosecutions since the Gretley disaster. These he notes have involved companies, mine managers and statutory authorities. He suggests that this policy has promoted division between the unions and NSW DPI on the one hand and the mining companies on the other.

Professor Gunningham sets out what he describes as ‘a series of design principles intended to achieve a more balanced and effective prosecution strategy.’ These he defines as:

- a) There ought to be a clear policy of when to prosecute.
- b) Prosecutions ought to be used appropriately.
- c) Prosecutions should relate to the culpability, risk and track record of the defendant.
- d) While the seriousness of the accident will place the event at the tip of the pyramid, there is no reason for prosecutions to be confined to case involving death or serious injury.
- e) To be effective deterrence should be applied to individual decision makers and the focus in this regard should be on senior corporate managers and directors rather than on mine managers and suveyors.
- f) Prosecutions for retributive reasons should be confined to egregious cases otherwise such prosecutions can be counterproductive.
- g) The legitimate concerns of victims and the community can best be met by applying techniques of restorative justice following a mining disaster.

Professor Gunningham viewed this series of principles as providing a balanced middle course between an ‘advise and persuade’ policy on the one hand and an over-zealous prosecution policy on the other.

TOR 8 - benchmarking the policies and practices of comparable mine health and safety agencies

In benchmarking the policies of comparable mine health and safety agencies the Professor confined his consideration to the three mining states (NSW, QLD, and WA). His comparisons of the approaches taken by the various states are:

1. With respect to the adequacy of the enforcement framework in the three states he says that each of the states applies graduated enforcement measures. Queensland and WA make provision for enforceable undertakings while NSW does not. However, the NSW provisions with regard to adverse publicity are broader than those in the other jurisdictions.
2. A comparison between the three states as to how they go about implementing policies and developing strategic approaches to mine safety reveals some wide differences. Even at the time of the Wran Report NSW had a ‘coherent framework for setting and communicating expectations, for developing goals and for enforcement investigations’. However, Wran found that ‘individual Inspectors vary the mix of application depending on their own personality and philosophy.’ His study of the three states led the Professor to the view that NSW led the other mining states in terms of benchmarking. In fairness it should be said that Queensland is developing a

new compliance policy 'consistent with the effective application of an enforcement pyramid approach'.

3. The difference between the three states in terms of the range and application of the sanctions available are not very wide. Each of the states provide for improvement and prohibition notices although the level of maximum penalties vary somewhat. Both NSW and WA make provision for adverse publicity and restorative orders while Queensland does not to the same extent. WA and Q make provision for enforceable undertakings while NSW does not and the NSW legislation dealing with workplace deaths involving recklessness have no equivalent provisions in WA and QLD.
4. A comparison of the role of the employers, the Unions and NSW DPI with respect to prosecutions shows that there are no differences as to the role of employers while it is only in NSW that Unions have the right to prosecute. NSW DPI in NSW is somewhat more active than the other states with respect to prosecutions.
5. Queensland and WA have adopted a less vigorous prosecutorial role than has NSW. In Q there is no evidence of prosecutions in the coal mining industry. A similar position pertains in WA although there are signs that this attitude may be beginning to change.

Professor Gunningham concludes his Report with the comment that the specialist mines Inspectorates fall far short of administrative best practice and most of the mines Inspectorates fall behind their generalist counterparts. There is no evidence to support this view in the wide range of material given to the Board and in any event, as Professor Gunningham notes, the comment goes beyond the terms of reference of the Inquiry.

12 STAKEHOLDER SUBMISSIONS

In general terms the stakeholders held substantially to the views expressed to the Honourable Neville Wran AC QC and which resulted in his decision to propose that a Board of Inquiry be set up to tackle the vexed question of enforcement further.

12.1 WRITTEN SUBMISSIONS

The closing date for written submissions to the Board of Inquiry was 1 June 2007. Submissions were received from the following groups summarised in Table 2.

Table 2. Submissions received by the Board of Inquiry from the following groups before 1 June 2007.

Stakeholder Group	Submission received from
Union/Employee Groups	CEFMU – National Office CEFMU – Northern District APESMA – Colliery Staff Division AMWU
Government	NSW Department of Primary Industries DPI Inspectors of Coal Mines (joint submission by 2 Inspectors) Paul Newey, DPI Inspector
Mineral Industry	NSW Minerals Council
Mining Companies	Coal and Allied (Rio Tinto) Centennial Mining

12.1.1 UNION/EMPLOYEE GROUPS

12.1.1.1 CONSTRUCTION FORESTRY MINING AND ENERGY UNION (CFMEU) – NATIONAL OFFICE

On 11 May 2007 the CFMEU Mining and Energy Division submitted its views to the Board a summary of which are as follows:

TOR 1 - The adequacy of the legislative framework for mine health and safety enforcement policies

The Union considered that the legislative framework for mine health and safety enforcement policy is ‘generally sufficient’. The Union is of the view that it is not the content of the legal framework and statutes that is open to criticism but rather the ‘execution of an effective compliance and enforcement policy’.

An important change in the Union attitude is reflected in its preparedness to assess on its merits the intended change in emphasis from prescription to a duty-based framework for safety legislation in the mining industry. The Union considers that the recent legislative amendments which bring the powers and procedures of mining specific legislation into closer synchronisation with those of the *Occupational Health and Safety Act 2000* (the OHSA) ‘have created significant opportunities in respect of mine safety enforcement’.

TOR 2 - the role of the NSW Department of Primary Industries (NSW DPI) Inspectorate, including the qualifications and experience of staff, resourcing and training

The Union view of the role of NSW DPI Inspectorate and the qualifications of the staff and their resourcing and training is that while significant progress has been made there is still room for improvement. In general, the Union holds to the view that NSW DPI is significantly under-resourced in certain respects. In this regard the Union calls for one additional mining engineering Inspector in the south east region, two additional Mine Safety Officers in the north east region and at least one additional mechanical engineering Inspector, one additional electrical engineering Inspector, two additional Mine Safety Officers and one mechanical engineering Mine Safety Officers in the Central West area.

The Union places particular emphasis on Parts 5 & 6 of the OHSA as relieving pressure and workload on the small number of mines Inspectors if the powers referred to in the sections are conferred on all 'government officials' under the *Coal Mine Health and Safety Act 2002* (the CMHSA). In particular the CFMEU believes that Mine Safety Officers should make greater use of the powers provided in Parts 5 and 6 of the OHSA.

The Union seeks to have Check Inspectors ceded wider powers than are already exercisable by them. Parts 5 and 6 of the OHSA will allow mine Inspectors and Mine Safety Officers to exercise powers that are new and additional to the mining specific safety legislation. These include, rights of entry (Section 50 – 54), broad powers of inspection (Section 59-60), the requirement to make a statement and produce documents (Section 62), the issuing of investigation notices (Section 89), the issuing of improvement notices(Section 91) and the issuing of prohibition notices (Section 93) , the issuing of a penalty notice for perceived breaches of the OSHA (Section 108).

To support these new initiatives the Union pressed for funds raised by the mine safety levy to be directed to improving NSW DPI's enforcement capacity generally and to allow the recruitment of additional mine safety Inspectors and to add to the funds already spent in training, with particular emphasis on training in the extra powers stemming from the OHSA.

The Union sees advantage in providing training and information seminars to all industry participants including OHS Committee members, employers, unions and Check Inspectors again with special emphasis on the powers now stemming from the OHSA.

Finally the Union suggests that a distinct legal fund be set up to ensure the adequacy of resources for prosecutions and other legal services aimed at ensuring compliance with legal duties. The idea of the fund is to enable an increase in the capacity of NSW DPI to pursue legal avenues to enforce compliance.

TOR 3 - the implementation of policies, including developing a strategic approach to enforcement with a view to long-term improvement in compliance

The CFMEU put forward the view that the central strategic goal of the government should be to 'engender a cultural change in the industry whereby every industry participant is under no illusion but that serious safety breaches will result in sanctions or other legal consequences'. The Union view is that while training, consultation and advice have a part to play in the process, in the end a vigorous programme of enforcement is necessary to secure a 'safety mind-set'. The Union views the increased emphasis on prosecutions during the last five years as being responsible for the 65% decrease in fatalities in the industry.

Strategically, therefore, the Union views an improvement in the rate of prosecutions and an increased use of Parts 5 and 6 of the OHSA as constituting the proper strategic goals into the future.

TOR 4 - range and application of sanctions available to Inspectors, and if inadequate, sanctions that might apply

The CFMEU considers that the powers available to Inspectors, including Mine Safety Officers, are adequate in light of the amendments to include Sections 47A and 47B in the OHSA.

TOR 5 – role of employers, Unions and NSW DPI in enforcement of breaches under the relevant legislation

With respect to the role of the Union in the enforcement of breaches under relevant legislation the Union accepts three areas of responsibility. It accepts its obligation to ensure the integrity of the role of industry and Check Inspectors and employee representatives on occupational health and safety committees in the industry. It also believes it has a further obligation to educate union members in relation to legal duties and rights arising out of occupational health and safety laws and where circumstances justify prosecuting offences.

TOR 6 – adequacy of monitoring and reporting systems

The principal mechanism for the collection of safety data is NSW DPI's COMET database. The CFMEU considers that despite its obvious value there are deficiencies in the collection of safety data. It believes that the whole question of suggested improvements in COMET is best left to the Mine Safety Advisory Council (MSAC). As it has been granted wider powers and given greater resources, the MSAC should now use these powers and resources to review the operation of the COMET data base and implement necessary changes to improve it. The Union, however, suggests that this examination should be deferred until a national level of consistency can be achieved by the National Mine Safety Framework Initiative.

TOR 7 – Prosecutions

The CFMEU acknowledges the improved performance of NSW DPI with respect to prosecutions but considers that there is room for more improvement. The Union considers that there has been a failure to prosecute for dangerous occurrences and 'near misses'. The Union expressed the view that a prosecution for such incidents 'is absolutely critical to developing an effective general deterrence'. Further, it considers that there is an imbalance between announced and unannounced inspections by NSW DPI.

The Union laid its emphasis in two areas; the prosecution of 'non-injury' breaches and an increase in the number and proportion of unannounced visits by Inspectors and mine safety officers.

TOR 8 - benchmarking the policies and practices of comparable mine health and safety agencies

The Union supports the policy of NSW DPI in benchmarking its performance against comparable mine safety agencies but believes that the performance of other inter-state mine safety regulatory authorities is no better and sometimes worse than the performance of NSW DPI.

On 1 June 2007, the CFMEU provided an updated submission to the Inquiry which takes into account recent research by Professors Neil Gunningham and Andrew Hopkins. It also expressed its concern that the Inspectorate has self-imposed limitations on the use of the new powers derived from the OHSA with respect to Mine Safety Officers. In particular it rejected the proposition that Mine Safety Officers should be limited in their use by association in a subordinate capacity to Inspectors. The Union endorsed the view of Professor Gunningham that salaries for the Inspectorate should be raised to ensure that the highest standard of person is attracted into the positions.

TOR 1 - The adequacy of the legislative framework for mine health and safety enforcement policies

The Union has reservations about some of the elements in the hierarchy of responses set out in NSW DPI submission, notably the ‘oral expression of concern’ which runs counter to the obligation to report and disseminate information to the workforce. It also notes the absence of the right to issue Penalty Infringement Notices (PIN) as in Section 108 of the OHSA.

The Union again asserts its reservations about the lack of forcefulness in the prosecution of some employers where there have been repeated breaches of health and safety and provisions where there have been repeated notices issued, multiple incidents, and where there have been high potential safety breaches. The Union agrees with NSW DPI in that it does not see the enforcement of mine safety simply as a matter of issuing prohibition notices, prosecutions and the like.

The Union presses for the enlargement of the powers of Mine Safety Officers and to have these powers defined by NSW DPI. It also seeks to have Check Inspectors, OHS committee members and authorised officers to be able to issue provisional improvement notices. In general it seeks to have broadened the list of persons that can exercise powers under Section 175 of the CMHSA. Further the Union suggests that Section 155 be amended to require government officials to consider complaints made by an authorised officer, OHS committee members and the OHS consultative committee.

TOR 2 - the role of the NSW Department of Primary Industries (NSW DPI) Inspectorate, including the qualifications and experience of staff, resourcing and training

The Union believes that the powers of inspection under Section 154 of the CMHSA should allow the investigation of a complaint from OHS committee members, employees and authorised officers. The shift from a prescriptive approach to a systems based approach to mine safety requires new training and new understanding of the role of all persons associated with mine safety and the introduction of greater organisational and support structures worked by a highly proactive NSW DPI. Among the new thinking the Union considers to be appropriate is the reconsideration of the need to have all Inspectors to have been mine managers. It also queries the need for the subordinate position of the Mine Safety Officers in the new regime. The Union considers that there is an urgent need for more Inspectors and for the location of more resources to the Inspectorate. In particular there is a need for the immediate appointment of two more Inspectors.

The additional training supported by the Union should concentrate on conducting investigations for purposes of prosecutions, intense training in risk analysis and the multiskilling of all persons involved in the enforcement of OHS standards. Salary improvements for Inspectors are needed to more closely align them to the salary scales of mine managers.

The Union believes that as part of its policy of equating more closely the mine safety officers with mining Inspectors. The mine safety officers should have the same competencies as current mine Inspectors together with any system based skills they may possess. The Union holds the view that Mine Safety Officers should be able to issue prohibition notices and penalty notices under Section 93 and Section 108 respectively of the OHSA.

TOR 3 - the implementation of policies, including developing a strategic approach to enforcement with a view to long-term improvement in compliance

The Union applauds NSW DPI policy of releasing records and information with respect to assessments and investigations of accidents and breaches of mine safety but thinks that in

some cases more stringent enforcement options should have been applied. The Union places great stress on consultation and regrets that in the past consultation has been lacking, and believes that there is no more fundamental requirement than consultation over OHS matters to ensure improved OHS outcome.

TOR 4 - range and application of sanctions available to Inspectors, and if inadequate, sanctions that might apply

In general the Union considers that the range and sanctions available to Inspectors are adequate.

This general support is predicated on the view of the Union that as a consequence of the operation of the CMHSA (Section 145) and the OHSA (Section 47A & 47B) Mine Safety Officers are Inspectors for the purposes of the OHSA. This means that they have powers under Part 5 investigations and can issue investigation notices, improvement notices, prohibition notices as well as penalty notices for certain offences under Section 108 of Part 7 Criminal and Other Proceedings. The Union noted that if this view of the Acts is wrong or if NSW DPI has a policy against this view then the Acts and NSW DPI policy should be amended to allow this interpretation to be law.

TOR 5 – role of employers, Unions and NSW DPI in enforcement of breaches under the relevant legislation

The Union confined its comments under this TOR to the roles played by the Union and employee representatives under the relevant statutes. It set out in some detail the roles played by authorised officers, Site check Inspectors, Industry check Inspectors and OH&S Committee members. The Union considers that while the role that has been performed by these employee representatives has been effective they need to have more consistency in the work they perform. In this regard the Union believes that there needs to be a less complicated structure to apply to the work of these employee safety representatives. To this end the Union submits that there should be introduced a new and additional power in the form of ‘provisional improvement notices’ as has been done in Victoria and Western Australia. This power should vest in OHS Committee Members and Site Check Inspectors. It is envisaged that once the provisional Improvement Notice is issued an employer would have to comply with the notice unless an appeal is taken to an Industry Check Inspector or a government official.

The Union proposes that the provisional Improvement Notice would be issued requiring a mine to address a health and safety issue but could only be issued by a person with suitable qualifications or expertise and this would include all Check Inspectors OHS Safety Committee members and Authorised Officers.

The Union sets out the obligations on a person issuing a provisional improvement notice and detail of the breaches giving rise to its issue. It stresses that the powers of Authorised Officers should be recognised and expanded so as to include the ability to issue provisional improvement notices or be given the powers of Industry Check Inspectors and those in Division 3 Part 10 of the CMHSA. The proposal that authorised officers should be able to issue a type of provisional improvement notice, valid until revoked by an Industry Check Inspector or Government Official.

TOR 6 – adequacy of monitoring and reporting systems

The Union considers that there are many weaknesses in the COMET system describing it as ‘lightweight and cursory’ and which places administrative burdens on Mine Safety Officers and Inspectors diverting them from core enforcement and safety roles. In particular the Union complains that it seems to have displaced the formal and recording obligations arising under the Enforcement Policy Statement. It suggests that COMET be revised because the information currently available through COMET is of no immediate value to Inspectors and Mine Safety Officers in performing their tasks.

TOR 7 – Prosecutions

The Union remains critical of the policy of NSW DPI towards prosecutions holding the view that there are insufficient prosecutions of employers involved in safety breaches. In part this is caused by a lack of the requisite training to enable Inspectors to develop appropriate skills and get the required level of expertise and have the resources to mount effective prosecutions. The Union also considers that there is a fear of the ‘boys club’ mentality among mine managers and Inspectors. A concentration on the significance of the event has meant that serious incidents have passed without being prosecuted.

TOR 8 - benchmarking the policies and practices of comparable mine health and safety agencies

The Northern Districts Branch of the CFMEU adopts the stance of the National Office toward this term of reference.

12.1.1.3 AUSTRALIAN MANUFACTURING WORKERS UNION (AMWU)

The AMWU principally addressed issues arising out of the report of Professor Gunningham. In general the Union supports and has always supported the rigorous enforcement of penalties not only as a penal measure but also to create behavioural change in the industry.

In general, the Union supports a unity of enforcement policy between the Mines Health and Safety legislation and the regimes and policies in force to protect general worker health. The Union concedes a place for ‘event based’ evaluations of enforcement decisions but considers this to be only one of a mix of considerations to be taken into account. The Union cautions that a rigid application of the pyramid approach. It points out that flexibility is needed as every case is unique.

The Union expresses a strong view in favour of additional and accelerated training of the Inspectorate together with a review of salary levels. In this regard the focus of the training should be on occupational health and safety management systems. The consultative mechanisms appear to be taken too lightly in the view of the Union. It has a view on safety which is founded on the strong deterrent effect of prosecution and penalty.

In suggesting a means for bridging the divide between employers and unions, the Union supports consensual but enforceable undertakings made between the registered Union and employers and filed with the Industrial Commission of NSW dealing with occupational health and safety matters. This would bring safety matters before the Commission where there was a case of non-compliance with the terms of the agreement. The Union thinks there is some justification for the Professor Gunningham’s view that some individual mines Inspectors could be ‘captured’ by the mine owners. To this end the Union supports the view that the mines inspectorate could be moved to the Department of Commerce or to it becoming a separate arm of WorkCover NSW.

The overall supervision of the NSW Industrial Relations Commission with respect to all OHS related disputes is also supported by the Union.

12.1.1.4 ASSOCIATION OF PROFESSIONAL ENGINEERS, SCIENTISTS AND MANAGERS AUSTRALIA (APESMA)

APESMA Collieries’ Staff Division represents ‘staff’ employees working in the mining industry in a range of engineering, technical and administrative roles. The Association’s submission to the Inquiry is confined to four of the terms of reference.

TOR 1 - the adequacy of the legislative framework for mine health and safety enforcement policies

APESMA complains about the adequacy of the legislative framework with respect to the control of fatigue and long hours of work. Giving examples of very long days and hours of

work APESMA claims that ‘fitness for work’ programmes arising from Clause 148(3) of the *Coal Mines Health and Safety Regulation 2006* provide no minimum standards or guidelines and that as a result there are no means of enforcement. The result is that there are no ‘fitness for work’ programmes at some mine sites and no consultation with staff even where there are such guidelines.

TOR 3 - The implementation of policies and the development of a strategic approach to enforcement with a view to long term improvement in compliance

APESMA holds the view that the broad nature of Section 26 of the *Occupational Health and Safety Act 2000* virtually forces NSW DPI to take a ‘scattergun’ approach to prosecutions which reduces the levels of confidence that statutory and other staff have in the department and its enforcement policies.

TOR 4 - The range and application of sanctions available to Inspectors and if inadequate sanctions that might apply

While generally supporting the range of sanctions available to NSW DPI the APESMA has some specific reservations on several of the new proposals. It holds the view that enforceable undertakings should not be used to undermine a prosecution which may be undertaken by a union. Equally, APESMA considers that the union and the injured worker should be involved in any negotiation leading to an enforceable undertaking. It also considers that the oversight of enforceable undertakings should reside in the Industrial Relations Commission of NSW.

APESMA supports the existing level of financial penalty for individuals as adequate but has serious reservations with respect to the revocation of Certificates of Competence because the serious consequence for an individual may discourage a defendant from pleading guilty to a charge. A similar penalty, the revocation of a licence to mine, should be applied to an employer in a proper case as financial penalties do not act as a deterrent in today’s climate.

TOR 7 – Prosecutions

APESMA confined its comments to questions touching the prosecution of individuals and in this regard holds the view that prosecutions against individuals should only be taken when there is a direct link between the offence and the culpability of the individual. It objects to the application of Section 26 of the *Occupational Health and Safety Act 2000* as making a person guilty by virtue of their status. It considers that the escape clauses amount to a reversal of the onus of proof and in some cases do not provide a defence to an innocent person.

APESMA suggests that the ambiguity involved in the use of the words ‘persons concerned in the management of the corporation’ should be replaced by the definition of the word ‘officer’ as in the Victorian legislation.

12.1.2 GOVERNMENT

12.1.2.1 NSW DPI INSPECTORS OF COAL MINES

Two mine Inspectors submitted a written joint viewpoint on the terms of reference which is supported by their union, the Public Service Association. They claim that NSW DPI has not sought their advice on the development of policy toward the terms of reference and not allowed the Inspectors to read the departmental submissions submitted to the Inquiry.

The Inspectors made the following suggestions

TOR 1 - The adequacy of the legislative framework for mine health and safety enforcement policies

The *Coal Mines Health and Safety Act 2002* be amended to require mine design consultants to provide advice to the mine listing any assumptions adopted in the design process that could limit elements of the design, state the safe operational limits of any design advice and certify that a design meets the mine's design outcome.

TOR 2 - The role of the NSW Department of Primary Industries (NSW DPI) Inspectorate, including the qualifications and experience of staff, resourcing and training

In discussing the role of NSW DPI inspectorate the Inspectors seek to have the Act amended to provide that Inspectors must have a Certificate of Competency as a coal mine manager and a minimum of 3 years experience as a coal mine manager.

The Inspectors complain that resources seem to be directed toward departmental administrative needs rather than toward increasing the number of Inspectors and re-establishing the position of Deputy Chief Inspector. They also feel that the department should cease the transfer of mine safety responsibilities to non-technical people and return the mining operations plan process to the Inspectorate.

They believe that many advantages would flow from the creation of an Office of Coal Mine Safety. Once again they press for Mine Safety Officers to be 'teamed' with Inspectors and be made answerable to the Inspector of the mine in which they are working. They expressed the view that the location and amenity of their offices and their work environment should be reviewed. They suggest that this ought to include improvement of their administrative support systems as they spend most of their time isolated from organisational and peer support.

TOR 4 - The range and application of sanctions available to Inspectors and if inadequate sanctions that might apply

The Inspectors noted that a majority of Inspectors are opposed to the issuing of fines as a sanction available to them. However, the two Inspectors who have prepared the written submission feel that if fines are to be considered as a sanction then they should be part of an escalating hierarchy of enforcement options and should not be seen as a measure of an Inspectors work output. In issuing fines the Inspectors believe they should be able to be issued against both persons and companies and when levied against a company the fine should be substantial. When issued against individuals the fines should be 'on the spot' and not subject to departmental approval. The institution of a Chief Inspectors Inquiry is suggested as an effective way of dealing with industry-wide issues resulting from major accidents, including fatalities.

TOR 6 – Adequacy of monitoring and reporting systems

The Inspectors recommend a radical and substantial reform of the COMET Data Base including entry into the data base to be undertaken by other than field operatives and that an expert analysis of COMET be undertaken to improve it.

12.1.2.2 SUBMISSIONS OF PAUL NEWHEY, INSPECTOR

Although Inspector Paul Newhey is working in the metalliferous mining sector many of his comments are applicable to the terms of reference and to this extent I have included them in this Report. Mr Newhey is a very highly qualified Inspector and his views are thoughtful and helpful.

He is critical of the Gunningham Report in its criticisms of NSW DPI Inspectorate and points out that the views of professor Gunningham are out of date and rely on the 1997 Review and the 2005 Review without considering that NSW DPI changes introduced since those reviews have substantially changed the situation. He challenges the view of Professor

Gunningham that NSW DPI Inspectorate has struggled to move from a prescriptive based standard to a process based standard.

Inspector Newey does not disagree with the enforcement policy *per se* but rather thinks there may be weaknesses in the implementation of the policy. He suggests improving the processes for selecting potential breaches for an intensive investigation and a greater range of high-level sanctions. He expresses the view that some guidance should be given to Inspectors to determine what enforcement options should be availed of and there should be a flexible approach to high level investigations to the effect that the decision to investigate is not automatically a decision to prosecute.

The Inspector derides the ‘enforcement pyramid’ suggested by the Professor because it does not take into account the ‘culpability’ of the offender. He defines culpability as a combination of risk and foreseeability. He advises a progressive response with clear warnings in English is preferable to the pure application of the pyramid.

He suggests that Penalty Infringement Notices might provide a sound medium-level sanction but qualifies this suggestion by mentioning that an appeal against the issue of a Penalty Infringement Notices might lead to an unnecessary prosecution. If there were a range of civil penalties introduced a Penalty Infringement Notices might be more easily supported.

In trying to reconcile the employer view that there should be less prosecutions and the Union view that there should be more, the Inspector, while acknowledging that these differences may never be bridged, thinks that NSW DPI should be more explicit in the reasons behind its actions one way or the other.

12.1.2.3 NSW DEPARTMENT OF PRIMARY INDUSTRIES (NSW DPI)

The comments of NSW DPI on the terms of reference are backgrounded by the reform programme introduced progressively since the Mine Safety Review 1997, the Gretley Inquiry 1998 and the Mine Safety Review 2004. The many and substantial changes introduced as a result of these reviews have led to a marked improvement in the level of mine safety in the NSW. The legislative changes during the period have both caused and accompanied the process of reform.

These changes paralleled the growing importance of the Mine Safety Advisory Council during this period. Additionally NSW DPI itself has been restructured to provide a separation of reporting in NSW DPI that assists in the creation of internal checks on the department’s regulatory activity with respect to the mining industry. In particular, the establishment of an autonomous Investigation Unit in response to a recommendation of the Mine Safety Review and the Gretley Inquiry has been central to the recorded improvement.

TOR 1 - The adequacy of the legislative framework for mine health and safety enforcement policies

In expressing its views on the adequacy of the legislative framework for mine health and safety enforcement policies NSW DPI is of the view that the current legislative model is appropriate. It supports the over-arching regime of *Occupational Health and Safety Act 2000* (the OHSA) with its mining-specific supplements drawn from the *Coal Mine Health and Safety Act 2004* (the CMHSA) together with the regulations.

Its general policy is qualified by not knowing at time of writing of the content of the Report of the Stein Inquiry which could have a marked effect on the legislation currently being applied to the mining industry. NSW DPI also regrets the complexity involved in the operation and interrelationship of the legislation concerning the OHS, the mining Acts, and the explosives and surveying statutes. NSW DPI flags a problem with the current gap that exists in the level of penalties that apply to individuals at different levels of responsibility in the management of a mine.

The Department envisages a streamlining of the legislation in the future to simplify the obligations and responsibilities of duty holders. It is alert to changes that may stem from the Stein Inquiry and the National Mine Safety Framework Initiative.

TOR 2 - The role of the NSW Department of Primary Industries (NSW DPI) Inspectorate, including the qualifications and experience of staff, resourcing and training

In expressing its views on the role of the Inspectorate and the qualifications and experience of staff, resourcing and training NSW DPI outlined the roles of the Inspectorate and expressed general satisfaction with its levels of experience and its professional expertise. A problem exists with the retention and attraction of applicants with the requisite levels of expertise. This is an existing problem which will become worse with the foreseeable retirement of and number of Inspectors and Mine Safety Officers in the next few years. A review of salary levels and the reintroduction of a graduate training programme are suggested to address this problem.

NSW DPI does not, however, see that throwing money at the problem alone will solve it. The maintenance of sufficient and appropriate expertise in the regions is important and the level of competency for Inspectors should have regard to industry levels. The emphasis on training to meet future needs should be maintained and particularly with respect to risk management and auditing.

While NSW DPI acknowledges that resources are needed sufficient to enable the Inspectorate to operate efficiently, it sees no pressing need to have the resource base lifted as the levy was last examined and fixed in February 2007. This submission is qualified by the prospect that if the number of prosecutions is to be increased so the resources necessary for that to happen would have to be also increased.

NSW DPI suggests that consideration be given to the Investigation Unit conducting inquiries into trends and emerging hazards resulting in alternate enforcement outcomes for example, enforceable undertakings. It also suggests that the qualifications and experience of the Senior Investigator should be reviewed to allow a wider range of persons with the necessary skills and experience to compete for these positions.

TOR 3 - The implementation of policies, including developing a strategic approach to enforcement with a view to long-term improvement in compliance

NSW DPI holds the view that the current enforcement policy is sufficiently broad and robust to remain the appropriate policy into the future.

These policies have involved NSW DPI providing clear leadership to the whole of the industry coupled with an educational role designed to lift safety standards and encourage best practice. Together with education warnings and sanctions are the means for the implementation of the process. Consultation with all parties in the industry assists in the continuous and evolving process.

The enforcement policy followed by NSW DPI is similar to that operated by WorkCover NSW with the exception that Penalty Infringement Notices are not used by NSW DPI. In any event NSW DPI believes that with new legislation and improved consultation processes in train, directive enforcement actions will reduce in number while targeted campaigns aimed at health and safety standards will increase.

NSW DPI is confident that the principles underlying its investigation policy will provide clarity and direction to Inspectors, Mine Safety Officers and Investigators when responding to a mine incident or accident. Similarly its incident identification procedures provide a triage by which incidents can be ranked for appropriate attention. The work of the Mine Safety Advisory Council (MSAC) and the National Mine Safety Framework complement these arrangements.

NSW DPI had expressed its concern that the Assessment and Review Committee of NSW DPI has no effective guidelines by which it may determine which company directors and official, concerned in the management of a mine should be considered for prosecution pursuant to Section 26 of the *Occupational Health and Safety Act 2000* (the OHSA). In this regard guidance for the Committee is very important. The advice given to NSW DPI by legal counsel should be considered in future prosecutions. This suggestion is that a prosecution should not be considered unless there is a clear act or omission on the part of the individual concerned that is causative of the harm done or created. Furthermore, the act or omission must be of such a nature as to be beyond the normal course of action, or inaction of a person in the position of that individual.

TOR 4 - The range and application of sanctions available to Inspectors and if inadequate sanctions that might apply

In considering the range and application of sanctions available to Inspectors and the sanctions that might be applied if these are thought to be ineffective NSW DPI speculated that the National Mine Safety Framework may well provide new thinking on the issue of the range and application of sanctions which could be useful.

NSW DPI listed all the options currently available. These include the giving of safety advice, the issuing of improvement notices and prohibition notices, the enforcement of codes and standards and prosecutions. These roughly form a pyramid of sanctions, escalating upwards in accordance with the seriousness of the safety breach or apprehended breach. Added to these are the suspensions or cancellation of Certificates of Competence and stop work orders. In the view of NSW DPI these add up to an impressive array of weaponry in the safety arsenal.

For the future NSW DPI considers that the legislation should be amended to make clear the power of Inspectors to intervene proactively when the Inspector sees that some situation may give rise to a danger at some point in the future. Doubt has been expressed as to whether the terms of the Occupational Health and Safety Act 2000 allow this approach to be taken.

NSW DPI is also proposing to use Penalty Infringement Notices (PIN) in the future. The Department is examining ways in which this process can be introduced without it becoming a process in and of itself (the parking ticket problem). Furthermore, the use of enforceable undertakings as an alternative to prosecution may be considered depending on the outcome of the Stein Inquiry.

TOR 5 – The role of employers, Unions and NSW DPI in enforcement of breaches under the relevant legislation

NSW DPI made a review of the various roles of the employers and unions, together with its own responsibilities, in the enforcement of breaches of the relevant legislation. It makes the point that everyone in the industry has some responsibility for the safety of everyone else in the industry although these responsibilities may vary depending on whether it has to be exercised by an employer, a union, a contractor or an individual.

In considering safety everyone in the industry is part of a 'team', each member of which has an important role to play in the safe operation of the industry. This concept makes consultation a central part of the processes of safety. The removal of the right of a union to take prosecutions is opposed in part for this reason. The important role of the Check Inspector is emphasised by NSW DPI.

The one important group standing on the fringe of the industry but which NSW DPI considers should be more centrally involved are the contractors. The department's view is that there should be better representation of contractors in the consultation processes and greater inclusion of contractors on OHS committees. Similarly NSW DPI considers that Check Inspectors should be involved in monitoring and reviewing contract management

systems. NSW DPI should also have a role in monitoring and enforcing contractor management systems.

TOR 6 – The adequacy of monitoring and reporting systems

NSW DPI recognises the great importance of having an adequate and national monitoring and reporting system in place to collect all the safety and health data upon which decisions can be based. The current incident data base is COMET which was developed in 1999. The system was expanded in 2004 to reduce duplication, improve the on-line capacity and to develop a keyword capacity and an investigation module.

Despite its value generally COMET has proved unsatisfactory as a means for recording information and detail arising from investigations and prosecutions especially failures in the systems. NSW DPI recognises the need for a single searchable data base and a proposal to this end is still in the conceptual stage.

NSW DPI supports the establishment of a National Reporting System and suggests that such a system could be managed in a major way by the Minerals Council of Australia which has historically played a central role in industry reporting.

For these reasons NSW DPI supports the further enhancement of COMET as a data base and the transfer of data to a national base such as that envisaged by the National Mine Safety Working group. It also supports the proposition that there be established an Investigations and Prosecutions data base that could serve as a searchable convictions register.

TOR 7 – Prosecutions

The main issue to come before the Inquiry is the matter of prosecutions. These provide the summit of the hierarchy of responses to breaches and potential breaches of mine health and safety. The current policy was introduced by NSW DPI in 1999 after the Gretley Inquiry. NSW DPI considers that it has served its purposes well over the last 8 years (see DPI 1999). It sees the policy as both transparent and well structured to meet the needs of the industry.

Central to the implementation of the policy is the Investigation Unit which operates independently of Mine Safety Operations, reporting directly to the Director-General. Currently, the unit is participating in 17 major investigations, seven of which involve fatalities and four involve serious injury.

NSW DPI is satisfied with the number and success rate of prosecutions since the establishment of the Investigation Unit. It proposes to continue with an enforcement focus which includes the full range of enforcement options from warnings through to prosecution. The level of investigation required will continue to be decided by the investigation process.

NSW DPI will examine the question as to whether an alternative prosecution process can be found by working through a local Court presided over by a Magistrate.

TOR 8 - Benchmarking the policies and practices of comparable mine health and safety agencies

In attempting to benchmark the policies and practices of comparable mine health and safety agencies NSW DPI undertook a survey of the relevant mining states, Queensland, Victoria and Western Australia.

This survey showed that the four mining states all had established clear policy statements, principles of enforcement, enforcement criteria, a hierarchy of responses and each had established factors for making a decision to prosecute.

The only difference in the state approaches was the Western Australia and Victoria did not have a single comprehensive policy document. In general, NSW DPI stated that it

proposed to continue to work through the National Mine Safety Framework Steering Group to develop best practice in the enforcement of mine health and safety standards.

12.1.3 MINING INDUSTRY ASSOCIATIONS AND MINING COMPANIES

12.1.3.1 COAL AND ALLIED

TOR 1 - The adequacy of the legislative framework for mine health and safety enforcement policies

Coal and Allied (C&A) believes that NSW DPI policy document *Enforcement of Health and Safety Standards in Mines* (EHSSM) should be revised and updated in light of the recent statutory changes. The revision should reduce the prominence of prosecution in any revision of the policy. It holds the view that the focus on prosecution as a means of enforcement has limited the culture of open learning and promoted defensive actions by companies and individuals to legally protect themselves from prosecution. The emphasis should be on a proactive approach including comprehensive risk management. Prosecution based on the seriousness of the injury or damage sustained does not assist in the proactive approach desired.

To this end C&A believes that a distinction should be made when deciding whether to prosecute between an honest mistake and reckless behaviour. The company believes it to be unfair that a person should have acted honestly and in good faith and yet still be liable for prosecution and criminal penalty because they did not exercise reasonable care.

C&A approves the proposed use of prohibition and improvement notices as an effective safety tool. It does not think that the current range of enforcement options available to NSW DPI are wide enough to allow an escalation of enforcement options. It sees enforceable undertakings as a suitable means to expand the range of sanctions and reduce the level of prosecutions.

C&A notes that Penalty Infringement Notices are provided for by Section 108 of the OHSA but mining Inspectors are not allowed to use them. C&A considers that Penalty Infringement Notices if carefully administered could provide NSW DPI with an effective safety mechanism and one which would reduce the level of expensive and time-consuming litigation.

TOR 2 - The role of the NSW Department of Primary Industries (NSW DPI) Inspectorate, including the qualifications and experience of staff, resourcing and training

C&A strongly supports the need for training and for further support to monitor and enforce OHS compliance in the mining industry. C&A believes that a cultural change is necessary and that this must be driven by the Inspectorate. C&A state that a focus on prosecutions this cultural change will not take place because the staff are intimidated and distrustful of the Inspector, fearing a prosecution. The necessary collaborative approach is thereby compromised.

C&A suggests that a published code of conduct for Inspectors would assist including a mechanism for complaints. A practical timeframe for the completion of investigations should also be developed and stakeholders should be informed when an investigation is complete and what the result is.

TOR 3 - The implementation of policies including the development of a strategic approach to enforcement with a view to long term improvement in compliance

C&A holds the view that long term impacts on safety require voluntary compliance and commitment to foster a sense of trust in NSW DPI, together with adoption of risk based safety management with less emphasis on individual behaviour and blame.

In placing the emphasis on cooperative responses to safety matters it urges consistency fairness and an encouragement of learning and improvement. It sees behaviour rather than the outcome of the behaviour as being the appropriate test. In this regard it would differentiate between dangerous and reckless acts causing accidents and honest mistakes. Honest mistakes should not be the subject of prosecution.

TOR 4 - The range and application of sanctions available to Inspectors, and, if inadequate, sanctions that might apply

In this regard C&A believes that 'restorative justice' is a preferable sanction as it gives the offender a chance to proactively put things right. It sees deterrence or retribution as having sometimes adverse side-effects. In this regard C&A adopts largely the views of Professor Gunningham.

TOR 5 - The role of employers, unions and NSW DPI in enforcement of breaches under the relevant legislation

C&A acknowledges the important role employers have to play in dealing with breaches of mine safety laws. It sees the employer as being obliged to internally investigate near misses and incidents, and institute corrective actions wherever necessary. It has an obligation to monitor, evaluate and audit all its safety systems and report all notifiable incidents to NSW DPI. It has the duty to cooperate with NSW DPI investigations and comply with any obligations imposed by NSW DPI.

C&A sees the obligation of NSW DPI as addressing mine safety issues with a greater collaborative approach. This would envisage notifying an employer of a safety issue identified from an investigation and providing the employer with the opportunity to rectify the matter. NSW DPI should provide advice and assistance to an employer in discharging its obligations and provide a report to the employer of the outcome of an investigation and allow the employer to suggest alternatives to prosecution.

C&A does not believe the unions should have the right to prosecute for mine safety breaches although it concedes that unions have a real role to play in workplace safety. It does not consider that unions are impartial and objective and therefore should not be allowed to prosecute. Where NSW DPI or WorkCover NSW are to be prosecuted such prosecution should be mounted by the NSW Director of Public Prosecutions (DPP) or some impartial prosecutor. Failing this, unions should have to obtain the written consent of the Minister and not receive a moiety.

C&A supports the view that prosecutorial functions within NSW DPI should be separated from the investigative functions but thinks that a clear policy framework would obviate the need for this to be done.

TOR 6 - The adequacy of monitoring and reporting systems

C & A complains that NSW DPI does not in fact report to a site concerned in an accident investigation the result of any assessment made and any concerns arising from the assessment. It suggests that NSW DPI should provide practical guidance to employers and that oral compliance advice should be confirmed in writing. C&A suggests that once an employer has been provided with guidelines on the interpretation and advice on the application of the OHS Act it should be a defence to a prosecution that they have complied with the written advice and it should be admissible in any criminal proceedings and prosecutions.

TOR 7 - Prosecutions

C&A considers prosecutions to be appropriate only when there has been an abject disregard for safety. This view should apply to individuals regardless of their position in the company or in the operating entity. Similarly, C&A considers that NSW DPI's emphasis on prosecution, based on event/outcome considerations should be reconsidered to be risk based not outcome focused.

C&A views the role of NSW DPI as prosecutor as involving assistance to arrive at the truth and ensure justice between the community and the accused. It involves a heavy emphasis on fairness and it ought not to involve any factional interest. NSW DPI should have no interest in the outcome. NSW DPI should avoid unnecessary expense and delay and the charges should reflect the seriousness of the offence. C&A believes that only cases involving a substantial falling short of reasonable expectations should merit prosecution; mere honest mistakes should not merit prosecution.

C&A holds the view that reasons for commencing a prosecution should be made available to the parties before a prosecution is commenced. Clear and transparent principles should govern the making of a case to be prosecuted. This involves considering all lower level sanctions before a prosecution is launched. C&A opposes the reverse onus of proof involved in the operation of the OHSA.

C&A opposes the principle of prosecutions of both individuals and the corporation. It believes that prosecutions should only proceed where criminal intent is evident. Thus, C&A considers it to be unfair that a person may have acted honestly and in good faith and still be found not to have exercised reasonable care and face prosecution. Recklessness should be the test to be applied to all offences committed by individuals. Currently competent managers are deterred from seeking to improve safety performance and standards for fear of prosecution for honest mistakes. Prosecution should not be taken against a director or manager utilising the current 'deeming' provision unless there is evidence directly linking the individual to the risk present in the workplace.

C&A considers that natural justice requires that there be a right to silence in the OHSA and persons should be able to refuse to answer questions that might be against their interests. A fair process should be introduced for individuals facing possible criminal prosecution.

TOR 8 - Benchmarking policies and practices of comparable mine and health safety agencies

C&A believes that an exchange of information between the agencies in the three mining states would assist in promoting health and safety in the workplace. This does not extend to any exchange of information relating to enforcement information.

12.1.3.2. CENTENNIAL COAL COMPANY LTD.

The Centennial Coal Company is an affiliate of the NSW Minerals Council and the submissions of Centennial adopt and repeat the submissions of the Council.

TOR 2 - The role of the NSW Department of Primary Industries (NSW DPI) Inspectorate, including the qualifications and experience of staff, resourcing and training

Centennial Coal Company believes there should be a new approach to the recruitment and training and resourcing of the Inspectorate in part because of the shift from a prescriptive to a performance based regulation. The company submits that the change might well lead to the recruitment of health and safety professionals from non-mining industries. It supports complaints about the conduct of some of the Inspectorate and call for the Inspectors to act with dignity and respect the mining personnel they are interviewing. The company would like to see NSW DPI revisit the rules governing the time and circumstances of interviews with mine employees.

TOR 3 - The implementation of policies including the development of a strategic approach to enforcement with a view to long term improvement in compliance

NSW DPI should focus on the culpability of the offender having regard to the risk involved and should focus less on the actual outcome. A distinction between reckless acts and honest

mistakes should be made. A long term strategic plan should background any enforcement policy and this should be formulated by consultation with all the stakeholders.

TOR 4 - The range and application of sanctions available to Inspectors, and, if inadequate, sanctions that might apply

Centennial believes that there is an overemphasis on prosecution as an enforcement policy and more flexible strategies should be adopted aimed at safety outcomes. Prosecution should be reserved for reckless and dangerous disregards for safety standards. While supporting the hierarchy of responses adopted by NSW DPI the company considers that greater consideration should be given to selecting the appropriate response and that the process should be transparent and consistent.

Centennial believes that the hierarchy of responses should have an additional response available to NSW DPI, being enforceable undertakings, and suggests that they should fall below prosecutions and above the issuing of formal warnings. Centennial believes that systems audits may prove successful as a means of improving safety but the company opposes the issuing of Penalty Infringement Notices. The company also believes that the current provisions governing the cancellation or suspension of Certificates of Competency are adequate and should not be strengthened.

TOR 5 - The role of employers, unions and NSW DPI in enforcement of breaches under the relevant legislation

Centennial believes that where NSW DPI intends to prosecute for a breach of mine safety an opportunity should be give to the alleged offender to show cause as to why no prosecution should be launched and submit an alternate enforcement remedy to be more appropriate. It also believes that the DPP should be the prosecuting agency rather than NSW DPI and unions should not have the right to prosecute. Centennial also holds the view that remedial action taken after an incident should not be able to be used as evidence in any prosecution or proceedings.

TOR 6 - The adequacy of monitoring and reporting systems

There should be established a code of conduct to govern the attitudes and activities of enforcement staff and this should be monitored with shortcomings revealed to lead to further training supervision or disciplinary action for repeat offenders.

TOR 7 - Prosecutions

Centennial believes that prosecutions should be confined to only the most serious safety breaches and to this end NSW DPI enforcement policy (EHSSM) is in need of review. It also believes that all prosecutions should be taken by the DPP and not by NSW DPI. In general Centennial considers that prosecutions should be used to make an example of serious offenders rather than be used to punish people who are making real efforts to ensure workplace safety. Where prosecutions are taken in inappropriate circumstances, grave consequences flow to personal defendants..

TOR 8 - Benchmarking the policies and practices of comparable mine health and safety agencies

Centennial believes that benchmarking is a useful exercise by which NSW DPI can test its policies against current regulatory models. A valuable comparison may be found in the UK HSE Enforcement Model. The Victorian Worksafe Compliance and Enforcement Policy is also a relevant comparison for NSW DPI. It suggests that the principles that should be applied to inspection and enforcement activities are that they should be targeted to areas of greatest need and effect, proportionate to the seriousness of non-compliance, consistent in approach and be fair.

TOR 1 - The adequacy of the legislative framework for mine health and safety enforcement policies

The NSW Minerals Council supports the view of the other mining companies to the effect that prosecution should only be applied for serious breaches of mine safety laws and in fact only where there can be shown that reckless and dangerous conduct is evident.

In particular the Council takes issue with the terms of NSW DPI policy governing the enforcement of health and safety standards in mines (EHSSM). It considers that the policy is in need of review to ensure that care is taken when reverse onus of proof is applied against directors and managers so that such a drastic provision is applied appropriately. In general the Council considers that all sanctions short of prosecution should be explored before resorting to the use of prosecution.

TOR 2 - The role of the NSW Department of Primary Industries (NSW DPI) Inspectorate, including the qualifications and experience of staff, resourcing and training

The Council seeks to have the Inspectorate focussing on the objectives of mine safety laws to secure and promote the health, safety and welfare of all people at work in the mine and not just focus on prosecutions. It complains that the conduct of some investigators does not reflect well on NSW DPI particularly following serious accidents. The training and guidance of Inspectors should be reassessed and there should be some development of a code of conduct designed to improve the conduct of some Inspectors.

TOR 3 - The implementation of policies including the development of a strategic approach to enforcement with a view to long term improvement in compliance

The Council complains that the current enforcement policies focus on outcomes instead of on the conduct of the relevant duty holder. It suggests that it is necessary for the objectives of the OHSA to be achieved for a distinction to be made between reckless acts and honest errors which lead to an incident at a place of work. It acknowledges that there needs to be a long term plan which is developed in consultation with stakeholders for the issue of workplace safety to be satisfactorily resolved.

TOR 4 - The range and application of sanctions available to Inspectors, and, if inadequate, sanctions that might apply

The NSW Minerals Council accepts that the range of sanctions currently applicable are wide and satisfactory, particularly when coupled with those derived from the OHSA there should be alternative sanctions to prosecution and consideration should be given to such alternatives to limit the use of prosecutions.

TOR 5 - The role of employers, unions and NSW DPI in enforcement of breaches under the relevant legislation

Safety policy should reflect the truism that safety is everybody's business and not be confined to be a duty of an employer. To this end an employer should be made aware of any investigation of his mine whenever a significant risk to health or safety is identified.

NSW DPI should confer with any person or corporation prior to decision to prosecute being taken to allow that person or corporation an opportunity to provide alternatives to prosecution in a manner similar to the Premiers Memorandum for Litigation.

TOR 6 - The adequacy of monitoring and reporting systems

There is a need for there to be established a code of conduct to govern the Inspectorate while they are conducting investigations and this should be implemented. Monitoring and

reporting on the results of the EHSSM and the code of conduct should be reported on a regular basis to confirm the effectiveness of these measures.

TOR 7 - Prosecutions

Prosecution as a sanction should only be used for serious breaches of the law. Prosecutions for minor offences which may well not succeed send out the wrong message to the industry as they will not act as a deterrent to others.

All criminal prosecutions should be conducted by an independent prosecutor such as the DPP. They should be brought to trial and finished within a specified time and started as soon as practical so as not to prejudice the parties' cases.

An aggressive prosecution policy deters experienced people from accepting positions as mine managers and other statutory positions. It should be kept in mind that a goal of a prosecution is to send a message to bad actors without inhibiting good actors from pursuing strategies conducive to work place safety.

TOR 8 - Benchmarking the policies and practices of comparable mine health and safety agencies

It is necessary that the policies of NSW DPI should reflect best practice in the field of mine health and safety. For this reason benchmarking the policies and practices of other government departments and agencies must take place on a regular basis. This process should be open to consider other models of enforcement of health and safety law.

12.2 ORAL SUBMISSIONS

Interviews were held at the request of the parties with officials of the National Office of the CFMEU and with the Chairman of the NSW Minerals Council. A presentation running over several hours was also made by the NSW Minerals Council which included statements by experienced officials and managers in the industry.

NSW DPI also provided the Inquiry with several hours of oral material to explain their material submitted in writing. Professor Gunningham also had the opportunity to provide further material in explanation for the view contained in his written report.

13 REPORT TO THE MINISTER

Given the great detail and the thoughtful consideration that comprise the written submissions of the parties it is a pity that they have to be summarised for purposes of this report. A summary can never provide the flavour or the detail of the original considered document. Should any of the stakeholders feel that the summary does not do justice to their submission the Board apologises. Time and space require considerable abbreviation of the original submissions. The Board is grateful to have had the opportunity of discussing the content of the written submissions with the principal stakeholders.

The preparation of this Report has been made easier by the marked improvement in mine safety over recent years. All stakeholders appreciate this improvement. There have been no mine fatalities in the coal sector over the past three years and this against the background of greatly increased coal production.

The NSW DPI asserts that this is because the Department has got the right blend of proactive policies with reactionary policies. The mining companies take much of the credit as a result of their proactive safety policies, while the unions hold to the view that it is because the vigorous prosecution policy of NSW DPI has spread the safety message throughout the industry. Although the NSW Minerals Council contests this union viewpoint there is some truth in each of the views.

What is true without doubt is that ‘the disconnect’ which so concerned the Hon. Neville Wran in 2005 has at the very least diminished in intensity and focus. All stakeholders in this vital industry appear now to be working more as a team than has been the position in the past.

In the light of the foregoing canvas of opinions the Board considers:

TOR 1 - The adequacy of the legislative framework for mine health and safety enforcement policies

Purposes of this Inquiry the current legislative framework consists of:

The *Occupational Health and Safety Act 2000* (the OHSA)

The *Occupational Health and Safety Regulation 2001* (the OHSR)

The *Coal Mine Health and Safety Act 2002* (the CMHSA)

The *Coal Mine Health and Safety Regulation 2006* (the CMHSR)

The *Mines Inspection General Rule 2000*.

The Explosives and Surveying statutes should also be considered as part of the mix.

In general terms the submissions to the Inquiry focused on the implementation of the statutes governing mine health and safety rather than on the terms of the statutes themselves. Subject to the following qualifications it can be said that the legislative framework for mine health and safety is adequate.

In legislative terms the current model governing mine health and safety is in a state of flux. Without knowing the terms of the Stein Report the OHSA is intended to have equal application to the mining industry. Over time far reaching consequences could flow from this. Furthermore, after December 2007 the CMHSA is required to be reviewed pursuant to Section 226 of the Act. By Section 226 the Minister is to ‘review the Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives’.

Given these two potential changes to the operation of the current legislative model it will be profitable to consider all the statutes during the CHMSA review with a view to simplifying the legislative framework and consolidating the legislation. This is particularly important given the additional training that will have to be given to all those involved in mine health and safety as a result of developing criteria applicable to the determination of liability for fault. The shift from a prescriptive model to a duty based model has been accepted by the CFMEU and all other stakeholders but all stakeholders, will watch the implementation of the policy with care.

Whatever else the new principles will involve they will certainly involve a new emphasis on training and perhaps a fresh approach to recruitment to the various levels of Mine Safety Officers, Investigators and Inspectors. These factors do not, however, go to the adequacy or otherwise of the current legislative ‘framework’.

Suggestions for changes to the implementation of the current statutes will be dealt with under the appropriate terms of reference below.

TOR 2 - The role of the NSW Department of Primary Industries (NSW DPI) Inspectorate, including the qualifications and experience of staff, resourcing and training

The submissions of the stakeholders and much of the time of the Inquiry was taken up by a detailed and thoughtful analysis of the role of NSW DPI Inspectorate. There was a marked divergence of views on some aspects of the functioning of the Inspectorate.

Generally speaking there was a common view that the expertise and professionalism of the Inspectorate is very high. There is also a common view that the salary levels of the Inspectorate should be reviewed to equate them more fairly with those of mine managers. There is no suggestion that salary levels should equate with mine managers but in the years immediately ahead there will be a significant loss of both Inspectors and Mine Safety Officers due to retirement. Higher salaries are needed to attract those with suitable and sufficient skills to the positions. The reintroduction of a Graduate Training Programme would assist in this regard.

The gulf between the major stakeholders under this term of reference arises from the employers complaints at the attitude of some investigating officers. This hiatus is seen to be underscored by the emphasis alleged to be the prevailing ethic of NSW DPI on prosecutions on the one hand and the unions view that there should be renewed vigour on the enforcement of breaches that fall short of the need for full prosecution on the other hand.

Although the role of the autonomous Investigation Unit of NSW DPI is not strictly within the literal terms of reference of the Inquiry, it seems plain that some of the criticism of the Inspectorate should be directed more appropriately at the Investigators. There was not a single example of an Inspector being rude or aggressive toward a mining company official before the Inquiry. The only examples were of Investigators and some of these allegations were vague and some were more directed at the time the investigation has taken rather than at the officer personally.

It must be obvious that a cooperative, courteous and unthreatening attitude by an Investigator or an Inspector will yield better results for safety in the long run than an attitude that creates fear in the mind of the mine manager or official. Fear is more likely to engender a 'cover up' than a cooperative approach. To this extent NSW DPI will need to further educate and encourage the kind of approach that will get the best results. Mine owners and their staff will also have to train both employees and contractors in an understanding that the role of an Investigator or Inspector is a demanding one and their authority is to be respected. The Board does not believe that the drafting of a code of conduct or the submission of Inspectors and Investigators to 'courtesy reviews' of any kind would be helpful. Everyone on a mine site should understand that when an Inspector comes on to a mine site he or she is working more in the interests of the workers on the mine site and the management of the mine, than he or she is working in the interests of NSW DPI. Some of the complaints of the conduct of investigating staff are disturbing. There has been created a climate of fear among managers and statutory office holders which has led to resignations and difficulty in filling important vacancies. Complaints include very long periods of questioning, aggressive (if not insulting) questioning, presumptions of guilt and immediate threats of prosecutions and the like. What is clear is that 'the disconnect' referred to by the Hon. Neville Wran AC QC which then existed between the mining companies and the unions, now exists between the mining companies and NSW DPI.

Many of the complaints of the mining company executives appear to be as to conduct which is a breach of the rules governing the conduct of investigations and the preparation of prosecutions. Threatening a prosecution, repeated questioning over a very long period, bullying witnesses and the like is not conduct in accord with the letter or the spirit of the Enforcement Policy Guidelines issued by NSW DPI (1999). This may be because the Guidelines are still 'event focussed' and in the light of recent statutory changes they could profit from being reviewed. This is a problem of policy and can best be resolved by NSW DPI meeting with the NSW Minerals Council members with view to restoring a relationship of confidence between the parties.

At the other end of the divide between the parties is the union view that enforcement powers of potentially serious consequence should be visited downward to Safety Committee Members, Check Inspectors and Mine Safety Officers. Safety in a mine cannot be ensured by a proliferation of officials all able to strike at will through the issuing of investigation, prohibition, improvement and penalty notices .

There is a powerful case for NSW DPI to look at Parts 5 and 6 of the OHSA and see to what extent they can be used to extend the authority of safety officials below the level of the Inspectorate and, more importantly what training needs to be introduced to allow this to happen. In particular the training of the Mine Safety Officers to fill more important functions in the arsenal of mine safety would seem to be an appropriate first step.

In the kind of extensive training of safety personnel required by the recent and prospective legislative changes there is no reason why all Check Inspectors and members on safety committees should not participate, as should representatives of contractors.

TOR 3 - The implementation of policies, including developing a strategic approach to enforcement with a view to long term improvement in compliance

There were no differences between the major stakeholders as to the long term approaches to be taken toward enforcement. The union was of the view that the strategic goal to govern all policies was to engender a cultural change in the industry. The employers too shared the view that long-term measures to achieve safety were essential. The Board accepts that these were more than ‘motherhood’ statements by the stakeholders. All participants in the Inquiry were sincere in their wish to bring about a safe mining industry. Where they differed was in how to achieve this.

NSW DPI was comfortable in its view that the current enforcement policy is sufficiently broad and robust to remain the appropriate policy into the future. The unions strongly believe that a safety culture can only be brought about when everyone in the industry is made fully aware that safety breaches will result in sanctions or other legal consequences. The mining companies insist that what is needed is voluntary compliance with safety standards together with the adoption of a risk-based safety management policy with less emphasis on personal behaviour and blame. In this regard the mining companies see behaviour rather than the outcome of behaviour, as the appropriate test. Prosecution should only be applied to ‘reckless’; and dangerous behaviour. In consequence it holds that honest mistakes should not be the subject of prosecution.

The employer view that only dangerous and reckless acts should be the subject of prosecution raises more questions than answers. The tests of ‘recklessness’ or ‘honesty’ are subjective and it is hard to see how these can be applied without some form of judicial scrutiny. Indeed, the employer complaints on the issue of prosecution frequently go more to penalty than to prosecution. Furthermore, one Investigator whose approach was considered by NSW DPI to be inappropriate was removed from the investigation team. Where a mining company has got what it considers to be a reasonable complaint against the conduct of an Investigator or Inspector the proper course would be to refer the complaint to NSW DPI for attention.

Between these two views there would seem to be a gulf as wide as an Irish mile. However, the gulf is not as wide as the parties themselves envisage it.

Behind the contending statements of both sides there emerged important areas of agreement. Both sides agree that a new era of consultation at every level of the industry is dawning and is being pushed hard by NSW DPI. This, of itself, will not remove ‘the disconnect’ referred to by the Hon. Neville Wran AC QC, but it will markedly reduce it. NSW DPI insists that the level of consultation in the industry is already significant and is growing and can be relied on to evolve still further.

Both sides welcome the significant improvement in the safety statistics, particularly in the reduction of the number of fatalities. The number of prosecutions brought in the last few years may have had some effect on this improvement but the prosecution policy is not the sole reason for the improvement. The unions are correct in their understanding that now that the level of fatalities is being steadily reduced it is time to focus more on the middle range of sanctions in the hierarchy of responses to breaches. This is not a view that departs greatly from the views of the mining companies.

NSW DPI view is that a vigorous educational role striving always toward best practice is critical in establishing a strategic approach to safety. It holds the view that long-term compliance prospects rely on the twin pillars of warnings and sanctions. NSW DPI does agree with a submission of the mining companies it has a pressing need to provide clarity and direction to Inspectors, Mine Safety Officers and Investigators when responding to a mine accident. The same clarity and direction should also be applied to the mining company officials and the union Check Inspectors and all involved in the safety process, including members of safety committees.

Thus, it emerges that prosecution is only one of a range of sanctions that can be called in aid of mine safety. It also appears that there is a sanctions weakness in the middle range of the hierarchy of responses which, if filled appropriately, would lessen the need for some prosecutions.

TOR 4 - The range and application of sanctions available to Inspectors, and, if inadequate, sanctions that might apply

The stakeholders all support the range of sanctions currently available. The mining companies express the view that there should be less stress on prosecutions and more on the middle range of responses in the hierarchy of such responses. In this regard the principle of restorative justice is to be preferred to penalties. All parties support the inclusion of enforceable undertakings in the pyramid of responses (Figure 3). It seems that this response should come below the level of a prosecution but above the less serious responses. NSW DPI also envisages enforceable undertakings as being worthy of positive consideration.

If enforceable undertakings were included in the pyramid of responses the pyramid would look like this:



Figure 3: Hierarchy of enforceable undertakings.

The unions view as to the appropriateness of the current range of sanctions is conditioned by the understanding that amendments to the OHS Act (Section 47A and 47B) have the effect of making Mine Safety Officers Inspectors for purposes of the OHS Act. This means they have extensive powers under Part 5 Investigations to act under Section 108 of Part 7. The

union seeks to have this given effect to by NSW DPI. Currently, the terms of engagement of Mine Safety Officers preclude their exercising powers which are potentially available stemming from the OHSA. The Board of Inquiry is of the view that mine safety officers should be authorised to exercise these powers when they are trained and have the appropriate levels of skill, qualifications and competence.

NSW DPI makes the point that in addition to the pyramid of responses there should be added suspension or cancellation of Certificates of Competency and stop work orders. NSW DPI will consider the use of enforceable undertakings as a further addition to the range of responses. A draft note has been prepared by NSW DPI as to how such undertakings would be processed (Appendix 2). NSW DPI is also preparing to have Penalty Infringement Notices (on the spot fines) added to the list of responses but is cautious about them becoming abused if they are not circumscribed in some way. There was no evidence before the Inquiry which would indicate that Provisional Improvement Notices should not be able to be issued by suitably trained safety officials such as Check Inspectors and members of Safety Committees.

NSW DPI is keen to have both Inspectors and Investigators exercise the power to intervene in any situation which is seen to create a potential hazard in the future. As there is some doubt as to whether the OHSA as currently worded will allow this course to be adopted the Board has recommended that this position be made clear. All of this is subject to the potential additions to the range of responses that may emanate from considerations of the National Mine Safety Framework.

TOR 5 - The role of employers, unions and NSW DPI in enforcement of breaches under the relevant legislation

Everyone involved in the Inquiry makes the obvious point that mine health and safety is a common obligation on everyone in the industry and that in this regard a cooperative and team approach is necessary to maximise the safe operation of a mine. It is common ground that old antagonisms must give way to this concept.

That being said there are differences in emphasis between the stakeholders as to their respective roles in the mining operation. The unions sees its responsibility to ensure the integrity of the various levels of check Inspectors and employee representatives on safety committees, the education of its members with respect to the legal duties and rights stemming from laws governing mine health and safety and in certain circumstances prosecution for breaches of the relevant laws.

The unions believe that it should have the right to have its Check Inspectors and OHS committee members issue provisional improvement notices pending an appeal to an industry Check Inspector or government official.

NSW DPI concurs with the stakeholders as to the general duty of all in the industry to have safety responsibilities but expresses concern at the isolation of contractors from the problem. It suggests that a programme of consultation be instituted to bring contractors into the loop of safety and that they should be represented on safety committees. It also considers that Check Inspectors should be involved in monitoring and reviewing contract management systems. NSW DPI feels that this should also be function of NSW DPI.

The employers see their responsibility as primarily being the internal auditing and dealing with 'near misses' and taking corrective actions whenever necessary. It has to report specified safety issues to NSW DPI and cooperate with NSW DPI in any actions that have to be taken with respect to the safety issue. The mining companies see the need for a greater collaborative approach with NSW DPI and this should entail the mining company being told of any possible prosecution and have the right to address that likelihood before a prosecution is launched. Equally, the employer should be told the result of any DPI investigation of a safety breach at the mine. These are not unreasonable requests.

The employers do not believe the Union should have the right to prosecute for breaches of safety as they are not impartial. It believes that the investigative functions of NSW DPI should be separated from the Inspectorate.

TOR 6 - The adequacy of monitoring and reporting systems.

While the stakeholders acknowledge the value of the COMET system of data collection there was a general criticism of COMET. The hope for a better system of data collection lies with the Mine Safety Advisory Council which has wide powers and resources to achieve better results than are currently available through COMET, Stakeholders see the MSAC as the most appropriate vehicle for the long term improvement of a national monitoring system.

The NSW Minerals Council looks on monitoring as important to be applied to EHSSM on a regular basis to confirm the implementation and effectiveness of the measures taken under its terms.

TOR 7 – Prosecutions

In general the mining companies all considered that there had been too much emphasis on prosecutions for breaches and not enough on the less serious responses. Their view is that prosecutions should be confined to objectively serious breaches of the law. Further, the mining companies see the emphasis as being better based on risk rather than event based. The independence of the prosecutorial agency is also generally supported by the employers. The DPP has been suggested as the preferred means for this to be done. Where individuals are to be prosecuted they hold the view that criminal intent must be present before an individual should be prosecuted.

While acknowledging an improvement over recent years the unions remain critical of the prosecution policy of NSW DPI. They also fear a ‘boys club’ mentality exists between the Inspectorate and mine managers that may have led to some prosecutions not being vigorously pursued. However, the union agrees with the mining companies that there should be a concentration in the future on non-injury breaches and the mid-range of responses rather than being concentrated only on serious events. To this end the unions seek to have Inspectors make more unannounced visits to mine sites to check on safety and health matters in the mine.

NSW DPI is satisfied with the current prosecution policy but will explore avenues by which lower courts with speedier processes can be used in some cases of prosecution for lesser offences.

TOR 8 - Benchmarking the policies and practices of comparable mine health and safety agencies

All stakeholders accept the wisdom of continuing to benchmark the practices of other agencies. The unions were of the view that NSW DPI compares more than favourably with the agencies in other states but suffers by comparison with the regulation of OHS in general industry in New South Wales

14 RECOMMENDATIONS

- 14.1. It is recommended that during the course of the review envisaged in Section 226 of the *Coal Mine Health and Safety Act 2002* (the CMHSA) the interrelationship of all mine statutes and regulations be similarly reviewed with a view to their simplification and consolidation.
- 14.2. It is recommended that NSW DPI remove those functional limitations imposed on Mine Safety Officers that prevent these officers issuing Prohibition and Improvement Notices. NSW DPI should introduce such training, management and supervisory practices that would enable those officers to exercise these additional powers commensurate with their skills, qualifications and competence. NSW DPI should also enlarge its current training programmes to include all its officers engaged in aspects of mine health and safety.
- 14.3. It is recommended that the salary levels of Inspectors, Mine Safety Officers and Investigators should be reviewed and that the working conditions in the field offices of Inspectors be improved, where appropriate.
- 14.4. It is recommended that the policy document *Enforcement of Health and Safety Standards in Mines* (EHSSM) be reviewed to ensure that there is an emphasis on risk assessment rather than focusing on an event. NSW DPI should train Inspectors, Mine Safety Officers and Investigators in any new skills required and in their responsibility towards all persons involved in an investigation. It is further recommended that officers of NSW DPI should meet with the NSW Minerals Council to ensure that the relationship between the members of the Council and the Investigation Branch of NSW DPI is fully in accord with the policy and wholly focussed on mine health and safety in a detached and objective manner.
- 14.5. It is recommended that training programs for mine safety officials including Check Inspectors and District Check Inspectors be developed to take account of the evolving changes in enforcement policy and that the relevant unions be resourced to implement these programmes.
- 14.6. It is recommended that NSW DPI accelerate programmes of providing consultative processes at every level of the mining industry and that all parties in the industry be given the opportunity to participate in the various levels of the consultative processes to be established, including appropriate levels of responsibility among contractors to the industry.
- 14.7. It is recommended that a policy of transparency, clarity and direction should form the basis of the EHSSM and that these principles should be the basis of the relationship with officials of mining companies and contractors as well as with Investigators, Inspectors, Check Inspectors and all persons with responsibility for mine health and safety.
- 14.8. It is recommended that legislation be reviewed to enable NSW DPI to add enforceable undertakings to its hierarchy of responses below the level of a prosecution but above the level of seeking a court order. There should also be added to the hierarchy the right to suspend or cancel a Certificate of Competency in an appropriate case and the powers of Inspectors and Investigators to investigate potential hazards should be made clear in the legislation.
- 14.9. It is recommended that NSW DPI should further examine the use of Penalty Infringement Notices (PIN) in the level of responses. It is further recommended that consideration be given to amending the legislation to allow the introduction of Provisional Improvement Notices to be available for use by Check Inspectors.
- 14.10. It is recommended that where consideration is being given for a prosecution to be launched for a mine safety breach a mining company should be called on to show

cause why such a prosecution should not be taken by NSW DPI and that some response lower in the hierarchy should be preferred. The right of a union to continue to take a prosecution in an appropriate set of circumstances should be maintained.

- 14.11. That the Minerals Council of Australia be supported in an urgent attempt to expedite the National Mine Safety Framework database proposals.
- 14.12. It is recommended that there continue to be a shift in emphasis toward enforcement in the middle range of offences and that every effort be made by NSW DPI to move enforcement forums to lower level courts such as the Chief Industrial Magistrate.
- 14.13. It is recommended that the current practice of monitoring statutory changes in other relevant mining states should continue but fresh impetus should be given to benchmarking the practices of enforcement applied by WorkCover NSW.
- 14.14. It is recommended that when acting pursuant to Section 26 of the *Occupational Health and Safety Act 2000* (the OHSA) the Assessment and Review Committee of NSW DPI should require there to be a clear act or omission on the part of any individual under consideration for prosecution, which act or omission is causative of the harm done or created. Furthermore, such act or omission is of such a nature as to be beyond the normal course of action, or inaction, of a person in the position of that individual.

15 REFERENCES

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- Wran, N. 2005. *NSW Mine Safety Review*. Report to the Hon. Kerry Hickey MP, Minister for Mineral Resources, by The Hon. Neville Wran AC QC and Jan McClelland, February 2005. (Available at <http://www.dpi.nsw.gov.au/minerals/safety/mine-safety-initiatives/wran-mine-safety-review>)

16 ABBREVIATIONS

APESMA	Association of Professional Engineers, Scientists & Managers, Australia
AMWU	Australian Manufacturing Workers Union, or more fully, the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union.
C&A	Coal and Allied (A member of the Rio Tinto Group)
CEPU	Communication Electrical Plumbing Union of Australia
CFMEU	Construction Forestry Mining and Energy Union
CMHSA	<i>Coal Mine Health and Safety Act 2002</i>
CMHSR	<i>Coal Mine Health and Safety Regulation 2006</i>
COMET	NSW Department of Primary Industries' COMET information system collects data on Mine Safety core business processes including assessments, accidents, incidents, approvals and authorisations.
DPP	NSW Director of Public Prosecutions
EHSSM	<i>The Enforcement of Health and Safety Standards in Mines</i> .
NSW DPI	NSW Department of primary Industries
MSAC	Mine Safety Advisory Council
OHS	Occupational Health and Safety
OHSA	<i>Occupational Health and Safety Act 2000</i>
OHSR	Occupational Health and Safety Regulation 2001
PIN	Penalty Infringement Notices
TOR	Terms of Reference

17 APPENDICES

17.1 APPENDIX 1. ABBREVIATE CV OF PROFESSOR NEIL CUNNINGHAM

Professor Neil Gunningham

Neil Gunningham is a lawyer and interdisciplinary social scientist who specialises in safety, health and environmental regulation. He is Professor and Director of the National Research Centre for Occupational Health and Safety Regulation at the Australian National University. His books include *Mine Safety: Law, Regulation, Policy* (Federation Press, Sydney, 2007) *Shades of Green: Business, Regulation and Environment* (Stanford UP 2003) and *Regulating Workplace Safety* (OUP 1999).

He has also been a consultant to a variety of groups, including the OECD, the United Nations Environment Program, the House of Representatives Standing Committee enquiry into the OHS implications of Asbestos Mining and to various State government bodies and OHS Inquiries

Academic Qualifications

1971:	LLB (First Class Honours) University of Sheffield
1972:	MA (with Distinction) in Criminology, University of Sheffield
1977:	Admitted as Solicitor, England and Wales
1981:	Admitted as Barrister and Solicitor, Australian Capital Territory
2000:	PhD, Australian National University

Reports to Government (last 6 years)

Specialist Advisor: Board of Inquiry into Enforcement Policy (NSW Department of Primary Industry, 2007).

Review of Northern Territory Work Health and Mine Safety Legislation (with Shaw et al), 2007.

Applying the National Mine Safety Framework: Review and analysis of Australian Mine Safety Legislation, Department of Industry, Tourism and Resources, (Cth) 2007.

OHS Policy Review of Proposed Consolidated Regulations (with Johnstone) WorkSafe Victoria, 2006.

Compliance Framework Policy: Developing a Conceptual Framework for Compliance, Victorian WorkCover Authority, 2005.

Linking Incentives, Integrated Policy Instruments to achieve Sustainable Agricultural Systems, Rural Industries Research and Development Corporation, 2004.

Ministerial Inquiry into OHS Systems and Practices, Ritter Inquiry, Western Australia (see particularly "The Gunningham Report", appendix 4) 2004.

Deterrence and Environmental Policy, US Environmental Protection Agency, 2003-2004 (with Kagan and Thornton).

Farm Machinery Regulatory Review, Rural Industries Research and Development Corporation, 2003.

Designing Innovative Strategies for Environmental Compliance, OECD 2001-2002.

Environmental Management Systems and Regulatory Design, United Nations Environment Program, 2001-2002.

Voluntary Compliance Initiatives: Forestry and Mining, OECD, 2002.

Environmental Partnerships in Australian Agriculture, Rural Industries Research Development Corporation, 2002 (with Sinclair).

Selected Publications

- “Prosecution for OHS offences: Deterrent or Disincentive?” (2007), *Sydney Law Review*, forthcoming.
- “Corporate Environmental Responsibility, Law and the Limits of Voluntarism” (2007), in McBarnett, D, Voicescu, A & Campbell, T (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law*, Cambridge University Press, Cambridge.
- “Managing Corporate OHS Performance: Reducing Mine Site Variation” (2006), 1(3) *Australasian Mine Safety Review* 92-100 (with Sinclair).
- “Best Practice Mine Safety Legislation: Are We There Yet?”, Paper presented at Queensland Mining Health and Safety Conference 2004, (August 2004, Townsville) at http://www.qrc.org.au/_dbase_upl/SafeConfPapers2004.pdf.
- “Editorial: Complexities of OHS Regulation” (2006), 22(3) *Journal of Occupational Health and Safety: Australia and New Zealand* 203-204 (Bluff, Gunningham and Hopkins).
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- “Design principles for smart regulations” (2006), in Ramesh, M and Howlett, M (eds), *De-regulation and its Discontents: Rewriting the Rules in the Asia Pacific*, Edward Elgar, Cheltenham.
- “Safety regulation and the mining industry” (2006), 19 *Australian Journal of Labour Law* 30-58.
- “Safety, regulation and the Mines Inspectorate: Lessons from Western Australia” (2005), 21(4) *Journal of Occupational Health and Safety: Australia and New Zealand* 299-310.
- “Principle, process, performance or what? New approaches to OHS standards setting” (with Bluff) (2004), in Bluff, E, Gunningham, N and Johnstone, R (eds), *OHS Regulation for a Changing World of Work*. (2004) Federation Press, Sydney, 12-42.

17.2 APPENDIX 2. NSW DPI NOTES REGARDING ENFORCEABLE UNDERTAKINGS



NSW DEPARTMENT OF PRIMARY INDUSTRIES

Notes on Enforceable Undertakings

In May 2007 NSW DPI prepared a submission to the Board of Inquiry which included proposals for, among other things, the introduction of enforceable undertakings as an enforcement option.

Enforceable Undertakings (EU) are available in OHS matters in Victoria and Queensland. The rules governing EU are expressed in the relevant OHS legislation. It is considered that EU could be adopted in the NSW mining industry if the legislative framework were made available in the *NSW Occupational Health and Safety Act 2000*.

The availability of EU as an enforcement option is not expected to substantially alter the way in which the DPI selects a matter for investigation, conducts the investigation and considers the matter for prosecution. An application for an EU will potentially become an intervention point where the normal processes are truncated in favour of implementation of the agreement. The following sets out a view of how the process could operate based on the approach taken by Qld and Victoria.

1. An incident occurs.
2. The DPI uses the established IDF process to determine the investigation response level.
3. If the incident is Level 3 then a detailed investigation will commence.
4. The DPI will progress the investigation through to filing charges and prosecution in accordance with established practice.
5. At any time during the investigation, the potential defendant may wish to apply to the DPI to enter into an EU.
6. An application for an EU may be made at any time during the investigation process, and up to 90 days after filing of charges.
7. If the incident involved a death or serious injury, the application would not be accepted. (The normal process would be to prosecute such matters, but there may be occasions under limited or special circumstances where an EU would be considered).
8. The application (where accepted) will be considered by the DPI and, if appropriate, referred to a review panel who will make recommendations to the Director General.
9. If the DG agrees, the EU will be ratified and no prosecution will ensue during the currency of the EU.
10. The EU will be registered with the Chief Industrial Magistrates Court or the industrial Court.
11. The EU will be subject to monitoring and auditing arrangements detailed in the undertaking.
12. If the undertaking is not met, the DPI may apply to the Court for orders to comply, or otherwise escalate enforcement action.

Note: The DPI will not be able to apply pressure to any potential offender to enter into an EU. This means that any investigation will, from the outset, need to be resourced and conducted at the detailed level that contemplates an ultimate prosecution. Savings to the DPI and Industry arising from an EU will occur as a result of avoided or truncated legal proceedings.

The EU must meet stringent criteria as expressed in the attached guidance notes. These include:

- A statement of remorse
- Acknowledgement that the regulator alleges a contravention
- Demonstration that the undertaking will rectify the consequences of the conduct and deliver tangible benefits
- Demonstration that the benefits are beyond compliance
- Arrangements for communicating details to staff and to the public
- Arrangements for monitoring and auditing including options for third party auditing.

The following four principles are expressed in a paper dealing with restorative justice.¹

- The EU should be the result of face to face negotiation.
- The aim of the meeting should be to seek cooperative rectification and prevention of all the problems identified by a regulatory investigation. It should be voluntary and premised on the offender admitting to the conduct.
- Where possible, the victims of the alleged misconduct and other stakeholders implicated in, or affected by, the conduct should be present or represented in the face to face negotiation.
- It is desirable to have an independent person convene the negotiation meeting.

Discussion Papers regarding Enforceable Undertakings.

In 2004 the Legislative Council General Purpose Standing Committee No.1 released its *Report into Serious Injury and Death in the Workplace*.

Recommendation 15 of the report states:

That the Government consider how best to include enforceable agreements in the compliance regime contained in the OH&S Act 2000, as an addition to prosecution for breaches of the OH&S Act 2000, with the terms of the agreement filed before the Chief Industrial Magistrate's Court or Industrial Relations Commission so that in the event the offender does not comply with the agreement, a prosecution may proceed.

The Government response to R15 states:

The Government will consider the inclusion of enforceable agreements as part of the statutory review of OHS legislation.

The Report of the Review of the *Occupational Health and Safety Act 2000* at s8.2 recommends that the OHS Act be amended to allow for Enforceable Undertakings to operate in a similar manner to Queensland and Victoria.

The published discussion paper to the Review canvasses the issues at S 4.2.9 of the paper. The inclusion of Enforceable Undertakings falls within the terms of reference of the Stein Review, the report of which is not yet available.

¹ Restorative Justice in Business Regulation? The ACCC use of Enforceable Undertakings – Christine Parker