

Report on Conduct of NSW DPI Mine Safety Investigators

Mine Safety Review Committee:

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Introduction

In February 2007, The Hon Dr James Macken AM was appointed by the Minister under the *Coal Mine Health and Safety Act 2002* to constitute a Board of Inquiry into mine safety enforcement policy. This Inquiry implements a recommendation of the *NSW Mine Safety Review* conducted by the Honourable Neville Wran AC QC, which reported in February 2005. The Inquiry called for written submissions from coal industry stakeholders, and also took a number of oral submissions.

The Board of Inquiry's draft report has been provided to the Minister for Mineral Resources for consideration prior to its public release. The report outlines criticisms raised by industry stakeholders regarding the conduct of mine safety investigators appointed under the Act.

In order to deal with these criticisms, the Minister established an independent committee to further review this issue and outline appropriate recommendations.

Background

The allegations about the conduct of NSW DPI mine safety investigators need to be considered in context. Prior to 1999, the Mine Safety Inspectorate had an educative and advisory role with the industry on mine safety. Under this "no blame" policy, no prosecutions were undertaken for breaches of the legislation. From 1980 to 1999 there were 101 fatalities in NSW coal mines, which is an average of five every year.

In 1999, following the *Mine Safety Review 1997* and the Gretley Inquiry, an independent Investigations Unit was established within NSW DPI to undertake investigations of fatalities and serious injuries with a view to commencing prosecutions. Since 1999, the Investigations Unit has participated in over 50 investigations involving 34 fatalities and resulting in 39 successful prosecutions. Importantly, there has been a significant reduction in fatalities in coal mines over that period, with 11 fatalities over nine years.

Over the same period, there have also been significant changes to the regulatory framework. The mining industry is subject to the general provisions of the *Occupational Health and Safety Act 2000*, which commenced in September 2001, including section 26, which provides:

- 1) If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each director of the corporation, and each person concerned in the management of the corporation, is taken to have contravened the same provision unless the director or person satisfies the court that:
 - (a) he or she was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or
 - (b) he or she, being in such a position, used all due diligence to prevent the contravention by the corporation.

This has placed additional responsibility for mine safety on company directors and managers. It should be noted that this responsibility rests with directors and managers of companies in all industries in NSW, as the *Occupational Health and Safety Act 2000* applies to all NSW workplaces.

Mining companies, unions and NSW DPI staff have had to come to terms with a significantly different regulatory and enforcement environment within a short period of time. It should be noted that this environment is by its nature significantly more adversarial than previous relationships between departmental staff and stakeholders. NSW DPI investigators are required to effectively and appropriately implement the legislation.

Terms of Reference

Membership

Norman Jennings (Chair)
Chairman, NSW Mine Safety Advisory Council

Peter Robson
Convenor, Assessment and Review Committee (advises Director-General on prosecutions under the *Coal Mine Health and Safety Act 2002*)

Barry Buffier
Director-General, NSW Department of Primary Industries

Terms of Reference

The Mine Safety Review Committee will undertake the following actions to review concerns raised by industry stakeholders about the conduct of investigators appointed under the *Coal Mine Health and Safety Act 2002*:

1. Consult with Dr Macken to identify the background and context surrounding comments made by industry stakeholders;
2. Consult with the NSW Minerals Council on comments made by industry stakeholders, including identification of specific examples to support the comments;
3. Consult with the Construction, Forestry, Mining and Energy Union on their experiences and on the comments made by industry stakeholders;
4. Consult with appropriate NSW Department of Primary Industries staff on the comments made by industry stakeholders;
5. Where specific examples are raised in support of the comments, review transcripts, recordings and other materials relating to the examples;
6. Report to the Minister on the outcomes of the review, outlining appropriate recommendations.

The Committee would aim to report back to the Minister by the end of December 2007, to expedite public release of the Board of Inquiry report.

Board of Inquiry

The Mine Safety Review Committee met with Dr James Macken, Chair of the Board of Inquiry into mine safety enforcement policy, on 13 November 2007 to discuss in more detail the issue raised in Dr Macken's draft report regarding the conduct of NSW DPI mine safety investigators.

Dr Macken confirmed that the issue was raised by a number of mining companies through their written submissions, in interviews and also in a meeting with a delegation led by the NSW Minerals Council. The mining companies did not provide details of specific incidents. The mining companies stated that it was difficult to recruit staff to manager roles because of fear of prosecution for strict liability offences under the legislation.

The Committee noted that it would be important to separate industry concerns with the Act from concerns with the conduct of investigators. The Committee is tasked with reviewing concerns about the conduct of investigators only.

Dr Macken recommended that the issue could be resolved through discussions between NSW DPI and the NSW Minerals Council, and a change in enforcement policy to limit prosecutions of managers and directors to situations where fault could be demonstrated.

NSW Minerals Council

On 30 November 2007, the Committee met with Dr Nicole Williams, Chief Executive Officer of the NSW Minerals Council, Paul Cutrone of Sparke Helmore Lawyers and individually interviewed seven representatives of the mining industry. The mining industry representatives were mainly from the coal industry, and represented a range of statutory positions.

The meeting and interviews were conducted under an assurance of confidentiality, so the names of mining industry representatives and the companies they represent will not be mentioned in this report.

The industry representatives provided specific examples of interactions with NSW DPI inspectors and investigators within the last ten years. A number of issues can be drawn from the examples provided. These are outlined below.

1. The industry stated there has been a fundamental shift in enforcement policy in the last few years towards a more adversarial approach, with a focus on prosecutions, often of individuals. This is perceived as leading to an abuse of power by some inspectors and investigators. Inspectors are seen as becoming “more aggressive”, with less attention being given to providing education and assistance at mine sites. Some are considered to be lacking in objectivity.
2. Investigators appear to focus on prosecution of certain individuals (such as those in statutory positions) rather than objectively gathering evidence against the company. Some industry representatives felt personally targeted by investigators and have been threatened with prosecution even before evidence has been gathered.
3. Some investigations have taken a significant length of time, which is disruptive for the work place. Some are perceived to have been “dragged out” for no reason or to obtain publicity for the issue.
4. The conduct of specific investigators and inspectors was considered unprofessional. This included making inappropriate comments, including to people affected by stressful situations, acting in an intimidating manner and holding overly long and “gruelling” interviews.
5. The industry argued that an enforcement policy with a focus on prosecution does not promote sharing of information between companies on safety improvements, or with the regulator regarding potential high-risk operations, because of fears of prosecution and retribution. This limits improvements that can be achieved in safety performance.
6. The industry recognises it does not have a clear understanding of the processes in relation to inspections and investigations. For example, it is unclear how information given to an inspector could be used in a later investigation, or when the union can prosecute. Education of the industry would improve this situation.

7. The industry questions the process that leads to lengthy investigations of apparently minor incidents which did not result in an injury.
8. The industry is frustrated that a number of these matters have previously been raised verbally with NSW DPI but have not yet been dealt with.

NSW DPI Staff

On 18 December 2007, the Committee met with NSW DPI staff with responsibility for mine safety inspectors and investigators. The staff outlined the processes followed in determining which incidents would be investigated and how investigations are conducted.

All staff confirmed that they had not received any formal complaints about the conduct of inspectors or investigators, although a small number of informal discussions had occurred and had been followed up informally with the supervisor concerned. Staff refuted claims by some company representatives that investigators were intimidating or overbearing, highlighting several situations where conduct may have been misconstrued.

Staff noted that NSW DPI has a published process for handling complaints against staff members. In addition, complaints could be taken to the NSW Ombudsman or ICAC.

Staff also noted that these issues had not been raised in previous discussions with the NSW Minerals Council. It was suggested that a regular bi-lateral meeting with the relevant industry associations may provide an opportunity to raise any similar issues in the future.

NSW DPI staff noted that the Investigations Unit was established in 1999 as a result of the *Mine Safety Review 1997* and the Gretley Inquiry. The Unit has developed and evolved its procedures and policies, including staff recruitment, over that time. NSW DPI staff recognised that there has been a cultural shift in regulation of mine safety, as the Investigations Unit was established to conduct investigations for the purposes of prosecuting companies and managers and directors for breaches of the legislation. This has precipitated a more adversarial environment, which has resulted in company lawyers participating from the beginning of investigations.

NSW DPI staff outlined the Investigation Decision system. This involves inspectors completing a form following every incident which identified whether it was a Level 1, 2 or 3 incident. Only Level 3 incidents are investigated by the Investigations Unit. These are serious incidents, or incidents causing or likely to cause death or serious injury. They are about 5% of all reported incidents. The remaining 95% are handled by inspectors through issuance of notices and the provision of education and advice. This approach has been implemented over the last two years.

Staff noted that the very nature of an investigation would be viewed as an unpleasant experience by most people, due to the legalistic approach taken, and the fact that investigations are undertaken in workplaces following serious incidents which would be traumatic for employees.

Staff also noted that despite the mining companies having a perception that individuals have been targeted under the new regulatory framework, in fact, there had not been many prosecutions against individuals. Since July 1999, 70 parties have had charges filed against them. Twenty-three of those are individuals. Of that 23:

- 8 have had the charges withdrawn;
- 5 have been convicted and received a fine;
- 4 had the case proven but no conviction recorded, and
- 6 have charges still pending.

The timeframes for conducting investigations are set out in legislation. A prosecution must be commenced within two years of a non-fatal incident occurring. This means that the NSW DPI investigator must present a report to Legal Branch about nine months after the incident occurred. Staff asserted that there was no policy to extend investigations and in fact, investigations were conducted as quickly as possible, given the statutory limitation period. Moreover, NSW DPI did not have the resources to prolong investigations unnecessarily.

Staff advised that every effort was taken to avoid re-interviewing employees of companies following an incident. However, the legal nature of investigations meant that sometimes additional information was required later in the process and some employees needed to be re-questioned to obtain or check that information.

NSW DPI undertakes an extensive program of education of mining companies about the mine safety regulatory framework. This includes presentations at industry seminars and conferences, newsletters and fact sheets. However, it was recognised that the companies may not see the need to understand this process in detail until they are dealing with a serious incident. NSW DPI staff commented that consideration should be given to other mechanisms to ensure mine managers and other staff understand their responsibilities and the processes followed. It was noted that senior inspectors often meet with mine managers in their region to discuss relevant mine safety issues.

NSW DPI staff commented that investigators are frequently asked to explain what they do and the processes followed. This provides the possibility for investigators' comments to be misconstrued or misunderstood.

The Investigations Unit and Inspectorate undertake regular training, including on topics such as investigation procedures, interviewing, conducting audits, photographing evidence and appearing as a witness in court. In addition, new investigators are partnered with experienced investigators to gain investigation experience through a "buddy system".

NSW DPI management has also discussed with staff how investigation work should be undertaken in a professional manner. NSW DPI has recently engaged the Brief Group to develop a series of workshops on issues such as what is appropriate behaviour and interviewing styles when dealing with difficult witnesses or the presence of lawyers during interviews.

One issue raised by the mining company representatives was that some inspectors have in some instances refused to sign in or undertake mine safety inductions on site, which is contrary to mine site safety procedures. NSW DPI staff explained that the law allowed inspectors to enter sites without complying with sign in and induction procedures. There is a possibility that these could be used by companies to delay access to relevant areas and documents. It was agreed that a blunt refusal to undertake inductions may portray the wrong impression, and that inspectors should try to comply with established site procedures wherever possible.

NSW DPI staff noted that the current mine safety prosecutions policy was not completely consistent with WorkCover's *Compliance and Prosecution Guidelines* in relation to determining the appropriate defendants in a prosecution.

NSW DPI staff support the adoption of Dr Macken's recommendation 14, that a prosecution against an individual should only be commenced where there is a clear act or omission on the part of the individual that was causative of the harm done or created. This recommendation was based on the NSW DPI submission to the Board of Inquiry. However, staff noted that such a recommendation needs to be considered within the context of the Macken Board of Inquiry and the Stein Inquiry with the Occupational Health and Safety Act 2000.

Pending finalisation of the Stein & Macken Inquiries, NSW DPI staff would recommend that the wording of the WorkCover guidelines be adopted, as this approach would achieve a similar intent, but could be implemented without legislative change.

Construction, Forestry, Mining and Energy Union (CFMEU)

On 19 December 2007, the Committee met with Tony Maher, General President, and Keenon Endacott, Industrial Research Officer NSW Northern District, from the Construction, Forestry, Mining and Energy Union (CFMEU).

The CFMEU noted that CFMEU members often participated in investigations, either as interviewees or as witnesses. The CFMEU did not agree with the mining companies' view that investigators were intimidating or overbearing, and stated that in their experience, investigators were polite and courteous. They felt that in some cases, investigators could have been more assertive when interviewees were not cooperating.

The CFMEU noted that if there had been reason to complain about the conduct of investigators, the Union would have written to the Department, as had occurred in the past in relation to other aspects of enforcement policy.

The CFMEU noted that there was a need to ensure investigations followed appropriate legal procedures, as the process followed would be closely scrutinised through court proceedings arising from any prosecutions. This may result in a perception that the interview process is intimidating.

The CFMEU noted that companies may be less forthcoming with information on incidents as this may lead to prosecution, and therefore there was less scope for education and continuous improvement through sharing of information. However, the Union also noted that prosecutions against companies and directors have been undertaken across all industries under the State-wide *Occupational Health and Safety Act 2000*. Therefore, mining companies would need to adjust to the new regulatory environment.

The CFMEU recognised the reasoning for adopting Dr Macken's recommendation 14 in relation to determining the appropriate defendants, but also recommended a broad interpretation of responsibility for occupational health and safety, extending for example to directors and managers with responsibility for appropriate funding for safety programs.

The CFMEU acknowledged the clear improvement in the operation of the Inspectorate and Investigations Unit over time.

Conclusions and Recommendations

During the course of the Review, the Committee met with Dr Macken, the NSW Minerals Council, CFMEU and NSW DPI staff.

Conclusions

Mining company representatives provided examples of what they regard as inappropriate or intimidating conduct by some NSW DPI investigators and inspectors. The Committee's impression is that these are isolated incidents, often relating to staff who have ceased working with NSW DPI but does acknowledge that this perception is widespread in the industry. The Committee does not believe that these examples represent a systemic culture within the NSW DPI.

The Committee notes that other parties interviewed during the Review does not support the view of the companies concerning the behaviour. Employees have also been involved in the investigation process, with, in particular, union members being interviewed by investigators and inspectors.

The companies' views have been taken seriously by the Committee and NSW DPI staff, and the Committee makes a number of recommendations to minimise the possibility of such conduct occurring in the future.

Importantly, the Committee has established that there are no allegations of corruption or malpractice in any shape or form against NSW DPI staff.

The Committee recognises that there have been significant gains in mine safety achieved under the current regulatory framework and prosecutions policy. This framework and policy are constantly evolving as the staff and stakeholders gain more experience in operating within the new environment.

The Committee also recognises generally the professionalism, integrity and independence of NSW DPI inspectors and investigators and notes that over time, the Investigations Unit has succeeded in attracting and retaining highly skilled and motivated staff. The Committee's recommendations seek, inter alia, to assist these staff to continuously improve on their important role in regulating mine safety in NSW.

In developing its recommendations, the Committee notes that there has been a major shift in the regulatory framework and prosecutions policy for mine safety. Consequently, mining companies, unions and NSW DPI have had to adjust to a new compliance culture and practice under the State-wide regulatory framework of the *Occupational Health and Safety Act 2000*. One outcome is a legalistic investigation process, particularly in relation to investigations of fatalities. This has meant that company lawyers are often present from the beginning of an investigation. This, in turn, precipitates increasingly formal and adversarial investigations.

Recommendations

Complaints

1. The Committee notes that while NSW DPI has not received any formal written complaints against the conduct of NSW DPI staff, some companies have made informal approaches to management. Company representatives have maintained that the reluctance to complain was due to a fear of possible retribution against the company or individuals. The Committee considers these fears to be unfounded and notes that NSW DPI has an established, published process for dealing with formal complaints. In addition, there are external avenues for making formal complaints against staff, such as the NSW Ombudsman and ICAC. The Committee recommends that NSW DPI provide information to companies on the processes for making and dealing with formal complaints about the conduct of staff.
2. In addition, the Committee recommends that NSW DPI establish a process of regular (eg twice yearly) bilateral meetings with the NSW Minerals Council and other relevant industry associations, and the CFMEU and other representative unions, to allow each sector to raise any issues in relation to the regulation of mine safety, including implementation of the enforcement policy.

Training

3. Some company representatives have alleged that some investigators and inspectors displayed intimidating conduct, or made inappropriate comments during investigations. The Committee recommends that this matter be addressed in general terms through additional training of staff involved in investigations. The Committee recognises that the Department undertakes considerable training of inspectors and investigators, and supports the recent initiative to engage the Brief Group to develop a series of training workshops on investigations. The Committee recommends that these workshops include training on techniques for dealing with a range of people and situations in a stressful post-trauma environment, and how to conduct investigations in such circumstances in a professional manner.

Education

4. The industry is unclear about the process for classifying incidents, and the process for inspection and subsequent investigation of serious incidents. The Committee recognises that NSW DPI communicates the enforcement policy and regulatory framework to industry through seminars, conferences, newsletters and the website. Nevertheless, the Committee recommends that NSW DPI ensures that those in statutory positions understand their responsibilities and the investigation processes.

Prosecution Policy

5. The Committee supports the continued implementation of the system NSW DPI uses for classifying incidents to determine the extent of an investigation. The risk matrix is a systematic way of classifying incidents which could be developed further to make it more objective. The Committee recommends that the incident decision system be communicated to companies. The Committee recommends that processes for conducting preliminary investigations of suspected Level 3 incidents be reviewed to reduce any duplication of work by inspectors and investigators, particularly the need to conduct repeated interviews of employees during the stressful period following a serious incident. The Committee notes that regard will need to be given to due legal process.

6. Some company representatives expressed the view that individuals in management and statutory positions have been targeted by some investigators, regardless of their involvement in or responsibility for an incident. One of Dr Macken's recommendations (recommendation 14) is that a prosecution against an individual should only be commenced where there is a clear act or omission on the part of the individual that was causative of the harm done or created. The WorkCover Compliance and Prosecution Guidelines provide guidance as to who should be prosecuted. The Guidelines state that:

“further general considerations that may be taken into account in choosing the appropriate defendant in a particular case are:

- a) who is primarily responsible for the alleged offence, that is, who was primarily responsible for the acts or omissions giving rise to the alleged offence or the material circumstances leading to the alleged offence or who formed any relevant intention;
- b) in relation to (a) above, what was the culpability of the proposed defendant;
- c) the effectiveness of any Court order that might be made against the proposed defendant.”

As the Macken recommendation 14 is still to be considered by Government and would involve legislative change, the Committee recommends that the WorkCover policy be adopted. This would provide clear guidance for investigations as well as greater consistency across Government.

7. The Committee recognises the important role played by the Assessment and Review Committee (ARC) in making recommendations to the Director-General on what matters should be brought to prosecution, and in maintaining a consistent approach with WorkCover in the implementation of prosecutions policy. The Committee recommends that the role of the ARC and the independence of the Convenor of the ARC be re-emphasised.

Confidentiality

Given the request for confidentiality by certain parties, the Committee recommends the Minister does not release those sections of the report dealing with interviews conducted with the Minerals Council, the CFMEU and NSW DPI staff.