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Author(s): Neil Gunningham and Darren Sinclair

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Regulation and the Role of Trust: Reflections from the Mining Industry

NEIL GUNNINGHAM* AND DARREN SINCLAIR**

The role of prosecution in achieving compliance with social regulation is a highly contentious issue, nowhere more so than with regard to work-related injury and death in the New South Wales mining industry. Following a mining disaster, political pressure prompted the mines inspectorate to abandon its traditional 'advise and persuade' approach in favour of a much tougher, deterrence-oriented approach. Our field-work suggests that while the former approach can result in regulatory capture, the latter can be equally counterproductive. In the mining industry, interactions between inspectors and the regulated industry are frequent and ongoing and trust is central to constructive relations. When those relations break down (as under an inappropriate prosecution policy) then dialogue ceases, information is withheld rather than shared, in-firm accident investigation, prevention, and remedial action are inhibited and both sides retreat to a form of adversarialism that undermines regulatory effectiveness. Through a 20-year case study of the mines inspectorate, the article demonstrates the centrality of trust to regulatory effectiveness, how it can be lost, and how it can best be regained.

* Fenner School of Environment and Society and Regulatory Institutions Network, The Australian National University, Canberra, ACT 0200, Australia and ESRC Centre for Business Relationships, Accountability, Sustainability and Society (BRASS), Cardiff University, 55 Park Place, Cardiff CF10 3AT, Wales

Neil.Gunningham@anu.edu.au GunninghamN@cardiff.ac.uk

** Fenner School of Environment and Society, ANU, Canberra, ACT 0200, Australia

darren.sinclair@anu.edu.au

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INTRODUCTION

For over two decades, writers on regulation have acknowledged the importance of enforcement in achieving effective regulatory outcomes. Many have focused on the question of 'regulatory style', debating, for example, the relative benefits of an 'advise and persuade' approach that emphasizes repair and results as compared to one concerned primarily with enforcement, sanctions, and deterrence.¹ Others have sought to integrate these approaches through strategies such as 'responsive regulation' under which regulators start at the bottom of an enforcement pyramid with a cooperative strategy assuming virtue, but gradually escalate to a more punitive approach if their expectations are disappointed.²

This debate is by now rather long in the tooth and one might reasonably conclude that there is not much more to add. But one issue that is demonstrably important but has rarely been studied directly is the relationship between trust and effective regulation.³ While trust may be of questionable importance where interactions between regulator and regulated are infrequent and no long-term relationship can credibly be built, it may play a critical role where interactions are frequent and ongoing. In the latter circumstances, regulatory outcomes usually emerge out of discussion, dialogue, and negotiation, rather than from the unilateral imposition of rules by one party on another. More commonly than not, they are the outcomes of regulatory conversations:

the communicative interactions that occur between all involved in the regulatory 'space' [that] can be the basis of coordinated action [or] important sites of conflict and contestation.⁴

Unsurprisingly, a constructive relationship or conversation usually generates constructive outcomes, and vice versa and this in turn may be substantially influenced by the level of trust between the parties.

This article examines the role of trust with regard to occupational health and safety (OHS) regulation in the mining industry in New South Wales, Australia. Hazardous industries such as mining have traditionally been subject to a high degree of regulation and large companies, at least, can

1 K. Hawkins, *Environment and Enforcement* (1984); B.M. Hutter, 'Regulating Employers and Employees: Health and Safety in the Workplace' (1993) 20 *J. of Law and Society* 452–70; R. Kagan, *Adversarial Legalism: The American Way of Law* (2001).

2 I. Ayres and J. Braithwaite, *Responsive Regulation* (1992).

3 For research on this issue, see V. Braithwaite, 'Responsive Regulation and Taxation' (2007) 29 *Law and Policy* 3–10; J. Job, 'How is trust in government created? It begins at home, but ends in the parliament' (2005) 6 *Aus. Rev. of Public Affairs* 1–23; T.R. Tyler and Y.J. Huo, *Trust in the Law: Encouraging Public Co-operation with the Police and Courts* (2002).

4 J. Black, 'Regulatory Conversations' (2002) 29 *J. of Law and Society* 163–96, at 163.

expect a substantial number of inspections each year.⁵ As we will see, such a high degree of regulatory scrutiny and ongoing interaction places trust at the centre of the relationship between regulator and regulated.

The New South Wales mining industry provides a particularly illuminating case study of the role of trust because it enables a comparison of two very different regulatory styles adopted by the same regulatory agency at different points in time, and the implications of each for trust and regulatory outcomes. Gunningham first studied the behaviour of the New South Wales mining inspectorate in the 1980s, characterizing it as 'negotiated non-compliance', a strategy located at the compliance extreme of the compliance-deterrence continuum, verging on regulatory capture.⁶ But the inspectorate's approach to enforcement changed dramatically following a mining disaster in 1996, making it possible to engage in a 'before and after' study of the relationship between the regulator and the mining industry, to track (through interviews with current and past stakeholders and documentary evidence) how this shift in enforcement style has impacted on trust, to explore the regulatory consequences of a breakdown of trust, and to examine how it might best be regained.

METHODOLOGY AND DEFINITIONS

The research reported in this article is part of a broader ongoing project that is concerned with identifying the causes of mistrust, understanding the ways in which the presence of mistrust may inhibit constructive interactions between stakeholders, and mapping the consequences in terms of OHS outcomes. The particular focus is on relationships between management and workers, between different levels of management, and between managers, workers, and the mines inspectorate. Only the last aspect is examined in this article.

Such issues of trust cannot be addressed primarily by surveys or via the use of quantitative data (although both may be valuable for purposes of triangulation). Only by engaging in face-to-face interviews with employers, employees, trade unions, regulators, and others can in-depth understanding be gained of relationships of trust (or mistrust) and their implications for OHS actions and outcomes. Accordingly, the principal data for this study was gained from semi-structured interviews conducted with a representative sample of corporate and mine management, trade union officials, inspectors and departmental officers, and miners, conducted at 13 mine sites in three companies.

5 For example, most sizable mines get visited about every six weeks in New South Wales.

6 N. Gunningham, 'Negotiated non-compliance: a case study of regulatory failure' (1987) 9 *Law and Policy* 69–97, at 91.

A predetermined range of topics was covered in individual interviews, but as far as possible, they became free-flowing conversations rather than formalized questions and answers since the former was more likely to yield both unexpected insights and candid revelations. It also allowed the interview to be more easily tailored to the circumstances and experiences of each interviewee. Generally, interviews lasted between 40 and 60 minutes. Each interview was conducted in private (for the most part, on site), with interviewees informed in advance that all material arising out of the interviews would be treated confidentially, and used anonymously in any subsequent publications.

A total of 151 mine site interviews have been conducted to date. Each mine site visit occurred over a two-day period in which a representative sample of both staff and workers participated. Typically, approximately twelve interviews were conducted at each mine, spanning senior management, middle management, line management, and workers. Although the precise composition varied from mine to mine, depending on availability, specific examples included the general or operation managers, mine managers, shift or process supervisors, under-managers, safety officers, engineering managers (mechanical and/or electrical), crew leaders (deputies, team supervisors), and workers and tradesmen (including local check inspectors/site safety representatives). In most cases, the balance of managers to employees was split approximately equally. Representatives from corporate management (including chief executives, corporate safety managers, and operational managers) across the three participating coal mining companies were also interviewed. The format of the interviews was similar to that described above. A total of twelve corporate interviews were conducted.

Beyond mining companies themselves, a sample of 10 inspectors, including mines inspectors and electrical and mechanical engineering inspectors, were interviewed. Discussions were also held with a Chief Mines Inspector and another senior departmental officer. Finally, a sample of eight union officials (district check inspectors/industry safety representatives, industry check inspectors) were also interviewed, and discussions held with a senior union official.

Qualitative material generated by the interviews was supplemented by reviews of both the domestic and international literature, including organizational trust, safety culture, mine safety, and OHS regulatory and prosecution policy literatures. The three mining companies involved in the project also provided internal policy background and safety statistical information and audit data (on a confidential basis). Consistent with the norms of social science research and of our ethics clearance, we do not identify the companies or any of the individuals who participated in the research.

The 'inspectoral style' of the Mines Inspectorate pre-Gretley was constructed from the evidence provided to a Parliamentary Inquiry on the asbestos mining industry and from secondary sources. The Parliamentary Inquiry (to which the first named author was OHS advisor) took extensive

evidence from a wide range of stakeholders and obtained access to a range of confidential, sensitive, and revealing company documents⁷. These included communications both internally and between the company and the inspectorate going back a considerable period and provided a graphic record of relationships between the company and the inspectorate. The findings (and an academic analysis) were published⁸ and need only be summarized for present purposes.

Efforts were made to triangulate and to use relevant statistical data, although only limited sources of information were available over the period necessary to make a 'before and after' comparison. Importantly, we were able to measure accurately the number of prosecutions both before and after the Gretley disaster, but the Mine Safety Performance Measures database was only developed in the aftermath of Gretley,⁹ as was the Department of Primary Industry's (hereafter the Department) enforcement policy and accompanying measures. Prior to Gretley there was 'no computer data bases system which records incidents and can produce sophisticated reports'. In any event, in the opinion of one senior regulator, even if previous records had been available they would have been unreliable since 'having to record information in the data base itself has changed behaviour and accountability'.¹⁰ The difficulties of making 'before and after' statistical comparisons were exacerbated by the fact that there was no specialist enforcement unit prior to Gretley, a lack of audit tools, and insufficient level of training (particularly investigation training) of mines inspectors.¹¹ On the other hand, the fact that all these developments took place in the aftermath of Gretley, in itself provides evidence of the impact of that disaster, and the comparison of the prosecutions conducted before and after Gretley also tells a stark story.

Before proceeding further, it is also important to clarify how 'trust' is defined for present purposes. Unfortunately, notwithstanding the importance of this issue to improving OHS performance, it has been the subject of a paucity of past research and only 'a limited number of researchers have examined the concept within the realms of safety research'.¹² Those who have examined it would readily concede that 'the exact nature of trust and its role in shaping organizational safety is poorly understood'¹³ and that 'the

7 Baryulgil Report, *The Effects of Asbestos Mining on the Baryulgil Community* (1984).

8 *id.*; Gunningham, *op. cit.*, n. 6.

9 See Department of Primary Industries, *Mine Safety Performance Measures* (2008) available at <<http://www.dpi.nsw.gov.au/minerals/safety/mine-safety-results/safety-performance-measures>>.

10 Personal communication, R. Morrison, 11 August 2008.

11 *id.*

12 S. Cox, B. Jones, and H. Rycraft, 'Behavioural approaches to safety management within nuclear reaction plants' (2004) 42 *Safety Science* 825–7; See, generally, (2006) 26 *Risk Analysis*, Special Issue on Trust.

13 S.M. Conchie, I.J. Donald, and P.J. Taylor, 'Trust: Missing Piece(s) in the Safety Puzzle' (2006) 26 *Risk Analysis* 1097–107, at 1097.

formation of trust within workplace relationships is complex and elusive'.¹⁴ Most definitions also recognize that in the OHS context, as elsewhere, trust is both complex and has multiple dimensions.¹⁵

For present purposes (and in the absence of any widely accepted definition) it is helpful to emphasize four aspects of the concept that have proved particularly valuable in organizational and inter-organizational contexts. First, we define trust in terms of good faith commitments, or more specifically 'an expectancy held by an individual or group that the *word, promise, verbal or written statement of another individual or group can be relied upon*'.¹⁶ This we emphasize because relationships between the inspectorate and regulated companies involve 'regulatory conversations' and negotiation, and constructive conversations and negotiations can only take place where there is trust with regard to promises and statements made.

Second, and related to the above, is that the person or organization is 'honest in whatever negotiations preceded such [good faith] commitments'.¹⁷ This is perhaps the most conventional understanding of trust and is also central to the effectiveness of negotiations, particularly at industry level. More broadly, whether a party 'walks the talk' is crucial in shaping its perceptions of the bona fides of the other.

Third, and closely related to the first two definitions, is the concept of *vulnerability*, or more precisely 'a willingness to accept vulnerability based upon having positive expectations about other people's intentions and behaviours in situations which are interdependent and/or risky'.¹⁸ Not only do relationships between the inspectorate and regulated companies involve interactions and interdependencies, but the companies are highly vulnerable if they disclose information (for example, about incidents, injuries or breaches of regulation), and are only likely to do so if they trust the inspectorate not to take advantage of that disclosure to take punitive action. Put differently, 'trust enables people to take risks'¹⁹ – because they are confident that others will not take advantage of them.

14 R. Zeffane and J. Connell, 'Trust and HRM in the New Millennium' (2003) 14 *International J. of Human Resource Management* 3–11, at 4.

15 *Risk Analysis*, op. cit., n. 12.

16 J.B. Rotter, 'A new scale for the measurement of interpersonal trust' (1967) 35 *J. of Personality* 651–65, at 651 (emphasis added).

17 L.L. Cummings and P. Bromley, 'The Organizational Trust Inventory: Development and Validation' in *Trust in Organizations*, eds. R.M. Kramer, and T.R. Tyler (1996) 302.

18 C. Clegg, K. Unsworth, O. Epitropaki, and G. Parker, 'Implicating trust in the innovation process' (2002) 75 *J. of Occupational Psychology* 409–22. Similarly, R.C. Mayer, J.H. Davis, and F.D. Schoorman, 'An integrative model of organizational trust' (1995) 20 *Academy of Management Rev.* 709–34, at 709, have proposed that, in an organizational context, trust is 'the willingness of a party to be vulnerable to the actions of another party based on the expectation that the other will perform a particular action important to the trustor, irrespective of the ability to monitor and control that other party'.

19 D.J. McAllister, 'Affect- and cognition-based trust as foundations for interpersonal cooperation in organizations' (1995) 38 *Academy of Management J.* 24–59, at 25.

Finally, as international evidence-based research has found, ‘people who feel they have been treated fairly will be more likely to trust that organization and be more inclined to accept its decisions and follow its directions’.²⁰ As we will see, a perceived lack of fairness lies at the heart of the industry’s grievance that substantial penalties are now being imposed in the absence of fault. As we will see, when inspectors and industry respondents spoke in terms of mistrust, it was in terms of one (and usually, more) of the senses described above.

REGULATORY STYLE, PROSECUTION, AND THE GRETLEY DISASTER

In 1996 four miners at Gretley colliery punched into old and flooded mine workings. There was an inrush of water and they were drowned. An inquiry into the incident by former Justice James Staunton made recommendations concerning prosecution, and charges were subsequently brought both against the two former operating companies and against a number of individuals.²¹ Commissioner Justice Patricia Staunton subsequently found that the corporate defendants had failed to ensure the health, safety, and welfare of their employees, and two former mine general managers and a mine surveyor were ‘[d]eemed to have committed the same offences as the corporations, having failed to satisfy the onus placed upon them’ to exercise due diligence to protect workers.²² Although the defendants argued that they were entitled to rely on old plans of the old workings supplied by the relevant government agency, Justice Staunton found that this:

does not excuse the defendants from their independent statutory obligation . . . to ensure a safe system of work. Nor does it relieve the defendants of their obligation to satisfy themselves by way of their own research as to the accuracy of . . . [the Dept of Minerals and Resources plans which] [o]n any considered view . . . were seriously deficient in purporting to depict old coal workings in a way that one could be confident of their accuracy.²³

On appeal, the conviction against the two companies was affirmed, as was that against the mine manager and former mine manager. The conviction of

20 K. Murphy, ‘The role of trust in nurturing compliance: A study of accused tax avoiders’ (2004) 28 *Law and Human Behavior* 187–209, at 199. See, also, E.A. Lind and T.R. Tyler, *The Social Psychology of Procedural Justice* (1988); T.R. Tyler, R. Boeckmann, H.J. Smith, and Y.J. Huo, *Social Justice in a Diverse Society* (1997).

21 New South Wales Department of Mineral Resources, *Gretley Inquiry Report: Final Report* (1998).

22 *McMartin v. Newcastle Wallsend Coal Company Pty Ltd* [2004] NSWIRComm 202, at 979.

23 *id.*, p. 806.

the surveyor was overturned on the basis that he was not ‘concerned in the management’ of either company.²⁴

The decision in the Gretley case and the subsequent ramifications of the disaster itself sent shock waves through the New South Wales mining industry. Not only were individuals as well as companies successfully prosecuted, but political pressure resulted in the inspectorate adopting a radically different approach to enforcement. To appreciate what a dramatic change of inspectoral policy was involved, it is necessary to summarize the inspectorate’s relationship with the mining industry in previous decades, before contrasting it with the post-Gretley approach.

Before Gretley, the mines inspectorate’s approach to the mining companies it was responsible for regulating had been conciliatory and cooperative and it had not engaged in prosecution to any significant extent. For example, in the seven years before that disaster, there had been 33 deaths in New South Wales coal mines without a single resulting prosecution.²⁵ And the very few prosecutions that had taken place in the mining industry in other circumstances (relating to metalliferous mines) had involved low penalties, were poorly publicized, and failed to send any significant deterrent signal.²⁶ This led to a general perception, particularly within the mining trade unions, that prosecution was a ‘dead duck’.²⁷

This seems an entirely reasonable conclusion, for the inspectorate had a history of resisting prosecution even in the most extreme circumstances and even when it was heavily criticized for its failures in this regard.²⁸ For example, Gunningham’s study of the inspectorate in the 1980s (focusing on the asbestos mine at Baryulgil, where multiple deaths resulted from asbestos-related disease) documented how it was not only loath to prosecute, even when faced with evidence of gross breaches of the asbestos regulations, but routinely warned mine management of prospective inspections, thereby enabling them to clean up and disguise many of the worst regulatory breaches. That analysis concluded that:

What the Mines Inspectorate provided at Baryulgil ... fell far short of any ... optimum. Its approach might best be classified as ... a complete withdrawal from enforcement activity, a toothless, passive and acquiescent approach which, however attractive to the regulatory agency and to the regulated industry, has tragic consequences for those whom the legislation is ostensibly intended to protect.²⁹

24 *Newcastle Wallsend Coal Company Pty Ltd v. Inspector McMartin* [2006] NSWIRComm 339, at 517.

25 New South Wales Department of Mineral Resources, op. cit., n. 21, p. 694.

26 In the absence of any available statistics relating to this period, information was gleaned primarily from a former Chief Inspector responsible for prosecution decisions in those years.

27 Construction Forestry Mining and Energy Union, *Submission to the New South Wales Government Mine Safety Review 2004* (2005) 71.

28 Baryulgil Report, op. cit., n. 7.

29 Gunningham, op. cit., n. 6, p. 91.

Under this extreme version of an ‘advise and persuade’ approach, trust was apparently rarely at issue in relations between the inspectorate and mine management. There is nothing to suggest, either from official documents of this earlier era or from interviews with inspectors or mine management who worked in the industry during the 1990s, that trust was at ever at risk. On the contrary, the inspectorate’s exceptionally conciliatory and consultative approach understandably met with considerable approval and support from the mining companies themselves. Relations between the inspectorate and the mining companies were commonly described as ‘close’ and indeed some commentators had suggested that at times they were so close as to amount to regulatory capture.³⁰

But following the Inquiry into the Gretley disaster, the culture of advise and persuade was substantially broken. As indicated above, the Gretley Inquiry called for the ‘timely prosecution’ of mining companies and senior officials, and two mine managers, a surveyor, and a number of under-managers were subsequently prosecuted. Moreover, public sympathy for the miners coupled with political pressure (especially from the main mining union, the CFMEU)³¹ on a receptive Labor government, prompted the establishment of an independent Investigations Unit comprised primarily of former police. This unit was much more inclined to treat breaches of regulation as criminal action warranting prosecution than previous in-house decision makers. And it was made clear to the inspectorate that it too was expected to become tough and prosecutorial and to adopt what is widely described as a ‘muscular’ approach to its regulatory role.

It soon became apparent to the mining industry that the Gretley prosecutions were not a ‘one off’ and that prosecution of individual ‘statutory duty holders’ was to become commonplace, at least in the event of death or serious injury. Another mine manager was successfully prosecuted following a subsequent fatality at Awaba³² and this case was followed by a number of others involving death or serious injury (and a handful that did not).³³ As at August 2008 there had been 33 successful prosecutions since the introduction of the DPI’s Enforcement Policy in 1999,³⁴ as compared to none in the seven years preceding Gretley and less than a handful in the decade before that.

30 id.

31 The CFMEU, had close links with the state government and that some key CFMEU officials had both personal and political reasons for wanting the government to take a tough stance against not only the individual company involved in the Gretley disasters, and its managers, but also the New South Wales coal industry more generally.

32 *Morrison v. Powercoal Pty Ltd* [2004] NSWIRComm 297.

33 See, for example, *Morrison v. Ross*; *Morrison v. Glennies Creek Coal Management Pty Ltd* [2006] NSWIRComm 205.

34 Department of Primary Industries, op. cit., n. 9.

That these prosecutions are the external manifestation of a new enforcement style is confirmed not only by the stark contrast between the numbers of pre and post-Gretley prosecutions, by the flurry of other measures put in place in the wake of Gretley (the new Investigations Unit, Enforcement Policy, incident recording system, investigation training, and audit tools) but also by our interviews with the inspectorate. Inspectors interviewed were unanimous that Gretley had generated pressures for increased prosecution both of companies and of mine managers. According to one:

Gretley, and the subsequent inquiry, was the catalyst to get things moving in the Department. The changes that were occurring, increasing litigation, were speeded up. This led to more prosecutions.

Another inspector reported:

there is now a recognition that you carry out investigations with a more formal, professional approach – although it varies from inspector to inspector, the end result seems to be the same ... we have gone down the road of prosecution.

Others also talked of an increasing pressure to take a tough stance on safety, and to demonstrate this through a greater willingness to stop production:

decisions are made about whether we need to stop the operation. This is a very serious step, but we are now more willing to do it. It is a fairly regular event.

Crucially (from the perspective of the mining industry) prosecutions have taken place not just in circumstances where there was recklessness or intent, but also where there was no more than negligence to the civil standard — a standard that according to industry associations and some independent observers is now an exceptionally demanding one, divorced from reasonable expectations.³⁵

A pivotal role in the post-Gretley world has been played by the Investigations Unit which was widely regarded, both by our inspectoral and mining company respondents, as having adopted a far more adversarial approach than its predecessor that had in itself soured its relationship with the mining companies. Some pointed out that the investigation unit was populated by former police officers, with a strong cultural preference for prosecution. Indeed one inspector was not alone in suggesting that there might be ‘political pressure for mine managers to be hung’ and that it was the Investigations Unit’s role to ensure that this objective was achieved. Another pointed out that this ‘makes it very difficult to build a relationship with the mines following an investigation – it is a major source of mistrust’ and ‘it is not the most comfortable relationship with the investigation unit –

35 Australian Chamber of Commerce and Industry, *Modern Workplace: Safer Workplace – An Industry Blueprint for Improving OHS in Australia* (2005) 21, <http://www.acci.asn.au/text_files/review/r123.pdf>; A. Hopkins, *An Evaluation of Certain Criticisms of the NSW OHS Act* (2005) 7.

they are too ready to jump on individuals, and not look at systems'.³⁶ The implications for trust of the post-Gretley regulatory style are explored below.

MISTRUST AND ITS CONSEQUENCES

It is clear that Gretley was the catalyst for a dramatic shift in regulatory style away from the previous and long-favoured advise and persuade approach to a much more muscular and adversarial approach. This new approach to enforcement had a profound impact on the relationship between the inspectorate and the industry and exacerbated existing mistrust of the Department by senior corporate management and of corporate management by many inspectors. That mistrust is now so deep that the 2005 New South Wales Mine Safety Review, based on broad-ranging stakeholder submissions and its own investigations, concluded it was a major contributor to the breakdown in cooperation between mining companies, unions, and the Mines Inspectorate in their collective attempts to improve OHS processes.³⁷ A similar conclusion was reached by the New South Wales Minerals Council, which maintains that a lack of trust remains the most significant impediment to improving the safety climate within the mining industry.³⁸

Things have not always been thus. Mine managers and those who have most direct contact with the inspectorate commonly indicate that relations had once been cordial and constructive but that now they are now strained and distant. Indeed, mine operators and industry associations widely report that trust between themselves and the mining inspectorate is at an all-time low.³⁹

This dramatic change in relations between the inspectorate and the mining industry is attributed largely to a widespread perception within the industry that, subsequent to the Gretley disaster, not only has the inspectorate conducted itself in an adversarial fashion with an emphasis on prosecution but those prosecutions are taking place in circumstances where there is no genuine blameworthiness. That is, there is a widespread and deeply held view within the mining industry that even managers whom are conscientious as to their OHS responsibilities are vulnerable to prosecution. As one manager, echoing the sentiments of many others, told us:

36 Yet some inspectors highlighted that having a separate investigations unit can be useful to inspectors when mine sites do not respond to their urgings: 'at one mine, there was a series of events of similar ilk. Despite my patience, there was reluctance by the company to address this. So I brought in the investigations unit – I didn't even do my own investigation.'

37 N. Wran and J. McClelland, *NSW Mines Safety Review: Report to the Hon Kerry Hickey MP Minister for Resources* (2005) available at <<http://www.dpi.nsw.gov.au/minerals/safety/mine-safety-initiatives/wran-mine-safety-review/>>.

38 New South Wales Minerals Council, *Submission to the 2005 NSW Mines Safety Review* (2005).

39 *id.*

the nature of accident investigation . . . it's almost automatic that somebody's guilty, because management's in control of the system. And it's not a matter of just pure reckless, and deal with that, fair enough, but it's when very innocent, very hardworking and systematic people get caught out for whatever reason. So that breeds big mistrust.

The fact that current enforcement policy is viewed as unfair by mining industry employers, managers, and other principal duty holders, has in itself resulted in a breakdown of trust between the inspectorate and the industry. Here, mistrust is intimately connected to a sense of unfairness and injustice (coupled with an increased sense of vulnerability to prosecution). Irrespective of whether this perception of unfairness is an objectively reasonable one or a substantial over-reaction to the inspectorate's prosecution policy – and there are many, including not just trade unionists but also academics who would take the latter view⁴⁰ – it is a sociological truism that what is perceived to be real is real in its consequences.

This perception of unfairness is closely connected with the fact that prosecutions for OHS offences, if not strict liability (as in some jurisdictions they are) can be undertaken at a relatively low point in the culpability hierarchy (a very low threshold of negligence). In New South Wales prior to Gretley, this was not an issue because prosecutions were so rare as to be virtually unheard of. But in jurisdictions where prosecutions have been more common, they have tended to attract only small penalties (and these usually against corporations not individuals). Such penalties are seen as appropriate in so far as they are 'indicative of the inherent difficulty associated with assessing the appropriate penalty . . . where conviction is *not the result of individual criminal culpability in the normally understood sense*'.⁴¹ That is, low penalties were the quid pro quo for imposing liability in circumstances where there was little evidence of culpability. However, such low penalties also send out the unfortunate signal that breaches of OHS law are 'not really criminal' and, for this reason, understandably aroused the ire of trade unions and some social reformers.⁴² But they did not cause any particular angst to employers or managers, any more than did the effectively non-prosecution policy of the pre-Gretley period.

- 40 N. Foster, 'Manslaughter by Managers: The personal liability of company officers for death flowing from company workplace safety breach' (2006a) 9 *Flinders J. of Law Reform* 79–111; N. Foster, 'Comments on the Draft Occupational Health and Safety Amendment Bill 2006' *Submission to OHS Act Review* (2006b) WorkCover, NSW.
- 41 R. McCallum, P. Hall, A. Hatcher, and A. Searle, 'Advice in relation to Workplace Death, Occupational Health and Safety Legislation and Other Matters' in *Report to the WorkCover Authority of New South Wales* (2004) 1–60, at 10, emphasis added, available at <http://www.workcover.nsw.gov.au/Documents/Publications/LawandPolicy/Policies/final_report_4481.pdf>.
- 42 W.G. Carson, and R. Johnstone, 'The Dupes of Hazard: Occupational Health and Safety and the Victorian Sanctions Debate' (1990) 26 *Aus. and New Zealand J. of Sociology* 126–41.

However, in New South Wales, as we have seen, political pressure for increased levels of prosecution and higher penalties, coupled with public sympathy for the Gretley miners and their families, has resulted in substantial penalties being imposed both on the operators and owners and on an individual manager, *but without insisting on a comparable degree of culpability*, and this lies at the heart of mining industries' current grievances, and the sense of injustice and unfairness which, almost without exception we found amongst members of management we interviewed.

However, although the new prosecutions policy has been the principal contributor to mistrust between the inspectorate and the mining industry, it is not the only such cause. Senior company representatives also pointed to the role of the Department within which the inspectorate is located, which they said had failed to honour commitments made in consultations over the implementation of new regulations. For example, companies believed that the Department gave assurances that the use of non-flame-proof diesel would be approved, only to be informed subsequently that was not the case. Further examples of such purportedly misleading behaviour, where the Department had reportedly agreed (albeit informally) to changes in the regulations, only for them subsequently to renege, include allowing the use of aluminum, and changing the definition of the hazardous zone from 100m from the entrance to be much closer to the mine site, notwithstanding that NSW mines have low gas levels. Similarly, some of the regional inspectors were also perceived to have compromised their relationship with mining companies in a variety of ways, such as by circulating official letters including statements previously made to them by mine site managers in private conversations. Thus there is a perception that commitments have not been made in good faith and perhaps that negotiations preceding such commitments were not conducted honestly. Either or both of these perceptions can serve to threaten or destroy trust.

The mistrust of the inspectorate by senior corporate management is mirrored by the inspectorate's mistrust of senior management, who were particularly singled out by a number of our inspectoral respondents. According to one: 'I wouldn't trust them as far as you could kick them. They have deliberately down-staffed mine sites' while another suggested that 'some groups are making huge profits, and are covering up flaws'. Most inspectors had little faith in corporate OHS initiatives and most expressed scepticism at the value and accuracy of corporate standards, particularly internal auditing. Some suggested that they not infrequently found basic breaches of the regulations at mines that have been recently been given a 'clean bill of health' by corporate audits. Further, several inspectors suggested that the audits themselves were designed to look better than the reality on the ground and one claimed that reported improvements are 'self-delusional'. Others suggested that some companies were not sincere about their stated commitments, as evidenced by their failure to invest more resources in OHS. Here, mistrust is primarily a product of perceptions that senior

management does not 'walk the talk' and make commitments in good faith. However, not all of corporate management is seen in such a negative light, and some companies were acknowledged to 'have fairly good attitudes, and try to do the right thing'.

Finally, an inconsistency in enforcement style between electrical and mechanical engineering inspectors on the one hand and mines inspectors on the other has also served to exacerbate the current climate of mistrust. As a result of all these factors, the relationship between the inspectorate and the mining companies was described by one senior corporate officer as having reached 'rock bottom', a view endorsed by many others.⁴³

As to the consequences of mistrust in terms of regulatory effectiveness, there is, unfortunately, no credible statistical evidence. Certainly there is no correlation between an increase in prosecution and improved OHS performance, but the new policy has been in place for only a limited period and it is plausible that there would be a time lag before any positive relationship became apparent.⁴⁴ But in any event, as numerous commentators and reports have pointed out, neither lost time injury frequency rate, nor the various workers compensation statistics, provide more than the crudest indication of actual injury rates and, even if they did, this might not be a helpful predictor of the likelihood of low-frequency high-consequence events.⁴⁵ And while the number of fatalities can be relied upon as a much more accurate figure, the numbers from year to year are too low to be relied upon in statistical terms, and for reasons indicated earlier, broader comparative data is not available.

Turning to soft data, however, the accounts of the various stakeholders are fairly consistent as to the adverse consequences of mistrust. Specifically, there is a consensus view amongst corporate managers, and a majority view at mine sites visited, and amongst inspectors interviewed for this study, that a breakdown of trust has resulted in a dysfunctional relationship between the inspectorate and the industry and that this is seriously compromising the achievement of better safety outcomes. Our respondents suggested that there are a variety of ways in which this appears to be playing out. In the following account we attempt to connect our respondents' descriptions with what is known from the broader regulatory literature. We also note that our findings in this regard are entirely consistent with those of the New South Wales Mine Safety Review,⁴⁶ although we have been able to go into substantially more depth than that review in exploring the consequences of mistrust.

43 See, for example, Wran and McClelland, *op. cit.*, n. 37.

44 J.M. Galvin, 'Occupational Health and Safety Acts — performance and prosecution in the Australian minerals industry' (2005) 114 *Mining Technology* 251–6.

45 A. Hopkins, *Making Safety Work: Getting Management Commitment to Occupational Health and Safety* (1995) 33–5.

46 Wran and McClelland, *op. cit.*, n. 37.

An effective inspection and enforcement policy involves a constructive dialogue between duty holders and inspectors. The meaning of compliance is often ambiguous and there is no single accepted understanding of how regulatory requirements should be interpreted and applied. Such dialogue and negotiation is especially important at the bottom of the regulatory 'enforcement pyramid' where the regulator is appealing to the better nature of the regulated.⁴⁷ Trust will be particularly important to such negotiation and research suggests that compliance levels are likely to be higher where regulators treated the regulated with trust.⁴⁸ But where relations between regulator and regulated have largely broken down and mistrust is rife, then the sort of constructive dialogue and repeated, reciprocal interactions that generate shared expectations about compliance and improved compliance outcomes, are no longer possible.⁴⁹ As John Braithwaite has argued:

We have a greater chance of efficient and effective regulation if we have a regulatory culture where [regulators and regulated] actually listen to each other and respect the concerns of the other; we have a lesser chance of cost-effective regulation if these two constituencies see their mission as to destroy the other, taking it in turns to win battles without either side winning the war.⁵⁰

In the case of the mining industry, Braithwaite's assertion is amply supported in a variety of ways. First, the two-way flow of information that is so important to effective communication between the inspectorate and the industry has almost completely broken down. For example, one corporate submission to 2005 Mine Safety Review asserted that:

lessons learned from fatalities in NSW are delayed for in excess of 2 years due to protracted prosecution . . . The litigants remain 'tight-lipped' throughout the prosecution process so little information disseminates about causal factors and prevention.⁵¹

Numerous industry respondents and inspectors made precisely the same point, contrasting the relatively open and honest exchanges that took place between inspectors and mine management pre-Gretley, in which information was freely exchanged, and documentation provided voluntarily, with the current reluctance of mine management to share information and

47 Ayres and Braithwaite, *op. cit.*, n. 2.

48 John Braithwaite and Toni Makkai suggested that this was because if those who are being regulated are treated as worthy of trust they will repay that trust with voluntary compliance: J. Braithwaite and T. Makkai, 'Trust and Compliance' (1994) 4 *Policing and Society* 1–12; J. Braithwaite, T. Makkai, and V. Braithwaite, *Regulating Aged Care: Ritualism and the New Pyramid* (2007).

49 J. Braithwaite, *Restorative Justice and Responsive Regulation* (2002); P. May, 'Compliance Motivations: Perspectives of Farmers, Homebuilders, and Marine Facilities' (2005) 27 *Law and Policy* 317–47.

50 J. Braithwaite, 'Responsive Regulation for Australia' in *Business Regulation and Australia's Future*, eds. P. Grabosky and J. Braithwaite (1993) 87.

51 Xstrata, *Submission to the New South Wales Government Mine Safety Review 2005* (2005) 50.

unwillingness to consult regulators for fear that their disclosures will be used against them.⁵² For example, according to one inspector:

It just makes your job harder – you won't get to the true story. I say to them, just tell us the truth so we can fix it. Little bit, bit by bit, you can try to work it out, but it takes longer. And sometimes, you might not get the right outcomes because you don't get to the root cause. Years ago, they used to be much more open

Similarly, another told us that:

Earlier, mines were open and honest with information, responded to questions and provided documentation. Now, after prosecutions of individuals, they are guarded, and tentative to let go of information, even if the Investigation Unit is not involved ... Managers say they will not talk to you without a lawyer present. This happens 10–20 per cent of the time.

Crucially, both management and inspectors are in agreement that the willingness of mines to provide a free and frank flow of information to the inspectorate has been fundamentally undermined.

A second and related consequence was that fear of prosecution may also inhibit in-firm accident investigation, prevention and remedial action. Inspectors reported that this shift in approach has impacted substantially on their relationship with mine managers: 'Mostly, managers are just guarded and frightened of where it is going to go. They don't trust us because that's where it could go with prosecutions'. As one manager reluctantly noted 'you are concerned about how much you do tell the Department ... even though my attitude is a fairly open attitude ... and I don't like keeping secrets'. This attitude is reflected at the corporate level, where one corporate executive, voicing a common view, acknowledged 'that the company is reluctant to engage in full disclosure'. Managers had reportedly become 'more cautious and defensive' and this in turn had diminished their willingness to cooperate and learn from past experience.

Third, for companies who perceive themselves as willing to comply voluntarily, or to go 'beyond compliance', the fear of 'unjust' prosecution may also have a number of other unintended consequences, for example, a reluctance to report incidents:

In the past ... when someone was really seriously hurt, [they] ... would come in and they'd do a reasonably thorough review. Nowadays, they're actually investigating incidents that ... haven't had a serious outcome, which is negative in itself, because it may stop the free reporting of those [incidents].

This resonates with the point that has been made by James Reason that developing a 'reporting culture' (to gather the right kinds of data) is an important step in establishing a safety culture but the former relies heavily

52 See, generally, E. Bardach and R. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (1982); J.T. Scholz, 'Voluntary Compliance and Regulatory Enforcement' (1984) 6 *Law and Policy* 385–405.

upon the willingness of the workforce and managers to report incidents and near-misses and on how the issues of blame and punishment are handled.⁵³ When members of management fear that any reporting of incidents and near-misses may be punished, then this will have a chilling effect on accident and incident investigation and reporting, and a ‘no-blame’ culture will be seriously threatened.⁵⁴

This is also consistent with evidence from other areas of regulation that suggests that where managers who are making good-faith attempts to comply fear that they may nevertheless be vulnerable to enforcement action, they become less cooperative with regulators.⁵⁵ Lacking trust in the regulator’s even-handedness, they refuse to do more than minimally comply, and relinquish all previous efforts to go beyond compliance. They may even, as Bardach and Kagan suggest, develop a ‘culture of regulatory resistance’ where more effort is made to challenge the regulator than to improve OHS.⁵⁶ Indeed, Haines argues that there is a risk of creating ‘chronically mistrustful corporations’ and that once this mistrust has become embedded in the corporate psyche as a result of the threat of prosecution it may become extremely difficult to rebuild trust.⁵⁷ Like Haines, we found that such companies may redirect their effort to reducing their vulnerability to scrutiny and potential prosecution, giving priority to protecting themselves from the risk of possible prosecution rather than continuous improvement of OHS outcomes. Routinely involving corporate lawyers from the very earliest stage of an accident investigation – a practice that had been highly unusual prior to Gretley – was the most obvious manifestation among our corporate respondents of this new defensive approach.

Fourth, individual prosecutions against statutory office holders may make it difficult to attract well-qualified applicants to such positions and reduce the skills base of the industry. According to the Mine Managers Association of Australia:

53 J. Reason, *Managing the Risks of Organizational Accidents* (1997) 195.

54 Compare for example the extremely poor performance of the criminal justice system as it functions in the United States of America, with the impressive success of airline safety regulation. As John Braithwaite has pointed out, the criminal justice institutions detract from prevention by focusing on punishment and deterrence while the air safety institutions seek to foster prevention through a ‘no-blame philosophy which is committed to correcting mistakes as opposed to punishing failings’: J. Braithwaite, ‘Between Proportionality and Impunity’ (2005) 43 *Criminology* 283–306; R. Wilf-Miron, I. Lewenhoff, Z. Benyamini, and A. Aviram, ‘From aviation to medicine: Applying concepts of aviation safety to risk management in ambulatory care’ (2003) 12 *Quality and Safety in Health Care* 35–9.

55 S. Shapiro and R. Rabinowitz, ‘Punishment versus cooperation in regulatory enforcement: a case study of OSHA’ (1997) 49 *Administrative Law Rev.* 713–62; S. Shapiro, ‘The social control of impersonal trust’ (1987) 93 *Am. J. of Sociology* 623–58.

56 Bardach and Kagan, op. cit., n. 52.

57 F. Haines, *Corporate Regulation: Beyond ‘Punish Or Persuade’* (1997) 219–20.

The approach taken by the Department to prosecution and the impossibly high standard set by the application of the duty of care is negatively impacting on safety in the coal industry. This is causing an exodus of the more experienced and capable coal mine manager, together with other supervisory personnel from statutory positions.⁵⁸

Several corporate managers support this view in reporting increasing difficulty in recruiting staff to fill statutory positions. They were able to point to several specific instances where individuals had declined such appointments, including both new graduate recruits (scared off by a perceived vulnerability of statutory positions in the industry), and more seasoned staff, unwilling to 'put themselves in the firing line'.

Finally, the new prosecution policy has substantially changed the behaviour of many inspectors who for the most part have now adopted a defensive, risk-averse strategy whereby they no longer provide advice for fear that this advice might be used as a defence by mining companies in future prosecutions. Thus many of the inspectors we interviewed were adamant that 'they are not there to run the mines' and they are 'not allowed to make recommendations' (a marked contrast to their former 'advise and persuade' mode of operation). As one inspector pointed out: 'you have to be very clear and concise about your instructions'. Mine managers expressed similar views about the ability of inspectors to impart practical advice:

You've only got to look these days mate at the way the inspector operates. They just basically take a hands-off approach now. They don't offer you any advice because they're fearful that you'll make a note and say yeah so and so told me to do this. So there's this huge dynamic there of mistrust right from the top and it filters all the way down.

The prosecutorial approach has also changed other inspectoral practices. For example, with the increasing likelihood of prosecution, any interaction between the inspectorate and a mine site might subsequently result in formal enforcement action with the result that documentation has become much more important and this also constrains interactions between the parties. Thus formal notices are now preferred because 'a verbal instruction is only as good as the paper it is written on' but this in turn is hardly conducive to an open exploration of what might have gone wrong and why.

It may also be that a prosecution policy that is perceived to be fundamentally unfair is undermining the general belief in the legitimacy of regulatory requirements. Certainly there is evidence from other studies that if regulated enterprises mistrust the regulator and believe that regulations are being used strategically, with regard to purposes and values with which they fundamentally disagree, then they are far less motivated to comply with these requirements.⁵⁹

58 See Wran and McClelland, *op. cit.*, n. 37, Appendix 6, p. 45.

59 T.R. Tyler, *Why People Obey the Law* (1990); J.T. Scholz and M. Lubell, 'Trust and taxpaying: Testing the heuristic approach to collective action' (1998) 42 *Am. J. of Political Science* 398–417.

As Hawkins and Hutter point out, many firms comply with the law not for instrumental reasons but rather:

because they feel they should comply as a matter of moral principle (thus it is morally right that you do not, say, hazard your employees' health and safety); or they comply in recognition of the legitimacy of the law (it is not right to violate a law ... whether or not you agree with that law).⁶⁰

For such firms, where regulation is perceived as unreasonable, or fundamentally unfair, then the law loses its legitimacy and regulated enterprises lose their moral commitment to compliance.⁶¹ This indeed can lead to a reciprocal adversarial legal posture on the part of the industry. In the New South Wales case, this appears to be already happening. At the time of writing, the industry is actively contemplating taking legal action against the inspectorate with regard to the use of non-flame-proof diesel in underground mines and has already launched an unsuccessful constitutional challenge to the criminal law jurisdiction of the New South Wales Industrial Commission.⁶²

WHERE NEXT?

Given the important role of trust in nurturing compliance, and the damaging consequences of the sort of mistrust that currently characterizes relationships between the regulator and regulated in New South Wales, what should be done? How in particular might it be possible to reduce levels of mistrust and so to achieve more effective compliance? How might it be possible to shift from an atmosphere of fear to one of mutual respect and partnership?

The international evidence-based research suggests that 'the key to creating trust is to act in ways that citizens will experience to be fair'⁶³ and as indicated earlier, those who perceive that they have been treated fairly are more likely not only to trust the regulator but also to accept its decisions and comply with its requirements. To achieve a perception of fairness would require a much more nuanced prosecution policy. Currently, prosecution against those who neither intended harm nor were reckless in their behaviour (epitomized in the Gretley decision) is widely perceived to be unjust, and this has caused the law to lose its legitimacy in the eyes of duty holders. It

60 K. Hawkins and J. Hutter, 'The Response of Business to Social Regulation in England and Wales: An Enforcement Perspective' (1993) 15 *Law and Policy* 199–295, at 204.

61 T.R. Tyler and P. Degoey, 'Community, family, and the social good: The psychological dynamics of procedural justice and social identification' in *Nebraska Symposium on Motivation*, ed. G. Melton (1995) 53–92.

62 *Powercoal Pty Ltd v. Industrial Relations Commission of NSW* (2005) 156 A Crim R 269.

63 K. Murphy, 'The role of trust in nurturing compliance: A study of accused tax avoiders' (2004) 28 *Law and Human Behavior* 187–209, at 189. See, also, Tyler et al., *op. cit.*, n. 20; Tyler and Degoey, *op. cit.*, n. 61.

has also generated a defensiveness on their part that results in an unwillingness to examine the root causes of accidents and incidents for fear of being prosecuted.

In the case of the mining industry, a more balanced approach requires that, rather than prosecuting routinely in the case of fatalities or serious injuries (irrespective of the level of culpability) prosecution only takes place against genuine 'bad apples' which are widely regarded as deserving of prosecution. This approach would enable the inspectorate to maintain a constructive dialogue with the majority of employers and achieve the large majority of their compliance goals without resort to prosecution and without alienating otherwise willing 'volunteers' and generating mistrust. Put differently, what is needed is to steer a middle path that neither rejects prosecution as an important deterrent at the top of the Braithwaitian enforcement pyramid, nor uses it in circumstances where it is likely to do more harm than good. Achieving such a balanced approach will not be easy. On the one hand, the evidence suggests that the sort of extreme 'advise and persuade' policy that the New South Wales inspectorate adopted pre-Gretley will fail to send appropriate deterrent signals to the recalcitrant. On the other hand, the sort of zealous prosecution policy that New South Wales has subsequently applied to fatalities demonstrably will also fail in preventative terms.

Elsewhere, Gunningham has proposed an alternative approach to prosecution that (i) focuses on risk rather than consequences; (ii) takes previous track record seriously (and makes escalation up an enforcement pyramid credible); and (iii) emphasizes that prosecution should not take place in the absence of culpability.⁶⁴ For these purposes, it has been argued that culpability should mean a substantial falling short of reasonable expectations (a form of negligence), recklessness or intent. The actual decision to prosecute, it has been suggested, should be based on a calculus which takes account of all three of the above factors. This approach would ensure that prosecution takes place even where no injury results (exposure to risk, irrespective of consequences, being at the heart of OHS regulation). It would also enable the inspectorate to target failures of risk management, and to focus on general patterns of failure to attend to risk despite warnings, while also reserving the right to take action in the absence of poor past history if there was high culpability (intent or recklessness) coupled with a high degree of risk/potential for extreme consequences. Such an approach would do much to restore legitimacy to the prosecution process, while ensuring that serious breaches of OHS legislation, and those who did not give serious attention to complying with OHS law, were firmly dealt with.

This approach does not imply a need for multiple prosecutions, because the literature suggests that a distinction must be made between the actual

64 N. Gunningham, *Mine Safety: Law, Regulation, Policy* (2007) ch. 8.

chances of detection and punishment, and the perceptions thereof. What is important is the belief that duty holders have of the likelihood and degree of punishment, even if, in actual fact, that belief is overstated.⁶⁵ Even a handful of prosecutions in the course of a year can achieve this effect provided the 'right' cases are chosen. That handful of prosecutions will, however, play a crucially important role at the tip of an enforcement pyramid, for without them less coercive policies at the lower levels of the pyramid lose their credibility.

Yet despite the difficulties of achieving such a balanced approach, there is evidence that some inspectors (albeit a minority), relying far more on past experience and their own intuition than on regulatory theory, are already practicing a form of responsive regulation that approximates what is recommended above. And they are doing so notwithstanding the heavy-handed edicts of their department to take a tough enforcement stance. Moreover, in the minority of cases where we identified this approach, there was evidence that it was working well and that levels of trust at mine-site level (that is, between the inspector and mine management) were relatively high. Thus we found a minority of mines that were remarkably positive in their description of dealings with the inspectorate, and who reported high levels of trust and cooperation in circumstances where the inspectors rejected a heavy handed enforcement role while at the same time being tough when they needed to be:

The inspectorate? I have had very good relations with them. Despite changing expectations on inspectors, the one we have is very good. They are experienced and capable people who want to coach and counsel, and really only pull out the big guns if you are recalcitrant.

Inspectors in this category were not enthusiastic about their new role as 'police', and resisted performing as such:

I see myself as helping with the direction and networking information, to make sure that people comply, but in a very practical way. [I] have developed a clear understanding over a very long period.

Another told us:

I'm probably more tolerant than other inspectors. I like to offer advice. I might support sites to get more resources by giving them [management] a rev-up.

A third described himself as still '80 per cent advisor and 20 per cent policeman'. For inspectors in this minority group, the consensus view is that if mines are 'up front' with any transgressions, and are willing to work constructively with the inspectorate towards a solution, then they, as inspectors, are far less likely to resort to a punitive approach:

My approach depends on how they respond. If they are cooperative, and want to move forward, I'll probably just issue an advice notice. If we have talked it

65 S. Simpson, *Corporate Crime and Social Control* (2002).

through and agreed, we can fix it up and move on. If they can't or won't see the issues, then I will give them a directive. I generally get cooperation from senior mine management – not too many are blockers, but there are exceptions to the rule.

Some inspectors in this group took the view that the best way of overcoming mistrust is to be 'straight' with the mine sites, for example: 'I flag it in advance if I'm looking at a serious breach'. It is asserted that this approach is mostly likely to yield a reciprocal response although not all will do so.

In short, a minority of inspectors described conducting inspections in a manner not dissimilar to that advocated by responsive regulation,⁶⁶ where they began by advice and persuasion and only invoked prosecution when a softer approach proved unsuccessful. Although they acknowledged that many of their peers had a greater preference for prosecution, clearly this was not the case across the board. And the large majority of engineering inspectors, in particular, seemed to have retained the trust of their counterparts in industry and to have maintained a constructive dialogue with them.⁶⁷ Indeed, it seemed that the greater the relational distance between the parties, the greater the level of mistrust was likely to be. As we have seen, inspectors and senior management were extremely critical of each other, but it was not uncommon to find a more constructive relationship between mine managers and the inspectors who were in regular and direct contact.

However, in New South Wales, as we have seen, political pressure for increased levels of prosecution and higher penalties has resulted in substantial penalties being imposed both on the operators and owners and on an individual manager, *but without insisting on a comparable degree of culpability*, and this lies at the heart of mining industries' current grievances.

Finally, is there a better way to address the complex issue of culpability than to prosecute even in cases of low culpability and either impose relatively trivial penalties or impose substantial penalties that are perceived to be grossly unfair? Arguably, a way around these difficulties is to provide for a special offence (for example, industrial manslaughter) in circumstances where there

66 Ayres and Braithwaite, *op. cit.*, n. 2.

67 Engineering inspectors, by and large, do not have much to do with mine managers, and mainly interact with their engineering counterparts, electrical or mechanical, at the mine-site level. They have even less to do with corporate managers. As such, engineering inspectors, particularly those with extensive experience, believe they have built up a good rapport with mine-site engineers over time. They also claim that dealing with mine-site engineers is easier: 'their role is to comply with regulations and to work safely. They are more willing to talk openly. They don't mind sharing their experiences. This exposes their vulnerabilities – they wouldn't do it if they didn't trust me'. Engineering inspectors also point out that they have been able to nurture trust through open meetings, usually quarterly, with representatives from each mine in the district. Not only is attendance high (reportedly, in the order of 95–100 per cent), but the meetings are described as being 'frank' and productive. It is made clear to participants that they are free to raise issues without fear of prosecution and for this reason no minutes are taken at these meetings.

are compelling reasons in terms of morality or retribution for expressing society's disapproval of corporate behaviour that results in workplace fatalities,⁶⁸ or which can be justified in preventative terms as being so heinous that the full weight of the 'real' criminal law can be applied to them. But such an additional tier of liability for offences that are 'really criminal' would imply a requisite mental element of intent or recklessness coupled with serious consequences: severe injury or death. A number of jurisdictions have been exploring this general approach in recent years, particularly with regard to the introduction of a new offence of 'industrial manslaughter'.⁶⁹

Consistent with this general approach, New South Wales enacted the Occupational Health and Safety Amendment (Workplace Deaths) Act 2005. This legislation amended the OHS Act 2000 (NSW), the Occupational Health and Safety Regulation 2001 (NSW), and the Criminal Appeal Act 1912 to include a new offence with a maximum penalty of \$1.6 million for corporations and \$165,000 and/or imprisonment of 5 years for individuals, where a breach of safety legislation results in death at a workplace. According to the Minister, this targets the small minority of employers (so called 'rogue employers') who demonstrate little or no regard for the safety of their workers — and are reckless or intentional in their behaviour.⁷⁰ The introduction of this legislation however, does not (at least in principle) diminish the role of prosecution under the OHS Act with regard to reckless conduct in the absence of death (or injury).

THE POLITICAL DIMENSION

While adopting the much more modulated and balanced prosecution policy advocated above would be a considerable step forward, it will solve only part of the problem. Much of the blame for the current conflict between the inspectorate and the industry lies not with the inspectorate but with trade union and employer groups who have sought to reshape government enforcement policies.

Trade unions and mining communities — especially following a fatality or serious injury — have argued strongly in favour of prosecution, even against those whose culpability is low. After the Gretley disaster, it was the trade unions that held sway, and the subsequent prosecutions of individual managers owed much to trade union demands for retribution. And the mining

68 N. Gunningham and R. Johnstone, *Regulating Workplace Safety: System and Sanctions* (1999) 212.

69 A. Hall, R. Johnstone, and A. Ridgway, *Reflection on Reforms: Developing Criminal Accountability for Industrial Deaths* (2004) Working Paper 26, National Research Centre for Occupational Health and Safety Regulation, ANU, available at <<http://www.ohs.anu.edu.au/>>.

70 Foster, op. cit. (2006a), n. 40, pp. 107–10.

unions have continued to argue for 'a vigorous system of enforcement aimed at industry compliance with the current legislation'.⁷¹

This in turn has generated a strong reaction from mining companies, managers, and other statutory position holders who suggest that prosecution should be reserved for a 'small minority of rogues' which they equate with the reckless and willful. At the time of writing, their political campaign to weaken the existing legal provisions and to overturn the current prosecution policy, has been gaining considerable momentum. A number of employer groups have launched strong attacks on current OHS laws and their enforcement. In 2007 the then Prime Minister, John Howard, wrote to State Premiers on the matter⁷² and the New South Wales government has set up an inquiry to examine contemplated changes to the OHS Act 2000 which would dilute the employers' duty of care and the obligations of company officers. In response the CFMEU has asserted that such changes would generate a 'race to the bottom' and accused Howard of pushing for 'lowest common denominator' standards.⁷³

Against this backdrop, what options are available? It has been argued that responsive regulation has considerable virtues in nurturing trust and encouraging voluntary compliance on the part of the majority, while maintaining the law's punitive capacity at the tip of the enforcement pyramid in order to deter the recalcitrant minority. But steering a middle path between the competing objectives of trade unions and mining companies to achieve this result is a substantial challenge, and regulators frequently find themselves between a rock and a hard place. Crucially, in seeking a viable way forward, regulators confront what has been appositely termed the 'compliance trap'.⁷⁴ This comes about as follows.

In the case of contemporary OHS law, the most credible penalty is the prosecution of individual managers. While fines against corporations may be insufficient to influence their behaviour (a few hundred thousand dollars at most, to a multi-national corporation, hardly breaks the bank), the prosecution of individuals is a far more serious matter. Even if the fine is unlikely to reach six figures, it is a traumatizing and stigmatizing matter for a manager to be hauled before a criminal tribunal or court. In terms of responsive regulation, managers can be viewed as 'soft targets' who can be motivated by lesser penalties (coupled with personal stigma and shaming) than 'hard targets' (such as corporations) which are far more difficult to motivate.⁷⁵

71 A. Benmedjdoub and R. Kotevski, *The Gretley Legacy* (2004) available at <http://oj.hss.uts.edu.au/oj1/oj1_s2004/HunterValleyMining/index.htm>.

72 OHS News, 'Mine safety uniformity not a "race to the bottom": MCA' (2007) 718 *Occupational Health and Safety News*; 'Howard attacking mine safety: NSW' *Australian Financial Rev.*, 2 January 2007.

73 OHS News, id.

74 C. Parker, 'The Compliance Trap, The Moral Message in Responsive Regulatory Enforcement' (2006) 40 *Law and Society Rev.* 591–622.

75 Braithwaite, op. cit., n. 49, p. 110.

But it is the prosecution of individuals (particularly in the Gretley case) that has provoked such a massive reaction from the mining industry, which views such penalties as grossly unfair and as sending an unacceptable message about the moral seriousness of the offence and the ‘criminality’ of individual managers. And it has also promoted a political reaction: there have been demands for the dilution of OHS laws, especially the duty of care imposed on employers and provisions relating to the culpability of managers, and for a winding back of enforcement.

Parker would argue that this is precisely what one would expect, and that what has just been described is a classic example of the ‘compliance trap’. For her:

where fulsome political and moral support for the enforcement regime is lacking, then the compliance trap is set. Responsive regulators find themselves in a dilemma: [ensure effective deterrence] by making morally tough demands that may not only undermine business commitment to compliance in the longer term (because they lack political legitimacy), but also undermine their own political support (because business will respond by lobbying government to emasculate the regulatory enforcement agency). Or avoid conflict with businesses by not making any difference at all ... It is a compliance trap because it occurs only when regulators are actively seeking to improve business compliance and commitment to compliance through their enforcement activity ... It is a trap because, in the absence of external political support, there is nothing the regulator can do to escape. The regulator must either choose weakness (no compliance impact) or have weakness thrust upon it (lack of legitimacy leading to emasculation) ... The compliance trap can only be resolved politically, external to any particular enforcement encounter.⁷⁶

However, while Parker identifies an important dynamic and a difficult dilemma for any enforcement agency, is her overall conclusion too bleak? In contrast to some other contexts (including Parker’s own case study of the ASCC), the mining industry and their industry associations are not the only means of external political support for the regulator. At times, and particularly following mining disasters during the tenure of state Labor governments, the trade unions rather than the mining companies have had the ear of government ministers, at least to the extent of influencing enforcement prosecution policy (as in the Gretley case itself).

But to rely on trade unions as a counter to undue pressure from the industry would be a mistake. During the course of coal mining history in Australia, the pendulum of bargaining power has swung between management and workers largely in accordance with the rise and fall of coal markets. And each side has taken full advantage of its temporary ascendancy to impose unpalatable conditions upon the other. The cyclical nature of this phenomenon and the ‘tit-for-tat’ industrial relationship this has generated has itself exacerbated distrust between management and workers, and is likely to do so again in the future.

76 Parker, *op. cit.*, n. 74, p. 593.

Another, more constructive possibility, is to seek some middle ground in terms of prosecution policy along the lines above. Doing so would avoid the trap of signalling that breaches of workplace safety legislation are ‘not really criminal’ because the penalties imposed are trivial,⁷⁷ while at the same time avoiding prosecuting those whose culpability is so low as to be perceived by the industry to be unjust. Since many large and influential corporations have already committed themselves to substantial improvements in OHS and are striving to go ‘beyond compliance’, such a policy need not be politically unacceptable to the industry.

It may well, however, be politically unacceptable to key trade unions. This takes us to the tension between prevention and retribution.⁷⁸ While the unions demand retribution against middle-level managers guilty, at most, of sins of omission in circumstances where there is evidence that their peers, in similar circumstances, would have taken the same decision, then little progress seems possible. The way out of this dilemma may be to pursue not retribution but restorative justice,⁷⁹ in all but the most egregious cases (as regards which industrial manslaughter prosecutions or their equivalent can be appropriate in both retributive and deterrence terms).

Although this point has not yet been reached, there are both principled and pragmatic reasons why the trade unions should embrace the middle ground. In terms of the former, prevention should have a higher priority than retribution,⁸⁰ and restorative justice coupled with prevention will have a

77 See W.G. Carson, ‘Some Sociological Aspects of Strict Liability and the Enforcement of Factory Legislation’ (1970) 33 *Modern Law Rev.* 396–412.

78 The goal for those who seek retribution is not an instrumental concern to improve future OHS performance, but rather to satisfy feelings of revenge and to achieve ‘justice’ in the victim’s (or their family’s) terms: D.B. Dobbs, ‘Ending Punishment in “Punitive” Damages: Deterrence Measured Remedies’ (1989) 40 *Alabama Law Rev.* 831–917, at 844.

79 John Braithwaite argues with considerable empirical support that approaches to regulation that seek to identify important problems and fix them work better than those which focus on imposing the right punishment or ‘just deserts’. For example, beyond a very limited range of circumstances, retribution does not ‘work well’, both because it is widely perceived to be unfair and because it has counter-productive consequences for prevention. Yet, at the same time, if prevention trumps prosecution and retribution is rejected, then the legitimate concerns of victims and their families for justice may be ignored. Braithwaite recognizes this, and suggests that there is a need for others to ‘listen to the stories of our hurts’ before we can move on to solve the problem: Braithwaite, *op. cit.*, n. 50. In this view, restorative justice, ‘a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future’, shows us the practical paths for moving from healing to problem solving: Tony Marshall, quoted in Braithwaite, *id.*, p. 11.

80 The value position of this article is that the primary purpose of prosecution is preventative: to reduce the level of work-related injury and disease. Although it does not reject retribution in its entirety, it suggests that, to the extent that the two principles are in conflict, prevention should be given precedence. Those who believe that the principal role of the criminal law is retribution will likely disagree with the

substantially greater benefit to their members than retribution. In terms of the latter, trade union power is in decline, and for some time ahead at least, employer groups are far more likely to have the ear of government. If the trade unions prefer the swinging pendulum to finding the middle ground, it may swing in a direction that they will find particularly unpalatable.

Reaching this middle ground is crucial to preventative safety. As Parker points out, for pyramidal enforcement to 'work', the law must not only be just but recognized as just (or morally appropriate and democratically supported) in order for the pyramid of responsive regulation to promote compliance rather than conflict. In her view: 'This rider should be printed in capital letters on every page of every scholarly or policy-oriented discussion of responsive business regulation'.⁸¹

CONCLUSION

The role of prosecution in achieving compliance with social regulation is a highly contentious issue. Nowhere is this more so than with regard to work-related injury and death in the New South Wales mining industry. Following the Gretley disaster in 1998 the Department abandoned its previous advise and persuade approach in favour of a new, muscular prosecution policy, particularly following fatalities. It has, moreover, chosen to prosecute not just companies but also individual mine managers and other statutory duty holders.

Our fieldwork, consistent with other evidence, suggests that while a traditional advise and persuade approach can lead to a regulatory capture and a failure of enforcement, a muscular prosecution policy, particularly if it includes individuals with a low degree of culpability, can be almost equally counterproductive. Where relationships between inspectors and the regulated industry are frequent and ongoing, then trust is central to constructive relations between them, and effective inspection and enforcement depends far more on a dialogue between these stakeholders (and ideally with workers too) than it does upon the unilateral imposition of rules by the regulator on the regulated. When that relationship breaks down (as it may under an inappropriate prosecution policy), then communication ceases, information is withheld rather than shared, in-firm accident investigation, prevention, and remedial action are inhibited, and both sides retreat into a form of

analysis made in the article. Its virtue, however, is to identify principles which, if followed, will send a set of signals that deter 'bad actors' from wrongdoing without inhibiting 'good actors' – or even those capable of becoming good actors under the right circumstances – from pursuing strategies conducive to improved workplace safety and health, and of building trust in ways that are supportive of improved workplace safety.

81 Parker, *op. cit.*, n. 74, p. 617.

adversarialism that seriously impedes productive outcomes. Ultimately, the sort of responsive and pyramidal enforcement strategy that has been widely advocated becomes untenable. Thus, how law is enforced can be as important in damaging trust as it can be in nurturing it. Today, according to the New South Wales Mine Safety Review, a ‘debilitating mistrust between the members of the tripartite process’⁸² is a principal obstacle to improved OHS in the mining industry.

Trust is much easier to break down than it is to rebuild; such rebuilding is nevertheless possible, but only with the adoption of a much more nuanced and balanced enforcement policy. Such an approach would ensure that prosecution takes place even where no injury results, it would enable the inspectorate to target failures of risk management, and it would ensure that serious breaches of OHS legislation were firmly dealt with. But, crucially, it would also emphasize that prosecution should not take place in the absence of culpability and, in doing so, it would do much to restore legitimacy to the prosecution process.

But such a policy can only succeed with the acquiescence and ideally the active endorsement of key stakeholders on both sides of the industrial relations divide. Such agreement will not be easy to achieve, given the decades of bitterness and animosity that have characterized relations in the mining industry. Yet, if this middle ground is not achieved, the mines inspectorates face only two alternatives. Either they can continue to prosecute in circumstances that the industry perceives as unjust – and risk political emasculation. Or they can do as many regulators have done in the past, and engage in little more than tokenistic enforcement, bordering on regulatory capture (sometimes referred to as ‘enforcement by wet lettuce’ – as contrasted with the use of the traditional big stick). This strategy will cause no offence to powerful employer groups, but nor will it succeed in protecting workers from work-related injury, disease or death.

82 Wran and McClelland, *op. cit.*, n. 37 p. 7.