

## Chapter 8

# Restorative and Responsive Regulation of OHS

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This chapter argues for six propositions to advance a lateral approach for the restorative and responsive regulation of occupational health and safety (OHS). These propositions are as follows.

1. Very high maximum financial and other penalties are needed for OHS offences. These need only be used rarely but they need to be large enough to allow big penalty discounts for good OHS management and to pay for large bounties to workers or unions who launch successful private prosecutions.
2. Because Australians support severe punishment of OHS offenders, innovative OHS agency heads (in the manner of former Australian Competition and Consumer Commission (ACCC) Chair Allan Fels) can publicise egregious under-punished cases in ways that make successful calls for very high maximum penalties.
3. In a world of very high maximum penalties with large penalty discounts for credible OHS management, most firms can be nudged to establish credible OHS management.
4. In a world with large penalty discounts for credible OHS management, workers and unions would rarely find it lucrative to launch private prosecutions against employers with impressive OHS performance.
5. Under laws which only allow private prosecutions by unions and workers where the state OHS agency fails to take enforcement action, business would support a well

funded state OHS agency and would call them in whenever a serious breach occurred.

6. The above set of five propositions are conditions where business and OHS regulators could be expected to commit to restorative and responsive justice where business takes active responsibility for restorative justice inscribed in enforceable undertakings.

After making a case for each of these propositions in turn, I will briefly describe the kind of restorative and responsive justice they might enable. The lateral aspect of the proposal is about the connections between the propositions. A 'Naderesque' approach is seen as the path to more innovative (in Australian terms, Allan 'Felsesque') OHS enforcement. 'Naderism' and 'Felsism' are seen together as ways of securing credible sanctions that are actually used by the courts. Credible sanctions enable credible discounts for excellent OHS management and credible bounties for private enforcement. All this paradoxically opens a path to a restorative justice approach to OHS based on collaborative problem solving among employers, workers and government. In this vision, the agent that needs to think laterally in order to trigger such a set of cascading possibilities is the trade union movement. It has both the triggering capability and an interest in pulling the triggers for the six propositions as a path to enhanced relevance and union membership.

## Community support for very high maximum OHS penalties

Australians, like citizens of all other countries from which I have seen evidence on this question (Grabosky, Braithwaite and Wilson 1987), think OHS offences are very serious matters which should be very severely punished. In an Australian Institute of Criminology survey of 2551 Australians in 1986 (Grabosky, Braithwaite and Wilson 1987), the respondents thought serious OHS offences deserving of considerably more punishment than armed robbery, child-bashing, wife-bashing and burglary. Of course convicted offenders of the latter type then, as now, get much heavier punishment and are vulnerable to longer maximum prison terms than OHS offenders. Of the 14 offences rated in that survey, only stabbing a victim to death and heroin trafficking were rated as more serious. Substantial minorities of up to 32 per cent of Australians thought the

serious OHS offences should attract long prison terms. These were offences of a type which had never resulted in anyone going to prison up to that time. Most recommended fines, however. The average fine recommended for one offence that was based on a real South Australian OHS case was 200 times higher than that actually imposed by the South Australian court concerned. So why don't democratically elected governments punish OHS offences at the level the community wants?

OHS penalties are considerably higher today than they were then, although they are still much lower than in many other countries. New South Wales has the highest penalties – a maximum penalty of \$825,000 for a repeat offence by a corporation or \$550,000 for a first offence. By very high penalties, in my proposition 1 above, I am thinking of penalties that might reach \$100 million, so we might see the eight figure penalties that we now quite frequently see under the Australian *Trade Practices Act*. In the next section, I will try to tell the story of how the ACCC came to acquire such enforcement capabilities. However, the Allan Fels story is not the only one of this kind one could tell. There is also the story of Michael Carmody, the Australian Commissioner for Taxation. In the 1986 study, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies*, Grabosky and Braithwaite's (1986, p 221) multivariate analysis classified most State OHS agencies alongside the Australian Taxation Office in one of the 'token enforcer' groups. These agencies initiated a steady flow of prosecutions that led to 'derisory average penalties which can only be interpreted as a slap on the wrist' (Grabosky and Braithwaite 1986, p 226). However, the sharp end of tax enforcement has become much sharper, in comparison to OHS. In 2003 a father and son were fined a record \$53 million for tax evasion by their family business and in a separate court case ordered to repay \$9.2 million in evaded tax plus interest (*Sydney Morning Herald*, 28 June 2003). Sixty people were imprisoned for Commonwealth tax fraud in 2002 and that number is expected to be much higher for 2003. How many OHS offenders have gone to jail this year? Are there any? The most aggressive campaign of Michael Carmody has been against the non-compliance of the legal profession. We have seen the spectacle of a judge being sent down from Queensland to try a Victorian judge amid a flurry of media interest in 'white wig criminals'. The judge had had six prior tax convictions when he was appointed to the bench, something he did not disclose at the time of the appointment (*The Age*, 9 March 2001).

The problem has been worst in New South Wales where 160 barristers have been referred, by the Commissioner, for investigation with a view to criminal prosecution. In the media, this enforcement campaign has been extremely popular with the people of New South Wales and also seems to have been effective. The amount of tax paid by New South Wales barristers increased by 36 per cent in 2001 in terms adjusted to the consumer price index, compared to 1998 (Commissioner of Taxation 2001, p 61). Multi-million dollar tax penalties for Australia's richest individuals and corporations have become much more common. Mr Carmody attracted particular interest and support from the Australian community when he took Australia's richest man, without much success, right up to the High Court.

What can the political logic be of this new phenomenon of a Carmody or a Fels even taking on the most powerful media barons in Australia? Why has that not proved politically fatal for them? In 1986 Australians gave serious OHS offences more than three times the seriousness score of serious tax evasion. Yet OHS enforcers still rarely put the most rich and powerful Australians in the dock.

### Allan Fels and his merry men and women

I will tell in some detail the story of the rise of Allan Fels's fame as a slayer of corporate dragons from the perspective of a semi-insider. An argument against doing this is that it makes me appear full of my self-importance. However, for someone who writes about the significance of hope and self-efficacy in struggles to change the way we respond to powerful corporations, there is some virtue mixed up in the vice of having too much of a sense of one's self-importance. OHS enforcers tend to have an impoverished sense of their self-efficacy. If they see merit in my six-point proposal, they will tend to be devoid of any hope for the political feasibility of overcoming the resistance it would engender from powerful business interests. My colleagues in the consumer movement felt that way in 1982 about the impossibility of putting backbone into the enforcement of the *Trade Practices Act* when I became Director of the Australian Federation of Consumer Organisations (AFCO). So I tell the story as a semi-insider's account to enliven my attempt to instil hope among fatalistic thinkers about regulation. Nonetheless, I want to emphasise at the outset that my personal contribution to shaping these events was very minor indeed in comparison to all the other people I will mention in my account and a great many others who are not mentioned.

At AFCO we made it one of our campaigning priorities to highlight the abysmally infrequent and low penalties imposed by both State consumer affairs agencies and the ACCC (then the Trade Practices Commission (TPC)). The total consumer protection (Part V of the *Trade Practices Act*) penalties imposed by the Commission during its first 10 years ranged from \$500 in the lowest year to \$289,400 in its record year for total fine collections (1980-81). In the 1970s the then federal labour Attorney-General, Lionel Murphy, had put imprisonment into the *Trade Practices Act* as one of the available sanctions, but this was never used and was excised from the Act by the subsequent conservative government's Minister for Business and Consumer Affairs, John Howard. Aggregate penalties for competition (Part IV) breaches of the Act between 1974 and 1984 ranged from zero in the two lowest years to \$320,000 for the most aggressive year in the first decade of the Act. Of the recommendations in Braithwaite, Vale and Fisse's (1984) AFCO Report - increased cash fines, equity fines, corporate probation, adverse publicity orders, community service orders, enforcement training and improved resourcing of enforcement - all but equity fines have now been implemented at the ACCC and in its statute, although the last of these reforms was not put in place until 2001. The report was much discussed in the media and some of the discussion in State parliaments, such as Queensland, led to minor change - the Bjelke-Petersen government introduced almost immediate increases in cash penalties for consumer protection offences. However, nothing was happening on the federal front.

Part of the AFCO campaign for a more aggressive approach by the TPC was to lobby the Attorney-General for a consumer movement representative as a part-time Commissioner who could sit in on enforcement decision-making. After repeated rebuffs, we got our chance when two part-time Commissioners were appointed from companies that had been successfully prosecuted by the Commission. The AFCO launched its 'putting foxes in charge of the chicken coup' campaign which attracted bad publicity for the government. On the next occasion, a part-time Commissioner was appointed it was a former Australian Consumers' Association council member who AFCO had nominated to the government, Professor David Harland. A year later, I was appointed as a part-time Commissioner, which commenced a period of more than 10 years when the consumer movement had placed two of its leaders on the Commission.

While Attorney-General Gareth Evans did much to strengthen the enforcement capabilities of the Act, Prime Minister Hawke was keen to please the Business Council with the Chairman he appointed. Their nominee, Bob McComas, was a Director of Australia's largest tobacco company and was not aggressive in his enforcement of the Act. McComas' worst mistake came after a complaint from anti-tobacco groups about a Tobacco Institute advertisement arguing that inhaling passive tobacco smoke was harmless. In a considerable feat of poor judgment, McComas personally negotiated a remedial advertisement with the Tobacco Institute. (He negotiated it in a 'smoke-filled room' as the joke in the Commission went.) McComas not only had been a Director of the leading tobacco company, he became its Chairman when he left the Commission. My argument within the Commission was that McComas either should have removed himself from negotiating the remedial advertisement or at least had another Commissioner in the room from the other side of the fence, when the deal was negotiated. Moreover, the claims in the remedial advertisement he approved were still false, so he had approved a further breach of the *Trade Practices Act* in the process of supposedly enforcing it. Others in the Commission were also angry and a front-page story appeared about dissatisfaction in the Commission with the way the Chairman handled the settlement. This emboldened AFCO and Action on Smoking and Health (ASH) to launch a private action in the Federal Court that argued the Commission had approved a remedial advertisement in response to their complaint which itself was a breach of its Act. The Federal Court accepted this argument, in finding that the evidence did indicate that passive smoking was dangerous to health. The decision had a substantial national and international impact in banning smoke-filled rooms! The case was the beginning of the end for McComas with the government deciding he would not be reappointed. His successor Bob Baxt, while also a nominee of the Business Council, was a more aggressive enforcer of the Act and his successor, Allan Fels, much more aggressive again.

In the middle of McComas' term, John Wood, the Director of the Federal Bureau of Consumer Affairs, led an argument to the government that there should be a full-time trade practices Commissioner from a consumer movement background. Alan Asher, former Public Affairs Director of the Australian Consumers' Association, was appointed and later promoted to Deputy Chairman. Asher had a huge impact on enforcement thinking at the

Commission, particularly on the use of enforceable undertakings (Parker 2003a and 2003b), adverse publicity and higher penalties. The Fels-Asher team, with extremely competent support from an ACCC staff led by CEO Hank Spier, told the story to the Australian people of why specific acts of corporate misconduct were egregious and why enforcement should be much more aggressive than it had historically been. They were both good storytellers on the media. Leading consumer advocates of the period – like Robin Brown (who later worked for the Commission), Liza Carver (who later served as a part-time Commissioner) and Louise Sylvan (nominated by the government to succeed Asher as Deputy Chair) – came in behind the Commission press releases adding more zest to the story. Fels and Asher proved to have what I would call a responsive regulatory imagination. They used the spectre of the publicity and multi-million dollar fines in their big cases to motivate highly creative informal settlements and then enforceable undertakings after they were introduced in 1993 (for a discussion of this strategy at the Commission, see Parker 2003a and 2003b; Ayres and Braithwaite 1992, especially ch 1; Fisse and Braithwaite 1993). The undertakings often involved large compensation payments (in one case of \$100 million) and independent review, revision and external monitoring of trade practices compliance systems. The strategy spawned a new trade practices compliance consultancy industry and a new trade practices compliance professionalism (see Parker 2002).

Asher's appointment to the Commission, like mine, had attracted howls of protest from the business community and the financial press. In contrast, the appointment of Allan Fels was smooth, pushed by the leadership of the Australian Council of Trade Unions (ACTU) and consequently embraced by both the Prime Minister and Treasurer. It was an appointment from the other side of the big end of town and we in the consumer movement were marginal, probably irrelevant, in supporting the Fels appointment. However, Louise Sylvan in particular had been working hard at educating the ACTU leadership on why the *Trade Practices Act* was important. The consumer movement also worked with the ACTU in lobbying for a Prices Surveillance Authority, of which Fels served as Chairman before joining the ACCC, and whose staff was later absorbed into the ACCC, becoming the heart of its utilities pricing work. With ACTU leaders, I had been a member of the committee chaired by Paul Keating from the National Economic Summit that drafted the *Prices Surveillance Act*. The

consumer movement had not worked effectively with the ACTU on many things. In his early years, the backing Fels enjoyed from the ACTU, particularly his former friend Bill Kelty, was obviously much more important than the support he continued to enjoy from the consumer movement as we sung his praises to the government. Like Taxation Commissioner Carmody, Fels was generally deeply resented, even hated, by big business. Again, like Carmody, this was not politically fatal. Even after the Howard government was elected and support from the ACTU became a minus rather than a plus, Howard reappointed Fels. The political genius of Fels is that he used his initial support from the ACTU and the consumer movement, combined with his position as head of an independent statutory authority, to cultivate support through the media from small business and from ordinary Australians who saw him as their consumer champion, the only regulator with the guts to stand up to big business. Being hated by big business was popular with the Australian people. The Howard government didn't much like what Fels was doing, but he was too popular to sack. Fels's final triumph was to persuade Prime Minister Howard to include imprisonment as a sanction under Part IV of the *Trade Practices Act*. In the 1970s John Howard as Minister for Business and Consumer Affairs had taken imprisonment out of (Part V of) the Act.

Pessimists about putting backbone into enforcement capability against big business might say there is a lot of contingency in this story. Fels was not on his own. The push for effective enforcement from Alan Asher, John Wood, Liza Carver, Robin Brown and others from the consumer movement who found themselves in governmental positions was also important but this is not so contingent a story. It is a standard story of social movements infiltrating the state that is well documented in other literatures such as those on the infiltration by the women's movement to become 'femocrats' (Sawer 1990). Compared to the women's, trade union and environment movements, the consumer movement was able to infiltrate the state and influence enforcement capability while being a comparatively weak political force. The business appointees to the agency made some mistakes that the consumer movement was able to exploit. While the particular mistakes were contingencies, all actors make mistakes that non-government organisations (NGOs) can expose in the public arena. Fels was lucky to have an outstanding group of senior staff to work with. However, good leaders who do not inherit such riches can create them, as one could argue is closer to the story of Michael Carmody in taxation. Having a



degree of independence through heading a statutory authority, as opposed to answering to a minister, was doubtless an important contingency that NGOs must keep in mind with the enforcement institutions they lobby for (see Goodwin 2003).

### Ralph Nader as an alternative to Allan Fels

During those long periods when NGOs like trade unions fail to put Allan Fels-style enforcers in charge of the key OHS agencies, the best strategy is to give the agency a hard time, as in alleging they are 'putting the fox in charge of the chicken coop'. This needs Ralph Nader-like figures who not only expose the failure of the agency to honour its legislative mandate (as in the passive smoking case), but also pre-emptively expose companies' misdeeds, forcing the regulator onto an agenda that is directly reactive to the NGO's agenda. Governments can be presented with a tacit bargain by the trade union movement over OHS enforcement policy: either put an Allan Fels-type in charge of the OHS agency or we will invest in creating a Ralph Nader to discredit the work of a more benign regulator who is popular with business. The message to government is that 'you must choose between being tough and unpopular with noncompliant businesses or being benign and unpopular with us, and we will make it our business to make you unpopular with the broad mass of the people'. At the time when top appointments are made to regulators, NGOs should make this threat an explicit one. This is one kind of threat an NGO can make with greater credibility than can business. It can be made with greater credibility in a country like Australia than in larger economies that have larger numbers of Nader-like figures competing for media attention. And for the same reason it can be more easily done at the State level than at the national level. Australian NGOs generally get more done by mostly working with governments and business to shape policy. So the thoroughly combative Nader-like niche is not such a crowded one that there is a shortage of media interest when an NGO jumps into it from time to time. An attractive social movement strategy in the Australian context is to organise splinter NGOs that are 'hard cops', attacking the collaboration with governments of 'soft cop' NGOs.

### Tough enforcement and compliance systems

Imposing bigger penalties delivers no guarantee that companies will protect themselves from them with corporate compliance systems. The agency must give signals that in deciding whether to prosecute, serious account will be taken of the existence and quality of their compliance program. These signals were explicitly part of the Fels/Asher strategy in *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076, French J, a former ACCC part-time Commissioner, explicitly indicated that compliance programs would be taken into account in the process of his court handing down penalties, a decision vindicated by subsequent ACCC cases before the courts which emphasised that penalty discounts would depend on the quality of compliance programs (see Parker 1999; Parker 2002, pp 249-50).

The next part of the strategy was to negotiate softer settlements with companies that had broken the law when they undertook to move the state of the art of implementing trade practices compliance systems to a new level of rigour. With the assistance of ACCC insiders like Bill Dee and business and law firm outsiders like Brent Fisse, Asher nurtured the creation of the organisations and professionals that came to be the heart of the Australian Compliance Institute (a number of whose member compliance consultants are former ACCC staffers) and the Society of Consumer Affairs Professionals in Business (where John Wood was the consumer movement leader who played a catalytic role). These built trade practices compliance professionalism in Australia and helped build a pool of the professionally competent to assist companies with compliance programs.

While OHS lags behind competition and consumer policy in the sanction capabilities available to it, with respect to OHS professionalism it is ahead of the game. Training in OHS compliance systems is well developed, so there is no need to create it from scratch in the way there was with trade practices compliance. It is just a matter of the regulatory agency increasing explicit demand for the use of OHS management consultancies in the aftermath of major problems and as an expectation if companies wish to avert future prosecutions.

### Private prosecutions

Gunningham and Johnstone (1999, p 335) argue that 'OHS prosecutions might be initiated by parties affected by poor OHS

management (for example, trade unions and public interest groups) if the OHS agency does not, and if the alleged contravention falls within the OHS agency's prosecution guideline'. My suggestion is to make this policy more aggressive by not only allowing it but encouraging it, by enabling private parties who launch successful prosecutions to claim a healthy proportion (say half) the very large fines available under my proposal. On the other hand, I would make the private prosecution policy more restrictive by barring it if the OHS agency takes any enforcement action consistent with its enforcement policy even if that is not a prosecution. So if the OHS agency takes the restorative justice route and successfully negotiates an enforceable undertaking that is credible to the court in terms of the agency's published enforcement policy, then the court would strike down the private prosecution. The idea of this is to give the firm an incentive to call in the OHS agency and start negotiating an enforceable undertaking that is credible in order to fend off private prosecutions. Of course, this will backfire for the firm when the OHS agency decides to reject all leniency and prosecute with the full force of its powers. When there are large sentence discounts for internal management systems, the credibility of which has been regularly certified by independent outside auditors, having such systems in place is another way of staving off private prosecutions. The large sentence discount makes the private prosecution less economic because of the discounted recovery but also less likely to succeed because of the greater difficulty of proving that a corporation has a culture of OHS recklessness when there exist audit reports that independently testify to the contrary.

In the large firm sector where OHS inspections are frequent, private prosecutions can be a check and balance on capture of the regulator. As in the passive smoking case at the McComas TPC, an important motivation in taking the risks of large legal costs from a private action is the desire to expose a captured regulator and thereby create the conditions for the appointment of more aggressive enforcers of the law. In the small firm, outwork and underground sectors, the value of private prosecutions is to create some deterrence in conditions where neither regular OHS inspections nor OHS management systems are likely to be operative. In the conditions of our contemporary deregulated labour market, it might make sense to make multi-pronged union legal attacks on lawless firms in these sectors viable by also allowing for private prosecutions and treble damages for underpayment of minimum wages, absence of workers compensation insurance and other breaches of all labour laws.

A structural analysis of such robust private prosecution capability is that it might attract union litigation not so much to make money as to spearhead unionisation pushes in workplaces, where the costs of this might be fully or partially funded by the treble damages from the legal actions. The other side of the structural analysis is that it would create conditions where employers actually lobby for the resourcing of government inspectorates to displace 'rogue' union enforcers.

### Tripartite restorative and responsive justice

From a restorative justice perspective, there can be virtue in allowing private prosecutions. Restorative justice is partly about empowering victims in criminal justice and qualifying historically recent state monopolies of enforcement. It is restorative justice thinking in German criminal law, for example, that sees today's rape trials often with two prosecutors present – one representing the state, the other the victim (often funded by state legal aid). Restorative justice philosophy is about equal consideration for the justice claims of defendants, victims and communities affected by the alleged crime.

With OHS, the idea of the state, workers and employers all being able to take credible enforcement action against each other is that each will display an enforcement pyramid to the others that will motivate all to sit together in the restorative justice circle to engage in a genuine way with conversational regulation (Black 1997 and 1998). The state displays a hierarchy of state enforcement actions that might range from improvement notices to mandating the preparation of a safety case, to prosecution and deregistration and a good many things in between. There is virtue in workers having more rungs in their enforcement pyramids than go-slows, work-to-rules and stop-work meetings, with private prosecutions as a less draconian possibility before resorting to a fully fledged strike. Employers have the most subtle range of enforcement tools, from reprimands to reassignment to less attractive tasks, withholding bonuses or promotions, up to dismissal. Both NGOs (like unions) and employers also have a range of ways they can regulate the state. Enforcing the Nader strategy discussed in the last section is an example of how NGOs can regulate the state, just as big business complaining to the Prime Minister about the need to trim Alan Asher's wings is one of their regulatory strategies.

The more clear it is that business, NGOs and government all have quite a range of escalatory options to deploy against the other two, the more sense it makes for the three to sit down together and see if they can discover a path to a win-win-win solution. In *Responsive Regulation*, Ayres and Braithwaite (1992, especially ch 3) argue that the logic of tripartite responsive regulation is that it creates incentives for dialogic problem-solving, as opposed to punitive regulation. The paradox of the pyramid is that capability to escalate to really severe sanctions is necessary to motivate restorative justice at the base of the pyramid.

Restorative justice means a process where all the stakeholders in an alleged injustice have an opportunity to discuss its consequences and what might be done to right the wrong. It is about sitting in the circle discussing who has been hurt, and then the victim being able to describe in their own words how they are coping with the hurt and what they are looking for to repair that harm and prevent this from happening again. It is about the virtue of active responsibility as opposed to the passive responsibility of holding someone responsible for what they have done in the past (Braithwaite 2002). Active responsibility means taking responsibility for putting things right in the future. So a common strategy in preparing for a restorative justice conference is to encourage everyone before the conference to think of any ways they might be willing to own a bit of responsibility for the past by offering to do something to make things better for the future.

Often restorative justice conferences break down because no-one wants to own responsibility. When that happens, the skilled facilitator of a business regulatory conference adjourns. They then widen the circle again and again until they find someone who will accept responsibility. If an executive who was directly responsible for an OHS violation digs their heels in, claiming neither they nor the company have any responsibility, then we can widen the circle to include the executive's boss. Perhaps the boss proves to be an even tougher nut in refusing to accept any responsibility on the part of the employer. Then the circle can be widened to that person's boss or their boss. The advantage the facilitator has as the circle is widened is that statistically they are likely eventually to hit a softer target who can be motivated by shame or moral suasion to offer to take some steps to fix the problem and prevent recurrence. The disadvantage the recalcitrant offender has is that they know that the facilitator deploying this strategy is likely eventually to reach a level of the organisation where good relations with the

government over a conflict that is spinning out into something larger than it should is going to result in them being told to fix the problem at the end of the process. So why not avoid all that grief and be a constructive problem-solver up front?

So conceived, the circle is a more efficient strategy than iterated prosecutions against workers, manufacturers, suppliers, designers, franchisors, contractors, subcontractors, managers, directors (Gunningham and Johnstone 1999, p 330) to own the bit of the responsibility for what went wrong that is rightly theirs. The circle is about avoiding holding actors to totalising conceptions of responsibility: 'It was your fault, not mine'. It is about trying to create a contagion of someone starting the ball rolling by saying, 'Well I think I should take responsibility for ensuring that next time this is done, because if I had done that on this occasion, the spillage of the chemical may never have happened'. Over-determined, multiple responsibility for acting in the future to prevent what has gone wrong in the past is also the best hope for taking safety 'beyond compliance' (Gunningham and Sinclair 2002), for forging together creative problem-solving strategies that might never have been seen in a process that focuses on deciding who to single out for blame.

In criminal law, the evidence from randomised controlled trials that restorative justice prevents future crime better than courtroom prosecutions is becoming moderately strong, at least with violent offences (Braithwaite 2002; Strang and Sherman 2003). However, I have argued that this is only so, at least in some contexts, because the restorative justice circle occurs against a background of the perceived inexorability of escalation to seriously punitive justice if an offender tries to just walk away from their responsibility. So my argument in *Restorative Justice and Responsive Regulation* (Braithwaite 2002) is that restorative justice needs a regulatory pyramid, even if it is only the implicit one of a parent or teacher saying that bullying another child is not something that will be allowed to stand. The safety of the bullied child will be addressed and the harm repaired, one way or another. The parent or teacher projects an image of invincibility. They may not be sure what form escalation will take, but whatever it takes, they are not going to walk away and leave this child unprotected from bullying and the injustice of the bullying unchallenged. The attitude we should want workplace OHS inspectors to adopt to OHS abuses (whether they are from government, unions or business itself) should be no less

than that inexorable will to confront and solve the problem, and learn from it.

Learning leads to the final virtue of the restorative justice circle. The evidence is that communication problems, which often means failure to learn from the same mistake being made many times before, underlies many serious OHS violations (Braithwaite 1985). Having all the stakeholders in the circle sharing their experience of the problem in their own voice is a better way of promoting learning than having the problem reduced to legal concepts in the words of lawyers who act as mouthpieces for the stakeholders in a courtroom.

## Conclusion

We have come a long way from an Allan Fels-style media conference about some egregious wrongdoing and why stiffer and more creative sanctions are needed to deal with such matters in future. My argument is that such a high publicity strategy is the first step and creates the climate toward stakeholders wanting to jump into owning their bit of the responsibility for what happened. Restorative justice has not been subject to the rigorous experimental evaluation with OHS that we have been able to implement with common crimes in Canberra and elsewhere. Nonetheless, it does seem to hold out hope of a richer dialogue that takes us beyond compliance to genuinely insightful learning from our mistakes. In these learning circles, the state is just one stakeholder. Most of the work of repair and future prevention is done by the other stakeholders who are closer to the action. For all that, the 'Felsesque' media conference announcing the mega-penalty is suggested as the crucial enabling event for the warm and fuzzy work of restorative OHS.

## References

- Aalders, M and Wilthagen, T (1997), 'Moving beyond command and control: reflexivity in the regulation of occupational safety, health and the environment', *Law and Policy*, vol 19, no 4, pp 415-444.
- ACOSH (1988), *Occupational safety and health reform: a public discussion paper*, Advisory Council for Occupational Safety and Health, Wellington, New Zealand.
- Aminoff, S and Lindstöm, K (1981), *Effektivare former för skyddsarbetets organisation*, Skoghögskolan, Garpenberg.
- AML (1999), *Bekendtgørelse af lov om arbejdsmiljø*, Departmental order on law on the working environment, Lovbekendtgørelse nr, 784 af 11. Oktober 1999.
- Andrews, R (2003), 'Study concludes environmental management systems can boost performance, compliance', University of North Carolina, Available: <[http://www.eurekalert.org/pub\\_releases/2003-03/uonc-sce030603.php](http://www.eurekalert.org/pub_releases/2003-03/uonc-sce030603.php)> (Accessed: 3 November 2003).
- Aronsson, G (1999), 'Contingent workers and health and safety', *Work Employment and Society*, vol 15, no 3, pp 439-460.
- AS/NZS (2001), *Occupational health and safety management systems. Specification with guidance for use*, AS 4801, Standards Australia, Sydney.
- ATK (2000), *Bättre möjligheter till en bättre arbetsmiljö - om skyddsombudens informations- och kunskapsförsörjning. Behov - möjligheter - tillgång - utbud*. Arbetstagarkonsult, Stockholm.
- Australian Law Reform Commission (ALRC) (2002), *Securing compliance. Civil and administrative penalties in Australian federal legislation*, Discussion Paper 65, Commonwealth of Australia, Canberra.
- AV (1997), *Arbetarskyddsverket: Årsredovisning 1995/96*. Arbetarskyddsstyrelsen, Solna.
- AV (2001), *Ett aktivt arbetsmiljöarbete?* Rapport 2001:12, Arbetsmiljöverket, Solna.
- AV (2003a), *Uppdrag att utreda utveckling och användning av arbetsmiljöcertifiering - Slutrapport*, Arbetsmiljöverket, Solna.
- AV (2003b), *Undersökning om Systematiskt arbetsmiljöarbete*, Rapport 2003:2, Arbetsmiljöverket, Solna.
- AV (2003c), *Årsredovisning 2002*, Arbetsmiljöverket, Solna.
- Ayres, I and Braithwaite, J (1992), *Responsive regulation*, Oxford University Press, New York.
- Baggs, J, Silverstein, B and Foley, M (2003), 'Workplace health and safety regulations: impact of enforcement and consultation on workers' compensation claim rates in Washington State', *American Journal of Industrial Medicine*, vol 43, pp 483-494.



- Baker, R (1998), 'Worker education and training' in *Encyclopedia of Occupational Health and Safety*, International Labour Organisation, Geneva, pp 18.8-18.10.
- Baldwin, R and Anderson, J (2002), *Rethinking regulatory risk*, DLA/LSE, London.
- Baldwin, R and Cave, M (1999), *Understanding regulation. Theory, strategy and practice*, Oxford University Press, Oxford.
- Baldwin, R, Scott, C and Hood, C (1998), *A reader on regulation*, Oxford University Press, Oxford.
- Barron, J (2000), 'Accurate assessment of OHSMS performance: impact of auditor skills' in Pearse, W, Gallagher, C and Bluff, E (eds), *Occupational health and safety management systems. Proceedings of the first national conference*, Crown Content, Sydney, pp 125-128.
- Bartrip, P (1985), 'Success or failure? The prosecution of the early Factory Acts', *Economic History Review, Second Series*, Vol XXXVIII, pp 423-427.
- Bartrip, P and Fenn, P (1983), 'The evolution of regulatory style in the nineteenth century British factory inspectorate', *British Journal of Law and Society*, Vol 10, pp 201-222.
- Beaumont, P, Coyle, J, Leopold, J and Schuller, T (1982), *The determinants of effective joint health and safety committees*, Centre for Research into Industrial Democracy and Participation, University of Glasgow, Glasgow.
- Becker, G (1968), 'Crime and punishment: an economic approach', *Journal of Political Economy*, vol 76, pp 169-217.
- Bell, C (1996), *Time for business*, Report of the Small Business Deregulation Task Force, Department of Industry, Science and Technology, Australian Government Publishing Service, Canberra.
- Bickerdyke, I and Lattimore, R (1997), *Reducing the regulatory burden: does firm size matter?* Staff Research Paper, Industry Commission, Melbourne.
- Biggins, D and Holland, T (1995), 'The training and effectiveness of health and safety representatives' in Eddington, I (ed), *Towards Health and Safety at Work: Technical Papers of the Asia Pacific Conference on Occupational Health and Safety*, Brisbane.
- Biggins, D and Phillips, M (1991a), 'A survey of health and safety representatives in Queensland. Part 1: activities, issues, information sources', *Journal of Occupational Health and Safety - Australia and New Zealand*, vol 7, no 3, pp 195-202.
- Biggins, D and Phillips, M (1991b), 'A survey of health and safety representatives in Queensland. Part 2: comparison of representatives and shop stewards', *Journal of Occupational Health and Safety - Australia and New Zealand*, vol 7, no 4, pp 281-286.
- Biggins, D, Phillips, M and O'Sullivan, P (1991), 'Benefits of worker participation in health and safety', *Labour and Industry*, vol 4, no 1, pp 138-59.
- Black, J (1997), *Rules and regulators*, Oxford University Press, Oxford.
- Black, J (1998), 'Talking about regulation', *Public Law*, Spring, pp 77-105.
- Black, J (2001), 'Managing discretion', paper presented at the Australian Law Reform Commission Conference on *Penalties: Policies and Practice in Government Regulation*, June 2001, Sydney.
- Bluff, E (2000), 'Producing risks: creating safety - how is product safety addressed in management systems?' in Pearse, W, Gallagher, C and Bluff, E (eds), *Occupational health and safety management systems. Proceedings of the first national conference*, Crown Content, Sydney, pp 101-121.
- Bluff, E (2003), *Systematic management of occupational health and safety*, Working Paper 20, National Research Centre for Occupational Health and Safety Regulation, Australian National University.
- Bluff, E and Johnstone, R (2003), 'Infringement notices: stimulus for prevention or trivialising offences?', *Journal of Occupational Health and Safety - Australia and New Zealand*, vol 19, no 4, pp 337-346.
- Boden, L, Hall, J, Levenstein, C and Punnett, L (1984), 'The impact of health and safety committees', *Journal of Occupational Medicine*, vol 26, no 11, pp 829-834.
- Bohle, P and Quinlan, M (2000), *Managing occupational health and safety: a multi-disciplinary approach*, Macmillan, Melbourne.
- Bohle, P, Quinlan, M and Mayhew, C (2001), 'The health and safety effects of job insecurity: an evaluation of the evidence', *economic and labour relations review*, vol 12, no 1, pp 32-60.
- Boix, P and Vogel, L (1999), *Risk assessment at the workplace - a guide for union action*, TUTB, Brussels.
- Braithwaite, J (1985), *To punish or persuade: enforcement of coal mine safety*, State University of New York Press, Albany.
- Braithwaite, J (1993), 'Responsive business regulatory institutions' in Coady, C and Sampford, C (eds), *Business Ethics and the Law*, Federation Press, Sydney.
- Braithwaite, J (2002), *Restorative justice and responsive regulation*, Oxford University Press, New York.
- Braithwaite, J and Geis, G (1982), 'On theory and action for corporate crime control', *Crime and Delinquency*, vol 28, pp 282-302.
- Braithwaite, J and Makkai, T (1991), 'Testing an expected utility model of corporate deviance', *Law and Society Review*, vol 25, pp 7-40.
- Braithwaite, J, Vale, S and Fisse, B (1984), *The role of prosecution in consumer protection*, Australian Federation of Consumer Organisations, Canberra.
- Brooks, A (1988), 'Rethinking occupational health and safety legislation', *Journal of Industrial Relations Society of Australia*, vol 30, pp 347-362.
- BSI (1999), *Guide to occupational health and safety management systems*, BS 8800, British Standardisation Institution, London.
- Bureau of Labor Statistics (1995), *New data on contingent and alternate employment*, Report 900, US Department of Labor, Washington DC.

- Burgess, J and de Ruyter, A (2000), 'Declining job quality in Australia: another hidden cost of unemployment', *Economic and Labour Relations Review*, vol 11, no 2, pp 246-269.
- Buultjens, J (1994), 'Labour market deregulation: does small business care?', *International Journal of Employment Studies*, vol 2, no 1, pp 133-157.
- Campbell, I and Burgess, J (2001), 'Casual employment in Australia and temporary employment in Europe: developing a cross national comparison', *Work, Employment and Society*, vol 15, no 1, pp 171-184.
- Carson, WG (1970), 'White collar crime and the enforcement of factory legislation', *British Journal of Criminology*, vol 10, pp 383-398.
- Carson, WG (1979), 'The conventionalisation of early factory crime', *International Journal of the Sociology of Law*, vol 7, pp 37-60.
- Carson, WG (1980), 'The institutionalisation of ambiguity: early British Factory Acts' in Geis, G and Stotland, E (eds), *White collar crime: theory and research*, Sage, London.
- Carson, WG, Henenberg, C and Johnstone, R (1990), *Victorian occupational health and safety: an assessment of law in transition*, The La Trobe/ Melbourne Occupational Health and Safety Project, Department of Legal Studies, La Trobe University, Melbourne.
- Carson, WG and Johnstone, R (1990), 'The dupes of hazard: occupational health and safety and the Victorian sanctions debate', *Australian and New Zealand Journal of Sociology*, vol 26, no 1, pp 126-141.
- Castells, M (1996), *The rise of network society*, Blackwell, Oxford.
- CCH (2002a), *Latest OHS Headlines*, 7 June 2002.
- CCH (2002b), *OHS Alert*, 22 August 2002.
- Centre for Corporate Accountability/UNISON (2002), *Safety last? The under-enforcement of health and safety law*, UNISON, Centre for Corporate Accountability, London.
- Coglianese, C and Lazar, D (2002), 'Management-based regulatory strategies' in Donaghue, J and Nye, J (eds), *Market-based governance*, Brookings, Washington DC, pp 201-224.
- Coglianese, C and Lazar, D (2003), 'Management-based regulation: prescribing private sector management to achieve public goals', forthcoming in *Law and Society Review*.
- Coglianese, C and Nash, J (eds) (2000), *Regulating from the inside*, RFF, Washington DC.
- Coglianese, C, Nash, J and Olmstead, T (2002), *Performance-based regulation: prospects and limitations in health, safety and environmental protection*, Regulatory Policy Program Report No RPP-03, Harvard University, Cambridge, Massachusetts.
- Cohen, H and Cleveland, R (1983), 'Safety programs in record-holding plants', *Professional Safety*, March, pp 26-32.
- Cole, T (2003), *Final report of the Royal Commission into the building and construction industry reform - occupational health and safety*, Volume 6, Commonwealth of Australia, Canberra.
- Commissioner of Taxation (2001), *Annual Report*, Australian Taxation Office, Canberra.
- Cooke, W and Gautschi, F (1980), 'OSHA plant safety programs and injury reduction', *Industrial Relations*, vol 20, no 1, pp 245-257.
- Cullen, L (1990), *The public inquiry into the Piper Alpha disaster*, Department of Energy, London.
- Dalrymple, H, Redinger, C, Dyjack, D, Levine, S and Mansdorf, Z (1998), *Occupational health and safety management systems. Review and analysis of international, national and regional systems and proposals for a new international document*, IOHA Report to International Labour Organisation, ILO, Geneva.
- Dawson, S, Willman, P, Clinton, A and Bamford, M (1988), *Safety at work: the limits of self-regulation*, Cambridge University Press, Cambridge.
- Dedobbeleer, N, Champagne F and German, P (1990), 'Safety performance among union and non-union workers in the construction industry', *Journal of Occupational Medicine*, vol 32, no 11, pp 1099-1103.
- De Grip, A, Hoevenberg, J and Williams, E (1997), 'Atypical employment in the European Union', *International Labour Review*, vol 136, no 1, pp 49-71.
- Diamond, W and Freeman, R (2001), *What workers want for workplace organisations: a report to the TUC's promoting trade unionism task group*, Trade Union Congress, London.
- Di Mento, J (1986), *Environmental law and American business: dilemmas of compliance*, Plenum Press, New York.
- Dorman, P (2000), 'If safety pays, why don't employers invest in it?' in Frick, K, Jensen, PL, Quinlan, M and Wilthagen, T (eds), *Systematic occupational health and safety management. Perspectives on an international development*, Pergamon, Oxford.
- Dotson, K (1996), 'An international safety and health measurement strategy: corporate programs, systems and results', *Journal of Occupational Health and Safety - Australia and New Zealand*, 12, pp 669-678.
- Eakin, J (1992), 'Leaving it up to the workers: sociological perspective on the management of health and safety in small workplaces', *International Journal of Health Services*, vol 22, no 4, pp 689-704.
- Eakin, J, Lamm, F and Limborg, H (2000), 'International perspectives on the promotion of health and safety in small workplaces' in Frick, K, Jensen, PL, Quinlan, M and Wilthagen, T (eds), *Systematic occupational health and safety management. Perspectives on an international development*, Pergamon, Oxford, pp 227-247.
- EEC (1989), 'Council directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work', *Official Journal*, L 183, 29/06/1989, pp 1-8.

- EFILWC (1997), *The social implications of telework*, European Foundation for the Improvement of Living and Working Conditions, Dublin.
- EFILWC (2001), 'For a better quality of work', conference summary for *European Union Presidency Conference*, Brussels 20-21 September 2001, European Foundation for the Improvement of Living and Working Conditions, Dublin.
- ENDS (1999a), *New environmental management models for SMEs*, Environmental Data Services Report 290, ENDS, London.
- ENDS (1999b), *DTI study identifies barriers to small firms uptake of EMS*, Environmental Data Services Report 299, ENDS, London.
- Engman, C (2003), *Regulating the psychosocial issues in changing work situations*, Working Paper 17, National Research Centre for Occupational Health and Safety Regulation, Australian National University, Canberra.
- ENSR (1999), *Fifth annual report of the European observatory for small and medium-sized enterprises*, Report to the European Commission DGXXIII, ENSR and EIM, Small Business Research and Consultancy, Netherlands.
- Environment Task Force (1998), *A benchmarking study of pollution prevention planning: best practices, issues and implications for public policy*, White Paper for The Business Roundtable, Washington DC, Available: <[www.brtable.org](http://www.brtable.org)> (Accessed: 3 November 2003).
- Eriksson, O (2003), *Plan för utvärdering av utvecklingsprogrammet ARNE*, Ove Eriksson, VUS, Arbetsmiljöverket, Solna.
- European Agency for Safety and Health at Work (1999), 'Health and safety at work - a question of costs and benefits?', *Magazine of the European Agency for Safety and Health at Work*, no 1, online at <<http://agency.osha.eu.int>>.
- European Agency for Safety and Health at Work (2002), *Research on work and health: research on changing world of work*, Working Paper of European Agency for Safety and Health at Work, Bilbao.
- European Foundation (2002), *Working conditions in the acceding and candidate countries*, European Foundation for the Improvement of Living and Working Conditions, Dublin.
- Fenn, P and Ashby, S (2001), *Workplace risk, establishment size and union density: new evidence*, Centre for Risk and Insurance Studies, Nottingham University Business School, Nottingham.
- Ferrie, J (1999), 'Health consequences of job insecurity' in Ferrie, J, Marmot, M and Ziglio, E (eds), *Labour market changes and job insecurity: a challenge for social welfare and health promotion*, WHO Regional Publications, European Series No 81, Geneva.
- Fisse, B (1994), 'Individual and corporate criminal responsibility and sanctions against corporations' in Johnstone, R (ed), *Occupational health and safety prosecutions in Australia: overview and issues*, Centre for Employment and Labour Relations Law, The University of Melbourne, Melbourne, pp 100-109.
- Fisse, B and Braithwaite, J (1993), *Corporations, crime and responsibility*, Cambridge, Sydney.
- Foliente, G (2000), 'Developments in performance-based building codes and standards', *Forest Products Journal*, vol 50, no 7/8, pp 12-21.
- Fox, R (1995a), *Criminal justice on the spot: infringement penalties in Victoria*, Australian Institute of Criminology, Canberra.
- Fox, R (1995b), 'Infringement notices: time for reform', *Trends and Issues in Criminal Justice*, no 50, pp 1-6.
- Franchise Council of Australia (2003), 'Facts at a glance', Available: <<http://www.franchise.org.au>> (Accessed: 3 November 2003).
- Freiberg, A (2002), 'Bayonets, tigers and other enforcement dilemmas', *Achieving Compliance Through Strategic Enforcement*, National Road Transport Commission, Gold Coast, Queensland.
- Frick, K (1979), *Workers' protection in small manufacturing companies*, Arbetsarskyddnamnden, Stockholm.
- Frick, K (1994), *Från sidovagn till integrerat arbetsmiljöarbete - arbetsmiljöstyrning som ett ledningsproblem i svensk industri*, FFA and Arbetslivscentrum, Stockholm.
- Frick, K (1995), *Reconciling the divergent goals of high productivity and occupational health and safety. The Swedish Working Life Fund's integration of work environment and industrial policies*, Working Paper, National Institute for Working Life, Stockholm.
- Frick, K (1996), 'Enforced voluntarism - purpose, means and goals of systems control', Workshop on Integrated Control/Systems Control, Dublin, pp 29-30.
- Frick, K (1997), 'Can managers see any profit in health and safety? - Contradictory views and their penetration into working life', *New Solutions - A Journal of Environmental and Occupational Health Policy*, vol 7, no 4, pp 32-40.
- Frick, K (2002), 'Sweden: occupational health and safety management strategies from 1970-2001' in Walters, D (ed), *Regulating health and safety management in the European Union*, PIE Peter Lang, Brussels.
- Frick, K (2004), 'EU's legal standard on risk assessment' in Karwowski, W (ed), *Handbook of standards and guidelines in ergonomics and human factors*, Lawrence Erlbaum Publishers, Mahwah, New Jersey (unpaginated).
- Frick, K, Jensen, PL, Quinlan, M and Wilthagen, T (2000), 'Systematic occupational health and safety management - an introduction to a new strategy for occupational safety, health and wellbeing' in Frick, K, Jensen, PL, Quinlan, M and Wilthagen, T (eds), *Systematic occupational health and safety management. Perspectives on an international development*, Pergamon, Oxford, pp 1-14.
- Frick, K, Sigala, F and Sundström-Frisk, C (1996), *Comparisons of the results of the surveys of LO RSRs*, National Institute for Working Life, Sweden.

- Frick, K and Walters, D (1998), 'Worker representation on health and safety in small enterprises: lessons from a Swedish approach', *International Labour Review*, vol 137, no 3, pp 367-390.
- Frick, K and Wren, J (2000), 'Reviewing occupational health and safety management. Multiple roots, diverse perspectives and ambiguous outcomes' in Frick, K, Jensen, PL, Quinlan, M and Wilthagen, T (eds), *Systematic occupational health and safety management. Perspectives on an international development*, Pergamon, Oxford, pp 17-42.
- Gaines, J and Biggins, D (1992), 'A survey of health and safety representatives in the Northern Territory', *Journal of Occupational Health and Safety - Australia and New Zealand*, vol 8, no 5, pp 421-428.
- Gall, G (ed) (2003), *Union organising: campaigning for trade union recognition*, Routledge, London.
- Gallagher, C (1997), *Health and safety management systems: an analysis of systems types and effectiveness*, National Key Centre for Industrial Relations, Monash University, Melbourne.
- Gallagher, C, Underhill, E and Rimmer, M (2001), *Occupational health and Safety management systems. A review of their effectiveness in securing healthy and safe workplaces*, National Occupational Health and Safety Commission, Sydney.
- Gallagher, C, Underhill E and Rimmer, M (2003), 'Occupational health and safety management systems in Australia: promise and reality', *Policy and Practice in Health and Safety*, vol 1, no 2, pp 67-81.
- Gallie, D (2003), 'The quality of working life: is Scandinavia different?', *European Sociological Review*, vol 19, no 1, pp 61-79.
- Gaupset, S (2000), 'The Norwegian internal control reform' in Frick, K, Jensen, PL, Quinlan, M and Wilthagen, T (eds), *Systematic occupational health and safety management. Perspectives on an international development*, Pergamon, Oxford, pp 329-348.
- Glendon, I (1995), 'Risk management in the 1990s: safety auditing', *Journal of Occupational Health and Safety - Australia and New Zealand*, vol 11, no 6, pp 569-575.
- Glendon, I and Booth, R (1995), 'Risk management for the 1990s: measuring management performance in occupational health and safety', *Journal of Occupational Health and Safety - Australia and New Zealand*, vol 11, no 6, pp 559-565.
- Glendon, I and McKenna, E (1995), *Human safety and risk management*, Chapman and Hall, London.
- Goldenhar, L, La Montagne, A, Katz, T, Heaney, C and Landsbergis, P (2001), 'The intervention research process in occupational safety and health: an overview from the National Occupational Research Agenda Intervention Effectiveness Research Team', *Journal of Occupational and Environmental Medicine*, vol 43, no 7, pp 616-622.
- Goodwin, M (2003), *The great wage robbery: enforcement of minimum labour standards in Australia*, PhD Dissertation, Faculty of Economics, University of New South Wales, Sydney.
- Gospel, H and Wood, S (2002), *Representing workers: union recognition and membership in Britain*, Routledge, London.
- Grabosky, P and Braithwaite, J (1986), *Of manners gentle: enforcement strategies of Australian business regulatory agencies*, Oxford University Press, Melbourne.
- Grabosky, P, Braithwaite, J and Wilson, P (1987), 'The myth of community tolerance toward white-collar crime', *Australian and New Zealand Journal of Criminology*, vol 20, pp 33-44.
- Gray, WB (1996), *Construction and analysis of BLS-OSHA matched data: final report*, US Department of Labor, Washington DC.
- Gray, WB, and Mendeloff, J (2002), *The declining effects of OSHA inspections on manufacturing injuries: 1979 to 1998*, National Bureau of Economic Research, Massachusetts.
- Gray, WB and Scholz, JT (1990), 'OSHA enforcement and Workers' Injuries: A Behavioural Approach to Risk Assessment' *Journal of Risk Assessment*, vol 3, pp 283-305.
- Gray, WB and Scholz, JT (1991), 'Analysing the equity and efficiency of OSHA enforcement', *Law and Policy*, vol 3, no 3, pp 185-214.
- Gray, WB and Scholz, J (1993), 'Does regulatory enforcement work? A panel analysis of OSHA enforcement', *Law Society Review*, vol 27, pp 177-213.
- Grunberg, L (1983), 'The effects of the social relations of production on productivity and workers' safety', *International Journal of Health Services*, vol 13, no 4, pp 621-634.
- Gun, R (1992), 'Regulation or self-regulation: is Robens-style legislation a formula for success?', *Australian and New Zealand Journal of Occupational Health and Safety*, vol 8, no 5, pp 383-388.
- Gunningham, N (1984), *Safeguarding the worker. Job hazards and the role of the law*, Law Book Company, Sydney.
- Gunningham, N (1987), 'Negotiated non-compliance: a case study of regulatory failure', *Law and Policy*, vol 9, no 1, pp 69-95.
- Gunningham, N (1996), 'From compliance to best practice in OHS: the roles of specification, performance and systems-based standards', *Australian Journal of Labour Law*, vol 9, no (3), pp 221-246.
- Gunningham, N and Johnstone, R (1999), *Regulating workplace safety - systems and sanctions*, Oxford University Press, New York.
- Gunningham, N, Kagan, R and Thornton, D (2003), *Shades of green: business, regulation and environment*, Stanford University Press, California.
- Gunningham, N, and Sinclair, D (2002), *Leaders and laggards: next generation environmental regulation*, Greenleaf Publishing, Sheffield.
- Gunningham, N, Sinclair, D and Burritt, P (1998), *On-the-spot fines and the prevention of injury and disease - the experience of Australian workplaces*, National Occupational Health and Safety Commission, Sydney.
- Gustavsen, B (1980), 'Improving the work environment: a choice of strategy', *International Labour Review*, Vol 119, pp 271-286.



- Gustavsen, B and Hunnius, G (1981), *New patterns of work reform: the case of Norway*, University Press, Oslo.
- Haddon, W (1996), 'The basic strategies for reducing damage from hazards of all kinds', *Hazard Prevention*, Sept-Oct, pp 8-12.
- Hahn, R (ed) (1996), *Risks, costs and lives saved: getting better results from regulation*, Oxford University Press, Washington DC.
- Haines, F (1997), *Corporate regulation: beyond 'punish or persuade'*, Clarendon Press, Oxford.
- Hale, A and Hovden, J (1998), 'Management and culture: the third age of safety. A review of approaches to organisational aspects of safety, health and environment' in Feyer, A and Williamson, A (eds), *Occupational injury. Risk prevention and intervention*, Taylor and Francis, London.
- Hale, A, Heming, B, Carthey, J and Kirwan, B (1997), 'Modelling of safety management systems', *Safety Science*, vol 26, no 1-2, pp 128-130.
- Hall, P (1988), *Employment injuries in workers of non-English speaking background 1982-1985*, Statistical Analysis Information Paper No 15, Department of Industrial Relations and Employment, Sydney.
- Hämäläinen, R, Husman, K, Räsänen, K, Westerholm, P and Rantanen, J (2001), *Survey of the quality and effectiveness of occupational health services in the European Union and Norway and Switzerland*, Finnish Institute of Occupational Health, Helsinki.
- Harms-Ringdahl, L (2001), *Safety analysis - principles and practice in occupational safety*, Taylor and Francis, London.
- Haslam, S, James J, Bennett, D (1998), *Developing proposals on how to work with intermediaries*, HSE Contract Research Report 185/1998, HSE Books, Sudbury.
- Havlovic, S (1991), 'Safety committees and safety education in reducing the risk of death: the experience of the British Columbia logging industry (1940-1989)' in Carth, D (ed), *Proceedings of the 28th Conference of the Canadian Industrial Relations Association*, IRC press, Kingston, pp 403-407.
- Havlovic, S and McShane, S (1997), *The effectiveness of joint health and safety committees and safety training in reducing fatalities and injuries in British Columbia forest product mills*, Burnaby: Workers Compensation Board of British Columbia, British Columbia.
- Hawkins, K (1984), *Environment and enforcement: regulation and the social definition of pollution*, Clarendon Press, Oxford.
- Hawkins, K (2002), *Law as a last resort: prosecution decision-making in a regulatory agency*, Oxford University Press, Oxford.
- Health and Safety Commission (2002), *Enforcement policy statement*, Health and Safety Executive, London.
- Hedegaard Riis, A and Jensen, PL (2002), Denmark: transforming risk assessment to workplace assessment in Walters, D (ed), *Regulating health and safety management in the European Union: a study of dynamic change*, Peter Lang, Brussels.
- Henriques, U (1979), *Before the welfare state: social administration in early industrial Britain*, Longmans, London.
- Hillage, J, Kersley, B, Bates, P, and Rick, J (2000), *Workplace consultation on health and safety*, CRR 268/2000, HSE Books, Sudbury.
- Hipple, S (2001), 'Contingent work in the late-1990s', *Monthly Labour Review*, vol 124, no 3, pp 3-27.
- Hopkins, A (1995), *Making safety work - getting management commitment to occupational health and safety*, Allen and Unwin, Sydney.
- Hopkins, A (2000), *Lessons from Longford: the Esso gas plant explosion*, CCH Australia Ltd, Sydney.
- Hovden, J and Jensen, PL (1989), 'Intern kontrol i Norden - status, perspektiver og forskningsbehov', Sintef, Trondheim, Norway.
- HSE (1997a), *Successful health and safety management*, HSG 65, Health and Safety Executive, Sudbury.
- HSE (1997b), *The costs of accidents at work*, Health and Safety Executive, HSE Books, Sudbury.
- HSE (1999), *Five steps to risk assessment*, Health and Safety Executive, HSE Books, Sudbury.
- HSE (2002), *Enforcement management model*, Health and Safety Executive, London.
- HSE (2003), 'Organisational change and major accident hazards', Health and Safety Executive information sheet, Health and Safety Executive, London.
- Hutter, B (1988), *The reasonable arm of the law? The law enforcement procedures of environmental health officers*, Clarendon Press, Oxford.
- Hutter, B (1989), 'Variations in regulatory enforcement styles', *Law and Policy*, vol 11, no 2, pp 153-174.
- Hutter, B (1997), *Compliance: regulation and enforcement*, Clarendon Press, Oxford.
- Hutter, B (2001), *Regulation and risk: occupational health and safety on the railways*, Oxford University Press, Oxford.
- ILO (1996), *The role of labour inspection in transition economies*, International Labour Organisation, Geneva.
- ILO (2001), *Guidelines on occupational safety and health management systems*, International Labour Office, Geneva.
- Industry Commission (1995), *Work, health and safety. Inquiry into occupational health and safety*, Volume I Report and Volume II Appendices, Report No 47, AGPS, Canberra.
- Isaac, J (1993), *Small business and industrial relations: some policy issues*, Centre for Industrial Relations and Labour Studies, Melbourne.
- ISO (2000), *Standard for quality management systems - requirements*, ISO 9001, ISO, Geneva.
- James P and Walters, D (1997), 'Non-union rights of involvement: the case of health and safety at work', *Industrial Law Journal*, vol 26, pp 35-50.
- James, P and Walters, D (1999), *Regulating health and safety: the way forward*, Institute of Employment Rights, London.

- Jensen, PL (1997), 'Can participatory ergonomics become 'the way we do things in this firm' - the Scandinavian approach to participatory ergonomics', *Ergonomics*, vol 40, no 10, pp 1078-1087.
- Jensen, P (2001a), 'Risk assessment: a regulatory strategy for stimulating work environment activities?' *Human Factors and Ergonomics in Manufacturing*, vol 11, no 2, pp 101-116.
- Jensen, PL (2001b), 'Working environment and technological development: the Danish experience', *Human Factors and Ergonomics in Manufacturing*, vol 11, no 2, pp 81-88.
- Jensen, P (2002), 'Assessing assessment: the Danish experience of worker participation in risk assessment', *Economic and Industrial Democracy*, vol 23, no 2, pp 201-227.
- Johnson, J and Johansson, G (eds) (1991), *The psychosocial work environment: work organization, democratisation and health*, Baywood, Amityville.
- Johnstone, R (1999a), 'Paradigm crossed? The statutory occupational health and safety obligations of the business undertaking', *Australian Journal of Labour Law*, vol 12, no 2, pp 73-112.
- Johnstone, R (1999b), *Evaluation of Queensland construction safety 2000 initiative*, National Occupational Health and Safety Commission, Sydney.
- Johnstone, R (2000), 'Occupational health and safety prosecutions in Victoria: an historical study', *Australian Journal of Labour Law*, vol 13, pp 113-142.
- Johnstone, R (2003), *Occupational health and safety, courts and crime. The legal construction of occupational health and safety offences in Victoria*, Federation Press, Sydney.
- Johnstone, R (2004), *Occupational health and safety law and policy. text and materials*, 2nd edition, Law Book Company, Sydney.
- Johnstone, R, Mayhew, C and Quinlan, M (2001), 'Outsourcing risk? The regulation of OHS where contractors are employed', *Comparative Labour Law and Policy Journal*, vol 22, nos 2-3, pp 351-93.
- Kagan, R (1989), 'Editor's introduction: understanding regulatory enforcement', *Law and Policy*, vol 11, no 2, pp 89-119.
- Kagan, R and Scholz, J (1984), 'The criminology of the corporation and regulatory enforcement styles' in Hawkins, K and Thomas, J (eds), *Enforcing regulation*, Kluwer-Nijhoff, Boston.
- Kamp, A and Le Blansch, K (2000), 'Integrating management of OHS and the environment - participation, prevention and control' in Frick, K, Jensen, PL, Quinlan, M and Wiltzagen, T (eds), *Systematic occupational health and safety management - perspectives on an international development*, Pergamon, Oxford, pp 413-436.
- Karageorgiou, A, Jensen, PL, Walters, DR and Wiltzagen, T (2000), 'Risk assessment in four member states of the European Union' in Frick, K, Jensen, PL, Quinlan, M and Wiltzagen, T (eds), *Systematic occupational health and safety management*, Pergamon, Oxford, pp 251-284.
- Kitay, J and Sutcliffe, P (1989), 'Employers and employment relations in small business in Australia' in Bray, M and Kelly, D (eds), *Australasian Industrial Relations*, AIRAANZ, Sydney.
- Khan, R (1993), *The effect of government on small businesses*, Department of Management Systems, Massey University, Palmerston North, New Zealand.
- Kochan, T, Dyer, L and Lipsky, D (1977), *The effectiveness of union-management safety and health committees*, WE Upjohn Institute for Employment Research, Kalamazoo.
- Kuperman, K and Sutinen, J (1998), 'Blue water crime: deterrence, legitimacy and compliance in fisheries', *Law and Society Review*, vol 32, pp 309-337.
- Lamm, F (1992), 'Persuasion or coercion enforcement strategies in occupational safety and health' in Deeks, J and Perry, N (eds), *Controlling interests: business, the state and society in New Zealand*, Auckland University Press, Auckland, pp 156-176.
- Lamm, F (1997), 'Small businesses and OH&S advisors', *Journal of Safety Science*, vol 25, nos. 1-3, pp 153-161.
- Lamm, F (1999), *Occupational health and safety in Australian small businesses: what can be done to reduce the lack of awareness and raise the level of compliance in Australian small businesses*, UNSW Studies in Australian Industrial Relations, University of New South Wales, Sydney.
- Lamm, F (2002), 'Occupational health and safety in small businesses' in Lloyd, M (ed), *Occupational health and safety in New Zealand: contemporary social research*, Dunmore Press, Wellington.
- Larsson, T (1996), *Systems control development in Sweden*, A paper presented at the Workshop on Integrated Control/Systems Control, Dublin.
- Larsson, T (2000), 'The diffusion of employer responsibility' in Frick, K, Jensen, PL, Quinlan, M and Wiltzagen, T (eds), *Systematic occupational health and safety management. Perspectives on an international development*, Pergamon, Oxford, pp 119-226.
- Larsson, T and Clayton, A (1994), *Insurance and prevention - some thoughts on social engineering i relation to externally caused injury and disease*, IPSO-Factum 46, Arbetsmiljöfonden & Folksam, Stockholm.
- Legislative Council Standing Committee on Law and Justice (1998), *Final report of inquiry into workplace safety*, Parliament of New South Wales, Sydney.
- Lehman, S (2001), 'Partnership with intermediaries in OSH - a chance to reach SMEs', *Proceedings of the 2nd European ENWHP Conference*, Lisbon.
- Le Nevez, C and Strange, L (1989), 'Delivering workplace solutions in OHS: the workers' health centre model', *Journal of Occupational Health and Safety - Australia and New Zealand*, vol 5, no 1, pp 45-52.

- Lentz, T, Okum, A, Schulte, P, and Stayner, L (1999), *Identifying high-risk small business industries: the basis for preventing occupational injury, illness, and fatality*, National Institute for Occupational Safety and Health, US Department of Health and Human Services, Washington DC.
- Levi, M (1988), *Of rule and revenue*, University of California Press, Berkeley.
- Lewchuk, W, Robb, A and Walters, V (1996), 'The effectiveness of Bill 70 and joint health and safety committees in reducing injuries at the workplace. The case of Ontario', *Canadian Public Policy*, vol 23, no 3, pp 225-243.
- Leymann, H, Hogstromm, RM, and Sundstrom-Frisk, C (1982), *Regional safety representatives: work situations and ambitions*, Undersokningsrapport, Arbetarsskyddnamnden, Stockholm.
- Lidwall, U and Skogman Thoursie, P (2001), 'Sickness absence during the last decades' in Marklund, S (ed), *Worklife and health in Sweden 2000*, National Institute for Working Life, Stockholm, pp 81-100.
- Lindøe, P (1996), *Internal control in the small business sector*, Ad Nortom, Oslo.
- Lindøe, P and Hansen, K (2000), 'Integrating internal control into management systems: a discussion based on Norwegian case studies' in Frick, K, Jensen, P, Quinlan, M and Wilthagen, T (eds), *Systematic occupational health and safety management. Perspectives on an international development*, Pergamon, Amsterdam, pp 437-455.
- Litwin, A (2000), *Trade unions and industrial injury in Great Britain*, Discussion Paper 468, Centre for Economic Performance, London School of Economics and Political Science, London.
- LO (1997), *Hur fungerar arbetsmiljöarbetet. En enkätundersökning bland LOs skyddsombud*, Landsorganisationen, Stockholm.
- Lowe, G (2001), *The quality of work: a people-centred agenda*, Oxford University Press, Don Mills ON.
- Lundberg, U and Melin, B (2002), 'Stress in the development of musculoskeletal pain' in Litton, E (ed), *New avenues for the prevention of chronic musculoskeletal pain and disability*, Elsevier, Oxford, pp 165-179.
- McCaffery, D (1983), 'An assessment of OSHA's recent effects on injury rates', *Human Resources*, vol 18, pp 131-146.
- McQuiston, T, Kakaocs, T and Loomis, D (1998), 'The case for stronger OSHA enforcement - evidence from evaluation research', *American Journal of Public Health*, vol 88, pp 1022-1024.
- Markey, R, Hodgkinson, A, Kowalczyk, J and Pomfret, S (2001), 'Gender, casualisation and employee participation in the workplace', paper presented to IIRA 6th European Congress, Oslo.
- May, P (2003), 'Performance-based regulation and regulatory design: the saga of leaky buildings', Meeting of the Law and Society Association, June 5-8, Pittsburgh, USA.
- May, P and Wood, R (2003), 'At the regulatory frontlines: inspectors' enforcement styles and regulatory compliance', *Journal of Public Administration Research and Theory*, vol 13, no 2, pp 117-139.
- Mayhew, C (1997), *Barriers to implementation of known occupational health and safety solutions in small businesses*, Division of Workplace Health and Safety and National Occupational Health and Safety Commission, Sydney.
- Mayhew, C (1999), 'Identifying patterns of injury in small businesses: piecing together the data jigsaw' in Mayhew, C and Peterson, C (eds), *Occupational health and safety in Australia*, Allen and Unwin, Sydney.
- Mayhew, C (2000), 'OHS in Australian 'micro' small businesses: evidence from nine research studies', *Journal of Occupational Health and Safety - Australia and New Zealand*, vol 16, no 4, pp 297-305.
- Mayhew, C and Quinlan, M (1997), 'The management of occupational health and safety where subcontractors are employed', *Journal of Occupational Health and Safety - Australia and New Zealand*, vol 13, no 2, pp 161-169.
- Mayhew, C and Quinlan, M (1998), *Outsourcing and occupational health and safety. A comparative study of factory-based and outworkers in the Australian TCF Industry*, Industrial Relations Research Centre, University of New South Wales, Sydney.
- Mayhew, C and Stacey, N (1997), *Occupational health arrangements in Australia. Occupational and Environmental Medicine Report*, National Institute of Occupational Health and Safety, Sydney.
- Mayhew, C, Young, C, Ferris, R and Harnett, C (1997), *An evaluation of the impact of targeted interventions on the OH&S behaviours of small building industry owners/managers/contractors*, Division of Workplace Health and Safety and National Occupational Health and Safety Commission, Sydney.
- Mendeloff, J and Gray, W (2003), 'Inside OSHA's black box: what is the link between inspections, citations, and reductions in different injury types?', paper presented at the Law and Society Association Meeting, June 2003, Pittsburgh.
- Mendeloff, J and Gray, W (2004), 'The effects of establishment and inspection characteristics on the impacts of OSHA inspections in manufacturing, 1992-1998', *Law and Society*, forthcoming.
- Merllié, D and Paoli, P (2001), *Ten years of working conditions in the European Union*, European Foundation for the Improvement of Living and Working Conditions, Dublin.
- Mitchell, D (2000), 'The challenges for mining health and safety regulators in the 21st century' in Minesafe International Conference Proceedings, *A new century, a new vision, a new direction for occupational health and safety in the international mining industry*, Minesafe International, Perth.
- MORI (2001), *Attitudes of Britain's captains of industry*, British Safety Council, London.
- Mottel, W, Long, J and Morrison, D (1995), *Industrial safety is good business - the DuPont story*, Van Nostrand Rinehold, New York.