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**REGULATION OF HEALTH AND SAFETY IN THE  
WORKPLACE: THE ROLE OF PROSECUTION AS A  
REGULATORY INSTRUMENT**

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## ***Abstract***

*The Health and Safety at Work Act 2015 has been enacted and will come into force in April 2016. The purpose of the Act is to provide a balanced framework to secure the health and safety of workers and workplaces. The Act promotes the provision of information, guidance and education and also seeks to secure compliance through effective and appropriate compliance measure, including criminal prosecution. The deterrent effect of prosecution is likely to inhibit the parties' willingness to engage in the open and transparent information sharing. This has the potential to create an unsatisfactory equilibrium in terms of achieving the regulatory goal where there is insufficient information and certainty to both comply with, and enforce, the legislation effectively. This can be addressed by the use of compliance and enforcement policies enabling regulators to take a strategic approach to the use of prosecution as a compliance tool and to signal when prosecution will be used, however the capacity for private prosecution adds an element of unpredictability for all parties.*

### *Word length*

*The text of this paper (excluding abstract, footnotes and bibliography) comprises approximately 14,000 words.*

## ***Subjects and Topics***

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Health and Safety in Employment Act  
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Sentencing Act  
Public Law  
Criminal enforcement  
Alternative enforcement tools

## I *Introduction*

The Health and Safety at Work Act 2015 (HSW Act) has recently been enacted and will come into force in April next year.<sup>1</sup> Developed in response to the Pike River tragedy, where 29 men were killed in November 2010 when there was an explosion in the underground mine at Pike River on the West Coast of New Zealand's South Island, the new law is modelled on the Australian Model Health and Safety Act.<sup>2</sup>

Proponents of health and safety reform advocated a number of changes, including: a new Act; a single focus regulator who would provide detailed guidance material to operators; stronger deterrent measures; and a modern, risk-based approach to promoting and enforcing compliance.<sup>3</sup>

While a recommendation to introduce an offence of corporate manslaughter<sup>4</sup> was not implemented, the new Act has a greater number of criminal offences with higher penalties.<sup>5</sup> These are intended to operate as a harsh deterrent to both promote compliance and punish non-compliance. They are expected to operate as part of a suite of enforcement tools to be used strategically by the regulator to achieve the purposes of the Act.

The challenges in regulating for socially valuable outcomes, such as health and safety, include striking an appropriate balance between information-gathering and enforcement. Where regulation includes criminal prosecution as an enforcement measure, this is likely to inhibit openness on the part of regulated parties and focus attention on the letter of the law. The purpose of this paper is to consider the influence of potential prosecution on the way that the Act is intended to operate.

Because a criminal conviction can result in deprivation of liberty or a significant financial penalty (or both), as well as reputational damage, the Legislation Advisory Committee cautions that the decision to create new criminal offences in legislation should not be taken lightly and criminalising behaviour should be reserved for the most egregious situations where alternative enforcement measures are not considered to be sufficient.<sup>6</sup> Similarly, the decision to prosecute in specific instances is considered to be appropriate only where there are clear breaches of the law and the public interest supports prosecution.<sup>7</sup>

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<sup>1</sup> Health and Safety at Work Act 2015, s 2

<sup>2</sup> Work Health and Safety Act 2011 C2011A00137 (Australia)

<sup>3</sup> *Report of the Royal Commission on the Pike River Coal Mine Tragedy*, (Wellington, New Zealand, October 2012) <pikeriver.royalcommission.govt.nz>

<sup>4</sup> Above n 3, 310 at [31], [32]

<sup>5</sup> See, in particular, ss 47 – 49

<sup>6</sup> Legislation Advisory Committee *Guidelines on the Process and Content of Legislation*, (Legislation Advisory Committee, October 2014) [<http://www.lac.org.nz/guidelines/>], at Chapter 21

<sup>7</sup> Crown Law, *Solicitor-General's Prosecution Guidelines 2013* (Crown Law Office, Wellington, 1 July 2013) at

Compliance and enforcement theory echoes this, with currently influential schools of thought advocating an approach to compliance by regulators where there is either an escalating response to non-compliance, or the regulator chooses an enforcement option from a range of responses, after weighing a number of criteria. In such cases, it is usual to describe a triangle, or pyramid, of enforcement options, with prosecution always being depicted at, or near, the top. This visual depiction reinforces the idea that prosecution is a serious punitive enforcement measure to be reserved for the most serious cases.

While prosecution may be considered to be a tool to be used only in serious cases, many compliance theorists support its inclusion as an enforcement measure, considering that the threat of potentially harsh penalties does more to encourage compliance than a mere 'advise and persuade' approach.<sup>8</sup> Many writers also consider that prosecution is likely to be more suitable where a breach of duty could result in a catastrophic outcome such as serious injury or death. In such cases, an escalating or negotiated approach to enforcement is not considered to be suitable.<sup>9</sup>

Key issues I wish to consider in this paper are: do harsher penalties work to effectively promote compliance and deter non-compliance? And what is the influence of the threat of prosecution on the regulatory relationship? I will discuss the potential for an atmosphere of distrust to develop among the regulated community. This could result in a lack of co-operation and inhibit information-sharing by regulated parties, reducing information available to develop education and guidance.

Next, I will look at the issue of compliance and enforcement policies. While some approaches advocate an approach to encouraging compliance whereby regulators adopt an escalating, negotiated, approach, rewarding co-operation and willingness to comply, this is considered less suitable in the case where serious injury or death could result. In such cases, prosecution is considered to be a suitable response, but one that requires legal certainty to be used effectively. A more suitable approach to encouraging and enforcing health and safety compliance is considered to be for the regulator to select the most appropriate enforcement tool depending on the seriousness of the breach.

However the capacity for New Zealand regulators to take a strategic approach to health and safety compliance and enforcement may be affected by the potential for private prosecutions under the HSW Act.<sup>10</sup> The Act continues the ability for third parties to prosecute where the regulator has decided not to do so. This is not a feature of the Australian or UK health and safety regimes, and needs to be considered alongside New Zealand's

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<sup>8</sup> Elizabeth Bluff, Neil Gunningham, Richard Johnstone, *OHS Regulation for a Changing World of Work*, (Federation Press, Sydney, 2004) at 150

<sup>9</sup> Richard Johnstone and Michaela Tooma *Work Health and Safety Regulation in Australia: The Model Act*, (Federation Press, Australia, 2012) At 254 - 257

<sup>10</sup> S 144

Accident Compensation system which prohibits civil actions for personal injury.<sup>11</sup> Recent amendments to the Sentencing Act provide for reparation payments to ‘top up’ ACC entitlements thereby operating as potential financial incentive for injured workers to prosecute.<sup>12</sup>

This paper is structured in 10 Parts:

- Part 1 sets out the introduction;
- Part II sets out the background to the new HSW Act and gives an overview of key aspects of the content of the Act;
- Part III discusses the challenge of regulating for health and safety;
- Part IV examines the need for clarity and certainty of meaning in command and control regulation;
- Part V discusses the potential deterrent effect of harsher penalties;
- Part VI sets out information regarding responsive regulation and the use of compliance and enforcement policies;
- Part VII discusses the impact of private prosecutions;
- Part VIII briefly looks at the issue of alternatives to prosecution;
- Part IX sets out some practical issues with prosecutions; and
- Part x provides concluding thoughts.

## *II Background and overview of the Act*

### *A Background*

On 30 October 2012, the Royal Commission on the Pike River Coal Mine Tragedy delivered its final report to the Governor-General.<sup>13</sup> The report followed the tragic deaths of 29 men in November 2010 when there was an explosion in the underground mine at Pike River on the West Coast of New Zealand’s South Island.

The Royal Commission’s report set out 16 recommendations.<sup>14</sup> The report included an analysis of the existing approach to enforcement (which was considered to favour light-handed and negotiated compliance measures). It recommended that the New Zealand offences and penalties for failure to comply with health and safety duties be reviewed and that increased penalties and an offence of corporate manslaughter should be considered.<sup>15</sup>

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<sup>11</sup> Accident Compensation Act 2001, s317

<sup>12</sup> Sentencing Amendment Act 2014, s 6

<sup>13</sup> Above, n 3

<sup>14</sup> Volume 1 at 36

<sup>15</sup> Volume 2 at 309, 310

Following this report, and in line with the Royal Commission's recommendations, an Independent Taskforce on Workplace Health and Safety was established. From the work of that Taskforce, several key changes were proposed to the regulation and administration of workplace health and safety in New Zealand.<sup>16</sup>

One of the changes was the establishment of the Crown entity, Worksafe New Zealand, as New Zealand's primary health and safety regulator. Worksafe's vision is that - "Everyone who goes to work comes home healthy and safe."<sup>17</sup> It is clear that the vision is aspirational and, unfortunately, will never be achieved with 100% success.

The work of the Taskforce also resulted in the HSW Act. The HSW Act states, at section 3, that its purpose is to create 'a balanced framework to secure the health and safety of workers and workplaces'.

The Act is based on the Australian Model Health and Safety Law and replaces the Health and Safety in Employment Act 1992 (the HSEA).<sup>18</sup> These instruments follow the approach outlined in the 1972 UK Robens Report which resulted in the replacement of a large number of prescriptive health and safety laws with legislation setting out high level duties and promoting voluntary self-regulation, supported by industry guidance and enforcement through prosecution. Named after Lord Alfred Robens, chair of the UK Committee on Health and Safety at Work established in 1970, its 1972 report to the British government, *Safety and Health at Work*, transformed the attitudes towards and organisation of occupational health and safety.<sup>19</sup> This approach formed the basis for health and safety regulation in the UK, Australia and New Zealand.

A report to the Cabinet Economic Growth and Innovation Committee proposing health and safety law reform stated as follows:<sup>20</sup>

The Robens approach seeks to increase awareness, knowledge and competence in managing workplace health and safety, rather than rely on prescriptive requirements focusing on a narrow range of workplace hazards. Performance-based general duties ensure broad coverage of work and workplaces. Advantages of the all-encompassing nature of these general duties are that they do not quickly date, they support innovation and they

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<sup>16</sup> *Report of the Independent Taskforce on Workplace Health and Safety*, (April 2013) online at <hstaskforce.govt.nz>

<sup>17</sup> <http://www.business.govt.nz/worksafe>

<sup>18</sup> above, n 2

<sup>19</sup> Robens (1972) *Report of the Committee on Health and Safety at Work 1970-1972*, (Her Majesty's Stationery Office, London, 1972)

<sup>20</sup> <http://www.mbie.govt.nz/pdf-library/what-we-do/workplace-health-and-safety-reform/effective-regulatory-framework.pdf> (Undated but the proposals relate to the current Health and Safety at Work Act)

provide flexibility. The duties are underpinned by industry- or hazard-specific regulations, approved codes of practice and guidance where further clarity is required.

It is notable that both Australia and New Zealand have chosen to continue to follow this approach despite the fact that the two jurisdictions were prompted to opt for reform of their respective health and safety laws for different reasons. In Australia, the impetus came from a wish to harmonise the approach to health and safety regulation across the various jurisdictions.<sup>21</sup> In New Zealand, the catalyst was a disaster which was partially attributed to the regulatory regime in place at the time and the way that it had been administered.

The Independent Taskforce cited Ayres and Braithwaite, and stated that “Modern regulator practice is for regulators to have the ability to apply a range of approaches to ensuring compliance, depending on the circumstances.”<sup>22</sup>

The Taskforce also recommended measures to increase the penalties for poor health and safety performance, including stronger penalties and cost recovery, and visible and effective compliance activity.<sup>23</sup>

## *B Content of the Act*

The HSW Act replaces an Act which was approximately 60 sections long with one that is over 230 sections. However the high level approach is essentially similar. The fact that an approach developed in the 1970's continues to be seen as the preferred option for regulating health and safety at work confirms the law-makers' view that this style of regulation does not date, supports innovation, and provides flexibility.

The purpose of the new Act includes: ‘a balanced framework to secure the health and safety of workers and workplaces’ by “protecting workers and other persons against harm to their health, safety, and welfare by eliminating or minimising risks arising from work or from prescribed high-risk plant”. The purposes also include “...securing compliance with this Act through effective and appropriate compliance and enforcement measures”.<sup>24</sup> The purpose provision requires that in furthering this purpose:<sup>25</sup>

... regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety, and welfare from hazards and risks arising from work or from specified types of plant as is reasonably practicable.

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<sup>21</sup> Above n, 9 at 1

<sup>22</sup> Above n 16 p51 at [201], Ayres, I and Braithwaite, J (1992). *Responsive Regulation: Transcending the deregulation debate*. Oxford University Press, Oxford,

<sup>23</sup> Above n 16 p 86 at [369]. The Taskforce recommended extending the existing manslaughter offence to corporations and revising the corporate liability framework that applies to all offences (including manslaughter), however it did not recommend introducing a new offence of corporate manslaughter.

<sup>24</sup> S3

<sup>25</sup> S3(2)

The Act establishes duties that must be fulfilled by key parties<sup>26</sup> and a range of measures to promote and enforce compliance, including offences for failure to carry out those duties.<sup>27</sup> This is consistent with the fact that a failure to comply with a duty under the Act may lead to serious injury or death – in other words the stakes are high. As noted above, while a recommendation to introduce a new offence of corporate manslaughter<sup>28</sup> was not implemented, the new Act has a greater number of criminal offences with higher penalties.<sup>29</sup>

The key duty holder is a ‘person who conducts a business or undertaking’ (PCBU).<sup>30</sup> The terms: ‘business’ and ‘undertaking’ are not defined in the Act. The primary duty of care requires a PCBU to ensure, so far as is reasonably practicable, the health and safety of workers who work for the PCBU while the workers are at work in the business or undertaking; and workers whose activities in carrying out work are influenced or directed by the PCBU, while the workers are carrying out the work.<sup>31</sup>

In line with the Royal Commission’s recommendations, to provide the necessary certainty and the specificity to operate at a practical level, the implementation and operation of the Act is reliant on the development of guidance and educational material and subordinate regulation.<sup>32</sup>

Because the HSW Act establishes a high level framework, it was noted by the law-makers in developing the legislation that:<sup>33</sup>

...in order to address uncertainty and regulatory gaps, regulations, guidance and ACOPs [approved codes of practice] will need to be developed to provide duty-holders and workers with certainty about how the law and regulations will apply to them, without being unnecessarily prescriptive. This will not only promote better health and safety outcomes, but will make compliance easier for businesses.

Over time, in addition to regulations, guidance, and educational material published by the regulator, the high level prescription in the Act will also be further interpreted and informed by case law developed by the courts.

In relation to proposed compliance and enforcement under the new Act, Worksafe’s website states that: <sup>34</sup>

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<sup>26</sup> Ss 30 - 46

<sup>27</sup> Part 4

<sup>28</sup> Above n 3 and n 16

<sup>29</sup> Ss 47 - 49

<sup>30</sup> S 17

<sup>31</sup> S 36

<sup>32</sup> See ss 211 - 228

<sup>33</sup> Paper to Cabinet Committee MBIE-MAKO-146085572

<sup>34</sup> <http://www.business.govt.nz/worksafe/about/reform/9-compliance-enforcement>



The Independent Taskforce on Workplace Health and Safety considered that the current penalties under the *Health and Safety in Employment Act 1992* were too low and the range of compliance and enforcement tools available to inspectors too limited. Reflecting the Taskforce’s recommendations, the Bill provides a range of new and existing enforcement tools and compliance mechanisms to the regulator, inspectors and the Court.”

In terms of the recommendations regarding modern, responsive approach to compliance,<sup>35</sup> the purposes of the Act include ‘securing compliance with this Act through effective and appropriate compliance and enforcement measures’<sup>36</sup>, and the Act also requires regulators to publish information about their approach to enforcing compliance with relevant health and safety regulation.<sup>37</sup>

The Bill sets out a number of statutory compliance measures. These include:

- three tiers of offences for breaches of statutory health and safety duties;<sup>38</sup>
- a requirement to notify significant health and safety events to the regulator and an offence for contravening this requirement;<sup>39</sup>
- a regulation-making power to prohibit the undertaking of certain work unless it has been authorised (by way of a licence, permit, registration or other authority);<sup>40</sup>
- the power of the regulator to issue improvement, prohibition and non-disturbance notices;<sup>41</sup>
- a power for the regulator to take remedial action and recover costs;<sup>42</sup>
- enforceable undertakings;<sup>43</sup> and
- private prosecutions.<sup>44</sup>

In addition, as government agencies, the regulators will be able exercise light-handed non-statutory functions, for example sector engagement, education, and publishing general guidance information. In line with the recommended approach to regulatory compliance and enforcement, it is envisaged that, in practice, the regulator will seek to use a ‘responsive’ approach, selecting the appropriate enforcement tool after weighing a number of relevant criteria.

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<sup>35</sup> Above n 16, p 51 at [210], [211]

<sup>36</sup> S 3(1)(e)

<sup>37</sup> S 190 and s 10 Worksafe New Zealand Act 2013

<sup>38</sup> Ss 47 - 49

<sup>39</sup> S 56

<sup>40</sup> Ss 203 - 208

<sup>41</sup> Ss 101 - 111

<sup>42</sup> Ss 119 - 121

<sup>43</sup> Ss 123 - 129

<sup>44</sup> S 144

The Act includes new maximum penalties on conviction of up to \$3 million or up to 5 years imprisonment.<sup>45</sup> This is a significant change from the current maximum penalties in the Health and Safety in Employment Act 1992 (HSE Act) of up to \$500,000 fine and/or imprisonment of up to 2 years.<sup>46</sup>

### *III Challenge of regulating for health and safety*

As noted in the introduction, one of the issues that regulators seeking to achieve socially valuable goals must determine is what type of regulatory approach they wish to use. In the case of health and safety regulation, a key issue is whether the emphasis is on information-gathering or deterrence. As noted, the HSW Act includes stronger deterrent measures than the 1992 HSE Act. The threat of prosecution is intended to encourage compliance, however it is also likely to discourage openness on the part of regulated parties who will be mindful of potential exposure to legal liability.

By way of contrast, the theory of safety culture or ‘just culture’ is based on a view that where regulated parties do not fear blame and reprisals they will be more open about their practices. This will result in regulators being able to find out the real cause of accidents and take steps to prevent them in the future. The theory being that it is more important to improve safety than it is to attribute blame and punish operators.

While this is not the approach adopted in the HSW Act, that Act does rely on interaction with regulated parties to develop specific guidance and to educate and inform. Therefore, it is important to understand the effect of strong penalties on the regulatory relationship. The following section describes the principles underlying the ‘no blame’ theory and how it is seen as a way to facilitate openness. This helps illustrate the potentially paradoxical nature of the HSW Act, which relies on interaction but includes the threat of significant penalties. By way of illustration, I have provided some examples of different regulatory instruments operating on the spectrum from no-blame through to criminal offence based legislation.

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<sup>45</sup> S 47

<sup>46</sup> Health and Safety in Employment Act 1992, s 49

## A No blame approach

James Reason discusses the concept of safety culture and a ‘just culture’. He explores the idea of ‘safety cultures’ within organisations.<sup>47</sup> He argues that:<sup>48</sup>

... a safe culture is an informed culture and this, in turn, depends upon creating an effective reporting culture that is underpinned by a just culture in which the line between acceptable and unacceptable behavior is clearly drawn and understood.

His focus is on the organisational culture in a particular industry and the factors that influence safety. Reason quotes Uttal’s definition of safety culture:<sup>49</sup>

Shared values (what is important) and beliefs (how things work) that interact with an organisations structures and control systems to produce behavioral norms (the way we do things around here).

Reason considers that, to avoid a sense of complacency caused in some cases by a lack of direct experience of unsafe events, organisations must create an ‘informed culture’. His view is that the only way to create an informed culture is to have a ‘reporting culture’ and he notes that this creates challenges as it requires operators to be open about mistakes and unsafe practices. His view is that the only way to encourage the required degree of openness and encourage a reporting culture is trust. He states that: “An effective reporting system depends, crucially, upon how an organisation handles blame and punishment.”<sup>50</sup>

However he appears to acknowledge that it is not realistic or desirable to have a system completely without blame but it may be possible to identify and ensure that all parties are aware of a “line...between unacceptable behavior, deserving of disciplinary action, and the remainder, where punishment is neither appropriate not helpful in furthering the cause of safety.”<sup>51</sup> This can be seen as having a degree of consistency with aspects of other regulatory theorists, including the theories of responsive regulation discussed below, although as I have discussed later in this paper, where prosecution remains a possibility it will colour the regulatory relationship and limit the responses realistically open to the regulator in serious cases.

In order for parties to be confident that they will not be prosecuted, there would need to be immunity from liability, which significantly limits the way regulators can act. I have set out two examples of where this approach has been taken in legislation where information gathering is the primary purpose.

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<sup>47</sup> James Reason “Achieving a safe culture: theory and practice” *Work & Stress* (1998) Vol. 12, NO. 3 at 293-306, Department of Psychology, University of Manchester, Manchester

<sup>48</sup> P 1

<sup>49</sup> Uttal, B. “The corporate culture vultures” *Fortune Magazine*, 17 October 1983

<sup>50</sup> P 302

<sup>51</sup> P 303

*B Legislative examples and immunity from criminal liability*

As noted above, there are some examples of where the ‘no blame’ approach described above has been incorporated into legislation, for example in relation to accident investigation. In such a case, the legislation may override the right against self-incrimination but provide that the information cannot be used in criminal proceedings against that person. This is likely to be where there is considered to be a higher value in obtaining the information than preserving the ability to use this in a prosecution.

An example is in the Transport Accident Investigation Commission Act 1990. The purpose of the Commission is: “...to determine the circumstances and causes of accidents and incidents with a view to avoiding similar occurrences in the future, rather than to ascribe blame to any person.”<sup>52</sup> To reinforce the ‘no blame’ approach, section 14B of the Act sets out restrictions on the disclosure and admissibility of certain investigation records.

Further along the spectrum, the Coroners Act 2006 states that its purpose is:<sup>53</sup>

...to help to prevent deaths and to promote justice through -

- (a) investigations, and the identification of the causes and circumstances, of sudden or unexplained deaths, or deaths in special circumstances; and
- (b) the making of specified recommendations or comments ... that, if drawn to public attention, may reduce the chances of the occurrence of other deaths in circumstances similar to those in which those deaths occurred.

The Coroners Act is also an example of legislation primarily aimed at identifying the cause of deaths, rather than attributing blame. Persons can be compelled to provide information and police can search under warrants, however, there are grounds to refuse to provide information. Section 127 provides for a limit on the use of the information obtained in particular its admission in court (except in relation to a crime of perjury or providing false information under the Coroner’s Act).

In contrast to the ‘no blame’ approach, the HSW Act contains a power to compel information to be provided and specifically sets out the application of the Evidence Act. There is a clear intention to provide for a balancing of interests between the regulator and the regulated party in anticipation of litigation. The Act provides that, for the purpose of performing any function of the regulator or an inspector under relevant health and safety legislation, any inspector may, at any reasonable time, enter any workplace and:<sup>54</sup>

- require the PCBU or a person who is or appears to be in charge of the workplace to produce information relating to the work, the workplace, or the workers who work

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<sup>52</sup> Transport Accident Investigation Commission Act 1990, s 4

<sup>53</sup> Coroners Act 2006, s 3

<sup>54</sup> S 168

there; and the PCBU's compliance with relevant health and safety legislation; and permit the inspector to examine and make copies of, or take extracts from, the information: and

- require the PCBU or a person who is or appears to be in charge of the workplace to make or provide statements, in any form and manner that the inspector specifies.

The Act specifically provides that this section does not affect the application of section 60 of the Evidence Act 2006. This is because the information obtained can be used in a criminal prosecution.

The TAIC Act, Coroners Act, and HSW Act illustrate different approaches to achieving safety outcomes and show the different considerations that apply when you travel up the spectrum from full transparency and cooperation at one end of the spectrum to punitive enforcement at the other end. Where the regulation is concerned with gathering information and identifying the cause of the accident, it is more likely to immunize the parties from criminal liability in return for obtaining the full story. However, where the legislation includes deterrent measures, the parties will be motivated to protect themselves against liability. In that case the legislation is likely to provide that they are not required to incriminate themselves. This is consistent with both s 60 of the Evidence Act and the Bill of Rights Act 1990.<sup>55</sup>

These statutes indicate the challenges in different approaches to managing information gathering for safety regulatory purposes. It is clear that a significant challenge is to identify when it is more important to obtain as much information as possible and when the potential for punitive measures needs to be available. This will always involve some form of balancing of rights and interests. This is because information will only be freely and generously provided in an atmosphere of trust – which means that if regulators want information from participants that includes details of potentially unsafe practices, those participants will be likely to seek an undertaking of immunity before disclosing any details.

The discussion above supports the view that when regulation includes criminal offence provisions, this has a pervading influence on the relationship between the parties. This is likely to be the case with the HSW Act. The fact that the new legislation contains harsher penalties than before is likely to strengthen the motivation of the regulated parties to limit potential liability by carefully managing the information they provide to the regulator.

However, to operate effectively, the Act needs the parties to be engaging with each other and sharing information. While the Act establishes a framework for regulating health and safety at work, the statutory duties are phrased in broad terms. To create a further level of clarity and certainty, the implementation and operation of the Act requires subordinate

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<sup>55</sup> New Zealand Bill of Rights Act 1990, s 23

regulatory instruments to be developed, including regulations, approved codes of practice and guidance documents.<sup>56</sup>

The next section discusses the importance of having effective measures in place to ensure that the parties have a common understanding of the Act. This is particularly important for enforcement through prosecution.

#### *IV Need for clarity and certainty of meaning*

The Act is an example of a command and control framework in that it establishes legally enforceable duties and sets out tools that can be used to enforce those duties. It is an example of instrumental regulation aimed at achieving a socially valuable goal, in this case, health and safety in the workplace.<sup>57</sup>

Julia Black defines regulation as “the intentional use of authority to affect behaviour of a different party according to set standards, involving instruments of information gathering and behaviour modification”.<sup>58</sup> However, a fundamental issue with this legislation is that, without further clarification, the term ‘health and safety’ may mean different things to different people. In relation to the Australian Model Act, it has been noted that “... the scope of the Model Act is limited only by the imagination of those entrusted to interpret them and to enforce them”.<sup>59</sup>

This is particularly relevant at the sharp-end of the enforcement spectrum with prosecution. The Legislation Advisory Committee states, in relation to the creation of criminal offences in legislation, that:<sup>60</sup>

Legislation must precisely define the prohibited conduct. People must be able to act in certain ways, or decide not to act in certain ways, and have a clear understanding of the legal consequences that might follow.

The LAC refers to the requirement in criminal proceedings, for the prosecution to prove beyond reasonable doubt that the defendant committed the physical act, and states that “an

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<sup>56</sup> Ss 211 - 228

<sup>57</sup> Fiona Haines, *The Paradox of Regulation What Regulation Can Achieve and What it Cannot*, (Edward Elgar, Cheltenham UK, Northampton, MA, USA, 2011) at 10, 23;

<sup>58</sup> Black J (2001) ‘*Decentring Regulation: Understanding the Role of regulations and Self-Regulation in a “Post-Regulatory” World*’, *Current Legal Problems*, 54: 103-47, quoted in Robert Baldwin, Martin Cave and Martin Lodge *The Oxford Handbook of Regulation* (from Oxford Handbooks Online [www.oxfordhandbooks.com](http://www.oxfordhandbooks.com)). (c) Oxford University Press 2015), *Introduction: Regulation – The Field and the Developing Agenda*, 6.

<sup>59</sup> Above n 9, at 3

<sup>60</sup> Above n 6, at 83

imprecise statement of the prohibited conduct may lead to inconsistent enforcement of the law, uncertain application of the law, unintended changes in behaviour, or an acquittal”.<sup>61</sup>

Julia Black discusses the issues with the use of rules in any context and states that the three main problems are the tendency of rules to ‘over- or under-inclusiveness, their indeterminacy and their interpretation’.<sup>62</sup> She considers that the problems result from “the nature of rules and the nature of language... how we understand, interpret and apply rules depends in part on how we understand and interpret language.”<sup>63</sup>

The HSW Act duties cannot really be described as ‘under- or over-inclusive’ rather they are deliberately almost ‘all inclusive’ in that they apply to all ‘persons who conduct a business or undertaking’ and all workers. While it may be tempting to say that this is an over-inclusive category, in fact the intention must be precisely to apply to all potential work arrangements and workplaces and to create a standard for all behavior in those contexts.

However, indeterminacy is potentially an issue. Black states that all rules are inherently indeterminate. She states:<sup>64</sup>

Their indeterminacy matters because rules, particularly legal rules, are entrenched authoritative statements which are meant to guide behavior, be applied on an indefinite number of occasions, and which have sanctions attached for their breach. It is thus important to know whether this particular occasion is one of those in which the rule should be applied.

This quote above is very similar to the words of the Legislation Advisory Committee in commenting on the importance of clear certain law when it comes to criminal enforcement.<sup>65</sup> Black states that a rule is only as good as its interpretation. This reinforces the need for the law to mean the same thing to the relevant parties who must use it – the regulated party and the regulator who applies and enforces it. Where parties share a judgment and understanding about what a rule means and when it applies, there is more likely to be compliance with the rule. This reinforces the need for rules to be clear in relation to the behaviour they are seeking to influence.

This is relevant not only to voluntary compliance but also enforcement. This need for a common understanding is a particular challenge in the case of regulation such as health and

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<sup>61</sup> Above n 6 at 83

<sup>62</sup> Black J. *Rules and Regulators*, (Clarendon Press, Oxford, 1997), 5 – 45. 1998. “Talking about regulation”, *Public Law*, 77 – 105, cited in Bronwyn Morgan and Karen Yeung *An Introduction to Law and Regulation*, (Cambridge University Press, Cambridge, 2007) at 153 - 158

<sup>63</sup> Page 155

<sup>64</sup> Above, n 62

<sup>65</sup> See n 60

safety regulation. The primary duty of care in the HSW Act is that a PCBU must ensure, so far as is reasonably practicable:<sup>66</sup>

- the health and safety of workers who work for the PCBU while the workers are at work in the business or undertaking; and
- the health and safety of workers whose activities in carrying out work are influenced or directed by the PCBU, while the workers are carrying out the work; and
- that the health and safety of others is not put at risk from work carried out as part of the conduct of the business or undertaking.

Many of the key terms in the Act are not defined. It is understood that this approach has been deliberately taken to allow the plain meaning to prevail. A specific example of this is in relation to the key term ‘risk’.

In its Report on the Health and Safety Reform Bill, the Transport and Industrial Relations Select Committee recommended removing part of the definition of “hazard” and all of the definition of “risk” to encourage people to consider which risk means to them in their particular circumstances.<sup>67</sup> The definitions removed were linked and very similar with “hazard” meaning “a situation or thing that has the potential to cause death, injury, or illness to a person”; and “risk” meaning “the possibility that death, injury, or illness might occur when a person is exposed to a hazard.”<sup>68</sup>

This is an interesting approach, particularly when you consider the implications for enforcement. Section 30 of the Act states that a duty imposed on a person by or under the Act requires a person to eliminate risks to health and safety, so far as is reasonably practicable, and, if not, to minimise those risks so far as is reasonably practicable. A person is required to comply with this duty ‘to the extent to which the person has, or would reasonably be expected to have, the ability to influence and control the matter to which the risks relate’.<sup>69</sup>

As previously noted, for a criminal conviction, the prosecution must establish the elements of the offence beyond reasonable doubt. By way of example, section 48 of the Act establishes an offence of failing to comply with duty that exposes individual to the risk of death or serious injury or serious illness. The penalties, on conviction, range from \$150,000 (for an individual who is not a PCBU or an officer of a PCBU), to \$1.5 million.

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<sup>66</sup> S 36

<sup>67</sup> *Report of the Transport and Industrial Relations Select Committee considering the Health and Safety Reform Bill*, Parliament, 24 July 2015

<sup>68</sup> Health and Safety Reform Bill as reported back from the Transport and Industrial Relations Select Committee considering the Health and Safety Reform Bill, Parliament, 24 July 2015

<sup>69</sup> S30



The defence to strict liability charge is that the defendant took all reasonably practicable steps.<sup>70</sup> The issue of whether there was a risk or hazard and if so whether it was appropriately managed will be central to each party's case in any prosecution. In the case where the legislation leaves this open, this provides the opportunity for prolonged argument by the parties leading to complex time-consuming litigation. It also makes any proactive education or guidance very difficult to develop.

Two cases described below which were considered under the 1992 HSE Act provide examples of the fact specific nature of health and safety prosecutions and the capacity for words such as risk and hazard to be open to interpretation. Both involved deaths from quad bike accidents where the regulator prosecuted the company in charge of the quad bike's operation under the 1992 HSE Act for failure to take all practicable steps to ensure the safety of the deceased person.

However, in the first case, involving the death of a tourist on a quad bike tour, the court found the defendants not guilty.<sup>71</sup> The court found that that the company was not required to completely eliminate risks, rather it was required to take reasonably practicable steps to minimise risks.<sup>72</sup> Applying this to the facts, the court found that the company had not failed in its duty under the Act. The Court found that the regulator had wrongly formed the view that "...because harm has resulted, ... it must be, "by default", characterised as a "hazard"."<sup>73</sup>

The court stated that:<sup>74</sup>

[The] understandable tendency [to use hindsight] must be resisted as it unjustifiably applies to the assessment of the existence of a hazard knowledge which, objectively, is not required by the Act of someone in the position of the defendant company.

By way of contrast, in March 2014, a share milking company was convicted and fined \$28,125 and ordered to pay reparations of \$75,000 after a farm hand died when the quad bike he was riding rolled on top of him. In the media release on this issue, WorkSafe's chief investigator said the company could have done more to protect the farm hand. He stated:<sup>75</sup>

The area he was riding in had been identified as a hazard, but the company had not taken any action to tell its workers not to ride quad bikes there, or in other hazardous areas.

For the parties to develop a common understanding of duties, and to implement effective responsive enforcement, there needs to be a regulatory 'conversation', that is, an on-going

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<sup>70</sup> *Civil Aviation Department v MacKenzie* [1983] NZLR 78

<sup>71</sup> *Department of Labour v Waitomo Big Red Ltd* [2010] DCR 381

<sup>72</sup> At [71]

<sup>73</sup> At [47]

<sup>74</sup> At [48]

<sup>75</sup> <http://www.business.govt.nz/worksafe/news/releases/2014/fine-over-quad-bike-death>

relationship between regulator and regulated party where information is shared and relevant issues are discussed.<sup>76</sup> Prosecution is both harsh and adversarial in nature and the threat of prosecution has the potential to create a pervading atmosphere of distrust. The distrust created by the threat of prosecution may also limit the capacity of the regulator to use other compliance and enforcement tools.

This leads me to the view that there is an internal paradox in the HSW Act. The Act establishes high level duties that need to be further clarified and explained by the regulator to provide the desired level of regulatory certainty. The regulator needs to gather relevant and useful information to develop guidance and subordinate regulatory instruments. This is best achieved through an open and transparent conversation with the regulated parties. However, because the Act provides that a breach of those duties is a criminal offence, this is likely to create distrust and a lack of openness. A regulatory instrument which operates as a threat may inhibit the open sharing of information for guidance and education.

Where the terms used to describe key duties and offences in the Act are capable of more than one interpretation or are so general that they encompass a broad range of possible behavior, there is a risk that regulators may seek to go too far in their regulatory decisions, seeking to enforce compliance with the ‘spirit of the law’ or seeking to penalize an operator for its ‘attitude to compliance’ rather than enforcing rules that are objectively agreed to apply.

While it is tempting to consider that the underlying purpose of the law should be enforced, in our legal system, the plain meaning of legally enforceable rules will apply. The purpose is relevant but only to the extent that this informs the plain meaning – it cannot replace or override this meaning.<sup>77</sup> The courts also serve a purpose here – which is to keep a check on over-zealous enforcement.

The problem with courts taking on the role of ‘fleshing out’ framework regulation is that courts cannot make binding broad policy or operational statements. Courts can only decide the facts in front of them.

It is arguable that Black’s concept of ‘regulatory conversations’ that Morgan and Yeung refer to is what is envisaged with the HSW Act. Julia Black discusses the situation where the conversation between the regulator and regulated parties may be a consciously adopted regulatory approach where:<sup>78</sup>

the regulator may issue only very broad rules, anticipating that it will then engage in a process of negotiation, a conversation, with individual regulatees as to how those broad rules will apply to those circumstances, including perhaps the approval of rules written by

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<sup>76</sup> “Talking about regulation”, *Public Law*, 77 – 105, cited in Bronwyn Morgan and Karen Yeung *An Introduction to Law and Regulation*, (Cambridge University Press, Cambridge, 2007) at 176 - 181

<sup>77</sup> Interpretation Act 1999

<sup>78</sup> Above n 76 at 177

the firm or individual to guide its own behavior in compliance with the generally applicable norm.

However there are significant risks in having regulator and regulated party effectively ‘agree’ on what the duties are. This is particularly the case where third parties may be significantly adversely affected – for example where there is the potential for injury or death. The Independent Taskforce recommended addressing this through having a tripartite instrument which it described in the following way: <sup>79</sup>

The internationally recognised model of engagement for workplace health and safety that is at the heart of the ‘Robens’ model described in a landmark 1972 British report by Lord Robens. Tripartism involves three key parties – employers, workers and the regulator – each playing critical, interdependent roles and assuming particular responsibilities in relation to each other.

The HSW Act has elements of tripartism in providing for worker participation in some workplaces <sup>80</sup> and for engagement by regulators with parties who may be affected.<sup>81</sup> However, the extent to which there will be meaningful input by all potentially affected parties, including, for example partners, parents and children of those who are injured or killed, remains to be seen. The capacity for third parties to take private prosecutions may go some way toward filling this gap and this is discussed further later in this paper. <sup>82</sup>

## *V Potential deterrent effect of harsher penalties*

In the Pike River case, the Court made the decision to consider the failures as a set of cumulative failures to address what was considered to be inadequate fines available under the legislation at the time. In doing so, Farish J made some significant statements regarding the purpose of sentencing in health and safety cases:<sup>83</sup>

The sentencing exercise today is to denounce and deter the breaches under the Act and also in some way hold accountable the company for its breaching and its lack of obligations to its employees and DCR *Department of Labour v Pike River Coal Ltd* 33 contractors. This last factor is of significant importance to the families of the men who died and is repeated by them in their victim impact reports. They have a sense that no one has been held to account for their loss and that no one has apologised to them for the significant breaches of the Health and Safety in Employment Act 1992.

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<sup>79</sup> Above n 16, at 144

<sup>80</sup> Part 3

<sup>81</sup> See for example ss 189 and 190

<sup>82</sup> S 144

<sup>83</sup> *Department of Labour v Pike River Coal Ltd* [2014] DCR 32 at [3], [21], [41]

...

Here the informant submitted that a concurrent fine in the sum of \$250,000 which was the maximum penalty in relation to any one of the informations would be inadequate to denounce and deter but also to reflect the overall culpability of the many failings here of the company. The informant submitted that the Court would be justified and entitled to impose cumulative fines in relation to those four discreet areas. That was the gas control management, ventilation control management, panel geology and the explosion mitigation management. The Court agreed with the informant. A single fine of under \$250,000 would be woefully inadequate.

One of the questions for this paper is whether harsher penalties would have made any difference.

### *A Issues with harsher penalties*

As noted above, the new HSW Act includes much harsher offence provisions. The question is whether this will work in practice to mean more effective compliance with the purposes of the Act. Writing some years prior to the development of the Australian Model Act, Richard Johnstone stated:<sup>84</sup>

It is now well accepted that the purpose of OHS prosecutions is deterrence, particularly general deterrence. OHS regulators are increasingly looking for a more strategic use of prosecution, as a means to reinforce and support measures to encourage voluntary compliance by duty holders. Recent regulatory theory positing an “enforcement pyramid” in which regulators seek to promote voluntary compliance with benign measures such as advice and persuasion in the shadow of “big sticks” (or the “benign big gun”) of prosecution, relies heavily on the deterrent effect of prosecution at the top of the pyramid. Deterrence theory holds that penalties for OHS contraventions should be high enough to induce duty holders to make rational judgments that the cost of non-compliance based on the perceived likelihood of detection and the severity of the penalty outweighs the benefits of non-compliance. Low levels of fines will render a deterrence-based enforcement regime ineffective.

The views expressed by Johnstone appear to be strongly reflected in the design of the Model Act and the new HSW Act. Increasing the fines is aimed at preventing behaviour by the least compliant actors who may have considered a fine under the 1992 Act as a ‘cost of doing business’ which was not sufficient to provoke a change in behaviour. However, it remains to be seen whether it will work in the New Zealand context. Relevant issues include how the courts will respond to the higher penalties and how the threat of prosecution may affect the regulator’s exercise of its other functions under the Act.

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<sup>84</sup> Richard Johnstone *Occupational Health and Safety Courts and Crime – the legal construction of health and safety offences in Victoria*, (Federation Press, Australia, 2003)

The Royal Commission report stated that “Penalties must deter potential offenders and ensure that health and safety obligations are taken seriously.” The Report quoted a submission which advocated that the range of punishments ‘must be sufficient to cause discomfort’.<sup>85</sup>

This deterrent effect of penalties is echoed in the lead sentencing decision under the 1992 HSE Act, where a full bench of the High Court set out key guiding factors for sentencing for health and safety offences.<sup>86</sup> Key factors for the purpose of this paper were emphasis on reparation and the creation of bands of potential fines assessed by culpability.

Compliance theorists consider that the deterrent effect of harsher penalties is likely to differ depending on the nature of the regulated party. Gunningham discusses the arguments in favour of deterrence by those who believe that regulated business corporations will only be motivated to commit resource to meeting socially valuable goals when required to do so by law and where they fear harsh penalties.<sup>87</sup> He states that “On this view, the certainty and severity of penalties must be such that it is not economically rational to defy the law.”

However Gunningham goes on to refer to Haines’ view that deterrence may be more effective in influencing the behaviour of small and medium-sized enterprises due to their size and simpler management structure.<sup>88</sup> However his view is “The size of the penalty may also be an important consideration: mega penalties tend to penetrate corporate consciousness in a way that other penalties do not.”<sup>89</sup>

## *B Potential responses*

### *i. Attitude of the courts*

There are a number of practical implications with the harsher potential penalties in the new Act. The first issue is whether the courts will in fact order these higher penalties. Many of the offences in the Act are strict liability offences and it remains to be seen whether there is an element of resistance by judges and juries to imposing significant fines for offences which do not require intent to be established, or that may be seen more as employment matters.

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<sup>85</sup> Above n 3, p 309 at [29]; Kathleen Callaghan witness statement, 23 March 20132, FAM0058/29, para 3.17; New Zealand Council of Trade Unions, Submission, NZCTU0001/36-37, para 14(a) –(d).

<sup>86</sup> *Department of Labour v Hanham & Philp Contractors & Ors* [2008] 6 NZELR 79

<sup>87</sup> Robert Baldwin, Martin Cave and Martin Lodge ed. *The Oxford Handbook of Regulation* (printed from Oxford Handbooks Online ([www.oxfordhandbooks.com](http://www.oxfordhandbooks.com))). (c) Oxford University Press 2015), 2

<sup>88</sup> Above n 87 at 3, citing Haines, F. (1997) *Corporate Regulation: Beyond ‘Punish or Persuade’*, Oxford, Clarendon Press.

<sup>89</sup> Above n 87 at 3, citing Gunningham and Kagan and Thornton (2005) ‘*General Deterrence and Corporate Behaviour*’, *Law and Policy*, 27: 262 -88

The Legislation Advisory Committee Guidelines reinforce that, in creating criminal offences, the usual case is to require the prosecution to establish the mental element of an offence beyond reasonable doubt. There are some cases, however, where it is considered appropriate for policy or practical reasons to “shift the burden of proof” from the prosecution to the defence. The Committee states that:<sup>90</sup>

A common example is strict liability offences in which the prosecution must prove the physical element, but not the mental element, of an offence. The defendant must prove an absence of fault on the lesser standard of the balance of probabilities.

The Committee further states that:

Strict liability offences are commonly used in the regulatory context and may be appropriate where:

- the offence involves the protection of the public, or a group such as employees, from those who voluntarily undertake risk-creating activities;
- there is a need to incentivise people who undertake those activities to adopt appropriate precautions to prevent breaches;
- the defendant is best placed to establish absence of fault because of matters primarily within their knowledge.

A leading authority on public welfare regulatory offences is the Court of Appeal case of *Civil Aviation Department v MacKenzie* which involved a prosecution of an offence, under s 24 of the Civil Aviation Act 1964, of operating an aircraft in such a manner as to be the cause of unnecessary danger to persons and property.<sup>91</sup> The question before the Court was: “Whether the onus of establishing absence of fault as a defence to a charge in respect of public welfare regulatory offending should rest on the defendant”.

The Court considered that “...in the case of public welfare regulatory offences ... a defence of total absence of fault is available unless clearly excluded in terms of the legislation”, and “...the onus of proving such a defence to the balance of probabilities standard rests on the defendant.”

Two key statements made by the court were:

[I]t is artificial to speak in terms of mens rea. Liability under legislation of this kind rarely turns on the presence or absence of any particular state of mind. But in social policy terms compliance with an objective standard of conduct is highly relevant. Courts must be able to

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<sup>90</sup> Above n 6 para 21.2 at 84

<sup>91</sup> [1983] NZLR 78

accord sufficient weight to the promotion of public health and safety without at the same time snaring the diligent and socially responsible.

and

[T]he defendant will ordinarily know far better than the prosecution how the breach occurred and what he had done to avoid it. In so far as the emphasis in public welfare regulations is on the protection of the interests of society as a whole, it is not unreasonable to require a defendant to bear the burden of proving that the breach occurred without fault on his part.

In terms of quantum, there may be a tendency for courts to consider strict liability offences to be 'less criminal' in nature and accordingly penalties for strict liability offences may be lower than those for other criminal offences.<sup>92</sup>

By way of a possible example, in recent weeks, a jury is reported to have delivered a not guilty verdict in relation to a manslaughter charge in a forestry death.<sup>93</sup> In what was considered to be a landmark case, police filed charges under the Crimes Act 1961 alleging reckless disregard for safety. While both the contracting company and the forestry operator also pleaded guilty to health and safety charges, the more serious manslaughter charge was successfully defended by the individual forestry operator charged. He will be sentenced for the health and safety charge, however his company is in liquidation and cannot therefore be sentenced.

This case may indicate that a conviction may be more difficult to obtain (at least in the case of a jury trial) in relation to health and safety matters (although it may equally be considered an argument in favour of strict liability in cases where there is a strong public safety purpose but intent is likely to be difficult to establish). The case may also be illustrative of another point - that defendants are more likely to defend more serious charges, increasing the cost and resource requirements of prosecuting where the penalties are potentially higher.

Finally the case also illustrates a key practical challenge in health and safety enforcement which is the ability of a defendant company to wind up leaving, in some cases, no-one to take the blame or pay any penalties.

*ii. Potential to prolong litigation*

As noted above, the potential for much higher penalties or imprisonment, while aimed at deterring behaviour, may, in fact, result in a much harder 'fight' in terms of enforcement,

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<sup>92</sup> This is discussed further by Johnstone R. in *Occupational Health and Safety, Courts and Crime: The Legal Construction of Occupational Health and Safety Offences in Victoria*, Monograph Series on Labour Law, (The Federation Press, Sydney, 2003) at 4

<sup>93</sup> [http://m.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=11512644](http://m.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11512644)

creating longer and more costly litigation. This could be seen as doing nothing to advance the goal of the legislation which is to make workers and workplaces safer and healthier and using up time and money that could be spent on promoting compliance by other means.

As I have already discussed, the threat of prosecution may also inhibit cooperative behavior by currently compliant regulated parties who may seek to minimize their potential exposure to legal liability and who may also start to resent and reconsider investing in safety practices when other less law abiding or competent operators are seen to be ‘getting away with it’.<sup>94</sup> This reinforces the general deterrent aspect of punitive sanctions. Gunninham refers to research that found that “...hearing about legal sanctions against other firms prompts many of them to review, and often take further action to strengthen, their own firm’s compliance programme.”<sup>95</sup>

The research in this area indicates that using harsher penalties may work well to achieve the regulatory goals. However the use of prosecution for this purpose needs to be done strategically. The best scenario is a successful prosecution with a high penalty that is capable of sending a clear specific and general deterrent message. In practice, however, the outcome of prosecution is not always easy to predict with key relevant factors being limited resources for the regulator, whether the charges are defended and whether it is a judge or jury making the decision. The outcome is also highly fact specific and dependent on whether the defendant is a company (which may wind up) and whether the defendant has the financial means to pay reparation or a fine.

While it remains to be seen what practical implications do occur from the inclusion of harsher penalties in the legislation, the discussion above points to a need for regulators to develop policies to guide them in deciding how to encourage and enforce regulation, including if, and when, to prosecute. The next part looks at regulatory theory in terms of encouraging and enforcing compliance.

## *VI Compliance and enforcement policies*

### *A Responsive regulation - the compliance triangle*

As noted above, both the Royal Commission and the Taskforce advocated the use of a responsive approach to health and safety regulation following Pike River.<sup>96</sup> The Act sets out a range of tools for regulators to encourage and enforce compliance. The previous section discussed how important it is for parties to clearly understand what their duties are and what

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<sup>94</sup> Above n 87

<sup>95</sup> Above n 89

<sup>96</sup> Above n 3 at 310; n 16 at 51



the consequence of their actions may be. This section discussed the way that regulators and others may respond to non-compliance under the Act.

Earlier in this paper, I described the ‘no-blame’ approach focused on obtaining information on the cause of accidents and incidents in order to prevent them happening again. However it is clear that this is only suitable in some situations and the approach in the HSW Act is to provide for a range of potential measures to encourage and enforce compliance. Many regulators choose to have a policy as to how they will strategically use these measures and this is the approach that is anticipated with the HSW Act.

The Act provides for prosecutions, but also includes other enforcement tools, and the purpose indicates that compliance with the Act will be secured through selecting effective and appropriate compliance and enforcement measures. Regulators must also publish information about their approach to compliance.

The responsive compliance model, which links the reaction of the regulator to the behaviour of the regulated party and advocates selecting the appropriate tool from a range of measures aimed at encouraging and enforcing compliance, was proposed by Ian Ayres and John Braithwaite in their book "*Responsive Regulation: Transcending the deregulation debate*"<sup>97</sup> which built on earlier work by John Scholz.<sup>98</sup> This approach looks at the overall compliance and enforcement spectrum – rather than dealing with enforcement as the separate and ‘sharp end’ of the regulator’s roles.

Scholz advocated an approach which has been described as ‘tit for tat’ where cooperative behaviour was rewarded by the regulator holding off on using a deterrent approach but, when cooperation ended, the regulator would switch to punishment using a deterrent approach. Ayres and Braithwaite argued for an enforcement pyramid with the regulator’s enforcement response progressing up the pyramid using increasingly punitive strategies.

Ayres and Braithwaite state that:<sup>99</sup>

Escalation up this pyramid gives the state greater capacity to enforce compliance but at the cost of increasingly inflexible and adversarial regulation...The key contention of this regulatory theory is that the existence of the gradients and peaks of the two enforcement pyramids channels most the regulatory action to the base of the pyramid – in the realms of persuasion and self-regulation. The irony proposed as that the existence and signalling of the capacity to get tough as needed can usher in a regulatory climate that is more voluntaristic and nonlitigious than when the state rules out adversariness and punitiveness as an option.

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<sup>97</sup> Ayres, Ian and John Braithwaite "*Responsive Regulation: Transcending the deregulation debate*" (Oxford University Press, New York, 1992)

<sup>98</sup> J.T. Scholz, "Cooperation, Deterrence and the Ecology of Regulatory Enforcement" (1984) 18 Law & Soc. Rev. 179; J.T. Scholz, "Voluntary Compliance and Regulatory Enforcement" (1984) 6 Law & Pol. 385

<sup>99</sup> Above, n 97

In the case of health and safety regulation, Australian and New Zealand approaches currently vary, with some regulators publishing their prosecution policy<sup>100</sup> and others adopting a compliance and enforcement policy, such as the Australian National Compliance and Enforcement Policy (NECP) published by Safe Work Australia which is set out below.<sup>101</sup> The ‘compliance pyramid’ approach based on Ayres and Braithwaite and others is influential with regulators opting for an approach where they state they will select one or more from a range of ‘tools’ aimed at reinforcing willing compliance and only using the prosecution as a final resort or in very serious situations.

The NECP uses the traditional triangle shape with different potential enforcement tools set out. The diagram does not necessarily require an escalating approach to enforcement, that is, it is not necessary to start at the bottom of the triangle and to progressively adopt more significant responses. Rather, the approach depicted in the diagram allows for a response at any level in the triangle (including at the top) to be used in the first instance if this is considered most appropriate after considering factors such as the extent or risk of harm, conduct, public interest and attitude to compliance. However, it does note that using tools lower down the triangle may avoid the need to escalate.

The HSW Act acknowledges that regulators may have powers under overlapping legislative regimes and requires that this is specifically addressed in their compliance and enforcement policies.<sup>102</sup> The Australian NECP states:<sup>103</sup>

Regulators will commence their intervention using the tools that are most appropriate in the particular circumstances. Some tools, as indicated in this policy, are alternatives while others may be used in combination. Using a range of tools in the lower levels of the pyramid may often achieve compliance without needing to escalate to the more serious levels of sanctions.”

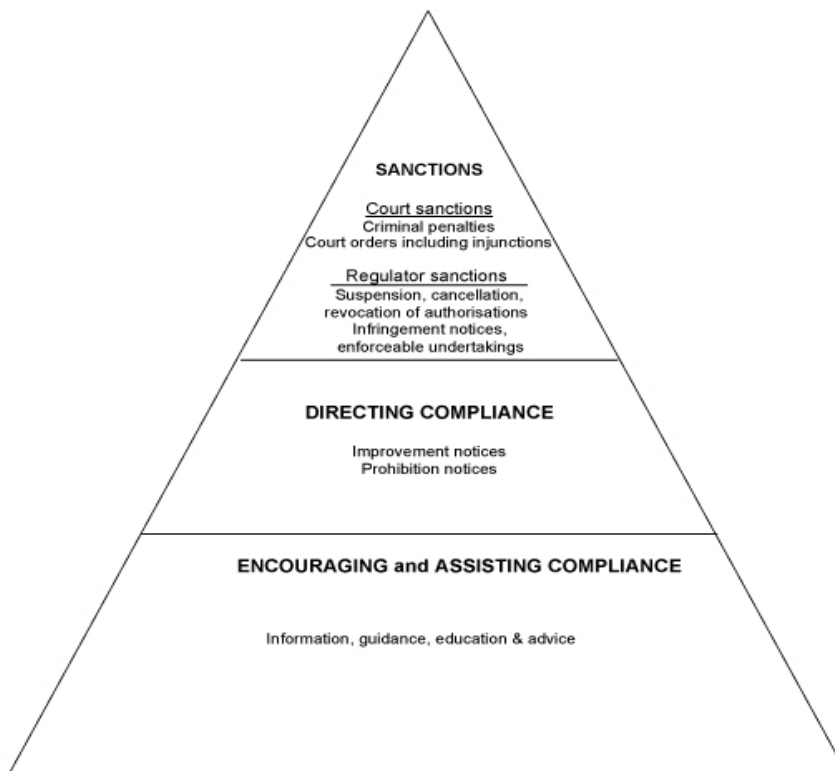
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<sup>100</sup> See for example Worksafe’s Prosecution Policy at <http://www.business.govt.nz/worksafe/information-guidance/legal-framework/worksafe-new-zealand-prosecution-policy>

<sup>101</sup> <http://www.safeworkaustralia.gov.au/sites/swa/about/publications/pages/national-compliance-enforcement-policy>

<sup>102</sup> S 190 HSW Act

<sup>103</sup> Above n 101



The ‘compliance pyramid’ is intended to encourage an interactive co-operative approach. However, I would argue that, at the point at which prosecution becomes a realistic option, this co-operation breaks down. Where regulators wish to preserve the possibility of prosecution, the situation moves to one of gathering evidence, hiring lawyers, and minimizing communication. The parties are no longer interested in a joined-up approach to achieving the overall spirit of the regulation. Rather, the parties will be seeking to develop a clear understanding of the rules to be objectively interpreted and proved in court if necessary. Regulated parties will be concerned to guard information where the release of it may adversely impact on them.

Therefore, where parties can face significant fines or imprisonment for failure to comply with regulatory requirements, the parties’ focus is likely to move from broad regulatory concepts to requirements for certainty and compliance with criminal procedure.

## *B Enforcing the spirit of the law vs the letter of the law*

As noted above, the use of the compliance pyramid approach seems to change if prosecution is a possibility. An issue that is often raised is the matters taken into account in determining which compliance tool to use and whether regulators are sometimes attempting to enforce the spirit (rather than the letter) of the law. This is linked to the view that operators sometimes seek to creatively comply with the law, by complying in a formulaic way which can be argued to circumvent the underlying purpose of the law. As is noted earlier in this paper, to achieve regulatory goals both parties need to have clarity and certainty as to the meaning of the law, particularly in command and control regulation where this is enforceable through prosecution or where regulators can make decisions that directly impact a party's livelihood.

If enforceable obligations are to be imposed upon people and to have the force of law, then these obligations need to be sufficiently clear to the parties concerned. Where there is a disconnect between the plain wording of a rule and the 'underlying spirit of the law', it is unlikely that a regulator could seek to claim wrongdoing by a party who had complied with his or her legal obligation – even if they have done this in a formulaic and opportunistic way. While law changes can seek to change attitudes, command and control regulation is more suited to controlling actions, rather than underlying motivations.

Ayres and Braithwaite's approach has been criticized for advocating an approach where regulators reward co-operation and willingness to comply and punish recalcitrant operators. Yeung calls this a 'potentially dangerous weakness' that fails to take into account the right for people to act as they wish provided that it is not unlawful.<sup>104</sup> She also strongly criticises the approach whereby the severity of the enforcement response is determined by reference to the degree of co-operation by the regulated party. Yeung refers to the "constitutional values of proportionality and consistency which should restrict the extent to which the regulation's instrumentalist enterprise may legitimately be pursued".<sup>105</sup> She states that these values:<sup>106</sup>

...suggest that, while regulatory officials should employ the enforcement tool most likely to be effective in securing compliance, that choice should also be informed by the desired social purpose(s) sought to be promoted, subject to the requirement that the choice of instrument constitutes a fair and proportionate response to the seriousness of the alleged response.

The theory of responsive regulation places prosecution at or near the 'top of the pyramid' suggesting that this response should be used least often and in the most serious case. There are many reasons for this including the highly punitive nature of prosecution, with criminal

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<sup>104</sup> Bronwyn Morgan and Karen Yeung *An Introduction to Law and Regulation*, (Cambridge University Press, Cambridge, 2007), at 201

<sup>105</sup> At 201

<sup>106</sup> At 202,203

conviction potentially resulting in significant monetary fines or imprisonment as well as public denouncement and a criminal record (which in some cases makes the holder ineligible for certain privileges). In addition to the impact on the defendants, prosecution is a costly exercise which ties up the resources of the regulator and the court system. It can also have a significant impact on other parties such as witnesses and juries who must also give up their time and take a significant amount of time to resolve.

*C Responsive regulation in context*

*(i) The ‘split pyramid’*

Although Johnstone referred to the enforcement pyramid in his 2003 comments,<sup>107</sup> in a 2012 text on the Australian Model Law after it had been passed, the authors have a different view. They provide state that the NECP professes to take a ‘responsive’ approach to enforcement but that “This approach should not be confused with the ‘responsive’ model of enforcement proposed by a number of theorists, most notably by Ayres and Braithwaite.”<sup>108</sup> They state that, in practice, a responsive approach will have a more restricted meaning:<sup>109</sup>

...which will involve the regulator choosing the optimal sanction from the hierarchy of sanctions, based on: the extent to which the firm’s work health and safety compliance falls short of the level required by work health and safety standards; the resulting level of risk to workers and others; the firm’s attitude and level of co-operation; and the firm’s prior compliance record.

Johnstone and Toomey also note that there is little evidence that a ‘tit for tat’ approach is taken by health and safety inspectors in Australia. They consider that inspectors take a ‘one-off’ proportional response in most instances. Notably, they state that:<sup>110</sup>

In practice it is rare for a fatal incident or serious injury to escape prosecution no matter how proactive the duty holder. Conversely, it is rare for a contravention that does not result in an incident, or that finds expression in a minor incident, to lead to prosecution, regardless of the seriousness of the risk underlying the incidence or the belligerence of the duty holder.

Johnstone and Toomey describe the approach set out above as an escalation based on the seriousness of the actual consequences. They note that Gunningham and Johnstone refer to this approach as the ‘split pyramid’ and state that this split of enforcement responses fails to

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<sup>107</sup> See n 84

<sup>108</sup> Above n 9, at 254

<sup>109</sup> Taken from data on the number of inspectors by Australian jurisdiction: 2001 – 2010, Workplace Relations Ministers’ Council, Performance and Monitoring Reports, Comparison of Occupational Health and Safety and Workers’ Compensation in Australia and New Zealand 10th ed, 2008 and 12th ed 2010; and Inspection and investigation activities of the Australian work health and safety regulators in 2008-2009, Productivity Commission Research Report, Performance Benchmarking of Australian Business Regulation: Occupational Health and Safety, March 2010, at 115, Table 5.9

<sup>110</sup> Above n 9 at 257

use the dynamic benefits that the enforcement pyramid can offer and does not provide for an escalating approach to compliance.<sup>111</sup>

In practice the predictable ‘split pyramid’ approach outlined above could result in complaisance by regulated parties. If it is the case that harsh enforcement tools are always used where there is a serious outcome and rarely in other cases, then this limits the capacity of regulators to deter unsafe behavior at an early stage before it becomes a significant problem and becomes merely a matter of responding to serious incidents when they occur – in other words enforcement becomes the ambulance at the bottom of the cliff.

*ii Regulatory design features affecting enforcement*

As Morgan and Yeung note, in considering approaches to enforcement, two features of the regulatory framework are particularly relevant, these are the standard of liability and the role of public or private enforcement.<sup>112</sup> In my view these matters are linked both in the regulatory design and in the practical application of the HSW Act.

Morgan and Yeung provide a view on the different characteristics of criminal and civil law. Their view is that:<sup>113</sup>

...criminal law places more emphasis on the actor’s subjective intent, imposes higher evidentiary requirements in order to prove that a violation has occurred, involves enforcement by a public official and is intended to censure and punish those who violate the law...[b]y contrast, civil law traditionally involves less emphasis on the actor’s subjective intent, imposes lower evidentiary requirements in order to establish contravention, may be enforced through litigation by private parties and aims to compensate or restore the damage caused by the legal contravention.

In considering these elements against the offence regime set out in the HSW Act, it is clear that, in practice, it falls somewhere in the middle of these categories. The offence provisions in the Act set out criminal offences that are subject to penalties on conviction of fines and/or imprisonment. However as noted earlier most of the offences are strict liability offences and the Act provides for private prosecutions where the regulator decides not to file charges under the HSW Act (or another relevant Act). The Sentencing Act and prevailing case law under the previous HSE Act 1992 gives priority on sentencing to reparation and Sentencing Act criteria have recently been amended to allow for higher reparation payments allowing for a ‘top up’ to ACC compensation for earnings.<sup>114</sup>

This provides the capacity for prosecutions under the HSW Act to be taken between private parties and with a significant objective being compensation to the victim. This creates

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<sup>111</sup> N Gunningham and R Johnstone, *Regulating Workplace Safety: Systems and Sanctions*, Oxford University Press, Oxford, 1999 at 122

<sup>112</sup> Above n 104 at 203

<sup>113</sup> Above n 104 at 204

<sup>114</sup> This is discussed in detail in the next section of this paper.

a situation where the criminal law is capable of being used as a replacement for the civil law and for essentially the same purposes. The discussion in the next section shows that this was not the intention when private prosecutions were provided for. It also emphasises the fact that regulatory instruments usually operation as part of a relevant broader regulatory context.

### *VII The impact of private prosecutions*

As I have noted, prosecution is one of the enforcement tools available to regulators under the HSW Act. This tool is also available to private individuals in the event that the regulator decides not to prosecute.

The HSE Act was amended in 2002 to enable third parties to initiate prosecutions.<sup>115</sup> Prior to that, prosecutions under the Act could only be brought by a health and safety inspector. The Select Committee considering the proposed amendment stated:<sup>116</sup>

There are a number of reasons for removing the Crown's monopoly on prosecutions. These include enhancing the deterrent effect of enabling a greater range of persons to enforce the Act; providing an alternative means of seeking justice for aggrieved parties where a case is not prosecuted by OSH; and providing a safeguard against potential inertia, incompetence or biased reasoning.

The Select Committee noted that it had been advised by the Department of Labour that there were robust safeguards surrounding private prosecutions which “protect against inappropriate litigation”. The Select Committee went on to note that “... the provisions of the Sentencing Act reduce incentives to take private prosecutions for financial gain because victims can no longer be awarded part of a fine.”<sup>117</sup>

However recent developments in sentencing may have changed this in a significant way. In December 2014, section 32 of the Sentencing Act was amended to permit a court to order reparation for consequential loss where compensation has not been paid under the Accident Compensation Act 2001. This specifically permits reparation for consequential loss or damage “to meet any statutory shortfall in compensation.”<sup>118</sup> This effectively permits ACC compensation to be ‘topped up’. Prior to that, under the Sentencing Act, and in accordance with the Supreme Court case of *Davies*,<sup>119</sup> the position had been that reparation could not be awarded for matters where compensation was payable (regardless of the amount actually

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<sup>115</sup> Health and Safety Amendment Act 2002, s 27

<sup>116</sup> Report of the Transport and Industrial Relations Select Committee date 21 October 2002

<sup>117</sup> Report of the Transport and Industrial Relations Select Committee considering the Health and Safety Amendment Bill 2002, 21 October 2002, at 15

<sup>118</sup> Ministry of Justice Departmental Report on Victims of Crime Reform Bill, April 2012

<sup>119</sup> *Davies v Police* [2009] NZSC 47

paid) on the grounds that to do so would undermine the “social contract” underpinning the national accident compensation scheme.<sup>120</sup>

This amendment came into force at the beginning of 2015.<sup>121</sup> It has been described by at least one commentator as a potential ‘return to personal injury damages claims’.<sup>122</sup> This is particularly the case where private individuals can initiate the prosecution. Although, equally, this development could also result in increased pressure by victims for regulators to prosecute. The potential for higher awards of reparation could also mean that there is increased resistance to liability by defendants, with more choosing to aggressively defend health and safety charges.

This capacity for private prosecutions has been continued in the HSW Act. The section is not limited in who can prosecute which leaves it open to interested parties such as unions if they have notified their interest with the regulator.<sup>123</sup>

Prosecution under the HSW Act enables victims to actively enforce the Act. Their decisions can be quite independent of any strategy the regulator may have and may be used as a vehicle for achieving compensation for specific loss that they have incurred. This has come about because of law changes since private prosecutions were first introduced in 2003 and may have ‘moved the goal posts’ in terms of the overall regulatory playing field. This incentive could result in either the victim (or other parties) influencing the regulator’s enforcement decision in favour of prosecution (rather than other tools), or taking a prosecution of their own. This adds an element of unpredictability to the choice of enforcement tool and raises a question about the ability for regulators to apply an enforcement policy effectively. It also raises real questions for other issues which are outside the scope of this paper such as the potential for a backdoor means of ‘suing for personal injury’ and inequalities in terms of financial compensation for accident victims between those who are ‘lucky’ enough to be injured at work and successfully prosecute and receive reparation and those who are not.

However, private enforcement is considered to add value to a regulatory regime. In addition to providing a means for the private actors to receive compensation, it is considered by Yeung to be a ‘participatory activity which allows individuals and groups to compete over increasingly pluralistic understandings of the public interest’.<sup>124</sup>

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<sup>120</sup> at [37]

<sup>121</sup> s6 Sentencing Amendment Act 2014, with effect from 6 December 2014

<sup>122</sup> [http://www.minterellison.co.nz/Sentencing\\_Act\\_changes\\_03-11-2015/](http://www.minterellison.co.nz/Sentencing_Act_changes_03-11-2015/)

<sup>123</sup> S 142

<sup>124</sup> Above n 104, at 211



The number of private prosecutions is increasing. While the amendment was made in 2003, it was not until 2012 that a private prosecution was successfully brought to Court.<sup>125</sup> The first successful private prosecution was taken by the NZ Meat Workers Union in 2012.<sup>126</sup>

The second case was in 2014 and was brought by Sergeant Stevin Creeggan against the New Zealand Defence Force who plead guilty to health and safety failures which led to the deaths of three men in a 2010 military helicopter crash<sup>127</sup>.

The Court in addressing Mr Creeggan stated:<sup>128</sup>

You are proof that one person can make a difference. By dint of your tenacity and resolve, you have managed to create a silver lining from an unimaginable tragedy that has seared itself into the nation's psyche. You have demonstrated what the amendment legislation permitting private prosecutions set out to achieve.

However, in the month of August 2015 alone, three private prosecutions are reported to have been determined.

On 3 August 2015, a guilty plea was entered in a case taken by the CTU for the death of forestry worker Charles Finlay. On 12 August, 2015 in another case taken by the CTU, Puketi Logging, the employers of 19 year old forestry worker Eramiha Pairama, were found guilty of a charge under the Health and Safety in Employment Act relating to his death in 2013.<sup>129</sup> Following that, on 31 August 2015, Otago University pleaded guilty to a private health and safety prosecution and paid \$60,000 to a woman visitor who slipped on wet tiles.<sup>130</sup>

It is not possible at this stage to state whether this is a trend. However, clearly the potential for private prosecutions indicates that parties other than the regulator can make enforcement decisions under health and safety legislation (albeit once certain conditions are met).

It is not possible to draw on the Australian experience in relation to private prosecutions as the Australian Model Law does not provide for private prosecutions. Although, in their text, Johnstone and Tooma strongly advocate for: "...a general third-party right to initiate prosecutions, exercisable by a union, an NGO (such as a worker' health action group or an

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<sup>125</sup> <http://www.findlaw.co.nz/articles/4294/health-and-safety-private-prosecution-appeal-fails.aspx>

<sup>126</sup> *New Zealand Meat Workers Union v South Pacific Meats Limited* [2012] DCR 877 (DC)

<sup>127</sup> *Creeggan v New Zealand Defence Force* DC Wellington CRI 2014-085-007231, 18 July 2014;

<sup>128</sup> At [48]

<sup>129</sup> <http://www.radionz.co.nz/news/national/281275/unions-win-new-forestry-death-prosecution>

<sup>130</sup> <http://www.radionz.co.nz/news/regional/282914/otago-pleads-guilty-to-health-and-safety-prosecution>

institute concerned with the protection of workers' rights), a competitor, or a group of workers".<sup>131</sup>

The inclusion of the right for a competitor is explained by reference to the way that laws concerned with food health and safety standards and consumer protection are most effectively enforced. Johnstone and Tooma state that:<sup>132</sup>

Competitors have the greatest interest in ensuring that competing businesses do not get an unfair price advantage by cutting health and safety corners and therefore will use the full extent of their commercial resources to enforce legal obligations against their competitors. It is the application of this motivation that will act as the greatest deterrent for breaches of the legislation.

With respect to this point of view, the same issues arise as with private prosecution by victims which is that this would have the potential to 'skew' the application of any overall enforcement policy by having some prosecutions that occur, not because they fit with an overall strategy for health and safety generally but because there is a private interest strong enough to motivate a private prosecution.

Again, it is noted that there are valuable reasons why these prosecutions should occur – however what is important is that the capacity for these prosecutions to occur or to influence regulator decision-making needs to be actively taken into account in terms of the overall regulatory design. If these influences are not taken into account and built into the system, lawmakers and regulators will be caught out and left wondering why the planned outcomes did not occur.

### *VIII Alternatives to prosecution*

The Act does include alternatives to prosecution, including the ability for the regulator to issue improvement and prohibition notices and to accept enforceable undertakings from the PCBU.<sup>133</sup> However the remedy for failure to comply with these notices is enforcement through prosecution. Regulations can also be made prescribing infringement offences – providing for a lesser penalty and quicker enforcement process.<sup>134</sup>

In addition, the Act provides for regulations to be made prescribing a requirement for specified work, products, or qualifications to be authorised by the regulator. This operates as a type of control of entry and exit into the market in an instrument that in other respects is open entry.

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<sup>131</sup> Above n 9 at 193

<sup>132</sup> Above n 9 at 193

<sup>133</sup> Part 4

<sup>134</sup> Ss 211 and Part 4, subpart 6

By way of contrast, some other forms of safety regulation establish licensing or certification regimes designed to control entry and exit by all operators and to establish criteria that must be met in order to remain a participant. Examples include land transport safety management which requires drivers to be licensed and vehicles to be registered and have a current warrant of fitness.<sup>135</sup>

While the driver licensing regime requires drivers to be a certain age, have passed written and practical tests and to have met standards for eyesight (and some other health related criteria), some other regimes go further and include more comprehensive requirements such as a requirement to be a ‘fit and proper person’, which often requires consideration of the person’s criminal history and possibly also character references or declarations of compliance.<sup>136</sup> Examples of these regimes include maritime documents issued under the Maritime Transport Act, including Maritime Rule Part 19 which establishes the Maritime Operator Safety System (MOSS).<sup>137</sup>

Features of licensing regimes include the fact that they require an ongoing relationship between the regulator and the regulated parties and they provide a range of tools which the regulator can use to respond to concerns and incidents. These tools are included in typical ‘compliance pyramids’. In many cases these models provide the regulator with the power to impose conditions on the operation of the licence, or to operate or to suspend or revoke it (after following an appropriate process).<sup>138</sup> They may also provide the ability for the regulator to ban the operator from re-entry as an industry participant, either for a specific period of time or potentially permanently.

Licensing regimes that include a ‘fit and proper person’ requirement or that require a criminal or compliance history check as a condition of holding a licence may also result in operators with poor compliance or safety histories being excluded as operators.<sup>139</sup> This is arguably the most significant deterrent for an operator as it directly affects their livelihood in a manner that other enforcement tools may not.

Because these regimes necessitate and create a close working relationship, they facilitate information exchange and the on-going relationship necessary for a compliance dialogue to take place. However they are also potentially vulnerable to capture resulting from the close working relationship between industry and the regulator and tend also to be very resource intensive.

In terms of encouraging compliance, licensing regimes arguably allow for a greater range of compliance tools to be used meaning that the response can be more closely tailored to the

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<sup>135</sup> Land Transport Act 1998

<sup>136</sup> <http://www.nzta.govt.nz/>

<sup>137</sup> Maritime Transport Act 1994, Maritime Rule Part 19, <http://www.maritimenz.govt.nz/Rules/Rules.asp>

<sup>138</sup> See for example s 43 Maritime Transport Act 1994

<sup>139</sup> See for example s 50 Maritime Transport Act 1994

issue than where prosecution is the main form of enforcement. In addition, the ability for an ongoing dialogue allowing the regulator to both ‘negotiate compliance’ with individual operators and send clear messages to other operators has the potential for good compliance outcomes. However, where there is ultimately a punitive outcome – this may create similar issues of distrust and self-preservation that exist in a model where prosecution is the main means of punishment. The potential for judicial review of a regulator’s decision also means that this model would not avoid the court system.

### *IX Practical issues with prosecutions*

In health and safety prosecutions, the individual circumstances and responses of the defendants and the victims can vary markedly. Key influencing factors include the fact that the defendants can range from large well-resourced corporations with healthy finances who are well insured and confident participants in the legal process, to small companies or individuals who are overwhelmed by the process and by the fact that they have become part of a distressing (and in some cases tragic) situation.

Prosecutions are heavily influenced by the way in which defendants are legally represented. This can range from those with a large expensive team of lawyers and experts to defendants who, by choice or necessity, are self-represented. Both of these raise potential complexities in terms of time and cost to regulators and increase the unpredictability of the outcome. It appears that the number of self-represented defendants is increasing.<sup>140</sup> In some cases the defendants themselves are also suffering significant emotional stress as a result of the accident that led them to be prosecuted.

Even if a prosecution is successful, the sentence is established by reference to the financial means of the defendant, meaning the outcomes in similar cases do not necessarily reflect the facts or principles at issue.<sup>141</sup> In other words, there is not necessarily a direct correlation between the gravity of the fact situation and the penalty – as this must in all cases take into account issues that are specific to the case. This makes it even more difficult to send a clear message to the public at large based on the outcome of a specific prosecution.

While the regulatory reform leading to the HSW Act follows the Pike River Royal Commission recommendation, it is interesting to note that, in the case of the Pike River tragedy, the company was reported to have been prosecuted and convicted in July 2013 without the company taking part in any of the proceedings. It was fined \$720,000 (this was by identifying a number of failings and fining each one - as the maximum fine for the charge laid was \$250,000), and ordered to pay \$3,410,000 in reparation (\$110,000 for each man – the

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<sup>140</sup> Elliot Sim “A Warning to the Profession” LawTalk (New Zealand Law Society, 13 March 2015) at 9

<sup>141</sup> Sentencing Act 2002, s 14

29 who died and the 2 survivors). However, by that time the company was in receivership and therefore it was extremely unlikely any money would be paid<sup>142</sup>.

Charges had also been laid against Peter Whittall, chief executive of the company on the grounds that, as an officer, he acquiesced or participated in the company's failures. Mr Whittall pleaded not guilty and successfully moved the proceedings to Wellington. The likelihood was that there would be a very long, expensive trial with no certainty of outcome. Then, in what was reported as a controversial decision, in December 2013, the charges were withdrawn and the full amount paid as a 'voluntary payment'.<sup>143</sup>

This clearly illustrates the complexities of the issues around prosecution – the cost, time, frustration and mixed messages inherent in the process. It is also ironic that higher penalties would not have made any difference. However, the question remains whether the victims and their families would have received any money without the threat of prosecution being part of the process.

## *X Concluding thoughts*

The HSW Act has been enacted with a view to securing the health and safety of workers and workplaces. It establishes high level duties and aims to achieve a greater degree of specificity and certainty for all relevant parties through ongoing interaction and information gathering. This is aimed at developing regulations, guidance documents, and education material aimed at providing a higher degree of specificity and certainty for regulators and regulated parties. This requires open communication between regulators and the regulated parties so that they can identify unsafe practices and work together to develop areas for improvement. However, the Act also has strong deterrent measures and these are likely to inhibit openness and promote a defensive attitude on the part of regulated parties, who may seek to limit their potential legal liability. This creates an unsatisfactory equilibrium where parties lack the optimal level of information and certainty to comply, on the one hand, and enforce, on the other.

There are many factors that influence how regulatory parties behave and whether the regulatory goal can be achieved. These include the extent to which the regulatory goal is clear and unambiguous to all parties, the characteristics and motivations of the regulated parties, the potential for other interested parties to participate in regulatory decisions, and the degree to which information is available to all relevant parties.

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<sup>142</sup> <http://www.listener.co.nz/current-affairs/the-3-41-million-question/>

<sup>143</sup> Taken from media coverage regarding the judicial review into this decision in May 2015 - [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=11454844](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11454844)

The Act seeks to address a number of these issues and, in particular, seeks to enhance the opportunity for worker participation. However, the Act provides limited opportunities for parties other than organised work groups to participate in decision making. This does not take account of the interests of the broader community in health and safety in the workplace. The legislation includes duties to ensure that no person is harmed by the actions of workers and/or in the workplace. Examples include members of the public who are lawfully at a workplace such as a shopping centre, a school or on a passenger ferry.

Without additional guidance or some form of authoritative decision making, it is possible for parties to be unclear about what their regulatory responsibilities are. Prosecution may provide the mechanism for some of this confusion to be clarified through the development of a body of case law capable of providing guidance to regulators and regulated parties. The prosecution process is likely to play a role in advancing common thinking and consistency in the application of health and safety regulation through the courts operating as ‘umpire’ and establishing legal precedent that can guide future action. However there are disadvantages with this in that courts do not necessarily consider a representative range of cases.

On a practical level, prosecution is a notoriously unpredictable process with the outcome being a product of many variables. The ideal situation is where the law and facts are clear and the prosecution process is efficient resulting in an outcome that clearly represents justice to all parties. However in reality this can be complicated by prolonged defended hearings resulting in unsatisfactory sentences limited due to financial capacity or in some cases because the defendant company has wound up and ceased to exist.

There is the potential for some real tension if the assumption is that the courts will routinely assist by stepping in to resolve uncertainty or at least authoritatively inform decision making for health and safety outcomes. This seems to be inconsistent with the concept of prosecuting as a last resort. Relying on the Courts to resolve areas of legislative uncertainty could be seen as a very expensive and time-consuming ‘regulatory instrument’.

Paradoxically, for prosecution to be successful, the law needs to be certain and clear, however prosecution often deters the open communication necessary for this. As a result, there is the risk that regulators will fail in their efforts to enforce or there will be prolonged and expensive litigation over ambiguous terms. The aim is for the parties to engage in a regulatory conversation with a view to gathering useful information and distilling this into rules and guidance. However, the chilling and unpredictable nature of the prosecution process may create distrust and mean that the parties are not willing to openly communicate.

A means of addressing this is for regulators to have, and clearly publicise, a policy setting out their proposed approach to enforcement which will include a range of measures and criteria for their use. This could clearly signal to regulated parties when they should fear prosecution and when they can be more open in their interaction with the regulator. However,

there is a danger that, where operators consider that enforcement action is too predictable, this may cause complacency and reduce incentives to operate safely where this comes at a cost.

In New Zealand health and safety regulation, the capacity for the regulator to take a strategic approach to enforcement is complicated by the potential for private prosecution. New Zealand has no ability to take a civil action when personal injury occurs.<sup>144</sup> However, health and safety legislation provides for private prosecutions where the regulator decides not to prosecute. As I have discussed above, recent law changes may cause victims to seek prosecution as a means to obtain financial compensation that they would otherwise not get. This could result in pressure on regulators to prosecute and an increased number of private prosecutions.

All of these issues remain to be seen once the Act is in force. While New Zealand can look to the Australian experience for some indication of how compliance and enforcement is likely to operate in practice, there are some key differences between the two jurisdictions. In particular, New Zealand has the accident compensation regime which prohibits civil action for personal injury. The New Zealand HSW Act also has private prosecutions. The New Zealand experience will, therefore, be unique to this country.

While the new legislation was developed following a crisis, the legislation will need to be sufficiently flexible, robust, and fit for purpose to promote workplace health and safety in a wide range of future situations. It is clear that there are challenges ahead for all relevant parties if the objective of the Act is to be met and some progress is to be made towards Worksafe's goal of ensuring that 'Everyone who goes to work comes home healthy and safe'.<sup>145</sup>

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<sup>144</sup> S 317 Accident Compensation Act 2001

<sup>145</sup> Above n 17

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