

# COMPLIANCE, PROSECUTION OR PRISON

**PRESENTER:**        *Neil Leveritt*  
                              *CompAud*

## **INTRODUCTION**

This paper has been written to review some of the issues which relate to providing a workplace that fully complies with legislation and the potential consequences of non-compliance on company directors, managers, safety officers, supervisors, employees and representative organisations. The subject is complex and greatly influenced by legal opinion and precedence, and this paper is somewhat superficial in that it is a layperson's view of the subject, not a lawyer's. I have attempted to deal with the issues which strike me as most significant from my day to day work and my reading.

This paper considers:

- Liability issues
- Statutory compliance
- Methodologies to gain compliance
- Audit Experience.

The experiences and examples of non-compliance quoted later in the paper represent work which has been done on twelve coal mines sites. Although this is a sample, it is considered that the issues raised are representative of the coal industry generally.

## **LIABILITY ISSUES**

The first act controlling coal mines was passed in November 1854 and was titled *An Act for the Registration and Inspection of Coal Mines in the Colony of NSW*. This legislation gave little protection for mine workers, but since then, the development of safety legislation has been well documented.<sup>1</sup>

With the current legislative changes moving from prescriptive requirements to "duty of care" and "due diligence" type requirements where the responsibility for the workplace health and safety is in the hands of those who control the workplace, i.e., the employers and employees, designers and suppliers, the result of an accident to a worker immediately raises the question of who breached the duty of care provision. These laws are now assuming that because the breaches of safety standards are deliberate acts of employers or workers intent on sabotaging the work environment, the individuals should, therefore, be punished for their failings. There is a definite trend towards the senior members of organisations being held responsible, both in a corporate and personal sense, for those breaches. To a lesser extent, employees are also being held responsible for breaches which cause accidents to themselves or others.

The Industry Commission has released a report on workers compensation. It highlights statistics showing that there are at least 500 deaths and 200,000 injuries each year costing Australian industry \$10 billion. This position cannot continue in Australia and as the Industry Commission suggests, a "culture of care" by employers and employees is required which will reduce the accident statistics and satisfy duty of care provisions of legislation.

Company directors in Australia have been charged with manslaughter over workers' deaths. In the United States of America<sup>2</sup>, a case is reported of company officials being charged and found guilty of murder following an employee's death after cyanide poisoning. These charges were overturned on appeal, but the officials were ultimately convicted of manslaughter, with prison sentences of between one and three years.

In Australia, there have been cases of company officials being charged with manslaughter. I am not aware of any cases of the officials being sentenced to prison terms, but prosecutions are increasing and the number of cases of companies (and company officials) being fined through the criminal courts is growing. Some recent cases include:

- In New South Wales, a company was fined \$100,000 over a near-fatal accident at a blast furnace. The foundry worker was cleaning a tap hole from the furnace. Part of a cover, which was also a guard, needed to be removed to carry out the cleaning. Molten metal was released onto the worker. A redesign of the cover has now been done. Other cases of \$80,000 fines have been made in New South Wales.
- A Queensland company has been fined \$30,000<sup>3</sup> for failing to ensure the health and safety of a worker. In September 1992, an employee sustained fatal injuries when the employee, who did not hold a certificate of competency, attempted to operate a skid steer loader, contrary to the foreman's instructions.

While the employee was in the operating position, the hydraulically operated loader arms were moved upwards, forcing his body against the roof.

The loader was not fitted with side screens to prevent the operator's body contacting moving parts. The seat belt, designed to restrain the operator, was also not operational.

The fine was imposed under Section 9(1) of the *Workplace Health and Safety Act*.

- Failure to obtain a demolisher's certificate of competency has cost a man \$400 in fines (maximum penalty \$3,000)<sup>4</sup>.

The Southport Industrial Magistrate heard the defendant, who did not hold the required certificate of competency, was employed to demolish several buildings.

The defendant was charged with contravening Section 109(2) of the *Workplace Health and Safety Act*. A plea of guilty was entered.

- A chemical company has been convicted of a breach of Section 9(1) of the *Workplace Health and Safety Act*<sup>5</sup>. An employee suffered a work-related illness caused by exposure to cyanide.

The employee was required to hose out an area which housed various equipment used to carry cyanide briquettes. To remove the cyanide, the floor was hosed at the end of each shift and the solution of cyanide drained into a bunded area and pumped into a holding tank for re-use. The depth of cyanide solution was approximately 12 mm in the area where the employee was required to work.

While hosing, the employee tripped and fell. One leg of his overalls (from the knee to the boot) became wet with the solution. Approximately twenty minutes later he collapsed and was given first aid for cyanide poisoning. Blood tests revealed a blood cyanide level far in excess of normal.

Waterproof clothing was available, however, no specific instructions had been given to the employee. The employer contended the equipment worn by the employee was sufficient for the task, given that the employee was instructed during induction training to shower immediately after contamination with cyanide.

The Gladstone Industrial Magistrate states it was not enough for the employer to supply a cure after the employee had been exposed to a risk. The employer has a duty to ensure the employee is not exposed to the risk. This could have been achieved by ensuring a suitable exhaust system removed the majority of the dust, and employees wore appropriate protective clothing, ie, waterproof.

The defendant was convicted and fined \$15,000.

- A principal contractor has been fined \$1,500<sup>6</sup> for failing to provide safeguards. An employee sustained back injuries after falling over 2.5 metres from the first floor of a project.

The accident occurred when the employee was taking measurements of the floor thickness to mark out the positions of internal walls. He was on his knees supporting himself with one hand resting against the vertical formwork sheet. The sheet gave way and the employee fell.

The fine was imposed under Section 23(c) of the *Workplace Health and Safety Act*.

- The Southport Industrial Magistrate has convicted a principal contractor and an unlicensed demolisher for breaching the *Workplace Health and Safety Act* and Regulation.<sup>7</sup>

The principal contractor, who pleaded guilty, was charged with contravening Section 20 (failure to notify the Director of the Division of Workplace Health and Safety) and 109(1) (allowing a non-certified operator to work in a prescribed occupation) of the Act, and Section 14(4) of the Regulation (failure to supply written details of work to be undertaken to the Director). He was fined \$1,200.

The demolisher pleaded guilty to contravening Section 109(2) of the *Workplace Health and Safety Act* which requires workers in prescribed occupations to hold a certificate of competency. He was fined \$400.

- A company charged with an alleged breach of Section 10(1) of the *Workplace Health and Safety Act* has been convicted and fined \$25,000.

The breach occurred as two forklifts were used to unload poles from a truck. The truck driver was standing on the truck tray when the poles became unstable, rolling off and striking the truck driver, who fell to the ground. He sustained fatal head injuries.

The forklift operators stated they had not received instructions from their employer as to a safe method of lifting such loads.

- A company which failed to ensure the health and safety of its workers has been fined \$2,500.

The Cairns Industrial Magistrates Court was told an employee suffered a serious bodily injury when the boom of a concrete pump collapsed without warning, striking him on the head. Investigations revealed the collapse happened after welded joints failed. The company was convicted of a breach of Section 109(1) of the *Workplace Health and Safety Act*. An initial fine of \$750 was set aside following a successful appeal.

- A trench collapse which killed a worker has cost a company \$20,000 in fines.

The Ipswich Industrial Magistrate heard the collapse happened because the trench, which was approximately 4.8 metres deep, had not been sloped. Other safety measures which ensure a collapse of soil does not occur had also not been taken.

The defendant was convicted, however, the Magistrate took into consideration the early plea of guilty; no prior convictions; and company co-operation during the investigation.

These examples have been included in this paper to indicate the exposure that employers and employees have, not only to their health and safety, but also to the liability of breaches of legislation. These types of accidents could and do occur in the coal mining industry, and although the convictions are from breaches of the *Workplace Health and Safety Act*, similar convictions are possible under provisions contained in the draft Coal Mining Bill for Queensland, currently under consideration. As workers in the mining and extractive industries are exposed to three times higher risk of injury and nine times higher risk of fatality<sup>8</sup> than other industries, the probability of prosecutions occurring is high.

From my work in this area through the coal industry, very few managers, employers and employees were aware of the extent of the legislation, standards, by-laws, etc., that are applicable to their sites, yet they can be prosecuted and fined for breaches of as many as thirty different Acts and related Regulations.

## STATUTORY COMPLIANCE

Statutory compliance is not just presuming that you are abiding by the legislative requirements of the area where your site operates, but having a systematic management approach to ensure that all the legislative requirements are met. Where non-prescriptive legislation ie, duty of care provisions, the best practices adopted are the ones to which the community will expect the site to conform. Best practice may be the standards set by groups such as the electricity authorities, Australian Standards or International Standards.

To ensure that compliance is achieved, the management system must ensure that personnel are firstly aware of the legislation and practices, and secondly, that all employees are working to these practices.

There are several reasons why companies strive for 100% compliance. These include:

- increased penalties for offences
- vigorous pursuit of offenders by government bodies and the public (media)
- increased publicity about fatalities, serious accidents and breaches
- company directors' liabilities, both corporate and personal
- managers' difficulty to comprehend all of the legislation due to its complexity
- supervisors' lack of understanding of the legislation and their responsibilities
- general desire to improve the sites' health and safety standards
- requirement to satisfy the broad duty of care clauses in the health and safety legislation through a thorough due diligence process.

## METHODOLOGIES TO GAIN COMPLIANCE

The first step is to identify which legislation, by-laws and/or Standards need to be complied with. This is not a simple task, and must be given due care and attention. All the legislation that affects an operation will include financial, taxation, employment, environmental, as well as health and safety. It is clear that explosives requirements meet the health and safety criteria, but what about the legislation concerning the plumbing and pipe fittings, or the aspects of Australian Standards that refer to quality and design standards from an operational point of view, as opposed to the safety aspects. There is not a clear line where the parts can be divided, and some aspects included and others excluded. An appreciation of these obligations will allow a strategy to be implemented which is not only cost-effective, but also appropriate to the circumstances.

When it has been established what legislation, codes of practice, shire by-laws, Australian Standards, company policies, standard procedures, etc., are to be considered as health and safety issues, a detailed check list or manual is prepared. This can be used by the site as a training tool to ensure that managers, supervisors and employees are aware of the issues.

The check list or manual that has been prepared is also used for an audit or monitoring process to establish whether or not the issue is being complied with. This is a systematic process that can be done superficially or in depth, depending on the resources available. It will almost always be a sampling and random checking exercise, which relies heavily on the due diligence of the managers, supervisors and employees. For example, in an open cut coal mine with ten coal haulers operating, an audit will generally only have the resources to examine one or two for compliance with, say, the requirement for fire extinguishers. However, the management system of checking and reporting the fire extinguishers can be audited.

When the areas of non-compliance have been identified, these are reported on to the site. The particular breach needs to be adequately described as well as the requirement of the legislation or standard. This reporting must be clear and concise and in a format that allows management to respond and prepare an action plan to overcome the non-compliance. The preparation by the mine management of the action plan ensures their ownership of the plan for implementation.

#### **AUDIT EXPERIENCES**

My experience with carrying out audits varies somewhat from site to site, depending largely on the ground rules established with the mine. The differences have varied from:

- the audit team being comprised of experts external to the mine organisation and working independently of the site
- the audit being totally managed by the site, with only minor technical involvement by the independent auditors
- the audit teams being approximately half site and half independent
- the audit being carried out under legal privilege for a law firm on behalf of the site

The time involvement of the audit has also varied from site to site. To carry out a comprehensive evaluation of a large open cut coal mine requires between one and two weeks on site with a team comprising an operations/management expert, a safety expert, a mechanical engineer and an electrical engineer. An underground coal mine takes a similar team slightly longer, mainly due to the logistics of travel underground and the time to examine the areas.

The check lists prepared prior to the audit comprise between 2000 - 2500 questions, based on the legislation, shire by-laws, Australian Standards, mine site rules and company policies. Each of the 2500 questions is asked of at least one person and is backed up by documentary evidence or inspection to verify the answer. Obviously, considerable sampling of inspections needs to be done as it is not possible to inspect every machine and item on the site. The sample numbers are noted in the audit results.

Typical compliance levels that mines have achieved are between 90% and 95%.

There have been similar audits carried out in New South Wales with compliance levels in the same order of magnitude.

It is considered that the level of compliance is not the area to focus on, but the level of non-compliance and the seriousness of the issues.

Typically, between 100 and 200 breaches of legislation or non-compliance items are found at each mine and between 25 to 75 of these are considered to be serious.

If an accident or fatality were to occur in these more serious cases, a site would be in a position of having a prosecution laid against it. There have been several instances where a serious injury or fatality could have led to the prison option in the title of this paper as the potential for the accident had been recognised and totally inadequate measures had been taken by the site to alleviate the problem.

In one case, a non-compliance issue had been recognised as a potential fatality through a previous review and the action plan had not adequately addressed the problem. This case had similarities to the \$100,000 fine in New South Wales where an engineering solution was available at not too large a cost and had not been done.

This means that the large number of non-compliance issues occur on a site are quite varied and could be the subject of a paper on their own. The mines that request an external auditor to review their compliance levels are obviously the ones where management has recognised the need for the external check. In most cases, I believe that if front line supervisors, employees and the mine engineers were aware of the legislative responsibilities and they had the resources, the level of compliance would increase. I have noted below some of the more common compliance problems that mines have, and in each of these issues, supervisors should have been aware of the issues.

These issues are:

- **Hazardous Materials.** The storage of incompatible chemical substances in the same locations.
- **Hazardous Materials.** The storage of substances in unmarked, unlabelled containers.

- **Hazardous Materials.** General non-compliance with the mine schemes in issuing chemicals from the store.
- **Isolation Procedures.** Many mines had inadequate isolation procedures, tags that were not designed according to standards, procedures not followed.

A particular case had the employee isolating the wrong conveyor prior to him climbing on the belt to carry out maintenance. The employee was new to the job and had been shown the "incorrect" procedure by another employee. The supervisor had shown a disregard for the training requirements and the manager had failed to ensure that the isolation would be done correctly. This issue had been raised previously in an audit and had been noted as a potential risk for a fatality.

- **Personal Protective Equipment.** Many mines fail to enforce the wearing of protective equipment in the designated areas.
- **Personal Protective Equipment.** An underground mine exempted employees roof bolting from the wearing of eye protection. This apparently was due to the employees request, not the manager's, however, the manager's scheme had the exemption. The employees when roof bolting had to turn their heads away from the work area when drilling and when inserting the bolts and chemical bond to ensure that their eyes were not damaged.
- **Guarding of Machinery.** Many cases of inadequate guards where hands, fingers, etc., could be inserted into moving parts. Many staff when informed of AS 1755 had no knowledge of its existence, and hence had not used it as a guide when fabricating guards for machinery.
- **Electrical Plans.** Commonly not kept up to date. This could be considered of low risk to injury, however, in a case of electricians carrying out maintenance on a pump they used the electrical plan when isolating the power supply. The plan indicated that a modification to the power supply had been made and not entered onto the plan. They carried out "correct" isolation procedure, but this did not isolate the pump they were working on. The work was done while the pump was live. Good luck prevailed and there was no injury.
- **Lighting Levels.** Commonly inadequate. AS 1680 specifies levels that are considered adequate and many mines do not achieve this standard in offices, walkways, etc.
- **Circuit Breaker and Earth Leakage** current settings and discrimination times. The clearance times were commonly found to be greater than the specified time. Relay settings shown in the studies and on plans were often out of date and had not been changed with changes to the mine or were simply not available.
- **Walkways, ladders and platforms.** Commonly, these had been constructed by mine site boilermakers with little or no regard for AS 1657, consequently mines have a large number of walkways, ladders and platforms that are in non-compliance.

There is correlation between the issues of non-compliance and reports of accidents from the Department of Minerals and Energy noted by B. Lyne<sup>9</sup>. This tends to confirm that the achieving of a high level of compliance of health and safety legislation will decrease the number of accidents in coal mines.

---

### CONCLUSION

Employers (and employees) are becoming subject to increasing duties, by legislation and regulation, to ensure the health and safety of workers and to aid in the rehabilitation following injury. The pace at which changes are being made to the legislation, to employers' liability in this area, and the extent of the increases in those liabilities are such that all employers and managers of those businesses will need to carefully consider all practical aspects of the conduct of their businesses, and design and implement appropriate strategies to ensure that the potential liabilities are minimised, controlled or eliminated entirely. This will lead to the risk of injury to workers being minimised, controlled or eliminated entirely.

- <sup>1</sup> R.J. Kininmoth, *The Development of Safety Legislation*, Australasian Coal Mining Practice, Monograph 12, Australasian Institute of Mining and Metallurgy.
- <sup>2</sup> Lilley. B, *Can You be Charged with MURDER by Accident?*, Australian Safety News, Nov 1993.
- <sup>3</sup> *Safety Zone*, Division of Workplace Health and Safety, Sept/Oct 1993.
- <sup>4</sup> Ibid.
- <sup>5</sup> Ibid.
- <sup>6</sup> *Safety Zone*, Division of Workplace Health and Safety, Jan/Feb 1994.
- <sup>7</sup> Ibid.
- <sup>8</sup> Robinson, M., 1992, *The Liability Net Widens to Affect All Operators*. Quarry, Sept 1992.
- <sup>9</sup> B. Lyne, *Accidents, Health and Safety*, Australasian Coal Mining Practice, Monograph 12, Australasian Institute of Mining and Metallurgy, 1993.