

Mining Safety Prosecutions

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Principal Safety Scenario

Introduction

Prosecutions for Health and Safety breaches are always controversial. For mining professionals the threat of prosecution is a serious one. If a company is prosecuted, it is serious enough. A good deal of time is spent in court preparation and briefing lawyers. The case may be well publicized, reputations are endangered, and other stakeholders will lose confidence in the capability of the company.

The situation is even worse if individuals are prosecuted. If found guilty, a heavy fine may ensue, or even a custodial sentence, and reputation and career are in ruins.

Pressure for prosecutions inevitably rises whenever there is a serious and well publicized accident. Partly as a result, prosecutions tend to be very outcome oriented. They follow from events which result in serious injury or death rather than what may be even more serious breaches of regulations which do not have the adverse outcomes.

The strongest argument in favour of more prosecutions is that they will make the industry safer. The threat of prosecutions, it is argued will make managers more cautious and less likely to take decisions which put lives at risk. Mining companies will seek to protect their reputations. "Cowboy operators" and "rogue contractors" will be eliminated, making the industry safer for everyone. If it were truly effective at improving safety, then it is hard to argue against prosecutions.

There is another argument for prosecution which goes beyond reducing accidents. This is for retribution - , to satisfy the desire of victims to see the perpetrator punished, and by the public generally to see that egregious violators of commonly accepted norms are punished. This is a legitimate function of the criminal justice system.

Where the justice system fails to meet the need, it will be filled by other institutions, most notably the media. For example after an exhaustive Inquiry into the Moura Number 2 Mine accident in 1994, the coroner determined there was no cause to justify the prosecution of the company or individual managers.

However a nationally broadcast TV program disputed this and presented the views of relatives and the union in a very one sided examination of the evidence. Such a broadcast can be just as damaging to a corporation as an actual prosecution, and the emotional trauma on managers identified by name can be severe.

In the Moura case and sometimes after other accidents there are calls for prosecutions to be initiated under criminal codes rather than specific mining legislation. However it is unlikely that such prosecutions would succeed because of the high level of proof of intent or at least recklessness that would be involved.

The Mining Act in force in Queensland at the time of the 1994 Moura accident included provisions reversing the burden of proof and implying negligence on the part of a mine manager in the event of a death or a serious injury at a coal mine. However no such prosecutions were ever initiated. Possibly the low level of penalties in the Act were a factor.

Another legitimate argument in favour of prosecutions is that they maintain public confidence in state institutions. The lack of prosecutions after the Moura accident led some to claim that the Mines Inspectorate had been “captured” by the industry. It is important that government departments are perceived to be independent.

The most legitimate arguments against prosecutions are also based on safety. Most mining accidents are the result of technically complex events. A thorough and accurate understanding of the causes of accidents is essential to prevent further accidents.

There is no doubt that the adversarial climate engendered by the possibility of prosecutions hinders full and effective investigation of causes. The response of some companies is to parachute in the lawyers and advise employees to go no further than meeting their legal obligations in co-operating with investigating officials.

There is a danger too that if prosecutions are seen to be arbitrary or unfair then competent people may be deterred from taking up responsible positions. It is arguable that this has happened among mine surveyors in NSW as a result of the Gretley prosecutions.

The aim of this paper is to examine the current state of prosecutions in the various mining states. First however it is relevant to consider how dangerous the industry is.

Fatality Record

Table 1 shows the number of mining fatalities in the mining states since the turn of the century. The frequency rate of fatalities has dropped, but they are still occurring. Mining can be hazardous, but the fatality rate is less than in Construction.

Table 1 Australian Mining Fatalities per State - 2000 - 2009

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	Total
NSW	11	4	2	1	4	1	0	2	0	5	30
Tasmania	0	3	0	2	0	0	1	0	0	0	6
Queensland	2	2	2	3	1	4	3	4	1	4	26
South Australia	0	0	0	0	3	2	1	1	1	2	10
WA	5	5	3	5	4	2	5	4	2	7	42
NT	0	0	0	0	0	1	0	1	0	0	2
Victoria	0	1	0	1	0	0	1	2	0	0	5
Total	18	15	7	12	12	10	11	14	4	18	121

Prosecutions in Queensland

Prior to 1999 there were very few prosecutions in Queensland. Under the Coal Mining Act there were never any prosecutions of coal mine owners and the last individual prosecution was 1981. As discussed above, the 1925 Coal Mining Act reversed the burden of proof by providing the occurrence of an accident was “prima facie evidence of negligence on the part of the owner and the manager.” However the penalties under this Act were a derisory maximum \$200.

Following the release of the Moura Inquiry Report, Queensland’s mine regulatory regime was completely overhauled. The overhaul took four years and was essentially a tripartite effort by industry unions and the regulators. The new Coal Mining Safety and Health Act and the broadly similar Mining Quarrying Safety and Health Act were passed in 1999. They made substantial changes to the philosophy of regulation, placing greater emphasis on concepts such as “ensuring an acceptable level of risk”, “risk management” and “safe work procedures”. The old designation of “Registered Mine Manager” was replaced by the concept of “Senior Site Executive” or SSE, recognizing that one person needs to be responsible for a site and that person should be the one who has the executive power.

Since the new Act came into effect there have been twenty five fatalities in Queensland mines – up to the end of June 2009. Five of these fatalities have resulted in prosecutions. In addition another six non fatal incidents have resulted in prosecutions.

The prosecutions are summarized in Table 2.

Table 2 Mining Prosecutions in Queensland

Date of Incident	Settled	Mine	Accident	Defendent	Outcome	Fine	Status
Oct-01	Sep-03	Diatomaceous Earth Mine	Injury fork lift overturned	Mine Operator	Guilty	\$18,750	Final
				Mine Manager	Guilty	\$1,875	Final
May-02	Apr-04	Quarry	Injury - caught in mill	Mine Manager	Guilty	\$4,000	Final
Jul-02	Apr-04	Mt Hay Tourist Mine	Fatality - young boy hit by highwall failure	Operating Company	Guilty	\$25,000	Final
				Two Directors	Guilty	\$5,000	Final
Dec-02	Nov-04	Highway Reward Mine	Fatality - crushed at articulation point on U/G loader	Operating Company	Not Guilty		Final
				Contractor	Guilty	\$30,000	Final
				Mine Manager	Guilty	\$3,500	Final
Jan-04	Dec-04	Mt Isa	Misue of safety tags	Miner	Guilty	\$1,000	Final
Jul-04	Apr-08	Goonyella	Spinal and leg injuries from mud falling off excavator	Operating Company	Settled out of court. Settlement amount includes costs. Charges dismissed	\$536,000	Final
				Mine Manager	Charge Dismissed		
Nov-04	Apr-07	Mt Norma Copper	Fatality - bench collapsed	Operating Company	Guilty	\$30,000	Final
				Mine Manager	Guilty	\$3,000	Final
Oct-05	Apr-07	Coal Mine	Injury - fell into ROM hopper	Supervisor	Guilty	\$3,000	Final
Jan-06	Feb-08	Broadmeadow	Severe burns after truck overturned and caught fire	Operating Company	Guilty	\$35,000	Final
				Mine Manager	Not Guilty		Final
				Contractor	Guilty	\$44,000	Final
				Mechanic	Guilty	\$4,400	Final
Jul-06	May-08	Wongabel Quarry	Fatality struck by front end loader	Mine Manager	Guilty	\$3,000	Final
				FEL Operator	NCR	\$1,000	Final
Oct-07		Watershed Exploration	Fatality - loader overturned	Site operator	Guilty	\$10,000	Final
				Equipment owner	Guilty	\$5,000	Final
				Manager	Guilty	\$3,000	Final

Most prosecutions have been against smaller mining companies, and have involved relatively light penalties. Ten of the 21 prosecutions have been against individuals rather than companies.

Most prosecutions have been settled fairly quickly, usually within two years. Under the legislation, prosecutions must be launched within one year of the incident.

Prosecutions are launched by a complaint to the Industrial Magistrates by the Director General of the Queensland Department of Mines and Energy (DME)

The Director General acts on advice from the Chief Mine Inspectors. The DME compliance policy requires recommendations for prosecution to be reviewed by a Review Committee consisting of:

- the Executive Director, Safety and Health;
- an inspector not involved in the investigation;
- a lawyer;
- a person with professional experience in the area under consideration; and
- a government officer (not necessarily from Queensland) with experience in health and safety matters.

The review committees have no statutory standing.

A review by the Queensland Ombudsman in June 2008 recommended that the decision to prosecute be delegated to the Executive Officer Safety and Health, on the grounds that the Director General of the DME is also responsible for promoting the mining industry in Queensland and there could be a perception of a conflict of interest.

Prosecutions in NSW

Like Queensland, NSW also changed its mining legislation in the 1990s. The Department of Primary Industries (DPI) in NSW, which is responsible for prosecutions under the NSW Occupational and Safety Acts, has been very active in launching prosecutions. Since 2000, more than 40 prosecution cases have gone to the Industrial Court. Table 3 lists the prosecutions in NSW.

The accident at Gretley in November 1996 was the catalyst for change in NSW, and has also been the most controversial of the prosecutions. The accident resulted from a coal mine breaking into old flooded workings. Four miners died in the inrush.

The mine had relied on a plan of the workings supplied by the DPI, which had been copied at some point from the original plans drawn in 1915. In the copies the identity of the seams had become confused.

Table 3 Part 1 Prosecutions in NSW

Date of Incident	Settled	Mine	Accident	Defendent	Outcome	Fine	Status
Apr-96	Jun-01	Berrima	Fatality from roof fall	Operating Company	Guilty	\$91,000	Final
				Mine Manager	NCR		Final
Nov-96	Dec-06	Gretley	Four fatalities from water inrush	Operating Companies	Guilty	\$1,460,000	Upheld on appeal
				Mine Manager at time of accident	Guilty	\$42,000	Upheld on appeal
				Previous Mine Manager	Guilty	\$30,000	Reversed on appeal
				Mine Surveyor	Guilty	\$30,000	Reversed on appeal
				Five Undermanagers	Not guilty		Final
Jan-97	Nov-03	Dartbrook	Fatality from collapsing blocks	Operating Company	Guilty	\$139,750	
				Contractor	Guilty	\$122,000	
Jul-98	Apr-05	Wallarah	Fatality and injuries from roof fall	Operating Company	Not Guilty		Reversed on appeal fined \$200,000
Jul-98	Dec-03	Awaba	Unsafe working	Deputy (Supervisor)	Guilty	\$1,750	
Jul-98	Mar-05	Awaba	Fatality from roof fall	Operating Company	Not Guilty		Reversed on appeal - fined \$100,000
				Mine Manager	Not Guilty		Reversed but NCR
Mar-99	Nov-05	Elura	Fatality from rockburst	Operating Company	Guilty	115,000	
May-99	Mar-06	Wyee	Runaway man car	Operating Company	Guilty	\$160,000	Final
Jun-99	Nov-03	Cooranbong	Fatality from machinery	Operating Company	Guilty	\$65,000	DPI appealed - Fine increased to \$155,000
				Contractor	Guilty	\$64,800	Fine increased to \$120,000
Jun-99	Dec-03	United	Fatality from roof fall	Operating Company	Not guilty		
Jul-99	Dec-02	Tahmoor	Fatality - drowning	Operating Company	Not guilty		Final
Nov-99	Apr-03	Northparkes	Four fatalities (including Mine Manager) from air blast following a massive cave	Operating Company	Guilty	82,500	
Feb-00	Jun-03	Hillgrove Antimony	Fatality from rolling rock	Operating Company	Guilty	140,000	
Feb-00	May-03	Cressfield	Fatality (Mine Manager) from welding expl	Operating Company	Guilty	42,500	

Table 3 Part 2 Prosecutions in NSW (cont)

Date of Incident	Settled	Mine	Accident	Defendent	Outcome	Fine	Status
Mar-00	Jun-06	Eureka Opals	Serious injuries from rock fall	Operator/Mine Manager	Guilty	\$4,000	Reversed on appeal and fined \$30,000
				Leaseholder	Not Guilty		
May-00	Dec-04	Ridgeway	Fatality from rock fall	Contractor	Guilty	\$136,000	
Jun-00	Jul-03	Emu Plains Quarry	Serious injury from m/c crush	Contractor	Guilty	55,000	
Dec-00	NS	Bellambi West	Fatality and injuries from roof fall	Operating Company	Not guilty		Under appeal
				Mine Manager	Not guilty		Under appeal
				Company MD	Not guilty		Under appeal
Mar-01	Jul-04	Wambo	Fatality from rib fall	Operating Company	Guilty	\$130,000	
Jun-01	Apr-05	Cobar	Dangerous operations leading to inrush of fill	Operating Company	Guilty	\$110,000	
				Contractor	Guilty	\$94,000	
Sep-01	Apr-08	Baal Bone	Fatality from face fall	Operating Company	Guilty	\$280,000	
Nov-02	Jun-07	Broken Hill	Fatality - struck by side of shaft	Operating Company	Guilty	95,000	
				Director of Operations	Not Guilty		
Jan-03	Jun-06	Glennies Creek	Unsafe HV electric working	Operating Company	Guilty	\$80,000	Final
				Contractor	Guilty	\$90,000	Final
				Mine Manager	Guilty	\$8,000	Final
Dec-03	Feb-07	Dartbrook	Fatality from crane accident	Operating Company	Guilty	125,000	
				Contractor	Guilty	125,000	
May-04	Dec-07	Dartbrook	Fatality from roof fall	Operating Company	Guilty	\$160,000	
				Contractor	Guilty	\$180,000	
				Mine Manager	Guilty but NCR		
May-04	Apr-07	Warkworth	Fatality from crane accident	Operating Company	Guilty	\$135,000	
				Contractor	Guilty	\$135,000	
May-04	Feb-08	Metropolitan	Eye and skull injury from flying debris	Operating Company	Guilty	\$175,000	
Jul-04	Nov-07	Clarence Coal	Serious injury from roof crush	Operating Companies	Guilty	160,000	
Jun-05	Oct-08	Dartbrook	Non fatal HV shock	Operating Company	Guilty	\$200,000	
				Contractor	Guilty	\$120,000	

By the time of the accident, the mine surveyor who had reviewed the old plans and prepared the new mine design had passed away and his mine manager had moved to another job and had been replaced.

A lengthy Inquiry was held to investigate the causes under the direction of Justice Jim Staunton. Justice Staunton in his 1998 report was critical of both the company and the DMR. Among his 48 recommendations was one that papers should be sent to the Crown Solicitor to determine whether charges should be laid under the Occupational Health and Safety Act.

As a result, in December 1999, 52 charges were laid against the operating companies and eight individuals, - the two mine managers, the new mine surveyor and five under managers. By this time ownership of the mine had changed hands.

The substantive trial opened on 12th August 2003 under Justice Patricia Staunton. It was characterized by an adversarial climate between the participants and a good deal of legal maneuvering. At the outset the operating companies offered to plead guilty if charges against the individuals were dropped. The prosecution declined this offer.

On 12 November 2003, the defence challenged the validity of the trial, saying it should have been commenced under orders signed by the Minister for Mineral Resources and not the Minister for Industrial Relations. The NSW Parliament rushed through a new bill to ensure the legitimacy of the prosecutions.

Justice Staunton handed down her decision in August 2004. She found the operating companies, the two mine managers and the surveyor guilty and imposed very significant fines. She dismissed the charges against the five undermanagers on the grounds that they were not involved in the decision making management of the mine. Justice Staunton was very critical of the conduct of the prosecution.

The companies and individuals appealed the decision to the full bench of the Industrial Court. This court in December 2006 reversed the convictions of the surveyor and the original mine manager but upheld the convictions and fines imposed on the second mine manager and the operating companies.

While most cases have not been quite so drawn out as Gretley, the average time from incident to finalization is close to five years.

The DPI has pursued mine managers in a number of cases. Except for Gretley, they have mostly ended with No Conviction Recorded against the individual. In some cases the mine managers have been able to show that they sincerely attempted to operate safely, and the courts have imposed no penalty on them.

South Australia

South Australia has initiated two prosecutions for mining safety since 2000. One of these followed a fatal accident at the Olympic Dam mine in July 2005. One man was killed and two injured when explosives detonated prematurely. The company was found guilty of failing to provide a safe work place, and fined \$153,000.

Western Australia

Western Australia has initiated very few prosecutions for mining safety violations.

At Mt Keith there was a fatal accident in January 2002 when a truck ran off a ramp after a slope failure on a ramp. The operating company pleaded guilty to a breach of section 9 and was fined \$40,000.

At Boodarie Iron plant there was an explosion in May 2004 which killed one man and severely burned two others. The operator was fined \$200,000

Victoria

No prosecutions have been initiated for mining safety violations in Victoria. This is despite the fact that Worksafe Victoria, which is responsible for mining and non mining safety prosecutions, is very active on prosecuting non mining safety violations. They launched more 120 prosecutions and collected \$3.4 million in fines in 2008.

Tasmania

Tasmania has not prosecuted mine operators for safety violations.

Northern Territory

There have been no mining related safety prosecutions in the Northern Territory.

Conclusion

There is a considerable difference between the states to prosecutions for mining safety violations. New South Wales has gone furthest in seeking to actively prosecute at every opportunity. The prosecutions have dragged out over a long period of time and have been very costly and time consuming for the companies and individuals involved. Seventeen of the fifty two defendants have been individuals.

The personal toll has been severe even when the individual has eventually been acquitted. Some individuals have never been able to work in the industry again.

The toll has also been hard on contractors. No account is taken in assessing penalties of the size of the company. What is just an embarrassment to a major international mining company can often be a death blow to a contractor. One underground contractor took more than six years to recover after a prosecution.

Nevertheless there is no question that prosecutions can be effective in getting companies to take safety seriously. It is suggested that prosecutions should be primarily aimed at companies, with the threat of prosecuting individuals only to be used in the most egregious of cases.