SCOPING SAFETY INVESTIGATIONS
Who investigates what?

Harold Downes

Partner
Herbert Smith Freehills

1 Introduction

The question of "who investigates what and why?" is one of the most important issues for an organisation responding to a mining incident. Not only is the answer crucial to determining the outcome of an investigation, but also to the exposure of that organisation, its workers and executive officers to legal action, including for example, regulatory prosecutions, disciplinary action and personal injury claims.

It is critical that organisations investigate the right issues using the right method. This paper explores techniques for structuring safety incident investigations so that organisations are best able to find and remedy root causes of incidents and prevent similar incidents recurring. It touches on:

(a) initiating and scoping investigations generally;
(b) the statutory requirements to investigate;
(c) appropriate use of legal professional privilege;
(d) commencing and scoping the investigation;
(e) selecting the investigation team; and
(f) notification requirements and communication strategies.

The correct approach to managing an investigation is not to hide information from investigation or scrutiny: rather, to ensure that organisations can make informed and appropriate decisions while retaining control over the process and information.

2 Initiating and scoping investigations generally

2.1 The goals of investigations

There are multiple purposes for conducting incident investigations. One purpose of incident investigation is to find and remedy root causes of incidents and prevent future incidents.

Other purposes include the identification of corrective action, breaches of legislation and applicable defences, bases for insurance claims, Just Culture type investigations and importantly requirements for statutory reporting. These differing objectives must be balanced or dealt with separately in an appropriate way.

2.2 Balancing goals of incident response

Early on, it is important to make a conscious decision to determine which goals have priority in any given situation and to ensure that all relevant decision makers and advisers are clear in this regard. It is foreseeable that there can be conflict between different objectives and the first decision to make is to identify which of them take precedence.

For example:

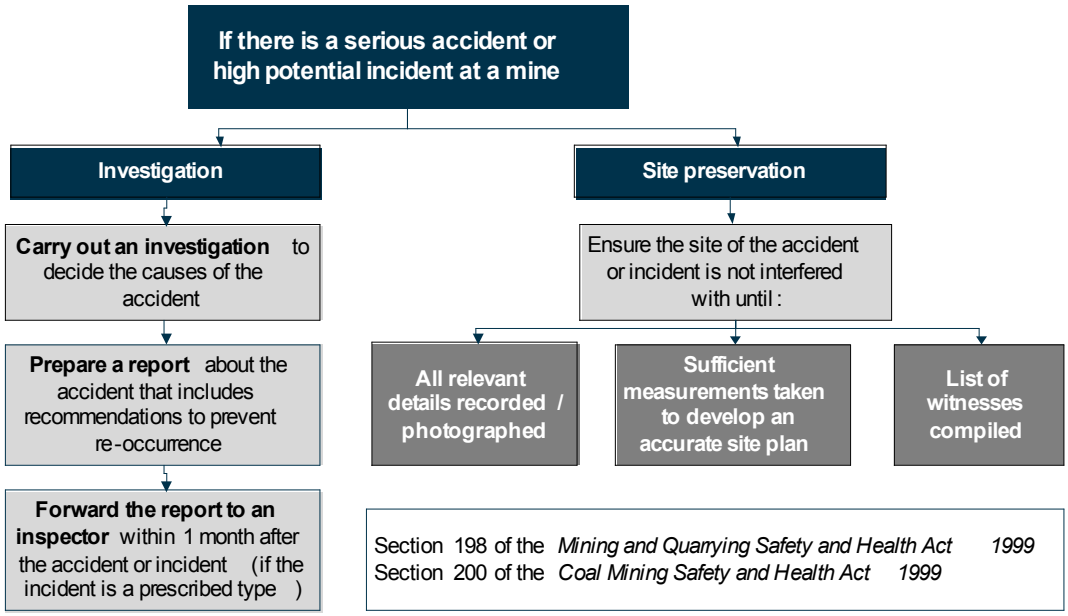
(a) maintaining commercial relationships may sometimes conflict with the goal of maintaining insurances, where commercial relationships require more cooperation than insurers would allow;

(b) the protection of individuals may result in risking relationships with regulators, when individual prosecutions of workers and officers is a possibility;

(c) some businesses might waive some priorities altogether, such as foregoing insurance rights where the reputational stakes are high.

3 What are the statutory requirements to investigate?

Section 198 of the *Mining and Quarrying Safety and Health Act 1999* (***MQSHA***) and s 200 of the *Coal Mining Safety and Health Act 1999* (***CMSHA***) deal with action to be taken following an accident or incident.



If there is a serious accident or a HPI at a mine, the SSE must carry out an investigation to decide the causes of the accident or incident and prepare a report that includes recommendations to prevent it happening again. On top of this, SSEs also have a range of duties relating to the collection and preservation of evidence.

An investigation for the purposes of satisfying a statutory reporting obligation cannot be the subject of a claim for legal professional privilege. However, investigations conducted for other purposes can be conducted in a legally privileged environment.

4 How can legal professional privilege be used?

4.1 What is privilege?

Privilege is the name given to a person's right to confidentially communicate with their lawyer and to have immunity from disclosure of that communication.

Privilege can be claimed in the context of an actual hearing, in which case information which is otherwise relevant may be withheld from the court, but it can also be claimed prior to a hearing at the stage of regulatory investigation.

4.2 Why have a privileged investigation?

In a safety management sense, privilege opens up investigations and helps the businesses and their officers limit exposure to potential claims.

Practically, privilege allows the business to conduct a '*warts and all*' investigation without increasing exposure to claims or potential prosecution.

Privilege does not prevent the open flow of information gained during investigations but it allows the business and its executive officers and workers to make informed decisions about the flow of information taking into account legal exposure for the business and themselves personally.

To give a practical example, an investigation may reveal that there is inadequate information available to users about plant or equipment involved in an incident. However, this breach may not have been causal to the incident. In this example, a privileged investigation would allow identification and rectification of the failure, without making admissions in the form of investigation reports or business records. However the aim of preventative safety action is still met.

Another example would be if the investigation revealed that the workers knew of the hazard for some time but did nothing about it. That may well create a personal exposure for themselves or the executive officers. An investigation under privilege could result in the cause being identified and the appropriate corrective action being taken but the details giving rise to the personal exposure not being disclosed.

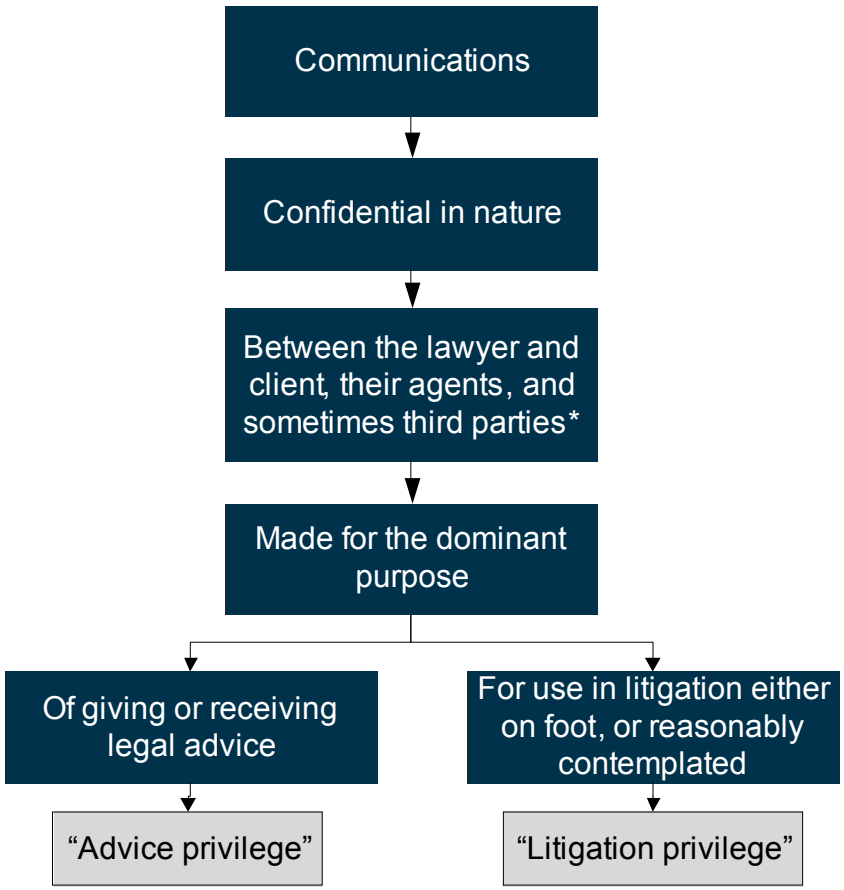
4.3 When exactly does privilege apply?

In summary, legal privilege attaches to confidential oral or written communications made between a client and legal adviser or third parties in the course of a professional relationship for the dominant purpose of:

(a) enabling the client to obtain, or the legal adviser to give, legal advice ('**advice privilege**'); or

(b) preparation for pending, contemplated or anticipated litigation (**'litigation privilege'**).

The diagram below shows the elements required to establish that a communication is privileged.



* Outside of the Federal Court it is not settled that the privilege extends to communications with third parties for the purpose of giving or receiving legal advice.

It is worth noting that a communication will not be confidential merely because it is commercially sensitive. This means that the team should be formed at the request of the company's lawyer (preferably external rather than in-house due to the commercial aspects of the in-house role) for the express purpose of providing a report as to the facts of the incident so that legal advice can be obtained regarding anticipated litigation.

4.4 The "dominant purpose" test

In Australia the 'dominant purpose' test applies to legal professional privilege. This test stipulates that only documents prepared for the dominant purpose of legal advice or use in anticipated or pending litigation will be protected by privilege.

Accordingly, care should be taken in scoping and documenting investigations to be very clear that the purpose of the investigation is to obtain legal advice on the specific organisational factors and the legal requirements in relation to them, rather than to satisfy a 'business as usual' operational need to take corrective actions.

In the *Powercor* litigation,[1] Powercor was sued by parties who had been affected by the Horsham Black Saturday fire in 2009 which was caused by Powercor. One of the issues was whether or not Powercor was in breach of its duties under the *Electrical Safety Act.*

Class action plaintiffs sought discovery of expert reports commissioned by Powercor's lawyer. Powercor did not deny that there were a number of purposes for which it obtained those reports, including:

[1] The cases leading to *Thomas v Powercor Australia Ltd* [2011] VSC 586 and particularly *Perry v Powercor Australia* [2011] VSC 308.

(a) obtaining legal advice;

(b) reporting to the regulator;

(c) preparing for a Royal Commission;

(d) providing information to the insurer;

(e) providing information for Powercor's internal investigation procedures;

(f) reviewing its maintenance program and the type of equipment that failed.

However, Powercor argued that all of these purposes demonstrated that the dominant purpose was how it might deal with likely litigation. The Court did not accept this, finding instead that the reports were obtained for normal business purposes and were not privileged. This demonstrates the critical need to have evidence to show the dominant purpose of incident investigations and to separate them from business as usual type investigations. So, if the company's processes state that all serious accidents or HPIs will be investigated to identify the root cause and that is the only investigation conducted, then it will not properly be the subject of a claim for legal professional privilege.

4.5 When is privilege lost?

Legal professional privilege attaches only to confidential communications. Privilege is therefore generally lost if a communication is made in the presence of a third party or is made available to another party before any claim for privilege is made.

Privilege is maintained by:

(a) keeping incident related communications confidential (i.e. between management who need to know, members of the investigation team and the legal adviser);

(b) clearly marking documents as 'confidential and privileged' (this is not decisive, but is evidence of the document being privileged in the event of a dispute); and

(c) not disclosing any legal advice received to anyone other than those within the business' senior management who are required to see the advice .

Within a business, formal obligations of confidence should be imposed on any person to whom the advice is disclosed within the organisation. This need be nothing more than reminding people that the advice is privileged and may not be disclosed. If hard copies are provided during a meeting, then they should be collected when the meeting ends.

5 Commencing an investigation

5.1 In writing?

There is no 'magic' as to how the request for an investigation occur, whether in writing or otherwise. However in order to have the best documented evidence to be able to prove that an investigation is privileged, a written request from external legal advisers is preferable.

5.2 Investigation protocols

Written protocols for the investigation team should be put in place to avoid the waiver of privileged information until a report is finalised, legal advice obtained and the company decides that the report should be released. Protocols must cover issues such as:

(a) scope of investigation;
(b) preservation of existing records;
(c) who can create documents;
(d) what documents and records can be made;
(e) confidentiality of team considerations; and
(f) format of the final report.

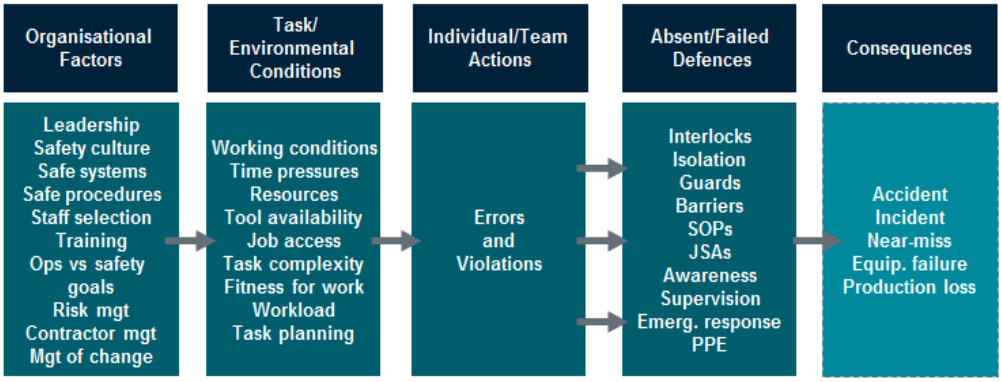
5.3 What needs to be investigated?

In most investigations, it will be necessary to consider the facts required to:

1 identify / correct the direct cause and contributing factors to the incident; and
2 understand whether legal and contractual requirements have been met.

ICAM, Taproot and other similar investigation processes are very useful at identifying the direct cause and contributing factors to the incident:

ICAM Model of Incident Causation



However, these methodologies do not necessarily fulfil the legal aspect of the investigation which involves understanding whether legal and contractual requirements have been met. The importance of taking time out at the scoping stage to consider the legislative obligations of the business cannot be underestimated: otherwise, critical evidence required for legal purposes – including defending any litigation that arises – can be lost.

It is also important that the scope of the investigation is not limited merely to an examination of the potential offences arising from the incident in question. Defences as well as offences need to be considered. Depending on the offences which arise, different defences may be applicable. The following table gives examples of offences and defences under the *Petroleum and Gas (Production and Safety) Act 2004*:

***P&G Act* offence**		**Applicable defence**
s 674	Failure by operator to ensure everyone who has an obligation under the safety management plan for the plant complies with their obligations under the plan.	Reasonable precautions and proper diligence Contravention was due to causes over which the person had no control
s 678(1)(c)	Failure by operator to revise the safety management plan following changes or proposed changes to the plant that could result in an increase in the overall risk levels, or a specific risk level, for the plant.	Limited criminal code defences: mistake of fact, act independent of will, etc.

P&G Act offence		Applicable defence
s 688(d)	Failure by Executive Safety Manager to ensure the safety management plan is implemented in a way that effectively manages the risks associated with the plant.	Reasonable precautions and proper diligence Contravention was due to causes over which the person had no control
s 693	Failure by Site Safety Manager to ensure that each person working at the site performs their functions safely and complies with standard operating procedures, emergency response procedures and other measures necessary for the safety of the site and the person.	Reasonable precautions and proper diligence Contravention was due to causes over which the person had no control
s 696(2)	Failure by designers, importers manufacturers and suppliers to take reasonable steps to ensure the plant or equipment, as designed, imported, manufactured, modified or supplied, complies with a safety requirement.	Limited criminal code defences: mistake of fact, act independent of will, etc.
s 697(1)	Failure by installer to comply with a safety requirement when installing a particular type of plant or equipment.	Limited criminal code defences: mistake of fact, act independent of will, etc.
s 698	Failure by operating plant owner to ensure the person operating the plant has the necessary competencies to operate the plant.	Limited criminal code defences: mistake of fact, act independent of will, etc.
s 699	Failure by a person at operating plant to take all necessary and reasonable action to ensure no person or property is exposed to more than an acceptable level of risk.	Reasonable precautions and proper diligence Contravention was due to causes over which the person had no control
s 702	Failure by a person at operating plant to comply with safety procedures and other obligations under the safety management plan for the plant to the extent the procedures and obligations apply to the person.	Reasonable precautions and proper diligence Contravention was due to causes over which the person had no control
s 703	Failure by a person at operating plant to comply with lawful instructions given for the safety of persons by the operator of, or supervisor for, the plant.	Reasonable precautions and proper diligence Contravention was due to causes over which the person had no control
s 704	A wilful or reckless act by a person at operating plant that adversely affects the safety of anyone at the plant.	Reasonable precautions and proper diligence Contravention was due to causes over which the person had no control
s 708A(1)	Failure by a person or corporation to comply with all safety requirements.	Limited criminal code defences: mistake of fact, act independent of will, etc.
s 814	Failure by executive officers of the corporation to ensure that it complies with the P&G Act.	If the officer: • was in a position to influence the conduct of the corporation in relation to the offence and exercised reasonable diligence to ensure the corporation complied with the provision or • was not in a position to influence the conduct of the corporation in relation to the offence.

5.4 Should the investigation cover individual workers?

Individual workers may be prosecuted regardless of whether or not the corporation they work for is also prosecuted. For instance, under the *WHS Act*, penalties of up to $600,000 or 5 years' imprisonment can apply.

Accordingly, it is essential to consider whether or not individual officers or employees of a company require separate legal representation after an incident. Although this is cumbersome, it is sometimes required, and the longstanding practice where a company's lawyer acts for both the company and its employees is not appropriate in many cases.

Workplace Health and Safety Queensland (WHSQ) has adopted the position that it will oppose dual representation by a law firm of both the employer and employees during an investigation into an incident as a matter of course and has threatened to seek injunctions preventing a solicitor from acting for the employer and the employee.

The rationale for this position is that dual representation subverts the proper administration of justice. In particular, if the employer is prosecuted following the incident and the employee is called to give evidence, the solicitor could be seen as having unduly influenced the employee in terms of the nature of the evidence given against the employer.

Although no one has challenged WHSQ's power to direct a solicitor not to act for a party, given the approach of WHSQ, other safety regulators are likely to follow suit given that their conduct is governed by the same Code of Conduct and Public Service Ethics Act.

6 Who should be involved in the investigation team?

6.1 Separate management from investigation team

It is best practice to separate the investigation team from the management team which has risk in relation to the incident and is responsible for communicating publicly in relation to crisis management. This helps in preserving privilege and avoiding conflicts in decision making. It also avoids stress upon individual managers.

6.2 Dealing with contractors

If there is a contractor within a business, this is because there is a contract in place between the contractor and the principal business which includes some allocation of risk. This could be a mining contractor, labour hire supplier, construction contractor, equipment maintainer or engineer.

If a contractor contributed causally to the incident or has suffered loss as a result of an incident (e.g. a stoppage), then it is likely that there will be divergence of interest between the contractor and the mining operator. Information which is privileged in the hands of the mining operator cannot be shared with the contractor without the risk of waiver, and vice versa.

Of course, there is no property in witnesses and a privileged statement can be obtained from contractor's employees without concern. However, this is always subject to their cooperation which can sometimes be difficult to secure.

To avoid the sharing of prejudicial information and waiver of privilege, it **is not** best practice from the risk allocation perspective for a principal to have contractors on the investigation team, in its role as speculating and concluding on the causes of incidents. However, it **is** best practice from the health and safety perspective to have them as a part of the team.

A balance might be struck if a contractor's cooperation can be sought to ascertain certain facts which are necessary for the investigation without including them in the incident investigation team itself.

It is always wise to plan for incident investigation protocols with commercial partners in advance. Contractual obligations upon parties to cooperate and to produce information or assistance are very useful to ensure appropriate information can be obtained.

If the contractor is to be included on a team, in order to preserve legal professional privilege in the investigation process, it is possible to agree to conduct the investigation on a 'without prejudice' basis (so that the documents created during the investigation cannot be used against the other party). It is also necessary that the contractor set up a privileged environment (i.e. by conducting the investigation for the purpose of seeking its own legal advice). However this approach must be used with caution as it does leave open some residual risk of cooperation by revealing documentation and avenues of inquiry that might be critical in the allocation of risk in subsequent litigation.

6.3 Dealing with Industry Health and Safety Representatives

Under s 27 of the *CMSHA*, an industry safety and health representative (**ISHR**) is a person appointed under the Act to represent coal mine workers on safety and health matters. Section 118 of the Act lists the functions of ISHRs, which include, relevantly:

- to participate in investigations into serious accidents and high potential incidents and other matters related to safety or health at coal mines; and
- to investigate complaints from coal mine workers regarding safety or health at coal mines.

Although one of the major functions of ISHRs is to "participate in investigations into serious accidents and high potential incidents", this does not compel SSEs to involve ISHRs as participants on their investigation teams. It requires that they can participate by making submissions or assisting workers within their powers under section 119 of the CMSHA.

Instead, ISHRs are given a very wide variety of powers under s 119 of the Act which allow them to conduct their own investigations. These include powers:

- to make inquiries about the operations of coal mines relevant to the safety or health of coal mine workers;
- to enter any part of a coal mine at any time to carry out the representative's functions, if reasonable notice is given; and
- to examine any documents relevant to safety and health held by persons with obligations under this Act, if the representative has reason to believe the documents contain information required to assess whether procedures are in place at a coal mine to achieve an acceptable level of risk to coal mine workers.

Importantly, the fact that ISHRs have power to make inquiries and examine certain documents is subject to legal professional privilege: where documents are protected by privilege, they need not be disclosed to ISHRs.

In addition to this, s 117 of the Act stipulates that ISHRs must not perform their functions and exercise their powers for a purpose other than a safety and health purpose. Accordingly, where businesses can demonstrate that ISHRs have requested access to sites or documents for non-health and safety purposes, they are well within their rights to refuse those requests.

7 Who needs to be notified of the incident?

7.1 Statutory notification requirements

Apart from the obvious requirements under the *CMSHA* and the *MQSHA* to notify the Mines Inspectorate as soon as practicable after becoming aware of a serious accident, high potential incident or death, businesses need to be aware that there are a range of other stakeholders and regulatory bodies who may need to be notified.

For instance, there are statutory reporting requirements to:

(a) other regulators, such as WHSQ, the Explosives Inspectorate, Heavy Vehicle regulator or the Electrical Safety Office;

(b) the ASX;

(c) the company's insurer;

(d) WorkCover Queensland (where an employee has been injured).

Apart from these statutory notification requirements, there are a range of other stakeholders who may need to be contacted, including:

(a) employees and their families;

(b) contractors;

(c) unions;

(d) group companies; and

(e) the media.

7.2 Releasing information during the investigation

Probably the most critical decision for management dealing with an incident is whether and when to release information. The default preference from the legal perspective is that information should not be released until the investigation is complete and legal advice has been obtained as to the incident consequences. However, from the management perspective, it is important to allow the dissemination of known and established facts from the investigation team to management for release as appropriate.

It is this particular information flow of known and established facts from the investigation which is the hallmark of a good safety investigation. This allows the company to maintain its reputation through thorough investigation combined with appropriate legal protection, yet it facilitates early release of known facts as soon as practicable.

7.3 Communications strategy

In today's media environment, a crisis situation can come to the attention of the whole world within minutes. Communication planning is a vital part of successful incident response. Poor communications often make a crisis worse.

The strategy should be to:

(a) communicate promptly with those who have an interest ;

(b) demonstrate that the company is a responsible corporate citizen; and

(c) help the media, the regulator and other interested parties focus on known facts and the company's positive actions.

It is usual to have one key person appointed as communicator, both to keep the message consistent and also to protect legal professional privilege in the incident investigation. Ideally this person should not be privy to all the privileged investigation information.

8 Conclusion

The process of scoping a safety investigation properly is essential: a poorly planned investigation not only compromises the health and safety outcomes that result from it, but can also expose an organisation and its workers to legal action.

This paper has examined a range of techniques for structuring and conducting safety incident investigations including the use of legal professional privilege to ensure that organisations are best able to find and remedy root causes of incidents and prevent similar incidents recurring.

In summation, it is important to reiterate that a strategic approach to managing an investigation is not about hiding information from investigation or scrutiny or avoiding the consequences of corporate wrongdoing: it is merely a technique that allows organisations to make informed and appropriate decisions while retaining control over the flow of information from the investigation and the decision making process that follows it.