How to Handle a Shrinking Budget - The Law

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Introduction

Decisions about the cost of risk are at the heart of business ethics. If our goal in industry is to maximise sustainable business value then every time we evaluate a risk we are faced with an inevitable ethical dilemma: whether to save or spend.

Everyone involved in safety management intrinsically understands this because funds are limited. Our own operational budgets are restricted, as are those of our organisations or divisions. This is particularly so in the current economic environment when profits are scarce and efficiency initiatives are in overdrive.

But I ask you this: what is the cost of a life?

And how can those of us making decisions about risk rest, knowing that commercially we must adjudge the acceptance of risk?

In preparing this paper for the QMIHSC 2016 I set out to explore and share what the courts have had to say about this dilemma. My goal is to aid sound defensible decision making about the cost of safety.

Economics and safety in the mining industry

When times are tough, safety is at risk of being compromised. Recent academic research supports this concern.[1] From one perspective, the mining industry subsists as part of complex sociotechnical systems that experience conflicting goals, placing stress upon safety and health delivery amidst a conflict between profit and safety.

Current leadership thinking urges safety and health professionals to take a leap away from seeking to demonstrate a return on investment for safety and health and instead to see safety and health as a strategic element of the business model.[2] For example BHP former CEO Mr Goodyear reportedly said of corporate social responsibility:

> *It's a powerful competitive differentiator. It has the potential to establish us as the company of choice, giving us better access to markets, natural resources and the best and brightest employees.*[3]

However, the question must be asked, whether or not the competitive advantage potentially falls away when times are tough, particularly when the economy is dependent upon mining revenue to support advancement of the wider community. According to the research referenced above, there is increasing pressure in favour of shorter term profit over longer term sustainability when the heat is on. Other research specifically exploring safety and health responses to the global financial crisis[4] concluded that as a result of the crisis there were negative safety outcomes. Although overall numbers of injuries may reduce during recession, for example because of a downturn in high risk work types, the research found that crucial organisational functions determinant of health and safety performance such as training, new work equipment purchasing and innovation are

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[1] Burcak Erkan, Gunes Ertan, Jungwon Yeo and Louise, 'Comfort, 'Risk, Profit or Safety: Sociotechnical Systems Under Stress' (2016) 88 *Safety Science* 199 – 210.

[2] Peter Gahan, Ben Sievewright and Paul Evans, *Workplace health and safety business productivity and sustainability(July 2014) Safe Work Australia* <http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/885/workplace-health-safety-business-productivity-sustainability.pdf>.

[3] Ibid 15.

[4] Loannis Anyfantiset al, *'Maintaining Occupational Safety and Health Levels during the Financial Crisis – A Conceptual Model' (2016)* Safety Science.

significantly affected by economic pressures. Work intensification and precariousness are also factors.

Based on this research it is hard to argue that safety and health performance is not potentially negatively affected by shrinking budgets. However, I must stress that I am not suggesting that businesses will knowingly tolerate unacceptable risk to enhance profit, or should do so. Rather my focus is more subtle: I seek to explore the legal response to circumstances where decisions must be made regarding the acceptability of risk but where issues of affordability and cost-benefit are influencing decision making.

Legislative definitions of acceptable risk

I should begin by flagging that all safety and health legislation in Queensland permits a zone of acceptable risk. The problem is mainly whether or not we actually can define with any degree of precision where the boundary is between risk that we may legitimately accept and risk we cannot accept.

The mining safety legislation defines the concept of "acceptable risk" as turning on two concerns: firstly whether risk is within "acceptable limits" and secondly whether it is "as low as reasonably achievable".[5] For example, the CMSHA s.29 provides:

> *29 What is an acceptable level of risk*
> *(1) For risk to a person from coal mining operations to be at an acceptable level, the operations must be carried out so that the level of risk from the operations is—*
> *(a) within acceptable limits; and*
> *(b) as low as reasonably achievable.*
> *(2) To decide whether risk is within acceptable limits and as low as reasonably achievable regard must be had to—*
> *(a) the likelihood of injury or illness to a person arising out of the risk; and*
> *(b) the severity of the injury or illness.*

The legislative regime does include a number of prescriptive regulatory requirements, which in some cases prescribe the only way of ensuring an acceptable risk[6]. But in the absence of prescription, the question of whether risk is within acceptable limits and as low as reasonably achievable, comes into play.

Regard must be had to the likelihood and consequence of any risk when undertaking an assessment of whether it is acceptable. However, these considerations are not exhaustive. In other words - the likelihood and severity must be considered along with any other factors relevant to the reasonableness of the risk.[7]

The courts clearly accept that there is a borderline threshold that can in theory be identified in terms of what is acceptable.[8] However in practice the courts rarely need to identify where that threshold lies, making this inquiry often a pragmatic operational rather than legal concern.

What are acceptable limits?

The question of the risk / reward balance is not new to the mining industry. Mining companies identify tolerable risks across many dimensions – such as for business risks like ore supply or stockpiling strategy to cover operational limitations. However the challenge that arises is where to draw line in relation to serious risks of personal injury including death.

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[5] *Coal Mining Safety and Health Act 1999* (Qld) ss 29 – 31; *Mining and Quarrying Safety and Health Act 1999*(Qld) ss 26 – 28.
[6] See *Coal Mining Safety and Health Regulation* s 5.
[7] The non-exhaustive nature of these issues was highlighted in *Dalliston v Taylor & Anor* [2015] ICQ 17 per Martin J [124].
[8] *Dalliston v Taylor & Anor* [2015] ICQ 17 Martin J.

Engineering models are available and in use to address acceptable limits of even fatal risk and identify what the boundaries of acceptable limits are in the industry. As identified by SRK Consulting:[9]

> *The most difficult criterion to accept for miners is that of fatality. All mining companies have a mission statement of zero tolerance for fatalities…This is not reasonable but also not necessary as there are many codes in engineering that stipulate the design criteria for fatalities that are acceptable. These criteria are related to the incidence of deaths due to natural causes, expressed as annual life time probability of death. This usually is presented in F-N diagram as shown in figure 14.*

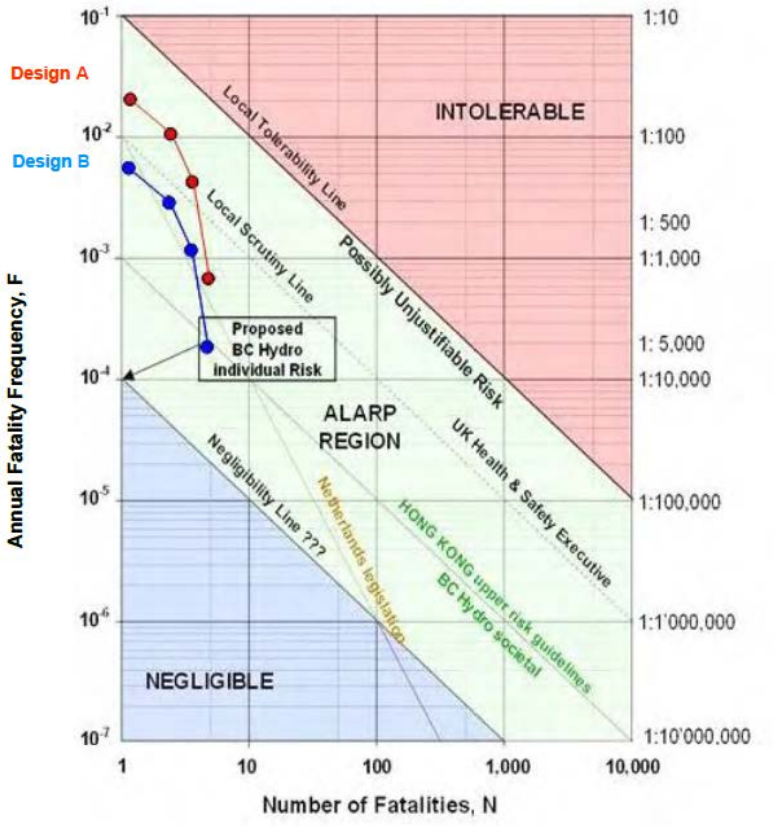

Fig 14 Annual fatality frequency vs No of fatalities (F-N)

> *These criteria follow on long term multi-industry research statistics. Of particular note is the single fatality with an annual frequency of 10-4, corresponding to the negligible incidents line. This line is also known as the divide between voluntary and involuntary risk. This line is derived from the lowest incidence during a person's life cycle of deaths due to natural causes in the North American population during the mid-90s. This lowest incidence of death occurs at an age of 10-14 years.*

This approach arguably assists in identifying the range of tolerable limits (ie. the ALARP region as shown in the model above) for which risks must then be treated to ensure they are reduced to a level as low as reasonably achievable. In my view this likely correlates with the reference to "acceptable limits" in the relevant mining safety provisions in the Queensland mining safety legislation.

Different industries and countries apply different standards of tolerability[10]. In legal matters courts are prepared to accept expert evidence on the boundaries of acceptable limits,

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[9] O.K.H Steffen, *Mine Planning – Its relationship to Risk Management* SRK Consulting <http://sponsored.uwa.edu.au/slopestability/__data/page/3620/STEFFEN_-_Mine_Planning-In_Relation_to_Risk_management.pdf>

[10] See for example HSE UK Guideline: "REDUCING RISKS, PROTECTING PEOPLE HSE's decision-making process" and the Safety Work Australia Guidelines for Major Hazard Facillities

particularly in relation to land use applications. For example the Queensland Planning and Environment Court recognised the concept of tolerable acceptable limits in relation to emissions from a gas fired power station[11] when it said:

> *The Court also accepts the evidence of the risk expert … based upon a quantitative risk assessment ….. The lower levels of managed risk involved are within an acceptable risk levels …. The risks from possible hazard scenarios evaluated for nearest residences were likely to be very low or negligible and certain well less than the risk of an accident in the home or a motor vehicle … The proposed risk management measures, including high standards of safety management systems both during construction and operational faces were 'industry standard'.*

However the fundamental operational problem still remains, when making decisions within the acceptable limit range. This model at that level begs the question of when such tolerable risk is then acceptable ie. also as low as reasonably achievable. This is what I have set out to further explore through legal decision analysis.

What is reasonably achievable?

The immediate question is then whether or not cost has any role to play in this assessment, in the context of the Queensland mining safety legislation. The factor of cost is not mentioned at all in the legislative definitions regarding risk acceptability and what is reasonable achievable.

The best answer is that it does - because the concept of "reasonableness" qualifies what is defined as an acceptable level of risk. Risk does not have to be as low as achievable, it must be as low as reasonably achievable.

Reasonableness is not expressly defined in the Queensland mining safety legislation however it is a familiar legal concept and it is highly likely that a court would take into account the burden of taking relevant precautions to reduce the risk, including cost, in deciding what is reasonably achievable.

The mining legislation can be contrasted with general WHS legislation in which the following provision is included in the definition of "reasonably practicable":

> *In this Act, reasonably practicable, in relation to a duty to ensure health and safety, means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including:*
>
> *…..*
>
> *(e) After assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.*

Similar concepts must be considered when reasonableness under the mine safety legislation is considered. As reasonableness is not defined, all relevant factors should be taken into account. This is also the approach under the general WHS laws, where the definition of reasonably practicable is not exhaustive and the test invites consideration of all relevant matters.

[11] *Westlink Pty Ltd atf Westlink Industrial Trust v Lockyer Valley Regional Council* [2013] QPEC 35.

When seeking to understand how the concept of reasonableness should be applied, in the context of cost, it is instructive to look back at the common law and the law of negligence. The tort of negligence is the historical foundation of the concept of reasonableness. At common law a duty of care was owed to take all reasonable precautions to avoid the risk of foreseeable harm to others. To decide whether or not the duty was breached, the courts would consider whether a "reasonable man" would have taken precautions in all the circumstances.

The common law in Queensland in relation to personal injury has now been amended by workers compensation and civil liability legislation.[12] That legislation expressly requires that when considering whether a reasonable person would have taken precautions against a risk, it is relevant to consider factors including the likelihood and consequence of injury as well as the "burden of taking precautions to avoid the risk".[13] I further consider how this has been interpreted in relation to cost, below.

Is affordability relevant?

One critical question is whether or not lack of funds is a factor that is in any way relevant. This question is rarely explored by the courts, presumably for the simple reason that few organisations would seek to rely on an argument that they could not afford to avoid an injury. However the question does come up most commonly in the context of not-for-profit organisations or public sector organisations.

According to Safe Work Australia, affordability should not be relevant when deciding whether to take a precaution against risk. In its “Interpretative Guideline” on the definition of reasonably practicable, Safe Work Australia said:

> *“If two duty holders are faced with the same hazard or risk in similar situations, one duty holder cannot expose people to a lower level of protection simply because it is in a lesser financial position than another duty holder…If a particular duty holder cannot afford to implement a control that is not so disproportionate to the risk as to be clearly unreasonable, the duty holder should not engage in the activity that gives rise to that hazard or risk”.*

The case law has tended to support this approach. The Victorian Supreme Court for example held:[14]

> *Duty of care is to be tested by reference to a reasonable person with adequate resources available for the activity which it was engaged in…*

That decision was made in a case in which the Australian Red Cross sought to rely on affordability in the context of whether it had a duty to protect against HIV infection from blood transfusions. It was unable to rely on impecuniosity in its defence because the court found the standard by which reasonableness was to be decided was objective, rather than subjective.

The same interpretation was later confirmed by the Supreme Court of Western Australia when considering the design of steps in budget accommodation. It said:[15]

> *I cannot accept that the financial circumstances of the Defendant, nor the cheapness of the accommodation could, alone or in combination, produce a situation where the extent of the duty owed by the Appellant to the Respondent was anything less than an obligation to exercise reasonable care for the safety of the paying visitor.*

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[12] *Workers' Compensation and Rehabilitation Act 2003*(Qld); *Civil Liability Act 2003*(Qld).
[13] See, eg, Civil Liability *Act* s10.
[14] PQ v Australian Red Cross [1992] 1 VR 19.
[15] *APEX Holiday Centre (Inc.) v Lynn* [2005] WASCA 58.

Of course for every rule there are always exceptions. Courts have allowed a more subjective analysis of cost and affordability in the context where the risk in question is not one which is an ordinary part of the business, but was a risk "thrust upon" a duty holder. This applies to hazards of natural origin, hazards over which the duty holder has very limited control, or mandatory activities of public authorities.[16] For example it was held not to be a breach of duty by a prison to have failed to have taken the precaution of continuous surveillance to reduce the risk of self-injury by prisoners, in the context of the burden involved.[17]

Despite the fairly well established position above, recently the Queensland Supreme Court has re-opened the issue. It now appears that according to the Queensland Supreme Court, the burden of costs in taking precautions should be considered in light of the subjective position of the defendant. Jackson J has recently said the following:[18]

> *In my view [the test] …… requires the Court to take into account the burden of taking precautions to avoid the risk of injury, not to set up a normalised standard based on an assumed capacity to provide precautions irrespective of cost.*

It must be observed however, that particular case was one in which the activity in question had a fairly high degree of public utility, and the particular risk in question had been assessed as low risk. There, a severely disabled client was living in a house for disabled persons and had caused injury to his carer, by biting her and grabbing her around her throat which required her to restrain him which led to back pain and distress. Over the prior year there were 10 similar incidents.

Jackson J held that the employer could not be reasonably expected to provide a second carer to have assisted in the event of an incident. This burden would have doubled the labour costs involved in the care of the disabled man, and the employing organisation could not have obtained funding to cover that cost. Ultimately then, on the grounds of affordability, the employer was held not to be negligent because the burden of taking precautions was grossly disproportionate to the actual risk. The boundary of acceptable risk had been identified.

This does not mean that a similar approach would be taken in a case in the mining industry where an employer argued that it did not have funds to reduce risk. It was very clear in that matter there were absolutely no opportunity for the duty holder to escalate budgetary concerns. In the mining industry however the question of escalation to seek additional resources and funding will always be one that must be addressed, and public utility of the activities may not support ongoing operations in the face of risk.

What costs can be considered?

When assessing reasonableness, generally the courts will consider the quantum of risk and weigh it against the sacrifice involved in controlling it on all dimensions including through money, time and trouble.

Cost means more than just money. The considerations include all kinds of burdens, including costs of purchase, installation, maintenance, operation of control measures and impacts on productivity. But equally the question of benefits must also be broadly addressed. For example, the European Agency for Safety at Work identified in its

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[16] *Stovin v Wise* [1996] AC 923.
[17] *Cekan v Haines* [1990] 21 NSWLR 296.
18 *Kelly Mai Stokes v The House with No Steps* [2016] QSC 79.

research[19] that the benefits to be considered should include productivity or improvement impacts.

We also know that the question of "costs" is not restricted merely to the direct business enterprise or activity which is occurring but can arguably be a much broader business question across organisations or potentially, industries. For example, the High Court has held that the costs of erecting a fence at one point upon a cliff face must be considered in light of the cost of placing fences along all cliff faces under the control of an occupier and not just at the given immediate direct location.[20]

When is a cost unreasonable?

The common law application of unreasonableness considers whether or not the cost is disproportionate to the risk. The UK Court of Appeal considered this issue in the important old case of *Edwards v. National Coal Board* in which the issue was whether it was "reasonably practicable" to prevent the smallest possibility of a rock fall in a coal mine. In Australian cases Higgins J has held that penny pinching measures will not be accepted as reasonable in undermining decisions about use of PPE.[21] But we also know that we do not need to totally safe guard against all risk, based on Queensland Supreme Court manual handling cases.[22]

The current guidance given in response is described by the UK Health & Safety Executive as follows:

> *Although there is no authoritative case law which considers the question, we believe it is right that the greater the risk: the higher the proportion may be before being considered 'gross'. But the disproportion must always be gross.*

But what exactly is a "gross" disproportion? According to the Oxford Dictionary the word "gross" means very obvious and unacceptable. This is circular in the context of the Queensland mining safety legislation. There are no identified cases setting a more useful specific standard although this paper has highlighted the application of the test in several cases.

According to the UK Health & Safety Executive:

> *HSE has not formulated an algorithm which can be used to determine the proportion factor for a given level of risk. The extent of the bias must be argued in the light of all the circumstances. It may be possible to come to a view in particular circumstances by examining what factor has been applied in comparable circumstances elsewhere to that kind of hazard or in that particular industry.*

We do know that industry practice is relevant, according to the NSW Supreme Court who have stated:[23]

> *The Respondent's adherence to the industry norm is a strong indication that a reasonable person in the Respondent's position would not have adopted additional precautions to guard against the risk.*

What does a defensible decision look like?

In practice, to make systematic and sound decisions, risk must be assessed on a case by case basis. The courts will take expert evidence regarding the analysis of risk and how the decision was made. There are many varied models of decision tools that are available to

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19 Dr Antonis Targoutzidis et al, *The business case for safety and health at work: Cost-benefit analyses of interventions in small and medium-sized enterprises* (2014) European Agency for Safety and Health at Work.
[20] *Romeo v Conservation Commission of the Northern Territory* [1998] 192 CLR 4V1.
[21] *Jamborvic v ACT* (1992) 108 FLR 8.
[22] *J W Deligios v QNH Pty Limited* [1992];*Swain v Waverley Council* [2005] HCA 4.
[23] *Erwin v Iveco Trucks Australia Limited* [2010] NSWCA 113.

be applied in this process. Standards Australia[24][25] identifies such tools as including cost benefit analysis, qualitative risk assessment, quantitative risk assessment, probabilistic safety assessments, analytic hierarchy processes, new decisions theories addressing uncertainty and linear programming.

However, not all methodologies utilised which may be used by experts will be accepted by the courts. To give an example – an economic rationalist approach seeking out an optimum investment equilibrium[26] does not appear to respond to the legal test of reasonableness.

There remain ongoing public concerns around qualitative risk analysis so far as terminology is vague or lacks transparency and is not suitable for comparison.[27] Equally there are issues with quantitative risk assessment. Hopkins is critical of any approach for ranking risk or spend based on probability and consequence alone, for reasons including that this approach does not give due weight to consequence and the gravity of risk.[28] He also critiques cost benefit analysis and monetised approaches as lacking in credibility unless supported by a full defence in depth approach (such as is utilised in bow tie analysis for critical risks).[29] Risk assessment academics are aware of the challenges in this regard and some recent techniques include a combination of qualitative and quantitative risk assessment techniques with appropriate accommodation for uncertainty to attempt to address such concerns.[30]

Courts also tend to treat risk evaluation methodology with appropriate degrees of suspicion. This approach is illustrated by one New South Wales decision[31]. The issue was the reasonableness of an application to overturn a notice that had been issued by the Sydney City Council to a property owner in relation to building fire safety.

The expert engineering quantitative risk assessment demonstrated that in relation to the installation of fire sprinklers the cost per life saved exceeded the value of a life. Expert evidence of a consulting fire safety engineer was that this approach was "best practice". The Court noted:

> *With regard to the risk assessment, a literature review of international data revealed a range in the values of a statistical life in the order of $US0.5m - US$21m. Consequently, by assuming the costing of the proposed sprinkler system is accurate, the cost per life saved for installation of the sprinkler system exceeds the researched value of a statistical life (US based) and values in other industries and as such may be considered unreasonable.*

However, a qualitative assessment was separately done by the local fire chief. This approach was stated to be "current practice". His expert opinion was:

> *Fire service intervention in their building would prove more difficult [for a number of reasons].*

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[24] AS/NZS ISO 31000:2009 Risk management— Principles and guidelines; see also HB89: 2013 Risk Management Guidelines on Risk Assessment Techniques.

[26] Saman Aminbakhsh et al, 'Safety Risk Assessment Using Analytic Hierarchy Process (AHP) During Planning and Budgeting of Construction Projects' (2013) 46 *Journal of Safety Research* 99–105.

[27] See Buncefield Major Investigation Board Report 2008 (UK)

[28] Andrew Hopkins, 'How much should be spent to prevent disaster? A critique of consequence x probability' (Working Paper 89, Australian National University, 2014).

[29] Andrew Hopkins, 'The Cost Benefit Hurdle for Safety Case Regulation' (Working Paper No 88, Australian National University, January 2014).

[30] See Valeria Villa et al, 'Towards Dynamic Risk Analysis: A Review of the Risk Assessment Approach and its Limitations in a Chemical Process Industry' (2016) 89, *Safety Science* 77-93.

[31] *Owners Strata Plan 16878 v Sydney City Council* [2009] NSWLEC 1137.

Ultimately the court accepted the current practice qualitative approach over the best practice quantitative approach. When considered qualitatively there were challenges for access and egress in case of emergency and problems with smoke containment.

The lack of certainty involved in all quantitative risk assessment in that case was a key factor in rejecting it. The Court said:

> *For my determination of these competing approaches, I initially acknowledge that the computer modelling approach appears attractive by endeavouring to quantify the risks and reduce the inevitable subjectivity incurred in the stated 'current practice'. However, the consideration of the evidence causes me some concern in accepting the reliability of the modelling, based on the stated limitations and assumptions …. Noting Mr Lundqvists' acknowledgement that there is always a degree of uncertainty in all assessment modelling.*

The court also said more broadly in relation to the issue of quantitative risk assessment:

> *It therefore appears to me that there is a significant public interest issue involved in adopting this somewhat radical approach, in the NSW context, unless recognised authorities independently support it as 'best practice'. Such recognition would presumably confirm the modelling methodology, the acceptable range of assumptions and input data used in the modelling and that it is appropriately correlated to the local context. It should also identify the level of risk to person parameters that the community considers acceptable and under what circumstances it is appropriate to make comparisons with other buildings. In the ultimate I consider it reasonable to maintain the current practice ….*

This highlights that a court may be loath to adopt quantitative methods of risk tolerability assessment in a regulated sector unless there is broad community based and regulatory support for the model adopted. Although current Queensland guidelines suggest risk acceptance criteria is matter to be determined at each mine[32] the courts appear to consider there is a greater public interest in this issue.

It is quite apparent in the Queensland mining industry context that such a model, to be accepted, would also likely need to have the broad support of the workforce and their representatives. The literature suggests that workforce participation produces safer outcomes in a general sense[33].

Conclusion

This review provides comfort that when facing shrinking budgets in an operational environment, cost is not a dirty word. However where cost is to be used as a factor in accepting risk, it should be addressed in full detail and front-on. Courts will permit considerations of cost as relevant to risk acceptance and this is likely to be a relevant factor for mining safety decisions in the same way as for other general industry. The more serious the risk the less gravity cost considerations will take, however. Further, when considering the application of cost decisions for any particular risks, courts will accept expert evidence as to the reasonableness of cost expenditure for particular precautions, and regulatory and industry acceptance of risk analysis methods as valid will be critical to whether courts will accept decisions involving cost as reasonable.

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[32] See eg Queensland Government: Natural Resources and Mines'Control of Risk Management Practices' Recognised Standard 02,(18 July 2003).

33 Philip Bohle et al (eds), *Managing Occupational Health and Safety* (Palgrave MacMillan, 3rd ed, 2010).

When making decisions involving cost as a factor in risk evaluation, the following approach should therefore be supported from the legal perspective:

1. **Specific -** Risk acceptance should be specific to the particular hazard for the specific location and time and activity and the specific costs of control so far as possible. Generalised risk evaluations are unlikely to be defensible.
2. **Expert -** Evaluation methodology and conclusions should be substantiated by expert opinion suitably qualified for the particular hazard type. Ideally experts will adopt current accepted practice rather than developing practice.
3. **Benchmarked** – Risk evaluation methodology including criteria and outcomes should be benchmarked from the industry perspective.
4. **Endorsed –** Regulatory endorsement for validation of methods and criteria should be sought including at local level.
5. **Certain** - Inputs for decision making should be explained including all assumptions and exploring all uncertainties. Qualitative decision argument should be provided and explained where significant uncertainties exist.
6. **Broad** - All broad burdens should be factored into the process, rather than pure monetary cost. Equally benefit analysis should reflect broader benefits also. Decisions about reasonableness of cost and benefit should be made based on organisation wide resources rather than at a more discrete level.
7. **Escalated** - Escalation should occur to an appropriate business level for risk acceptability decisions to be made. This should be based on a consideration of maximum potential consequence rather than a factor of likelihood and consequence.
8. **Back up** – For critical risks, a defence in depth and management plan approach should continue to be applied to validate methodologies selected.
9. **Sensitive** - Safety impact assessments should be conducted where risk acceptance decisions are proposed to demonstrate change management for the broader risk context.
10. **Consultative -** Worker participation in decisions about risk tolerability should be facilitated before final decisions are made.

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Further Information

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