

**Working Paper 11**

**From Fiction to Fact - Rethinking OHS Enforcement**

July 2003

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**This paper was first presented at the conference *Australian OHS Regulation for the 21<sup>st</sup> Century*, National Research Centre for Occupational Health and Safety Regulation & National Occupational Health and Safety Commission, Gold Coast, July 20-22, 2003.**

## **From Fiction to Fact – Rethinking OHS Enforcement**

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In the past quarter of a century there has been a significant evolution in the style and form of occupational health and safety (OHS) regulation in Europe, North America, and Australia with most jurisdictions moving from a prescriptive ‘command-and-control’ style of regulation, to more flexible, ‘self-regulatory’, models using less direct means to achieve broad OHS goals (see Gunningham and Bluff, 2003). While OHS standard setting in Australia has changed over the past 20 years, and quite dramatically over the past ten or so years, changes in OHS enforcement have lagged behind. OHS inspection and enforcement is still biased towards ‘traditional’ hazards, such as plant and falls, enforcement is still dominated by advice and persuasion strategies, and prosecutions still largely brought in response to serious injuries and fatalities. The central argument in this paper is that OHS statutes should be strongly enforced, but in a way that both responds

- (i) sensitively to the major thrust of the modern approach to standard setting, namely that organizations must learn to adopt systematic approaches to OHS management, and should get credit for doing so, and
- (ii) decisively to detected high risk situations.

After outlining the complexities of compliance with modern OHS provisions, the paper places OHS enforcement in its historical context, and shows how the Robens Report partly entrenched the historical approach to OHS enforcement, while highlighting the importance of self-regulation and targeted inspection and self-inspection. The paper then summarises the evidence on the effectiveness of deterrence as an enforcement strategy, and critically evaluates the now well-accepted framework for responsive enforcement. It examines examples of targeted inspection, self-audit and issues involved in inspecting OHS management (OHSM). It concludes with an analysis of the key enforcement methods – improvement and prohibition notices, infringement notices, enforceable undertakings, and prosecution.

## **1. Compliance (and Beyond): The Purpose of Enforcement**

This paper works from the very simple premise that the role of enforcement all dealings between OHS inspectorates and duty holders: see Health and Safety Commission, 2002: 3) is to contribute to the improvement of OHS by ensuring compliance with OHS legislation. This assumes that compliance with OHS standards will result in the elimination, or at least reduction, of work-related illness and injury (see Industry Commission, 1995). The UK Health and Safety Commission (Health and Safety Commission, 2002: 3) envisages the purposes of enforcement as ensuring that duty holders deal immediately with serious risks; promoting and achieving 'sustained compliance with the law'; and ensuring that duty holders who breach statutory provisions are 'held to account' through prosecution. To these, I add motivating and requiring all duty holders to take a systematic approach to OHS management (OHSM).

Researchers (see especially Hutter, 1997 and Di Mento, 1986) have observed that, from the regulator's perspective, it is clear that it is overly simplistic to think that compliance is simply about regulators comparing the way that actual behaviour conforms with or measures up to the requirements of published rules or standards. Compliance is not just a single event, but an open-ended and ongoing social (and sometimes political) process of negotiation (see Carson, 1970a, 1979 and 1980; Di Mento, 1986; Hawkins, 1984 and 2002; Hutter 1988, 1989 and 1997; Black, 2001).

Of the many reasons for seeing compliance as an ongoing process, the most important are that OHS regulation more often than not imposes ongoing, or continuing, obligations, which may be satisfied today but not tomorrow; that it may take considerable time for business organizations to organize themselves to reach the standards required for compliance; that legal rules and standards are often unclear about what constitutes OHS compliance (Hutter, 1997); and that interpretations of whether or not the facts comply with the interpretation of the legal standard may be complex. What makes issues of OHS compliance even more challenging, is that modern OHS regulation is an example of constitutive regulation, a form of regulatory law which attempts to use legal norms to constitute structures, procedures and routines which are required to be adopted and internalised by regulated organizations, so that these structures, procedures and routines become part of the normal operating activities of the

organization (see Hutter, 2001: chapter 1). Where this fails, the law has the option of intervening more overtly, through external regulation and sanctions (restraining regulation).

Recent empirical research (see Parker, 2002: especially ix, 43-61 and 301) suggests that ensuring that organizations comply with their obligations involves at least three stages:

1. A ***management commitment to comply***, through ‘self-regulation’, which may arise from various motivations (the potential for bad publicity, a new regulatory requirement etc: see Bluff, 2003) but often is only promoted by a shock induced by enforcement action;
2. ***Learning how to comply***, or, as Parker (2002: 301) puts it, ‘nurturing the acquisition of expertise’ (specialised skills and knowledge) for self-regulation, which may involve appointing a person at a high level in the organization to be responsible for implementing a compliance program. Hutter (2001: 302) talks of a ‘design and establishment’ phase, where risk management systems, procedures and rules are developed – for example specialist personnel are appointed, and OHS committees established;
3. The ongoing ***institutionalisation of compliance***, or ‘purpose in self-regulation’, in everyday operating procedures, performance appraisals and in the culture of the organization. Hutter (2001: 301-302) suggests that there are two phases in this process. First, in an ‘operational phase’, risk management systems, procedures and rules are implemented, so that committees meet and audits are completed, a ‘safety culture established’, and responsibility is institutionalised. Second, in a ‘normalisation phase’, behavioural change is institutionalised, there is ‘compliance with risk management procedures and rules as part of the normal, everyday life’ of the organization, and there is an awareness and understanding of risks at corporate and individual employee and manager level.

Hutter (2001: 303) emphasises that these models are dynamic, are dependent on the fulfillment of a range of conditions, and that stages or phases are not unilinear, in that ‘it is possible to move both forwards and backwards through the different phases.’ The ‘normalisation’ phase, for example, will rarely be found, and when it is, it is likely to be temporary, because it is difficult to maintain full OHS compliance once it is achieved.

In summary, the aim of OHS enforcement - compliance with OHS statutory obligations - is extremely difficult to ‘measure’, and requires subtle and nuanced judgments. These challenges are heightened as a result of increasing recognition that OHS regulators should be

doing more to encourage organizations to seek continuous improvement in reducing OHS risks through systematic OHSM (see Gunningham and Johnstone, 1999, chapter 3; and Bluff and Gunningham, 2003).

## **2. Approaches to OHS Enforcement**

### ***(a) The Historical Legacy***

There is an ongoing, but rather tired, debate (see Hutter, 1989 and 1997, Black, 2001) regarding the role of the inspectorate in maximising compliance with OHS legislation: is the best way to maximise compliance with OHS standards to *advise* and *persuade* employers to comply with standards (sometimes rather misleadingly called the ‘compliance strategy’) or *punish* them for not doing so (the ‘deterrence strategy’)? The dominant position, at least in relation to OHS, was established in the mid-nineteenth century in Britain, before the enactment of the first Australian OHS statutes (see Johnstone, 2000; Gunningham, 1984, chapter 4, and the references cited in both). Soon after the establishment of the first UK Factories Inspectorate in 1833, there emerged an enforcement culture which eschewed prosecution as the major enforcement strategy, and instead focused on securing compliance through advice, persuasion and negotiation. Whereas initially inspectors resorted to prosecution relatively frequently (see Bartrip and Fenn, 1980a, especially 205-206, and 1980b), prosecution rates quickly fell, so that prosecution was relatively rare by 1860 (see also Bartrip and Burman, 1983: 60).

To explain this phenomenon Bartrip and Fenn (1983a: 210-222) argue that the inspectors, with their limited resources, adopted cost effective enforcement techniques. Faced with a worsening ratio of inspectors to premises to be inspected, the early inspectors began to avoid the time consuming process of preparing and conducting costly prosecutions. Second, the early inspectors wanted to introduce the legislation in a way that ensured it was respected by millowners, and only prosecuted when repeated warnings failed, or when there were serious offences, or wilful disobedience or obstinacy. In addition, the law would be seen to have effective sanctions if only a few cases were lost. Amongst the other factors limiting the use of prosecution was the vague and uncertain state of the law; a general ambivalence about the degree to which regulatory offences, usually committed by business creating wealth and employment, are morally reprehensible; and the attitudes of the magistracy to the legislation, in particular their idiosyncratic legal interpretations, and the low level of fines imposed (see

Bartrip, 1985: 425-6; but cf Peacock, 1984: 206). The inspectors were convinced of the inability of low penalties to deter contraventions (Henriques, 1979: 104).

A remarkable aspect of this enforcement culture is its ideological longevity, and its role in creating and recreating the conditions under which industrialisation and laissez faire capitalism could thrive (see Carson, 1979 and 1980). Carson (1980) refers to the 'ambiguity' of factory crime - a discontinuity between OHS crime and 'real' crime, such that the community views OHS contraventions as not being 'really criminal'. While factory offences have been statutorily described as crimes and proscribed by law, contraventions have been frequent but substantially tolerated in practice and rarely prosecuted (what Carson (1979) called the 'conventionalisation' of OHS crime).

Carson (1979 and 1980) has argued that by 1833 a number of large, urban, manufacturers had, for various motives, already voluntarily introduced improved factory conditions, and sought compulsory and effective regulation of working conditions to reduce long-term competition from smaller, less scrupulous manufacturers and from rural manufacturers. The *Factories Regulation Act* of 1833 Act was based on a belief that abuses were practised by only a few, non-urbanised, millowners. But after 1836 the inspectors realised that factory crime was firmly embedded in the prevailing structure, organization and ideology of production, and practised even by 'respectable' employers. Widespread use of prosecution would have entailed 'collective criminalisation' of employers 'of considerable status, social respectability and growing political influence' (Carson, 1979: 167). Further, the inspectors found it difficult to check on the operations of mills in between visits and devised regulations to require the maintenance of time books, certificates of age and similar documentation. Employers questioned their moral culpability for these 'administrative' offences. The partial resolution of these contradictions, and the low penalties imposed by magistrates, led to the inspectorate devising a number of strategies. One was for inspectors to prosecute only 'wilful and obstinate' offenders, and only after the employer had been given an opportunity to offer an exculpatory explanation. Inspectors developed informal and conciliatory approaches to enforcement, based on informal advice, persuasion and warnings, with prosecution the last resort. Third, the removal of the element of intention, and hence moral culpability, from the formal elements of factory offences in the 1844 Act facilitated this drift towards setting such crimes apart from the ordinary crimes involving intention. Carson (1980: 169) concludes that by the late 1840's the 'pattern of factory law enforcement had been set, and the ambiguity

[and conventionalisation] of factory crime established', and has become an important part of the hegemonic culture of the enforcement of OHS legislation (see, for example, Prior, 1985; and Johnstone, 2000).

***(b) Inspection, Enforcement and the Robens Report***

The Robens Committee was critical of the existing approaches to inspection, preferring that (Robens Committee, 1972: paras 213 and 219) 'the main emphasis ... be on self-inspection by employers, in co-operation with employees and their representatives'. 'The activities of the inspectorates should be supplementary' and, 'rather than based on periodical visits of a general character', inspections should be directed 'towards those problem areas where they are most needed and where they are likely to be most productive,' with 'occasional spot checks' to fulfil the inspectorate's 'general "watchdog" role'.

While it was critical of the 'derisory' level of fines for contraventions of the legislation (Robens Committee, 1972: 81), the committee believed (Robens Committee, 1972: para 208) that submissions

that inspectors should pursue a policy of rigorous enforcement, utilizing the sanctions of the law widely and to the full [were] misconceived. Even if it were feasible, it would be generally inappropriate and undesirable... But in any case it is not feasible. There are far too many workplaces, and far too many regulations applying to them, for anyone to contemplate anything in the nature of continuous official supervision and rigorous enforcement...

Consequently, it recommended (1972: para 215) 'an explicit policy' with the 'prime objective the prevention of accidents and ill-health and the promotion of progressively better standards at work through the provision of information and skilled advice to industry and commerce', and that 'the provision of advice, and the enforcement of sanctions where necessary, should continue to be regarded as two inseparable elements of inspection work.' When 'advice and persuasion fails' (Robens Committee, 1972: para 265), the Committee, emphasising the 'preventive' aspects of enforcement, argued that 'the pressure should be exerted in a form that is positive and constructive as well as quick and effective. For the most part, as we have argued, prosecution is none of these things.' Rather, it recommended the creation of new administrative techniques, in the form of improvement and prohibition notices.

As far as OHS prosecutions were concerned, the Committee (1972: 80-81) suggested that a 'fundamental weakness' of criminal prosecution for contraventions of OHS legislation was that

the criminal courts are inevitably concerned more with events that have happened than with curing the underlying weaknesses that caused them....[T]he traditional concepts of criminal law are not readily applicable to the majority of infringements ... Relatively few offences are clear cut, few arise from reckless indifference to the possibility of causing injury, few can be laid without qualification at the door of a particular individual.. The typical ... combination of infringements arises rather through carelessness, oversight, lack of knowledge or means, inadequate supervision or sheer inefficiency ...

The Committee's other major other recommendations (1972: paras 263 and 264) were that maximum fines be increased; there be higher penalties for repeat offences, and that prosecutions be brought not only against corporations, but against 'individuals such as directors, managers and operatives.'

Apart from the Committee's reluctance to call for greater resources for inspection and enforcement, there appear to be two major flaws in the committee's approach to enforcement, and, in particular, prosecution. First, it is clear that the committee did not rethink the role of prosecution, but rather assumed a very traditional 'command and control' approach to enforcement in which criminal sanctions would be used 'widely' and 'to the full' for all contraventions in all workplaces. Second, despite recommending new enforcement mechanisms (improvement and prohibition notices) which in itself should have promoted a reconsideration of the role of prosecution in an OHS enforcement strategy, the Committee contributed little to the development of a new form of criminal law to reflect the 'self-regulatory' approach to standard setting, workplace arrangements and inspection so as to deal effectively with corporate behaviour. Instead, it entrenched 'event focus' of traditional OHS prosecution (see Johnstone, 2003) and the 'ambiguity' and 'conventionalisation' of OHS crime. In my view, the Robens Committee's failure to rethink the criminal law in the context of OHS *has itself* rendered the criminal law ineffective in regulating OHS crime (see further Johnstone, 2003: chapter 9), and I will return to this point at the end of this paper.

### ***(c) The Dominance of the 'Advise and Persuade' Approach in OHS Enforcement?***

The important point emerging from this brief history of OHS enforcement is that the 'advise and persuade' approach to OHS enforcement emerged in response to particular social, political and economic circumstances in the early nineteenth century in Great Britain. Despite its historical contingency, it was strongly endorsed by the Robens Report, and has become the entrenched regulatory response in Australia to contraventions of OHS statutes (Prior, 1985; Industry Commission, 1995; Gunningham, 1984: chapter 4; Johnstone, 1997: chapter 2; Johnstone, 2003, chapters 3 and 4). The same appears to be true of the practice of most

Western OHS inspectorates (ILO, 1996: 32, and for the UK, see Centre for Corporate Accountability 2002; and Hawkins, 2002). Further, Grabosky and Braithwaite's (1986) important research in the mid-1980s suggests that this enforcement approach is commonly adopted by most Australian regulatory agencies.

That, by itself, is not to say that it is the 'correct' or 'best' approach to OHS enforcement, but rather that it is a historically contingent approach that has been 'taken-for-granted' and until recently in Australia been left largely unexamined. Indeed, there is little, if any, empirical evidence showing that the 'advise and persuade' model does indeed reduce workplace injury and disease.

The 'advise and persuade' model is centrally concerned with achieving the goals of the regulatory system and to prevent rather than to punish contraventions. It essentially relies on persuasion to achieve compliance, and emphasises cooperation rather than confrontation, and conciliation and negotiation rather than coercion (Gunningham, 1987). The threat of enforcement remains in the background, to be used where all other strategies fail (see Hawkins, 1984 and 2002, and for a nuanced discussion of the different types of advice and persuasion strategies, see Hutter, 1989).

Indeed, some would argue that as OHS statutes move away from detailed technical prescriptive rules to broader, more open-ended general duties, performance and process standards, an 'advise and persuade' strategy is more appropriate (see Baldwin, 1995), because rules which impose evaluative standards implicitly confer discretion upon those applying the rule in the particular circumstance, and provide scope for persuasion and negotiation as to what constitutes compliance (Black, 2001: 7). Against that, general rules often quickly acquire clear and specific interpretations, and can facilitate a deterrence approach in situations not actually covered by detailed rules (Black, 2001: 7).

#### ***(d) The 'Deterrence' or Sanctioning Approach***

The classical deterrence model argues that regulated organizations are profit-driven 'amoral calculators' (Kagan and Scholz, 1984) which will comply with a regulatory provision when they judge that the benefits of compliance (including avoiding fines or other sanctions) exceed the costs of compliance (see Becker, 1968). Commentators talk of two kinds of deterrence: specific deterrence, which is aimed at a specific, already identified, offender, and general

deterrence, which is aimed at potential offenders in general. The theory is that if offenders are detected with sufficient frequency, punished with sufficient severity and violations publicised, then they and other potential violators will perceive that the costs of future violations exceed the perceived benefits, and will make greater efforts to comply with OHS statutory requirements.

The deterrence strategy emphasises a confrontational style of enforcement and the sanctioning of rule-breaking behaviour (Gunningham, 1987). Future compliance with the rule may be a by-product of enforcement action, but it is not its central purpose (see Black, 2001: 4). Critics (see Sparrow, 2000: 182-185) argue that a punishment orientated approach is essentially reactive. With most crimes, this means that prosecution takes place once the damage has been done. (This, of course, is not necessarily so for OHS contraventions, because an OHS offence is generally committed when an employer or other duty holder fails to provide a safe system of work, or fails to provide safe plant and so on. An injury need not occur for an offence to be committed.) Further, it is often argued that punishment-based approaches rely too heavily on the state to enforce the law, rather than helping people to comply. By processing prosecutions one at a time, OHS regulators fail to produce systemic solutions.

### **3. Stronger and More Responsive Enforcement**

From the late 1980s there has been some support for a stronger emphasis on deterrence in OHS enforcement strategies (see especially Industry Commission, 1995: 109, recommendation 12). Building on this trend, in the remainder of this paper I argue that OHS inspectorates should take a stronger, but more responsive, approach to enforcing OHS statutes. This argument is based upon three developments emerging from the regulatory research over the past 15 years – first, the general acceptance that systematic approaches to OHSM are desirable and should be encouraged (see Bluff and Gunningham, 2003); second, the evidence that deterrence can (at least in certain circumstances) be part of an effective enforcement strategy, at least for most organizations; and third, the groundswell of opinion supporting the use of a responsive enforcement (or ‘interactive compliance’) model of a mix of advice and persuasion and escalating sanctions.

*(a) Deterrence: the evidence*

Proponents of a deterrence approach argue that if ‘both general deterrence and specific deterrence are strong over time, compliance may be incorporated by firms as an organizational norm’ (McQuiston, Zakocs and Loomis, 1998: 1022). The assumption underlying classical deterrence theory, that employers are economically motivated to comply with regulation, is problematic, although, as many commentators have noted, the assumption of economically rational behaviour is more likely to be true for business organizations than it is for the average person (see Braithwaite and Geis, 1982: 302; and Tombs, 1995: 356). An important element in deterrence theory, particularly for general deterrence, is how the particular offender *perceives* and calculates (or does not calculate) the potential risks and benefits to her or him of the course of conduct. This will clearly differ from individual to individual and organization to organization (see Freiberg, 2002). Little is known about how much people know about changes in the certainty of detection or the severity of penalties being imposed, or about how information can be disseminated to potential offenders.

Most of the OHS research has been conducted in the USA, with OSHA inspections the main object of the study, and has mostly concentrated on injury reduction, rather than the impact of enforcement on the incidence of work-related disease. Because of the significant differences between the OHS regulatory system in the USA and Australian systems, the data must be viewed cautiously, but it does provide some support for the use of general and specific deterrence.

In relation to general deterrence, a recent survey of executives in large UK companies found that 60 per cent of respondents were aware of sanctions imposed upon other companies in their sector, and 57 per cent of respondents indicated that sanctions against other companies had ‘impacted their own management of risks ‘very strongly’ (Baldwin and Anderson, 2002: 11). Studies support a general deterrent effect of OSHA citations (see Gray and Scholz, 1990: 295, 297), but suggest that certainty of punishment is more important than size of penalty. Gray and Scholz (1991: 203) concede, however, that their findings in relation to size and penalty cannot be generalised to the kinds of high ‘mega-penalties’ (for example, penalties involving hundreds of thousands of dollars), which may have ‘large effects’, attract media attention and ‘send strong signals about enforcement priorities’. Braithwaite and Makkai’s

(1991) very important research on nursing home regulation,<sup>1</sup> however, found almost no correlation between nursing home compliance rates and their perceptions of the certainty and severity of punishment, except for a small number of homes in some contexts. There is some data to show that organizations are not generally deterred so much by hearing about individual cases, but that they are affected by the *cumulative effect* of numerous prosecutions against other companies and by hearing of the imposition of very large penalties or jail sentences (Thornton, Gunningham and Kagan, 2003). Deterrence strategies may affect firms in more subtle ways, through what some have called ‘implicit general deterrence’ (Thornton, Gunningham and Kagan, 2003).

The research across a number of areas of business regulation suggests that organizations are not just motivated by general deterrence in the explicit sense discussed above, but also by normative motivations (a sense of civic duty to comply, or an ‘internalisation of the relevant rules’) (see Tyler, 1991; Levi, 1998 and Kuperman and Sutinen, 1998) and social reasons, such as social pressures from significant other persons (peer groups, family and even inspectorates) (see Hawkins, 1984 and 2002; Hutter, 1988), or simply to protect their commercial reputations (Gunningham, Kagan and Thornton, 2003; Baldwin and Anderson, 2002: 11; MORI, 2001). Compliance is also promoted by a sense of trust that the regulator will act honourably and fulfil its promises, and a belief that other duty holders will keep their bargains (Levi, 1988; Winter and May, 2001). Organizations motivated by duty and/or fear of loss of reputation may not be motivated by fear of sanctions, but their awareness of sanctions imposed upon others may serve as a ‘reminder’ of pre-existing commitments to comply, and may result in measures to ensure that its managers implement existing compliance programs (Kagan and Scholtz, 1984; Thornton, Gunningham and Kagan, 2003). Many (perhaps the majority) of organizations will comply with regulatory requirements as long as the organizations which do not comply are caught and punished. The imposition of penalties on others may also ‘reassure’ organizations that have undertaken costly compliance measures that they will not be at a competitive advantage in relation to non-compliers.

The data supporting specific deterrence appears to be stronger. Baldwin and Anderson’s (2002: 10-11) survey of UK executives found that 71 per cent of companies that had

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<sup>1</sup> The nursing homes in the study had, on average, about 40 employees, and had a flat management structure with a chief executive (the Director of Nursing) who exercised strong control (Braithwaite and Makkai, 1991: 10-11).

experienced punitive sanction reported that ‘such sanctioning had impacted very strongly on their approach to regulatory risks ... For many companies, the imposition of a first sanction produced a sea change in attitudes’, and concentrated their minds on the problem.

Most of the OSHA studies focus on *specific deterrence*. While industry-wide studies have shown little evidence of a preventive impact from inspection and citation activities (McCaffrey, 1983; Ruser and Smith, 1991; Smith, 1979; Viscusi, 1979), studies looking at the impact upon individual firms, however, have shown that even relatively small fines can achieve high levels of compliance. While even here the evidence is not consistent, there are certainly considerable data to suggest that both the severity of sanction and the certainty of detection and penalty do influence injury rates, with the latter exerting a much stronger influence than the former (Gray and Scholz, 1990, 1991 and 1993; Gray and Mendeloff, 2002 Mendeloff and Gray, 2003a; Baggs, Silverstein and Foley, 2003; and see also Von Hirsch et al, 1999 45-50, and Freiberg, 2002: 11). The studies also show that inspection without penalties either has no impact upon injury rates (Gray and Scholtz, 1993; Gray, 1996; Shapiro and Rabinowitz, 1997: 722; and Baggs, Silverstein and Foley, 2003), or resulted in higher injury rates (Mendeloff and Gray, 2003a). There is some evidence that even where the cost of compliance may substantially outweigh the penalty imposed, nonetheless a marked increase in compliance can be achieved (Weil, 1996). Although Gray and Scholz’s work (cited above) supports specific deterrent effects even for small OSHA citations, penalties which are too low, however, may have little condemnatory force associated with them, and may actually reduce the deterrent effect of law (Ministry of Justice, New Zealand, 2000).

A recent study by Baggs, Silverstein and Foley (2003) suggests that the impact of specific deterrence is not confined to ‘narrowly focused safety improvements following an inspection’. Rather ‘enforcement visits may trigger a re-shuffling of managerial priorities and a greater attention paid to safety and health improvement opportunities throughout a worksite’ (Baggs et al, 2003: 491, and see also Gray and Scholz, 1993). Similar findings were reported by Mendeloff and Gray (2003b: 4), who concluded that ‘it does appear that OSHA penalty inspections do often induce managers to pay more attention to safety issues in manner that is not limited to compliance with OSHA standards.’

Haines (1997, especially chapter 8; and 1994) has cautioned that, depending on the culture within the firm, the threat of prosecution may induce duty holders to minimal compliance, but

this may be at a formal level only, with no substantive change to OHS processes, procedures or overall culture (see also Shapiro and Rabinowitz, 1997: 717-718). Haines' research also emphasises that the impact of deterrent measures depends on the position of the target corporation or individual within the broader social structure. While small businesses may in fact be 'more responsive' than larger organizations to punitive sanctions, the impact of such sanctions will be confined to the short term if the competitive context within which the small business operates, and which constrain its ability to introduce OHS programs, remain unaltered (Haines, 1997: 223).

This rather confusing empirical evidence suggests that deterrence has some effect in the case of corporate, although it does not work across the board. Specific deterrent effects are stronger than general deterrence, which appears to work only in certain contexts, motivating at least some organizations to comply. Research has highlighted the importance of the reinforcing effect of penalties, reassuring those that, for other motivations, do commit resources to comply that their commitment has been worthwhile, and is worth continuing. This qualified impact of deterrence is not an argument against the use of criminal sanctions (Tombs, 1995: 356), but rather - particularly in the light of Braithwaite and Makkai's (1991) work - an argument for the use of the enforcement pyramid, and for targeting those sanctions to circumstances and actors where persuasive measures have been ineffective, and where sanctions are most likely to be justified. Indeed, responsive enforcement, using an interactive and graduated enforcement response, has been developed because of the limitations of both the 'advise and persuade' approach and the deterrence approach. It 'covers the weakness of one with the strengths' of the other (Braithwaite, 2002: 32).

#### ***(b) Responsive Regulation and an Escalating Enforcement Response***

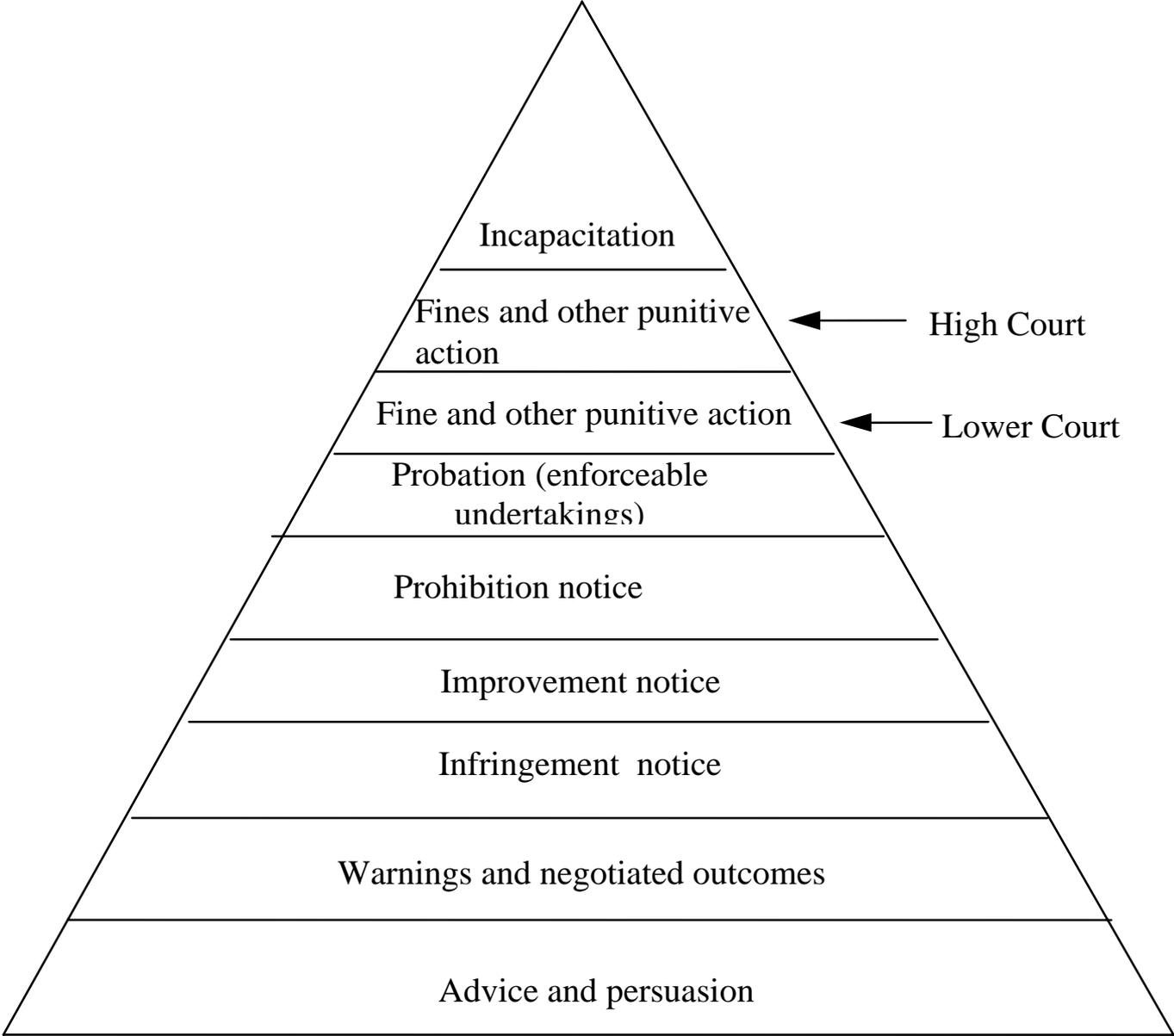
The renewed interest in deterrence amongst some Australian OHS regulators coincides with a greater understanding of the importance of 'responsive regulation', in which regulators 'should be responsive to the conduct of those they seek to regulate', or more particularly, 'to how effectively citizens or corporations are regulating themselves' before 'deciding on whether to escalate intervention' (Braithwaite, 2002: 29; Ayres and Braithwaite, 1992). Regulators have increasingly realised that an approach based strongly on strong penal enforcement may produce a culture of regulatory resistance among some employers, including employers who are prepared to improve OHS because they recognise that improved

OHS makes good business sense. Regulators are also beginning to accept that reliance simply on informal measures can ‘easily degenerate into intolerable laxity and a failure to deter those who have no intention to comply voluntarily’ (Gunningham and Johnstone, 1999: 112). Indeed, Shapiro and Rabinowitz (1997 at 722) point to evidence from a number of jurisdictions showing that ‘cooperative approaches can decrease compliance if agencies permit law breakers to go unpunished.’

The response of regulatory theory (and increasing regulatory practice) to the punish-persuade debate has been to adopt a judicious mix of the two approaches in some form of a graduated enforcement response or enforcement pyramid (see Rees, 1988; Ayres and Braithwaite, 1992; Braithwaite, 1993; Scholtz, 1984; Nonet and Selznick, 1978; Sigler and Murphy, 1988 and 1991; Carson and Johnstone, 1990; Gunningham and Johnstone, 1999). The challenge is to develop enforcement strategies that punish the worst offenders, while at the same time encouraging and helping employers to comply voluntarily. As Braithwaite (1993: 85) argues regulators should nurture virtue (good corporate conduct), and regulatory institutions ‘should be designed to nurture rather than destroy civic virtue in the business community. At the same time, we need tough-minded regulatory institutions that can shift to a hard headed approach when virtue fails, as it often will.’ The regulator cannot assume that all duty holders will comply voluntarily, although many will, and for various motivations. Some duty holders will need mild enforcement action to spur them on to improve OHS. ACT WorkCover, for example, explicitly bases its enforcement strategy on the assumption that five per cent of firms engage in best practice OHS, 20 per cent comply voluntarily with OHS statutory provisions, 70 per cent are ignorant and unwilling, or are willing but ‘don’t know what to do’, and five per cent are unwilling to comply. For this reason, credible enforcement must include a significant deterrence component, but this must be targeted to offenders and circumstances where ‘advice and persuasion’ have failed, and where deterrence is likely to be most effective. Strong enforcement measures are also required against the irrational and the incompetent.

The enforcement pyramid employs advisory and persuasive measures at the bottom, mild, administrative sanctions (improvement and prohibition notices and on-the-spot fines) in the middle, and punitive sanctions (prosecution) at the top. Figure 1 (drawn from Gunningham and Johnstone, 1999: 115) illustrates a possible pyramid. (For a discussion on the composition of the pyramid, see Gunningham and Johnstone, 1999: 116-121). Regulators should start at the bottom of the pyramid assuming virtue – that business is willing to comply voluntarily.

Where, however, this assumption is shown to be ill-founded regulators should escalate up the enforcement pyramid to increasingly deterrence-orientated strategies, and, if necessary, ‘an incapacitative response’ (Braithwaite, 1993 at 88). The enforcement pyramid, as Braithwaite and Ayres (1992: 39) observe, does not rely on ‘passive deterrence, that is deterrent credibility shaped by the potency of the sanctions waiting to be used.’ Rather it relies on a ‘more dynamic modeling of deterrence as an unfolding process’, hence the importance of active escalation.



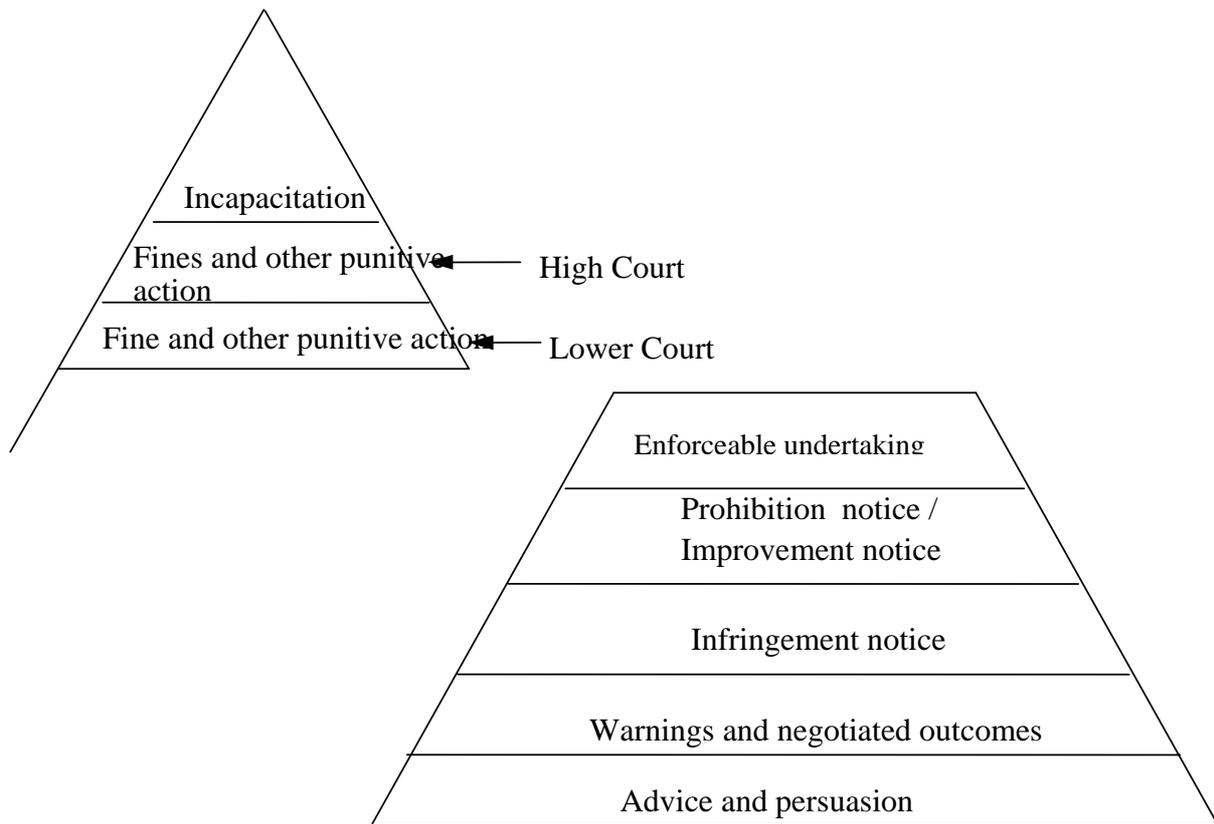
**FIGURE 1**

At the heart of the theory of the enforcement pyramid is a paradox – the greater the capacity of the regulator to escalate to the top of the pyramid, and the greater the available sanctions at the top of the pyramid, the more duty holders will participate in co-operative activity at the lower regions of the pyramid (Ayres and Braithwaite, 1992: 39). It is a ‘carrot and stick’ approach, which recognises that people usually respond better to rewards (incentives) than punishments; that those who comply willingly perform better than those who comply under duress; that incentives are less demanding on the regulator; and that incentives avoid unnecessary antagonism between the regulator and duty holders. It provides a powerful strategic approach to enforcement, because it can operate effectively even where the regulator does not know whether she or he is dealing with the rational, irrational or incompetent.

Before moving on, there are six observations about the pyramid, and its application to OHS.

The first point is that OHS regulators often claim to be implementing the pyramid, in that they point to their aggregate enforcement statistics and show that in most cases they use informal advisory and persuasive measures, occasionally resorting to administrative sanctions, with the rare prosecution. The pyramid, however, describes a *dynamic and interactive process*, a ‘tit for tat’ strategy, by which OHS enforcement agencies respond to individual duty holders – encouraging voluntary enforcement, and threatening sanctions when voluntary compliance is not forthcoming (Scholz, 1984; Sigler and Murphy, 1988 and 1991; Ayres and Braithwaite, 1992: chapter 2; Braithwaite, 2002: 30-34).

Second, closer scrutiny of enforcement profiles usually reveals that, in fact, regulatory agencies resort to two different kinds of enforcement responses. Where serious injuries and fatalities occur, the regulator goes immediately to the top of the pyramid, and conducts a prosecution, with little, if any, action at the lower levels of the pyramid. Where a contravention is found but no injury occurs, the regulator confines enforcement action to the lower levels of the pyramid. In other words, as illustrated by figure 2 below, there is a split pyramid. There are serious dangers with this approach (see Gunningham and Johnstone, 1999: 122-123). Agencies are both failing to take advantage of the considerable benefits that a pyramidal enforcement strategy can deliver, and leaving themselves with no escalating deterrent to address the recalcitrant minority.



**FIGURE 2**

Third, for the pyramid to work in the interactive, ‘tit for tat’ sense envisaged by its proponents, the regulator needs to be able to work out the kind of firm it is dealing with, and the firm needs to know how to interpret the regulators’ use of regulatory tools, and how to respond to them (Black, 2001: 20). This requires regulators not only to know what is entailed in effective compliance programs and systematic OHS management approaches, but also to have a sophisticated understanding of the contexts within which organizations operate, and the nature of an organization’s responses to the various enforcement measures. This is not an easy task. OHS regulation operates side by side with other legal regulatory regimes (workers’ compensation, common law compensation, environmental regulation, anti-trust legislation, consumer protection, taxation), each of which act simultaneously, but not necessary in the same direction. Organizations’ responses to legal threats and sanctions will also depend on the size of the organization, their access to power, whether or not they have a high profile within the community, their organizational culture, and their position in the economic and social structure, and the regulator will have to understand each of these in order to find the most responsive approach to the firm (see Haines, 1997: 224-225).

Fourth, Haines (1997: 219-220) argues that the enforcement pyramid may overestimate the ease with which regulators can escalate and de-escalate punitive responses to perceived organizational behaviour. Regulators taking more punitive measures should be aware that such measures are likely to make organizations more defensive, distrustful, and defiant. Such qualitative changes may not easily be reversed when penalties are de-escalated and the regulator attempts to re-establish trust.

Fifth, we should note the critics (for example, Toombs, 2002) whose skepticism about the capacity of business organizations to put concern for worker health and safety ahead of profit and production imperatives calls into question the appropriateness of a starting assumption of corporate virtue, and the ability of the pyramid approach to operate in contexts dominated by an imbalance in power-relations between employer and worker.

The final difficulty is that most OHS regulators do not have the resources to work their way up and down the pyramid with each duty holder (see further Gunningham and Johnstone, 1999, 123-129). To achieve the benefits of responsive enforcement, regulators will have to develop enforcement strategies which:

- target the organizations most needing the regulator's attention (see the discussion of targeting 'poor performance' organisations, and, to a lesser extent, the discussion of 'systems inspection' and 'adapted inspection' below);
- stimulating organizations to begin to develop systematic approaches to OHSM by encouraging self-audit and the reporting of self-audit results to the regulator (see below), so that the regulator can decide whether the organization is making sufficient progress with designing, organising and institutionalizing OHSM, or needs an inspection visit;
- while avoiding the 'split pyramid', have different points of entry to the pyramid (see the discussion of inspection of OHSM, and the 'Enforcement Management Model' below); and
- enable an acceleration up the pyramid where, for example, the previous record of the duty holder suggests that the assumption of 'virtue' is ill-founded, or where the organization is not controlling the major hazards at the workplace (see the discussion of 'Adapted Inspection', 'Focused Inspection' and the 'Enforcement Management Model', below).

## **5. Developments in Inspection**

With these fundamental frameworks in mind, the remainder of this paper canvasses some key issues in OHS inspection and enforcement. As noted in the previous section, OHS enforcement agencies are inevitably under-resourced, and the challenge for OHS inspectorates is to:

- make the most efficient use of scarce regulatory resources, by targeting high risk industries and organizations, and the most significant hazards within organizations;
- in response to greater emphasis on systematic OHS management in OHS standard setting (see Gunningham and Bluff, 2003; and Frick, 2003), encourage duty holders to learn how to self-regulate and manage OHS systematically by requiring firms to self-audit and self-inspect, and by adopting inspection methods with a greater focus on OHSM, rather than only on workplace hardware;
- develop stronger, but more ‘responsive’, approaches to OHS enforcement, and approaches which are sensitive to, and encourage and support, systematic approaches to OHS management; and
- engage with the full range of duty holders on the basis of targeting the person(s) with real control and influence over OHS, and best placed to control risk.

### ***(a) Targeted inspection programs***

Inspired, at least in part, by the Robens Report, contemporary OHS inspectorates have developed new approaches to inspection. Rather than the traditional mix of reactive investigations (in response to complaints and reported injuries and fatalities) and routine proactive inspections in which an inspector works her or his way through their allocated region, inspectorates are increasingly trying to improve their ratio of proactive to reactive inspections, and targeting proactive inspections (often in the form of ‘blitzes’ and similar programs) to particular kinds of hazardous activities (for example, manual handling), or industries or individual firms undertaking hazardous activities, with poor attitudes and/or approaches to OHS management, and/or with poor safety records (for example, the Victorian Focus 100 Program). These programs are based on data derived from injury statistics, workers’ compensation claims, and other, more qualitative, data. They can also be a response to political factors, a series of incidents, or media pressure.

Targeting of particular workplaces has increasingly been used in the United States. The Occupational Safety and Health Administration (OSHA) in the past decade has paid proportionally more and more attention to the most hazardous activities in the most dangerous industries. In 1999 OSHA first implemented an annual *Site Specific Targeting Inspection Program* (SST) (see OSHA Directive number 99-3, 19 April 1999), designed to focus OSHA inspections on workplaces with the highest illness and injury rates – that is, ‘those workplaces of highest safety and health risk’ (OSHA, 2003).

For example, in 1998 OSHA conducted a Data Survey, collecting establishment specific injury and illness data for 1997 from approximately 80,000 employers. Based on that data, OSHA identified 2,200 employers with lost workday illness and injury (LWDII) rates over four times the national average (16 compared to 3.3) and subjected them to comprehensive programmed inspections by the end of 1999. The LWDII rate is the number of lost work day injuries and illnesses divided by the total number of hours worked by all workers during the calendar year multiplied by 200,000 (the base for 100 full-time equivalent workers). After each OSHA office calculated the resources it had available for further inspections, inspections were carried out at sites where the rate was between 10 and 16. While this program is in operation, OSHA continued its unprogrammed inspections, and inspection programs focusing on particular hazards or particular industries, although the SST inspections had priority. In addition to this measure, OSHA sent out letters to the 12,000 employers with rates above the average, advising them that they were on the OSHA list and encouraging them to take steps to improve their OHS performance by contacting a private consultant, their insurer etc, and to establish a safety and health program.

In June 2003 OSHA announced a new SST plan, which will target approximately 3,200 ‘high-hazard worksites’ (now defined as those reporting a LWDII rate of 14 or more) for unannounced comprehensive OHS inspections over the year 2003-2004 (OSHA, 2003). This is based on OSHA’s Data Initiative for 2002, which surveyed 95,000 employers (including, for the first time, the construction industry) for their injury and illness data for 2001. For the first time OSHA will also be targeting sites based on a ‘Days Away from Work Injury and Illness’ (DAWFII) rate of nine or higher – that is, where the worksite has nine or more cases involving days away from work per 100 employees. Employers who had reported LWDII rates of between 8 and 14, or DAFWII rates between 4 and 9 have been placed on a secondary

list for possible inspection. The average LWDII rate in 2001 for private industry was 2.8 and the average DAFWII was 1.7.

OSHA will also randomly select and inspect about 200 workplaces across the nation (selected from those industries with above average LWDII and DAFWII rates) that have reported low injury and illness rates in order to review the actual degree of compliance with OSHA requirements (OSHA 2003).

Another approach to targeting 'high risk' workplaces focuses on a responsive approach to the quality of OHSM at the workplace, and is discussed below.

Finally, I note that one of the implications of the changing face of the labour market, (see Bluff and Gunningham, 2003; Lamm and Walters, 2003; and Quinlan, 2003), is that OHS inspectorates will need to target inspection efforts to labour hire work, contractors, subcontractors, home-based workers, franchise arrangements and small and medium sized enterprises (SMEs).

#### ***(b) Facilitating Self-Inspection and Self-Audit***

As foreshadowed in the Robens Report, one response to the inadequacy of inspectoral resources is for OHS inspectorates to develop alternative strategies to direct regulation, such as self-inspection and self-audit (see Gunningham and Sinclair, 2002: 18-21). These methods enable inspectors to get information on how firms are self-regulating, without necessarily dispatching an inspector to visit the premises. Responsive enforcement can begin without the inspector leaving her desk. The aim of these approaches is to promote regulatory compliance, rather than continuous improvement, but their advantage is that they have the potential to assist duty holders to 'learn how to comply' and to 'self-regulate' (see above) and to develop systematic approaches to OHSM, even if other regulatory methods will be required to ensure that they are sustained, evaluated and improved. Zwetsloot's (2000) work on stages of maturity in developing OHSM approaches, as well as the three stages of compliance discussed earlier in this paper, provide a framework for understanding how these self-auditing and self-inspection strategies might improve OHSM in organizations.

Zwetsloot (2000: 392-393; see also Bluff, 2003) identifies four stages in the development of OHSM approaches in organizations. The first stage is an *ad hoc* stage, where the organization

has little expertise in OHSM and reacts to problems as they occur (for example when an injury occurs, or an inspector visits). In the second, *systematic*, stage, the organization undertakes occasional risk assessment, action planning, prioritising of problems and implements control measures, but is still developing internal OHS competency and might need to bring in outside OHS expertise. In the third, *system*, stage, the organization implements and maintains an OHSM system by continuous and well-structured attention to OHS before activities are undertaken, and procedures and accountabilities are clear. The focus is on prevention and control, and periodic auditing and management review of the OHSM system. In the fourth, *proactive*, stage, OHSM is integrated into other management systems (for example, environment or quality systems), and/or into the organizations business processes, and there is attention to continuous improvement, with directive participation from everyone. Collective learning is fostered, and the other elements of a fully fledged OHSM system are institutionalised and constantly evaluated and reviewed.

Self-inspection and self-audit can play a part in helping an organization move through the early stages of these various processes outlined by Parker (2002), Hutter (2001) and Zwetsloot (2000), each discussed earlier in this paper. Over the years, for example, the Queensland Division of Workplace Health and Safety has developed and provided to duty holders audit documents that provide a framework for duty holders to self-audit, and to identify and control risks, ‘thereby encouraging all organizations to take greater internal responsibility for risk management’ (Gunningham and Sinclair, 2002: 19). A recent version of this approach is to be found in Part 8 of the *Workplace Health and Safety Regulation 1997* (Qld), where principal contractors, contractors and sub-contractors in the construction industry must complete ‘construction workplace plans’ and ‘work method statements’, and exchange and discuss these plans before work can commence on construction sites (see Johnstone, 1999b).

More robust examples of this approach can be found in United States environmental regulation. Gunningham and Sinclair (2002: 19-20) describe the approach taken in Minnesota under the *Environmental Improvement Act 1995*, where SMEs are encouraged to self-inspect and to report the outcomes of their inspections to the regulator, in exchange for limited protection from enforcement action, and a ‘Green Star’ award for firms completing an environmental audit. In the printing industry an agreement between the state and the local industry association has resulted in the establishment of a corporation, the PIM

Environmental Services Corporation, to provide auditing services to industry association members. The corporation evaluates a firm's environmental and OHS systems and reports back to the firm, which then submits to the corporation a plan for addressing identified compliance problems. The corporation acts as an enforcer in holding the firm to its plan, and non-compliance results in the firm being evicted from the scheme. Participating firms are not exempt from enforcement action by the regulator, but a firm carrying out a self-audit in good faith and making genuine and appropriate efforts to comply is well placed to mitigate the consequences if contraventions occur.

The cost of engaging the services of the auditing corporation has reduced the participation rate of firms, but this might be improved by imposing higher levels of enforcement against firms not in the scheme (Gunningham and Sinclair, 2002: 20). For example, in the underground storage tank industry in Minnesota the regulator sent letters to tank owners advising them of the regulator's audit program, and enclosing a self-inspection checklist, requiring the completed self-audit checklist to be returned to the regulator, and threatening inspection for firms which did not participate in the scheme. Firms were advised of the inspection program, and then told that

as an alternative to facility inspection, the [regulator] has implemented a new self-audit program which enables owners of facilities ... to self-evaluate facilities to determine their state of compliance. If it is determined through the self-audit process that your facility is not in compliance ..., you have 90 days ... to bring your facility into compliance. Violations disclosed and corrected as a result of the self-audit will not be subject to fines or other penalties...

This is an example of a 'carrots and sticks' approach, with a good balance between enforcement and assistance (a strong outreach program and educational approach), providing incentives for firms to invest in self-monitoring (Gunningham and Sinclair, 2002: 20-21).

### ***(c) Inspecting and Enforcing management systems***

OHS inspectorates also have a vital role in promoting, and auditing the effectiveness of, OHSM. While a full framework for systematic OHSM is not yet established under Australian OHS legislation (Bluff and Gunningham, 2003), key elements of this approach are in place, in particular the risks management process. Research (for example, Jensen, 2001 and 2002; Saksvik et al, 2003; Johnstone, 1999b: chapter 2) suggests duty holders often have difficulty understanding these obligations and developing systematic approaches to hazard identification, risk assessment and control. For example, Jensen's (2001 and 2002), research on the implementation of Danish statutory 'workplace assessment' requirements, showed that

Danish firms are mostly concerned with physical risks; identified problems already known to the firms; identified one or two immediate causes, rather than multi-layered causes; generated paperwork (such as documenting surveys of work environment problems in response to checklists), rather than preventive action; concentrated on resolving problems in existing worksites and activities rather than solutions involving design of equipment, workplaces and jobs; emphasised the parties reaching a 'shared feeling of satisfaction with the job done', rather than following a hierarchy of control; referred problems for resolution by a department responsible for technical equipment; and demonstrated weaknesses in the ability to establish a participatory process covering all of the phases of workplace assessment. Further, firms demonstrated a lack of organizational learning in their responses to the workplace assessment requirements, and risk assessment and solutions to problems tended to be the responsibility of safety officers, representatives and committees, rather than being an overall organizational responsibility.

Consequently, the contemporary OHS regulator has challenges not faced by inspectorates enforcing specification standard OHS statutes. Indeed, as Von Richthofen (2002: 205) notes, the 'traditional approach whereby inspectors aimed simply to identify legal irregularities and then give advice or impose sanctions, depending on the seriousness of the offence, is increasingly discredited.' Further, the traditional approach 'will never raise standards quickly, since management does the minimum to satisfy the labour inspector and then sighs with relief that he or she will not return for a few years' (2002: 208).

The challenge is for inspectorates to change their inspection and enforcement approaches to inspect OHSM systems. In this approach, the traditional focus on hazardous conditions and work practices is not abandoned but provides signals of weaknesses in OHSM to be uncovered. Observation of conditions and activities is part of the 'evidence' of effectiveness (or otherwise) of OHSM. The performance outcome and target standards proposed by Bluff and Gunningham (2003) for incorporation under OHS regulations would also underpin more generic process requirements, providing a focus on key hazards and performance outcomes required in relation to their control.

Further, the inspectorates not only have to inspect workplaces but also to develop strategies to motivate duty holders to develop their approaches to systematic OHS management, using not only threats of sanctions, but also the commercial self-interest of management, and by

demonstrating the efficiency and effectiveness of the OHSM approach (Von Richthofen, 2002: 208). It is questionable whether OHS inspectorates should play any role in providing advice to duty holders in relation to the development of OHSM systems. Von Richthofen (2002: 205) observes that in many countries, the OHS inspectorate is prohibited from giving such advice, and in many countries the obligation is on the duty holder to develop its own solution, or to pay for outside expertise. While recognising that SMEs might require advice from inspectorates, Von Richthofen (2002: 205) argues that ‘labour inspectorates do not have the resources, or often the detailed knowledge of the process, to act as unpaid safety advisers to the whole of industry and commerce.’

This has raised at least two issues for OHS inspectorates. How should an OHS inspector go about inspecting the quality of an organization’s systematic OHS management? How can the inspectorate tailor its enforcement approaches to the quality of the firm’s implementation of systematic OHS management? In other words, how can inspectors use diagnoses of the quality of a firm’s OHSM to ensure that ‘good’ firms with sound OHSM systems are left to self-regulate, and ‘poor’ performers receive greater attention from the regulator?

The answer to the first question is that OHS inspectorates will need to learn how to conduct effective ‘systems audits’. The literature (see, for example, Waring, 1996: 178-182; Parker, 2003a: 13; Bluff, 2003) suggests that ‘an effective auditor’, whether this be a third party auditor or a state inspector, would do more than look at the ‘paper systems’ developed by an organization. The auditor should adopt a triangulated approach to data collection (Waring, 1996: 178-182; Bluff, 2003) which involves (Bluff, 2003):

Interviews with a representative sample of managers, supervisors and workers, observation of conditions and activities, and examination of supporting documentation, including key procedures and records of developmental and preventive action (for example, training needs analysis, plans and records of competencies achieved, action plans, design and procurement standards, committee minutes, work procedures, and so on).

Parker (2003a: 13) reminds us that an ‘effective auditor would conduct systematic fieldwork to find out what actually happens where it counts, that is, how compliance processes are implemented and understood by line management and line staff. They would test the limits of management systems and see what happened.’ Parker (2003a: 13) suggests that the auditor might test the system by posing a problem for the OHSM system, to see how the system reacts to the issue. Further,

They will ask employees to explain in their own words how they understand compliance procedures or what they learnt from a training session. They would track through processes by looking at both documentation and talking to staff at each stage of the process about what actually happens at each stage. They might conduct focus groups or anonymous surveys to determine how employees ... view the self-regulation culture of the firm and commitment of management, or what their perception is of violations.

There is evidence that such approaches are being taken in some European countries and North America to adapt OHS inspection programs to accommodate and encourage duty holders to implement systematic OHSM (see Larsson, 1996, Gunningham and Johnstone, 1999: 107-111, 149-51, 378-82; Karageorgiou, Jensen, Walters and Wilthagen, 2000; 274-80; Hedegaard Riis and Jensen, 2002 and Jensen, 2003; Popma, Schaapman and Wilthagen, 2002; Frick, 2002; Von Richthofen, 2002: 189-208).

The answer to the second question begins by conceiving of the inspectorate as the 'overseer of the company's own efforts to regulate' (Hutter, 2001: 305), a crucial element of which is for the regulator to identify the firm's level of compliance and self-regulation (see again, the discussion of compliance at the beginning of this paper), and then adjust its enforcement response to the level of effective self-regulation, so that the regulator has a high degree of involvement in the early stages of compliance, and gradually reduces, and changes, its role.

Sanctioning strategies may be necessary to ensure management attention to OHS. Once this is achieved, in Hutter's (2001: 305-307) model (see above), the inspectorate is likely to adopt educative and persuasive strategies in the 'establishment phase', because the firm may not yet have the necessary knowledge and expertise, and its capacity is likely to be 'limited and relatively rudimentary at this point'. Once the establishment phase is complete, Hutter suggests that the inspectorate's strategy might include greater resort to sanctions if the firm is unwilling to move into the operational phase. In the third ('normalisation') phase, the inspectorate's role is fairly minimal, distanced, and focused mainly on monitoring and overseeing. The inspectorate's role is extremely complex, because not only do inspectors need to be able to identify the level of compliance and adoption of OHSM principles, and to effectively audit OHSM systems, but they will also need to understand the external conditions which will hinder movement from level to level.

In Sweden, since the early 1990s the National Board of Occupational Safety and Health and the Labour Inspectorate (which merged a few years ago to form a single Work Environment

Authority) have been developing 'systems supervision' or 'systems inspection' as a special method for checking whether the systems created for internal control within large and medium-sized companies are efficient. In 1994, the National Board of OHS declared that systems control was no longer one among many inspection techniques but was 'the modern paradigm for state supervision of the working environment' (Larsson, 1996).

Two inspectors conduct 'systems inspection', aimed at ensuring that there is progress in the development of an OHSM system. For all except small organizations (which are subjected to traditional approaches to inspection), the Swedish inspectorate undertakes a 'top down' approach, 'whereby proactive enforcement is undertaken in pedagogical or instructive terms' (Von Richthofen, 2002: 202). Inspection is targeted at high level management, and focuses on the system of organization of work, as well discussions with safety delegates and random checks on actual working conditions to make certain that OHS management systems are being implemented (Swedish National Board of Occupational Health and Safety, 4/1989, 2/1994; and 2/1995). The inspection establishes the level at which 'internal control' has been established: level 1 (no internal control); level 2 (internal control has been adopted in principle, and risks have been identified, an action plan prepared and tasks allocated, but the system has not been implemented); level 3 (such systems have been implemented); and level 4 (there is evidence that internal control is actually having a positive effect on all aspects of the working environment (physical and psychosocial), and the level of work-related injuries and illness has been reduced. The inspectors' role at levels 1 and 2 is principally to demand progress to a higher level, but their role changes at level 3, when the inspection needs to verify whether the system functions or not (see also Frick, 2002: 227-228).

In an investigation of serious accidents, the Swedish inspectorate adopts a 'bottom-up' approach (Von Richthofen, 2002: 207-208). In the first stage, the inspector examines the event itself, and then, in the second stage, investigates the causes of the incident through interviews and inspection of the workplace. In the third stage, the inspector examines underlying causes (including general working conditions, such as methods, substances and tools). The fourth stage considers deficiencies in management and in internal control at management level.

This 'bottom-up' approach can also be used for proactive inspection, and follow-up inspections. Contraventions found during a workplace inspection are discussed with top level

management, as evidence that OHS is not being effectively managed, and the emphasis is on 'identifying the underlying cause in terms of inadequate risk analysis, planning, corrective effort, training, supervision or monitoring. A failure is seen not just as a contravention of the law, which it may be (and attract a penalty) but as a failure of the enterprise to follow its own system' (Von Richthofen, 2002: 207-8).

Since 1999, the Danish OHS inspectorate has been using 'adapted inspection' as one of its inspection methods (National Working Environment Authority, 1999). The major focus of adapted inspection is on determining the extent to which firms of implementing OHSM requirements (called workplace assessment' in Denmark), and its purpose is partly to enable the inspectorate to 'focus its efforts on enterprises with the greatest need and partly to support enterprises in their own efforts, so that the management and the safety organization work systematically' on improving OHS. It recognises that organizations have taken varying efforts to manage OHS, and that this is reflected in the standard of their working environment.

Some enterprises already make a satisfactory effort to improve working conditions. Others are willing to do so, but need help from outside, while yet others are deemed neither willing nor able to meet the requirements of the working environment legislation. That affects the relationship between [the inspectorate] and the enterprises – with respect to both inspection frequency and the form of intervention (National Working Environment Authority, 1999).

Under adapted inspection, each firm is categorised by the inspectorate on the basis of an assessment of the enterprise's own efforts to improve OHS and the standard of the working environment at the enterprise. The inspectorate can then spend most of its efforts in organizations where the level of the organization's own efforts and preventive action is low, and at the same time giving 'greater independence' to organizations which have demonstrated that they can make the necessary improvements. Following an inspection of the working environment, the inspectorate makes an 'overall assessment' of how the main OHS problems at the enterprise are being managed, and categorises the firm's level of preventive action as 'low', 'average' or 'high' (or level 3, level 2 or level 1).

Level 1 and 2 firms are judged to be making an 'active effort' to improve OHS, and the inspectorate gives these firms a say in how serious OHS problems should be dealt with. Level 3 firms are those judged to be insufficiently able to improve their working environment on their own, and the inspectorate adopts traditional enforcement methods using notices. This approach to inspection and enforcement is examined in Per Langaa Jensen's paper (Jensen, 2003; and see also Hedegaard Riis and Jensen, 2002).

In the United States, some OSHA inspection programs abbreviate inspections if employers can show that they have effective safety and health programs. For example, in the mid-1990s, OSHA introduced a 'focused inspection' program, in which an officer visiting a construction site on a programmed inspection will assess, in the opening conference, whether the controlling contractor on the site has a written and effective safety and health program already in place and a designated competent person on the site responsible for its implementation. If these requirements are satisfied, the officer will conduct a focused inspection, which will involve:

- verification of the effectiveness of the safety and health program or plan by interviews and observation. A key factor is the extent to which employees understand the program, and know who is responsible for it. Four criteria are used to evaluate whether the program is being properly implemented: (a) the comprehensiveness of the program, (b) the degree to which it has been implemented, (c) the presence of a competent person, and (d) the means by which the program is enforced (Smith, 1995: 35);
- a focus on the four 'killer hazards' resulting in 90 per cent of injuries and fatalities in construction -- falls from elevations, being 'struck by' machines, materials, or falling objects, caught in trenching, cave-ins, or being crushed by equipment, and electrical shock;
- attention to other serious hazards observed by the officer.

Although the inspection focuses on the four major safety hazards, citations are issued against the principal contractor or sub-contractors for any serious violations and for any other-than-serious violations that are not immediately abated (United States, Department of Labor, 1994). Other-than-serious violations that are immediately abated are not normally cited or abated. If the controlling contractor does not have both an effective safety and health program and a person responsible for implementing the program, then the compliance officer will perform the usual comprehensive inspection. If the focused inspection reveals that the project's safety and health program or plan is ineffective, or that there are serious violations, then the officer can exercise her or his discretion to terminate the focused inspection and conduct a comprehensive inspection.

In the first year of the implementation of this approach, 30 per cent of visits to construction sites by OSHA inspectors qualified for and received focused inspections (Dear, 1995). In

1994 the most frequently cited standard in the construction industry was the hazard communication standard, with 15,000 citations. By the end of 1995, after a year of focused inspections, it had dropped to less than 7,000, leaving scaffolding (7300) the most cited (Dear, 1995).

Australian OHS inspectorates can learn much from these approaches. The mix of OHSM requirements, other process standards, performance standards and specification standards found in modern OHS statutes (see again Bluff and Gunningham, 2003) requires inspectorates to be able to assess the quality of OHSM to determine the appropriate approach to inspection and enforcement; inspect OHSM 'top down' where relatively advanced OHSM systems are in place; inspect 'bottom-up' where specific contraventions are detected, but OHSM approaches have been initiated but are nevertheless underdeveloped; and conduct traditional inspections to detect and take action in relation to specific hazards. In each of these approaches, the inspectorate will need to make choices about appropriate enforcement responses.

Finally, I note that with organizations increasingly resorting to contracting, labour hire and franchising arrangements (see above), and the significant use of home-based and teleworking, inspectorates will need to check that OHS management systems have measures to systematically manage OHS that explicitly recognise and address outsourcing and other changes to work organization. For example, the management system will need to include procedures for special training and induction needs of contractors, temporary or labour hire workers, and the evaluation process necessary for any workforce restructuring (Quinlan, 2000: 407-408).

## **6. Enforcement**

If OHS inspectors are to enter the enforcement pyramid at different levels, these points of entry should be based not only on the quality of OHSM demonstrated by the firm (see above), and the firm's OHS track record, but also the degree of risk resulting from a contravention of the OHS statute. A useful framework with which to begin to operationalise a graduated enforcement response is provided by the British Health and Safety Executive's (HSE) Enforcement Management Model (EMM), which guides an inspector's choice of sanction in response to the degree of risk posed by a duty holder's contravention. The EMM seeks to achieve five criteria specified in the Enforcement Policy Statement (see Health and Safety

Commission, 2002a: 6-10): ‘proportionality’ (of enforcement responses to the risk to OHS posed by the breach); ‘consistency’ (cases involving similar circumstances receive a similar response); ‘transparency’ (communicating the framework of duties and enforcement approach to duty holders); ‘accountability’ (to the public, in the sense of having policies and standards against which enforcing authorities can be judged); and ‘targeting’ (the most risk-generating activities and hazards that are least well controlled are the primary focus of inspection and enforcement). In relation to the latter point, enforcement action should be directed towards those responsible for the risks and those who are best placed to control them. The person best placed to control the risk ‘might include the owner of the premises, designers, manufacturers, suppliers, the self-employed and others. Management competence might need to be taken into account since a low hazard site poorly managed might create more risks to workers or the public than might a high hazard site where the risks are managed’ (Mitchell, 2000: 27).

The EMM provides inspectors with a framework for making proportional, consistent, targeted and transparent enforcement decisions and helps managers monitor the fairness and consistency of those decisions (HSE, 2002: 1). Mitchell (2000: 28) notes that the

model is designed to capture the principles of the decision making processes an experienced inspector goes through when faced with circumstances involving health and safety risks ... It is not a procedure in its own right, but more of a reference framework against which inspectors can measure their potential enforcement decisions.

The model establishes the essential risk-based criteria against which decisions should be made (Mitchell, 2000: 28; and for full details, see HSE, 2002). The data upon which the model is based is collected by the inspector from the site – principally the hazards present and the safeguards or control measures adopted. This data enables the inspector to make a judgment about the levels of *actual* risk at the site (‘what is’ the ‘potential for harm’) and compare it with the *benchmark* risk (‘what should be’, in the sense of ‘the level of risk remaining once the actions required by the duty holder by the relevant standards are met’) set out in the relevant general duty, regulation or code of practice. The *risk gap* is the difference between the consequence and likelihood of the *actual risk* and the consequence and likelihood of the *benchmark risk*, and will be described as ‘extreme’, ‘substantial’, ‘moderate’, or ‘nominal’. The *risk gap* is then considered in relation to the legal ‘weight’ or level of ‘authority’ of the appropriate benchmark standards (for example, whether the standard is in a general duty/regulation or in a code of practice or a standard that is not published), to give the *initial enforcement expectation*. For example, the EPP identifies the initial enforcement expectation for an extreme risk gap in relation to contraventions of the Act or regulations, or a code of

practice, as an improvement notice or a prosecution. Not all premises or duty holders are the same, and *duty holder factors* or key aggravating or mitigating factors - the attitude of management, intention of duty holder in non-compliance (in particular, whether an economic advantage has been sought), previous inspection and enforcement history, general conditions of the workplace, and incident/injury etc history, etc - may suggest an adjustment of the initial enforcement expectation. The model then guides inspectors in identifying *targets for action* to deal with identified matters. The inspector will need to address specific problems, as well as *management system failures*, if there are different problems, or the same problem is identified on a number of different occasions (Mitchell, 2000: 29). Finally the model also incorporates *strategic factors*, which included the wider public interest, protection of vulnerable groups, effect on other duty holders, and the initial, function and long-term impact of the action on the duty-holder. If strategic factors are present, inspectors will need to discuss these with their supervisors.

While this model provides a good framework for consistent and proportional enforcement decision-making for ‘bottom-up’ or traditional inspections, it also suggests a framework to counter the tendency towards the ‘split pyramid’, in that it focuses enforcement action on ‘risk’ rather than actual outcome. It could easily be adapted to a wider range of enforcement methods than those found in the UK system (ie to include infringement notices and enforceable undertakings), and also to building up specific elements of OHSM (see Bluff and Gunningham, 2003) which the inspector judges to be the crucial next stage of the development of OHSM appropriate to the type of workplace. For example, the inspectorate might develop a strategy to ‘fit’ OHSM frameworks to particular organizations, and then use infringement notices to ‘grab’ management attention, and improvement notices, and enforceable undertakings, to ‘scaffold’ key elements of OHSM (such as appropriate workplace arrangements for consultation, the engagement of appropriate OHS expertise, and the institutionalization of hazard identification and risk assessment and control processes).

In the remainder of the paper, I examine four key sanctions around which the upper half of the enforcement pyramid should be built: improvement and prohibition notices, infringement notices, enforceable undertakings and prosecution. John Braithwaite’s paper will discuss strategies for the bottom half of the pyramid.

***(a) Improvement and Prohibition Notices***

Improvement notices are remedial sanctions which can be used to demand systematic change, and which contain, within themselves, a ‘graduated enforcement response’ (ie non-compliance can lead to an on-the-spot fine or a prosecution). While improvement notices have always been used by Australian inspectors for hazard abatement, they might also be used as a mildly coercive but flexible tool to induce organizations to build up key elements required for successful OHSM. Where organizations have a strong OHS committee and representative structure, improvement notices can promote effective self-regulation if the inspector gives copies of issued notices to members of these institutions so that they can participate in the search for solutions, and to be potential persuaders and enforcers.

Prohibition notices are not immediately concerned with remedying contraventions, but with situations in which workers are exposed to immediate risks to their OHS. They enable the regulator to require immediate removal of an immediate threat to OHS, pending which the dangerous activity ceases. They can be used to rectify dangerous hardware (a machine must be guarded before it can be used again, or a substance must be permanently removed from the work process), but can also be used to promote systematic change (an activity may not continue until a risk management process has been implemented and the work process reorganized to remove a serious hazard).

Most Australian improvement notice provisions specify that duty holders must be given a minimum specified period (usually a week) to comply with the notice. To introduce greater flexibility into the process, Australian regulators might consider introducing ‘immediate improvement notices’, such as those found in some Scandinavian countries, which would require the contravention to be remedied as soon as possible, but without requiring a cessation of the hazardous activity. This ensures prompt compliance, but without overly disrupting the work process.

The sanctions for failure to comply with notices should be significant and fast. Some Australian jurisdictions already have, and the Commonwealth and ACT are proposing to introduce, injunctive remedies to enforce notices, so that non-compliance can immediately be sanctioned by a court order that the notice be complied with, which immediately exposes the

duty holder to sanction for contempt of court if compliance is not forthcoming. Such provisions significantly strengthen the role of notices in the enforcement framework.

Finally, in some jurisdictions, the wording of the notice provisions prevents notices being issued to parties other than employers. It is imperative that the inspectorate have discretion to issue notices to all parties (including, for example, self-employed contractors, designers of plant and buildings, suppliers of substances) to maximise the preventive possibilities of notices.

### ***(b) Infringement Notices***

Infringement notices (otherwise known as on-the-spot fines) enable enforcement of lesser offences in a quick, easy and inexpensive process without costly court action or the need to prove the elements of an offence (ALRC, 2002: 395-8). The action which creates the alleged offence and the infringement notice are also linked in time, which may increase the preventive effect. Further, the studies on the deterrent effect OSHA citations outlined above support the use of infringement notices in Australian OHS enforcement. This is bolstered by the only Australian empirical study of OHS infringement notices (Gunningham, Sinclair and Burritt, 1998) which suggested that the positive impacts of infringement notices included the perception that a notice was an effective means of 'getting the safety message across'; that it was treated as a significant 'blot on the record' which spurred preventive activities; and that it was an indicator for judging the safety performance of site/line managers (in some larger companies). A more general deterrent effect was that once one firm in an area or trade had received an on-the-spot fine, the 'word got around' and other firms were influenced to reassess their OHS performance, and adopt preventive measures. While on-the-spot fines were considered mainly to lead to short-term improvements in performance, such improvements might be sustained if resources are provided for continuing enforcement (Gunningham, et al, 1998: 21-29).

While these arguments provide a positive rationale for the use of infringement notices, there are some legal concerns about their use. The lack of court appraisal and associated court procedure may undermine principles of due process and fairness. There is a risk that innocent people may pay on-the-spot fines to avoid the inconvenience and cost of contesting proceedings. There is a possibility of discriminatory enforcement if inspectors use

infringement notices as an ‘automatic’ response in circumstances that would otherwise be dealt with by caution or warning, or if they fail to consider the circumstances of individual cases, adopting a ‘one size fits all’ approach. There is also concern that the procedures for the use of infringement notices may be diverse, inconsistent and essentially pragmatic (ALRC, 2002: 398-404; Fox, 1995a, Fox, 1995b), although these problems would be reduced by the adoption of a transparent decision-making framework.

Other criticisms focus on the suitability of an infringement notice as a response to a criminal offence (Gunningham and Johnstone, 1999: 257). First, infringement notices are subject to the standard criticisms of fines (see below). Second, infringement notices, by circumventing criminal processes in the courts, remove a significant deterrent effect of the scrutiny and social stigma of a court hearing. Third, as argued above, OHS offences have historically been regarded as ‘not really criminal,’ which has reduced the impact of OHS prosecutions. This tendency is exacerbated by the use of sanctions like infringement notices, particularly where they impose low penalties for relatively serious offences.

Further, infringement notices are intended to be a penalty for a particular episode of non-compliance, and are arguably inappropriate for dealing with continuing offences, such as the general duties in the OHS statutes and risk management standards in OHS regulations. In principle, once an infringement notice is paid a person’s liability for the offence is taken to be discharged and further proceedings cannot be taken for the offence. This strongly suggests that OHS agencies’ enforcement strategies need to specify ‘trigger points’ so that inspectors have several opportunities to issue infringement notices in order to penalise continuing failure to comply (ALRC, 2002: 404 and 413).

The Australian Law Reform Commission (2002: 418) suggests that infringement notices should only apply to clear-cut, strict or absolute liability offences, or contraventions of a less serious nature. Consequently, OHS regulators might be cautious about using infringement notices for offences which are qualified by (reasonable) practicability, or which require a decision about the adequacy of risk management processes. They should be reserved for non-complex, minor offences where the breach is clearly defined in law, the facts are easily verified, the evidence is non-controversial, and the offences have a direct bearing on risk control. For example, infringement notices might be issued when exposure to noise exceeds exposure standards, portable electrical equipment is not RCD protected, and machines are not

guarded. Together with improvement and prohibition notices and prosecution, they can be used to rectify individual hazards, and to attract management attention (see above), while improvement notices and enforceable undertakings can be used to require the implementation of systematic OHSM. To ensure progress towards systematic OHSM and the abatement of individual hazards, infringement notices should rarely be used on their own.

OHS regulators might increase the size of penalties in infringement notices. The US and Canadian systems, and the recently enacted New Zealand system, carry the threat of a higher penalty than those in Australia. One option is a tiered system of on-the-spot fines in which the most serious offences merit a more substantial penalty. Increased penalties might also be imposed for repeat offences of the same type within a given period. Another strategy is to use fines in conjunction with publicity to escalate the response, especially for larger recipients for whom the stigma of the fine, rather than the amount, is a primary motivating factor (Gunningham, Sinclair and Burritt, 1998: 38). All of this might be achieved within the Australian Law Reform Commission's recommendation that the level of penalty should not exceed 20 per cent of the maximum penalty that could be imposed by a court (ALRC, 2002: 418). (For procedural matters that will optimise the use of infringement notices, see Bluff and Johnstone, 2003).

Finally, even though it is clear that infringement notices which have been issued to duty holders cannot be 'prior convictions' for the purpose of OHS sentencing, this information might form part of the organization's compliance history. For example, a history of infringement notices might indicate the need to escalate the enforcement response against the firm. It is also relevant, in mitigation of penalty in OHS prosecutions, to rebut claims by organizations that they have a good attitude to safety or a good OHS record (see Johnstone, 2003: chapters 7 and 8).

### ***(c) Enforceable undertakings***

Enforceable undertakings are Australian inventions, pioneered in 1993 by the Australian Competition and Consumer Commission (ACCC) in the *Trade Practices Act 1974* (Cth) (s 87B), and now also to be found in other statutes, including the Commonwealth *Australian Securities and Investments Commission Act*. They seek to secure quick and effective remedies for contraventions, without the need for formal court proceedings.

Enforceable undertakings have been included in the *Workplace Health and Safety Act 1995* (Tas) s 55a and the *Workplace Health and Safety Act 1995* (Qld) ss 42D-42I., and are

included in a Bill to amend the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cth). Essentially these provisions empower the inspectorate to accept from a person a written undertaking about remedial measures in connection with a contravention of the OHS Act. The person may withdraw or vary the undertaking, but only with the consent of the inspectorate. If the inspectorate can prove that the person has contravened the undertaking has contravened any of its terms, a court may make one or more orders directing the person to comply with the terms of the undertaking; ordering the person to pay an amount not exceeding any financial benefit that the person obtained directly or indirectly from the contravention; ordering that the court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the contravention, or can make any other order that the court considers appropriate. The Queensland provisions provide that the inspectorate may publish details of the undertaking (s 42E).

OHS regulators using, or considering introducing, enforceable undertakings should be aware of the ACCC's practices and experience with such provisions (the following discussion is drawn from Parker, 2003a and 2003b). ACCC enforceable undertakings are usually publicised by media release and published on a public register accessible on the ACCC's website. They are enforceable through court action, and, if breached, the original contravention can be prosecuted. The ACCC has issued a Guideline outlining its policy for entering into enforceable undertakings. It only accepts undertakings if there was evidence of a contravention that would justify litigation, and will not accept an undertaking if the alleged offender denies liability. The factors considered by the ACCC in accepting enforceable undertakings include whether the conduct should attract penalties; whether the alleged offender's record suggests an undertaking will be sufficient to deter it from future contraventions; the impact of the contravention on third parties; the type of service, practice or product involved; the history of complaints against the company or, in relation to the product in the industry generally; the history of previous court or similar proceedings against the alleged offender; the cost effectiveness for all parties of pursuing an administrative process rather than court action; prospects for rapid resolution of the issue; and the apparent good faith of the alleged offender. All decisions to accept enforceable undertakings are made by the Enforcement Committee of the ACCC, which considers a briefing document that outlines the evidence for the contravention, and legal counsel's opinion of the likely success of any action.

Parker's (2003a; 2003b) research shows that both ACCC and ASIC make significant use of enforceable undertakings. The ACCC, for example, accepted 340 enforceable undertakings in the calendar years 1997 to 2002, most (83 per cent) of which were entered into after an investigation revealed a breach or potential breach, and the enforceable undertaking was used to settle potential or actual enforcement litigation. For selected types of misconduct, the ACCC accepted enforceable undertakings in 37 per cent of matters in which it took enforcement action from mid-1997 to mid-2002, and in 22 of all matters it was the only enforcement action taken. ASIC accepted 179 enforceable undertakings between August 1998 and the end of 2002. Parker's research also suggests that even though the ACC and ASIC try to ensure that decisions about accepting enforceable undertakings are consistent, the use of undertakings varies considerably from year to year, and the use of undertakings by both regulators has been declining since 2000.

Both the ACCC and ASIC believe that they have overused enforceable undertakings in the past, and that the ACCC, in particular, may have overused undertakings in 'some cases where enforcement action with a more public and deterrent effect might have been more appropriate' (Parker, 2003a: 5). In serious matters enforceable undertakings are more likely to be used for 'supplementary remedies' that cannot be obtained through a court order. The ACCC also uses enforceable undertakings 'as a form of banning advisers and directors without the need for formal administrative action' (Parker, 2003a: 6).

Enforceable undertakings usually include a *background* section (with a brief description of the company and the relevant conduct), an *acknowledgement* that it is the policy to publicise undertakings in media statements, publications and on a public register; and usually include a *positive commitment* by the alleged offender to cease the alleged misconduct, provisions for *compensation, reimbursement or redress to affected parties*, and other *corrective action* as appropriate (eg corrective advertising), and *preventive* element — the inclusion of a requirement to implement a *compliance program* and to have the implementation of that program independently reviewed. They occasionally include 'community service obligations', such as funding or implementing an industry or consumer compliance education program (Parker, 2003a: 6).

The ACCC, and business and compliance professionals, consider enforceable undertakings to be a successful innovation (Parker, 2003a: 7-8), largely for pragmatic reasons. Enforceable undertakings are considered to be quicker, cheaper and more predictable than litigation, and,

at the same time, unlike other purely administrative measures, they can be enforced and made public. They also provide a constructive, ‘non-adversarial’ way to genuinely ‘fix’ a problem, and provide regulators with ‘more innovative, expansive and preventive remedies’ than are available through court orders. They also motivate businesses to improve compliance programs. Enforceable undertakings can both attract management attention, and then (in contrast to financial penalties – see below) can capitalise on that by requiring the company to appoint appropriate staff and implement a compliance program to meet particular standards and by requiring ongoing attention to audits and reports. This will, however, only be done if enforceable undertakings require independent review or audit of compliance with the undertakings (Parker, 2003a: 8-9). The first independent audit or review of the compliance program spurs the company to implement or review the compliance program, and periodic audits provide a focus for ongoing improvement and commitment, and testing management implementation of compliance programs.

Parker (2003: 9-19) warns that there are two ‘major problems’ that can prevent enforceable undertakings being affective. The first problem is that the undertaking may not be a ‘true, collaborative resolution to a problem’, but rather the regulator coercing the alleged offender into a pre-set agreement. Parker’s data suggested that smaller businesses, in particular, may have agreed to all of the ACCC’s requests without seeking professional advice. The aim should be for a genuine negotiation, face-to-face, convened by an independent party, premised on the offender admitting the conduct, canvassing flexible solutions to resolve problems, and resulting in voluntary, consensual resolution of a problem identified in an investigation. The negotiation should also include parties affected by the contravention (see Parker, 2003a: 16-17). The acceptance of undertakings should be accompanied by media releases, and copies of the undertaking should be accessible on the regulator’s website, to allow interested parties to analyse regulator’s practices in accepting enforceable undertakings, and enables lawyers and other advisors to be aware of the different ways of formulating an undertaking.

The second problem is that the quality of audits can vary considerably, and ‘in many cases is probably inadequate.’ Enforcement of both ACCC and ASIC enforceable undertakings appear to be very rare. The main form of accountability is, therefore, the third party audit. It is a common feature of ASIC and ACCC enforceable undertakings that there be an independent, professional ‘review’ or ‘audit’, at regular intervals, of compliance with the undertaking, particularly the compliance program requirement. The audit or review is paid for by the

alleged offender, and the auditor reports to the company, and sends a copy to the regulator. If the audit reports unsatisfactory progress with the undertaking, then the regulator can enforce the undertaking.

Parker's (2003a) research suggested that there was very little action, if any, by the regulators in response to audit reports. Both regulators appear to rely on the original investigating officer to monitor compliance with the undertaking, and the data suggests that, particularly in the case of the ACCC, this is not a good approach. Staff turnover, the competing pressures on investigator's time, has meant that follow up of compliance with undertakings has been inconsistent. In particular, officers tend to ignore deficiencies in the compliance program if other requirements have been met.

A second deficiency in the audit process raised by Parker is that neither regulator published any guidance as to what a compliance program audit requires, and how the program is to be assessed, apart from the contents of the undertaking itself, which usually refers to the Australian Standard on Compliance Programs, AS3806-1998. The audit method was largely left to auditors themselves, and auditors remarked that they got very little feedback from regulators. Neither regulator maintained list of improved auditors, nor did they have processes to check who was being appointed as auditors. Auditors were expected to be 'independent', in that the auditor should not have a direct interest (eg as manager or shareholder) in the company being audited, but it was not clear if it was acceptable for the auditor to have otherwise provided legal, accounting, auditing or other services to the company audited.

Parker (2003a: 11-12) reports that there is no common practice among auditors of compliance program as to their assessment methods, or the form of their audit reports, and suggests that many reports may be of little value to the regulator. The data revealed that audits relied primarily on documentation of the system, and discussions with senior management. For most audits there were no interviews with staff lower than middle management, and for many not even middle managers were interviewed; no inspection of processes in action; and clients and customers were not contacted. Most audits only revealed the intended design of the system, and did not assess how systems were implemented, the outcomes they achieved, or the limits of the program (Parker, 2003a: 13). Even auditors who did see the importance of forensic investigation reported that the level of investigation that they could conduct depended on the fee they were paid, and the requested scope of the audit.

Parker (2003a: 18) suggests that it should be part of the auditor's task to assess the appropriateness of the terms of the undertaking, and the practices and processes followed by the regulator in negotiating the undertaking. Affected third parties (such as consumers, and in the case of OHS, worker representatives) should also be part of the audit process.

This research suggests that OHS inspectorates could use enforceable undertakings as a medium-level sanction in a graduated enforcement response, to promote OHSM approaches, and provides a good checklist of issues that OHS regulators need to address when integrating enforceable undertakings into their enforcement armoury. They should not be seen as a 'soft option' by alleged OHS offenders, but rather as an opportunity to undertake serious organizational reform to implement effective systematic OHSM. They should not be used when there are strong reasons for preferring a deterrent or retributive sanction (for example, where a contravention has resulted in serious illness or a fatality). Undertakings should be consistently used, not over-utilised, open to public scrutiny, entered into voluntarily and requiring systematic approaches to OHS. OHS regulators must have specialist in-house staff to oversee the implementation of undertakings, and must develop auditing criteria, oversee the appointment of, and ensure the independence and quality of work of, auditors, and strongly enforce contraventions of undertakings.

#### ***(d) Criminal Prosecution at the Top of the Pyramid***

OHS regulators should be able to encourage, facilitate and negotiate compliance with OHS standards within the shadow of potentially large sanctions and the stigma of criminal penalties. To be successful such a strategy requires major reforms to the legal architecture shaping OHS prosecutions and a rethinking of prosecution strategies.

##### *The weaknesses of existing approaches to OHS prosecution*

The first criticism has been that in those countries where prosecutions have been initiated for contraventions of OHS statutes, is that prosecution has generally been reactive, and reactive in relation to physical hazards only, and injuries rather than disease. This has meant that whatever enforcement benefits have derived from prosecution have been confined to a narrow range of hazards, reinforcing traditional preoccupations with 'accidents', having little value in

preventative enforcement strategies for chemical hazards, or hazards emanating from psycho-social or organizational factors.

The reactive and event-focused emphasis of OHS prosecutions has resulted in OHS prosecutions that fail to see breaches of the OHS statutes in the context of systems of work or OHSM systems, but rather construct OHS contraventions as a chain of specific actions leading to a specific injury or death (see Johnstone, 2003, especially chapters 3-5). Consequently, arguments in mitigation of penalty use 'isolation techniques' which shift the sentencing court's attention away from an analysis of the failure of the OHS system, to scrutinising the minute details of the events leading to the injury (see further Johnstone, 2003, chapter 7). This enables defendants to shift blame onto workers and others; and facilitates uncontested claims to be good corporate citizens; coupled often with the allegation that the accident was a 'freak' or 'one off'. Further the event is isolated in the past (ie remedied the actual hazard; have a new management team; have introduced new OHS system etc).

Where courts have a largely unfettered discretion to determine the level of penalty imposed on those prosecuted successfully for OHS contraventions these mitigating arguments generally result in inadequate levels of penalty, a point discussed below. A comparison of the OHS sentencing principles developed by the Australian courts and the 'isolation techniques' used to mitigate penalties in Australian courts (see Johnstone, 2003: chapter 8) show that the sentencing principles do little to counter these techniques.

Second, since the first half of the nineteenth century, the most widely articulated and pervasive criticism has been that the maximum fines available in OHS statutes are too small to be an effective deterrent, and that the courts rarely approach the maximum penalty when imposing sanctions for contraventions (see Industry Commission, 1995). The consequence of this is that the full impact of criminal prosecution for OHS offences has never been explored and evaluated.

A third criticism is the weakness of the fine itself as a sanction (see Fisse, 1994). A monetary fine signals to offenders that offences are 'purchasable commodities' rather than activities or omissions judged by the state to be intolerable. Fines do not require the offender to investigate the reasons for the contravention, to discipline those responsible, or directly to review and remedy the defects in the OHS management system. Monetary fines only affect the financial

values of the organization, and on their own can have little impact on non-financial values (such as reputation and prestige). In some circumstances fines can be passed on to consumers, employees or shareholders. Finally the level of fine required to reflect the seriousness of the offence, to serve as a general deterrent, or as retribution, may exceed the firm's capacity to pay (the so-called deterrence or retribution trap).

A fourth criticism of the traditional approach to prosecution is the overemphasis on corporate employers (see Fisse and Braithwaite, 1993). Despite the wide range of duty holders under modern OHS statutes, and the availability in many statutes of the possibility of prosecutions of responsible corporate officers, generally OHS enforcement agencies tend to focus their prosecution strategies, against corporate employers. In Australia, where prosecutions are taken against directors and senior managers, this almost always occurs in relation to directors and managers in small firms. This narrow enforcement approach severely underutilises the armoury of the OHS enforcement agency, and in particular relies too heavily on the assumption that the corporate employer is a coherent and integrated unit, acting in a uniform and rational manner. It also fails to put pressure on duty holders further up the chain from employers to design and manufacture plant, equipment, and substances in ways that reduce or remove work hazards.

We have already outlined a proposal for remodeling the legal architecture and strategies to ensure that prosecution is more visible as the ultimate sanction at the top of the enforcement pyramid, and can play a role more supportive of the systems-based approaches to OHS regulation (see Gunningham and Johnstone, 1999: chs 6-7), and I will simply draw out the main points here.

As discussed earlier in this paper, OHS inspectorates must ensure that enforcement decision-making is consistent, targeted to high risk situations, and that measures are proportional to the risks created. Most important, to mend the split pyramid, prosecutions must be launched for high risk contraventions even though no injury has yet occurred.

Second, prosecutions must focus not just on corporate employers, but on *all duty holders*, including manufacturers, suppliers, designers, self-employed persons, principal contractors, sub-contractors, and the individual managers and directors of corporate employers and other corporate duty holders (for a discussion of the deterrent effect of prosecutions on individual

managers and directors, see Gunningham and Johnstone, 1999, chapter 6). The OHS inspectorate must be able to target the prosecution at individuals or organizational entities which are most responsible for the contravention, including those who design of plant and equipment for use in workplaces, manufacture and supply of dangerous substances, and design and plan construction projects. Where contraventions take place within forms of commercial organization utilising outsourcing and franchising, the agency should ensure that prosecutions are targeted not only at the immediate employers of labour (franchisees, host firms, the contractor or sub-contractor), but also at the parties responsible for the overall design or coordination of the work system (franchisors, labour hire agencies, head contractors, principal contractors and planning supervisors).

Third, the *mainstream* criminal law (for example, manslaughter and related crimes) must be *integrated* into the pyramid, so that enforcement officials initiate prosecutions for manslaughter and causing serious bodily injury where fatalities and injuries occur, but coupled with prosecutions under the OHS statutes which portray contraventions in terms of inadequate OHSM. This strategy will circumvent the dilemma facing OHS regulators contemplating the use of prosecutions for manslaughter and related offences. Non-use of mainstream criminal prosecutions, on the one hand, offends a key principle of the Rule of Law that the mainstream criminal law apply equally to all legal subjects. On the other hand, the use of mainstream criminal prosecutions for contraventions resulting in fatalities, in preference to prosecutions under the OHS statutes, suggests that OHS contraventions are minor offences, and not ‘really criminal’ (see Carson and Johnstone, 1989). The use of both types of prosecutions in tandem will at least avoid the suggestions that corporate offenders are not subject to the mainstream criminal law, or that OHS offences are ‘quasi-criminal’, and will increase the deterrent and retributive effect of prosecution. In most jurisdictions the legal rules governing the requirements for corporate liability for these offences will need to be reformed, so that corporate liability can be attributed from the acts of upper and middle management, or from an overall ‘corporate culture’.

Fourth, to reinforce the emphasis on systems-based approaches to OHS standard setting and enforcement, and to remedy the weakness of the fine as a criminal sanction, criminal sanctions must be consistent with, and promote, *systems-based approaches* to OHS management and compliance. Sanctions should be redesigned to give the courts the option of requiring measures to be taken to implement the principles of sound OHS management.

Fifth, there must be *tough sanctions* ('big sticks') at the top of the enforcement pyramid – higher maximum fines, and broader range of sanctions. Higher monetary fines, and the possibility of imprisonment for culpable corporate officers, are required to provide a greater general and specific deterrent to OHS duty holders, to ensure that the perceived costs of OHS contraventions exceed the likely benefits of ignoring or sidestepping statutory OHS obligations. Sanctions should also signal to OHS duty holders that where they fail to introduce appropriate OHS management systems, courts will order them to do so.

These last two points require OHS statutes to be reformed to increase the maximum fines available (to increase the size of the stick), but ensuring that penalties should be tailored to the duty holder's resources. Revenue from increased fines should be made available to the OHS agency and to the courts, to offset the call on their respective resources likely to result from the introduction of the new sanctions outlined below.

In order to ensure that there are other tough sanctions over and above the possibility of a prosecution for manslaughter (described above), that greater publicity is given to OHS prosecution outcomes (see below), and that those sanctions are consistent with a system-based approach to OHS regulation, a number of new sanctions might be introduced into OHS statutes. These sanctions might include:

- *court-ordered adverse publicity*, which enables a court to require the details of the contravention and the outcome of the prosecution to be publicised through the media to enhance general deterrence, and to affect non-financial values of the organization.
- *supervisory orders and corporate probation*, which include:
  - ⇒ internal discipline orders requiring the organization to investigate the contravention, discipline those responsible, and return a compliance report to the court;
  - ⇒ organizational reform orders, which require organizations to report regularly to the court on its efforts to develop a compliance program and to reform its OHS management system; and
  - ⇒ punitive injunctions, where the court requires the organization to introduce a specific OHS management system.

- *community service orders*, which require the duty holder to carry out an OHS-related project using organization's resources, involving top management, during normal business hours.
- *dissolution*, where the most egregious offenders are required to cease their activities until their OHS management systems are reformed, or wound up permanently if the court decides that they are incorrigible.
- *equity fines*, where instead of being fined, offenders are required to issue new shares to the OHS agency which can be liquidated by the agency when it chooses. This sanction might result in a dilution of the offenders shares, might increase its susceptibility to a take over, and might decrease the value of top management's shares in the organization.
- *disqualification from tendering for government contracts*.

Courts may be ill-equipped to make judgments about which sanctions will be appropriate in each situation. OHSM systems cannot simply be tacked onto pre-existing management structures, and so sanctions like corporate probation will need to be carefully tailored to each offending company. Similarly, the court will need assistance in structuring sanctions like adverse publicity orders, community based orders, and equity fines to the circumstances of the offender. The court might be assisted by routine inquiries conducted by court-appointed officials, resulting in something like the United States' corporate inquiry report which might give the court information on the structure of the company, its financial position, and the suitability of the different sanctions outlined above.

Most of these new sanctions have been introduced somewhere in Europe and North America. The *Occupational Health and Safety Act 2000* (NSW) has introduced community service orders and adverse publicity orders.

To maximise the general deterrent effect of prosecution two further conditions need to be satisfied. The *outcomes* of successful prosecutions must receive the *maximum publicity*, so that OHS duty holders are fully aware that there is an active prosecution strategy resulting in formidable sanctions where contraventions are pursued successfully through the court system. Publicity will also enhance the stigma of criminal prosecution for OHS contraventions, and will amplify the effect of prosecution in shaming OHS offenders.

Not only should greater publicity of prosecution outcomes, but OHS duty holders should also be aware *in advance* of the likely approach that will be taken to their contraventions by the OHS agency and the courts. In other words, the operation of the pyramid, and the role of prosecution within it, must be *transparent*. If duty holders are aware of publicly available prosecution guidelines and sentencing guidelines, they are more likely to respond to these signals and incentives promoting voluntary compliance, for example, through the development of satisfactory OHS management systems.

Transparent and well structured sentencing guidelines can be particularly useful in ensuring that irrelevant or inappropriate sentencing factors are not considered by the court, and that convicted offenders have the exemplary or unsatisfactory aspects of their OHS performance considered by the courts. For example, sentencing guidelines might outline the appropriate range of sanctions for OHS offences, guide the courts in their choice of sanction, indicate factors to be ignored, to be considered in mitigation (for example a proven compliance program, and/or OHSM system, a regular process of self-reporting of contraventions and so on) and in aggravation (a poor OHS record, proven top management involvement in the offence; lack of co-operation in investigation and so on). Transparent and well publicised sentencing guidelines will signal to duty holders that their investment in compliance programs and OHS management systems will be rewarded if they are prosecuted for a contravention which occurs despite these measures.

## **Conclusion**

In this paper, I have argued for a more responsive approach to OHS inspection and enforcement. In particular, OHS inspectorates should

- carefully target programmed inspections to the most dangerous workplaces, and industries;
- make greater use of self-audit and self-inspection strategies in order to encourage firms to develop their approaches to OHSM;
- develop strategies to inspect OHSM systems, and to tailor enforcement strategies in response to the quality of the organization OHSM system;
- develop frameworks for transparent, consistent, targeted and escalating enforcement, which both deters organizations from creating workplace hazards, and encourages systematic OHSM. These frameworks should use infringement notices to ‘grab’ management attention, and to punish clear cut contraventions of regulations which

expose workers to significant risk; utilise improvement notices strategically to require organizations to develop their capacities to implement systematic OHSM; ensure that prohibition notices put a stop to dangerous activities; and use enforceable undertakings to ‘rehabilitate’ organizations that show remorse for contraventions, and show a willingness to commit to a process of developing robust OHSM systems. The framework for OHS prosecution should be reformed, to include a wider array of flexible penalties, and prosecutions should focus not only on punishing organizations for contraventions resulting in illness, injury or death, but also organizations which expose workers to significant risk of injury, illness or death.

These proposals have been developed after an analysis of the available research on inspection and enforcement. OHS regulatory agencies must ensure that future approaches to OHS inspection are carefully evaluated – at two levels. First, the interventions must be evaluated to assess whether policies and programs were implemented as intended, both by the regulator and by duty holders; and second to establish whether implemented measures led to a reduction in work-related rates of injury, illness and death (see Goldenhar et al, 2001).

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