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REGULATING OCCUPATIONAL HEALTH AND SAFETY: THE NEED FOR A NEW PARADIGM

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1. INTRODUCTION

The military dictum that generals are to be found fighting the last war may find its echo in the area of the regulation of occupational risks, in the fact that regulatory regimes and approaches often appear to be structured to the needs of an earlier economic and technological structure. This includes the celebrated turning point in Anglo-Australian occupational health and safety regulation, the 1972 Robens Report. There is some irony in this fact, for the Robens Committee of Inquiry was set up by the British Government, in 1970, precisely because of concerns that the traditional system, based upon the framework of the nineteenth century British Factory Acts, was too rigid and complex and unable to keep pace with social, economic and technological change. The Robens Report response was that, in place of the traditional approach of legislative provisions, supplemented by regulations, mandating detailed minimum safety standards, which were enforced by an independent inspectorate, there should be a move in the direction of promotion of an "effectively self-regulating system".

In Britain, the *Health and Safety at Work Act 1974* closely reflected the proposals outlined in the Robens Report and would later strongly influence changes to occupational health and safety legislation in Australia. In particular, it adopted the framework of a series of general duties on employers, occupiers, manufacturers, suppliers and employees. As well, the 1974 legislation provided for a system of safety representatives and safety committees. The legislation also created a new administrative structure in the form of two statutory bodies, the Health and Safety Commission, in which was vested the overall regulatory control, and the Health and Safety Executive which was the administrative arm of the system and charged with overseeing the activities of the inspectorate. Between 1972 and 1993 all the Australian jurisdictions brought "Robens style", or at least "new style", occupational health and safety legislation to the statute book.

The irony is that the Robens style approach, designed to overcome the rigidities of the past, emerged precisely at the time that the economic and industrial world upon which its approach was predicated was changing quite substantially. The Robens model was developed in an environment of a relatively strong trade union movement, a highly regulated labour market, relatively low unemployment levels, a predominance of 'standard employment' and relatively well-resourced regulatory agencies. The environment two a half decades later is radically different. It involves ongoing fragmentation of labour market arrangements and increasing levels of part-time, casual and precarious employment. The various developments over the last two decades in terms of labour flexibility has brought with it new organisational arrangements. One of the most prominent of these has been an enormous growth in labour hire arrangements, something that has closely paralleled the growing resort to outsourcing of business functions. It has also been associated with a marked increase in the number and relative proportion of 'own account' or

self-employed workers, particularly in construction and a number of service industries. However, a significant proportion of such workers are operating in situations of highly dependent or 'fake' self-employment, often only being engaged by a single entity. This has been part of a worldwide trend, driven, in part, by neo-liberal economic and management theory and the continuing pressures of trade internationalisation.

2. APPROACH

This paper argues that there is an urgent need for the formulation and implementation of a new framework for the regulation of the occupational hazards; one that is appropriate for the new economic and occupational structure of work. It suggests that this task should initially involve stepping back and revisiting the frame of reference in which the protection of against occupational injury is viewed. In particular the contrast between the protections accorded against workplace hazards and the policing of dangers present in other areas of society should be addressed.

The context in which the argument is presented is primarily that of Anglo-Australian approaches represented by the Robens or "new style" regulatory framework. It is recognised that, while the Robens approach has been extremely influential, it has not been the only model. In North America, there had been changes towards a form of 'general duties' legislation had taken place before this British report. However, the North American model, while embodying a 'general duties' approach is founded upon a much greater reliance upon state inspectorial activity and (particularly in Canada) upon enunciated worker rights than on statutorily sanctioned worker involvement. As well, a new model for OHS regulation is emerging in the efforts of the European Union to fashion an approach to direct the efforts of the members in that European community of nations. This new model requires member states to introduce 'risk assessment' requirements into their OHS statutes, and is heavily influenced by changes in Scandinavia subsequent to the Robens-inspired changes in Britain. While the argument in the paper is primarily directed to policy makers in the Antipodes, it is hoped that it will still have some resonance elsewhere.

In approaching the issue of reformulation of an approach to occupational health and safety regulation, the paper, first, attempts to provide a succinct mapping of the environment of occupational risk, through a brief examination of its historical, as well as social and ethical dimensions. The historical background is traced through the work of the German sociologist, Ulrich Beck. Attention upon Beck's work has concentrated upon his exploration of the notion of the 'risk society' with an emphasis upon the dangers posed by nuclear power and chemical and bio-technological production. However, Beck has provided insights into the nature of risks in 'industrial society' that are more germane to the general concerns of this conference. Although not novel in nature, they reinforce the position of accident researchers that such risks are not random phenomena but are systematic in nature.

The dichotomy between the systemic and individual characterisation of risk is also reflected in the social and ethical dimensions of this question, between the view that there is a moral and social duty to mitigate, and as far as possible eliminate, physical and mental harm and one that sees such consequences of industrial production as largely inevitable and that, while their removal may be desirable, this action should not be at the expense of other social and economic goals. It is argued, however, that there is a need to transcend the present default acceptance this situation to a position in which it is recognised that there is a fundamental personal right not to be killed or seriously injured at work. In fact, there is a model for such a move, namely the framework for dealing with road trauma in Sweden, known as 'Vision Zero'. It is argued that such a framework should apply to the world of occupational trauma and illness. However, such a process needs to be cognisant of the intrinsic structural entrenchment of inequality in workplace relations and, consequently, the requirement for treating the infringement of bodily integrity in the workplace in a manner more in line with that for similar infringements in other aspects of social relations.

Having outlined these background issues, the paper attempts to set out the particular values and assumptions – guiding postulates – that should underpin or inform the legislative and regulatory framework for a reformulated system. Turning to the legislative framework there is consideration of the basis of duties and responsibilities that should be set out in such a framework and also the nature of general penalties that should apply for non-compliance with these duties and responsibilities. As well, additional compliance measures are considered as well as the need for providing for an offence of industrial manslaughter. The

complexity of modern industrial systems means that a 'one size fits all' approach is incapable of meeting the challenge of contemporary conditions. Accordingly, there is a need for a number of special approaches to meet the needs of particular circumstances. This has already been recognised in the case of the regulation of major hazard facilities. However, other approaches, such as means of augmentation of the industrial inspectorate and applying wider community perspectives such as the 'safe communities' movement, should be explored.

3. THE ENVIRONMENT OF OCCUPATIONAL RISK

Historical dimensions

One of the foci of the work of the German sociologist, Ulrich Beck, has been upon the historical aspect of risk in his postulation of a move from 'industrial society' to 'risk society'. Over a number of works,[1] Beck has explored the notion of qualitatively different dimensions of risk, chiefly in terms of techno-economic development. That is, in response to the assertion that, given famine, plague and other misfortunes which often affected large populations, all societies over all times are in fact 'risk societies', he contends that industrial society has given risk a different dimension. It is not the number of dead or ill that is the salient distinction but the nature of risk generation that results in these consequences. In Beck's use of the term, "risks presume industrial, that is, techno-economic, decisions and considerations of utility."[2]

By utilising the term 'risk' in relation to decision making, there immediately emerges the issue of social accountability and responsibility for the consequences of this decision-making process. That is, the industrial system has to deal with the risks produced by it. The attempt to quantify the statistical consequences reveals risks as systemic events that are in need of general political regulation. Insurance becomes a mechanism for achieving an amelioration of some of the adverse consequences of this form of decision making, a step that also has the effect of helping make the raw brutalism of early industrial capitalism less objectionable. In documenting this process, Beck and others have drawn on the studies of the French sociologist, Françoise Ewald, on the emergence of social insurance in France in respect of industrial injuries and disease. Thus, in a dialectical process, the adverse consequences of industrial modernity "finds its counter-principle in a *social compact against industrially produced hazards and damages*, stitched together out of public and private insurance agreements; and, thus activating and renewing trust in corporations and government."[3]

However, in the further development of Beck's argument, this "pact for the containment and 'just' distribution of the consequences of the standard industrial revolution" became subverted by a series of technological challenges (including nuclear power, many types of chemical and bio-technological production) as well as continuing ecological destruction. These developments abolish the four pillars of the calculus of risks, namely, limitation, security, calculation and compensation. That is, these special types of risk, exemplified by Chernobyl, cannot be limited in terms of time or place ("the injured of Chernobyl are today, years after the catastrophe, not even all born yet"). As well, the security concept of anticipatory monitoring of results fails since it is based on concepts derived from nineteenth and twentieth century industrial society, as are the standards of normality, measuring procedures and therefore the basis of calculating the hazards. The extent of the consequences of the "worst imaginable accident" is such that the risk becomes uninsurable. Thus "the residual risk society has become an uninsured society". In Beck's colourful language, an accident in this area "becomes an event with a beginning and no end; an 'open-ended festival' of creeping, galloping and overlapping waves of destruction."

This is a very broad-brush outline of the schema of Beck's concept of the historical dimensions of risk and one that does not do justice to the nuanced nature of the argument. His conceptual programme is one that is developed within a sophisticated methodological tradition of German sociology, with close connections to the work of the Frankfurt School and Jurgen Habermas. Beck has explored various avenues and consequences of the distinctions that he has drawn within the notion of 'reflexive modernisation', an

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[1] These include Ulrich Beck, *Risk Society, Towards a New Modernity*, London: Sage Publications, 1992 [originally published 1986]; *Ecological Enlightenment: Essays on the Politics of the Risk Society*, Amherst, NY: Humanity Books, 1995 and *World Risk Society*, Cambridge: Polity Press, 1999.

[2] *World Risk Society*, at p 50.

[3] *Ibid*, p 52 (emphasis in the original).

area in which his writings have paralleled those of Anthony Giddens. Beck's views have been the subject of considerable controversy, a debate that has perhaps been exacerbated by his often-apocalyptic language. This trait may not be unconnected with the fact that he is also, again in a tradition of German sociology, a feature writer/essayist for a leading German daily newspaper.[4]

The greatest emphasis in the debate on Beck's work has been on the 'open-ended festival' of the 'risk society'. This, of course, has relevance for the regulation of major hazard facilities and areas such as biotechnology. While the question of effective regulation of low incidence/high consequence exposure is extremely important, the bulk of occupational trauma and illness is still generated in Beck's 'industrial society'. Although less commented upon, a number of Beck's formulations in relation to such risks are important. While not representing a novel insight, Beck forcefully makes the case for the structural and organisational nature of risk. While this fact is axiomatic among accident researchers, there is still a strong lay perception that accidents and injuries are largely random phenomena with the connection between them being mostly a matter of 'chance'. Thus Beck notes that, through documentation of statistical pattern, risk de-individualises'. That is:

> Risks are revealed as systematic events, which are accordingly in need of a general political regulation. Through the statistical description of risks (say in the form of accident probabilities) the blinkers of individualization drop off . . . A field for corresponding political action is opened up: accidents on the job, for instance, are not blamed on those whose health they have already ruined anyway, but are stripped of their individual origin and related instead to the plant organization, the lack of precautions, and so on.[5]

This is a welcome corrective to the lay perception, noted above, one that has more recently been given oblique and implicit official endorsement through the neo-liberal programme of privatisation of risk management in a variety of spheres of life. That is, in a process that Pat O'Malley has called the 'new prudentialism',[6] governments have increasingly devolved, often through barely disguised compulsion, to individuals, families and households the responsibility for their own risks – whether it be in respect of health, retirement protection, becoming a victim of crime – in terms of private health insurance, superannuation and 'neighbourhood watch'.

Social and Ethical Dimensions

This issue of the characterisation of risk – social/organisational or individual – has its counterpart in the ethical domain, namely in respect of how the consequences of such risk should be dealt with. The two polar positions are again reflective of the social/individual dichotomy. On the one hand stands the view that there is a moral and social duty in developing regulatory structures and processes to mitigate – and, as far as possible, eliminate – the consequences of physical and mental harm. On the other side of the divide is a form of industrial fatalism, that sees occupational injury and disease as 'accidental' byproducts of the production process that should be viewed as 'friction costs', somewhat akin to downtime as the result of damage to, or wearing out of, production machinery.

Where particular societies fit on this spectrum is, of course, the product of many factors, including the level of economic development, the political and social culture, and trade union strength. Thus, on a global basis, there are stark and obvious differences between the systems relating to worker protection (occupational health and safety, workers' compensation, workplace discrimination etc) between nations falling into broadly defined categories of designation such as that of first world vs third world countries. However, even within many first world countries there are vastly divergent standards and arrangements operating between different industry sectors; for instance the contrast between the regimes in effect in strongly unionised areas of activity (eg car manufacture) compared to marginalised areas of labour (such as

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[4] The *Frankfurter Allgemeine Zeitung*, a journal for which Walter Benjamin earlier regularly wrote.

[5] Beck, World Risk Society, p 51.

[6] Pat O'Malley, "Risk and Responsibility" in Andrew Barry, Thomas Osborne and Nikolas Rose, eds, *Foucault and Political Reason: Liberalism, Neo-liberalism and Rationalities of Government*, London: UCL Press, 1996, pp 189-207.

outworkers in the clothing industry).[7] Even in areas of roughly comparable industrial activity there are striking differences in approach between different first world countries.[8]

In terms of actualisation, the first position (that is, injury prevention as a moral and social imperative) does remain everywhere something of an idealised situation. That is, occupational health and safety is a relative rather than absolute goal. While the worthiness of accident prevention or the minimisation of harm as a desired social goal is contested by (hardly) anybody, debate emerges around the amount or level of resources that should be devoted to achieving this goal. It is one that is complicated by the fact that the goal of the prevention or minimisation of accidents may conflict with other ends that modern industrial societies find desirable.

As the Cooney Report[9] noted, it is conceivable that a nation could consider the prevention of accidents to be such a pre-eminent social goal that it would be willing to fundamentally restructure its economic and social framework in order to achieve that end.[10] However, there is a tacit social understanding that pursuit of the safety goal must yield to other considerations; a situation encapsulated in the dictum of Lord Justice Asquith in *Daborn v Bath Tramways Motor Co Ltd* [1946] 2 All E.R. 333, that "if all the trains in this country were restricted to a speed of five miles an hour, there would be fewer accidents, but our national life would be intolerably slowed down" (at p. 336).

This balance even occurs in the areas in which there is an extremely high priority given to safety. Thus, in Australia, in a response to the (then) Industry Commission's survey of the practices of national and Commonwealth agencies in relation to the analysis and regulation of safety risk, the Civil Aviation Authority (now Civil Aviation Safety Authority), in which is vested overall responsibility for aviation safety, stated that:[11]

> "It is quite simple to achieve a perfect safety level in aviation, however, no-one would be able to afford to fly and there would be no industry. In other words, the standard would be so high that nothing flies. The most difficult task in aviation standards development is achieving that minimum standard which allows the industry to operate and still provides the public with an acceptable level of safety."

The difficulties associated with this balancing process were highlighted by the Monarch air crash[12] and the trenchant criticism by the New South Wales Coroner, in his report into that mishap, of the notion of 'affordable safety' that he found underpinned the CAA's operations.[13]

In certain circumstances, there can develop a political and organisational will to attack, in a concerted manner, particular problems. For instance, under the aegis of the World Health Organisation, there has been a successful campaign to eradicate smallpox as a human affliction. In the area of occupational health and safety, there are few such instances, mainly involving the proscription of the use of particular substances; one such example being the international conference convened by the Swiss Government in Berne in 1906 that resulted in the international labour convention to prohibit the use of white phosphorous in the manufacture of matches because of the severe corrosive effect ("phossy jaw") that it had upon workers in that industry.

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[7] C Mayhew and M Quinlan, *Outsourcing and Occupational Health and Safety: A Comparative Study of Factory-based and Outworkers in the Australian TCF Industry*, Sydney: University of New South Wales Industrial Relations Research Centre, 1998.

[8] See, for example, S Kelman, *Regulating America, Regulating Sweden: A Comparative Study of Occupational Safety and Health Policy*. Cambridge MA: MIT Press, 1981.

[9] A 1984 report into workers' compensation in the state of Victoria in Australia.

[10] *Report of the Committee of Enquiry into the Victorian Workers' Compensation System* (B C Cooney, chairman), Report, Melbourne: Government Printer, 1984, para 2.3.

[11] Industry Commission, *The Analysis and Regulation of Safety Risk*. Canberra: Australian Government Publishing Service, 1995, at p 36.

[12] A crash of an aircraft operated by Monarch Airlines in June 1993 near Young in New South Wales in which seven people were killed.

[13] The coroner's comments echoed those of an investigation report by the Bureau of Air Safety Investigation (BASI)that also suggested that the CAA placed the commercial interests of airline operators ahead of overall passenger safety.

Vision Zero

As encapsulated in the comments of Lord Justice Asquith, quoted above, there appears to be general social acceptance of the denouement of the conflict between safety and 'progress'. That is, ultimately, the benefits of a modern industrial society are seen to justify, or at least to outweigh, the residual social cost in terms of occupational trauma and illness. This result is not so much a reluctant acceptance of a melancholy dilemma as the unreflected reality of power relations in society. However, there is a framework within which it is possible to mediate the safety/progress relationship in a more ethically satisfactory manner. That is the framework surrounding the initiative of the Swedish Parliament in enacting, in October 1997, the Road Traffic Safety Bill and thus legislatively enshrining the principle of 'Vision Zero'. This is the notion that it can never be acceptable that people are killed or seriously injured while utilising the road transport system.

The strength of the 'Vision Zero' framework is that it combines an explicitly ethical dimension with a strategically pragmatic or problem solving approach. It also involves a fundamental change of the road safety paradigm from one where the primary responsibility for safety has traditionally been placed upon the system user (the driver) to one where this responsibility rests squarely with the system designers. The notion of system designers is given a wide rendering to include motor vehicle manufacturers, fleet owners, freight forwarders, land use planners, road builders and the like.

The 'Vision Zero' approach involves a change of emphasis from that of the ability of the individual road user to cope with the system to a concern with how the entire system can operate safely. As well, it represents a change in focus from an attempt to reduce the number of accidents to that of the elimination of serious injuries and death as the result of road accidents. It mandates a shared responsibility between system designers and road users in which:[14]

1. The designers of the system are always ultimately responsible for the design, operation and use of the road transport system and thereby responsible for the level of safety within the entire system.

2. Road users are responsible for following the rules for using the road transport system set by the system designers.

3. If road users fail to obey these rules due to lack of knowledge, acceptance or ability, or if injuries occur, the system designers are required to take necessary further steps to counteract people being killed or seriously injured.

A number of ethical rules have been promulgated to guide system designers. These include the principles that 'life and health can never be exchanged for other benefits within society' and that 'whenever someone is killed or seriously injured, necessary steps must be taken to avoid a similar event'. As well, some operational principles have been propounded aimed at maximising the effectiveness of the 'Vision Zero' strategy. These principles include:[15]

- At political level not allowing road traffic to produce more health risks than other means of transportation or other major technological systems.
- At professional level seeing serious health loss due to traffic accidents as an unacceptable quality problem of products and services connected with road transportation.
- At individual level viewing serious health loss as unacceptable, being aware of what it takes to create a safe system, and playing an active part in placing demands on society and manufacturers for safe road traffic.

In terms of implementation, this involves co-ordinated action from all the system designers. This includes road design, traffic calming, vehicle design (for instance, seat belt interlocks, alcohol interlocks and intelligent speed limiters), training of professional drivers in emergency aid assistance and the like. Rather

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[14] C Tingvall and N Haworth, "Vision Zero – An Ethical Approach to Safety and Mobility", paper presented to the 6th ITE International Conference on Road Safety and Traffic Enforcement: Beyond 2000, Melbourne, 6-7 September 1999. This paper can be accessed on the Monash University Accident Research Centre web site.

[15] Ibid.

than the dead hand of a purely command and control model, the approach encourages creative solutions. As one of the leading architects of the new initiative has noted,

> "[i]n a broad sense, the decision [to adopt Vision Zero] stimulates innovations and investments into the road transport system, and gives a new perspective as to how the society can handle different actors in a complicated world. If mobility is what society wants, it can only reach that by an increased inherent safety. If safety is what society wants, it can be reached in two ways – reduce mobility or invest in safety."[16]

The 'Vision Zero' model is one that should resonate outside of the area of road traffic safety. It is submitted that it provides an approach that should be seriously explored within the realm of the regulation of occupational risk; one that could inform, if not provide a framework for, a reformulation of the basis of such regulation. However, before turning to some preliminary – and sometimes tentative – exploration of these possibilities, it is perhaps important to note a salient difference in dynamics between the road traffic and occupational environments. In many respects the road traffic area is inherently more democratic than that of work. That is the participants (drivers) are able to negotiate the system on terms of relative equality. This is not a true democracy of course. In terms of safety, for instance, those with greater resources have the capacity to purchase larger cars (greater crashworthiness than smaller vehicles) and which incorporate greater safety features – side impact protection, multiple airbags etc – than persons with lesser resources. However, the area of work is marked out from the rest of social life by an intrinsic structural entrenchment of inequality.

Differential Treatment of Occupational Health and Safety

Particularly in respect of the nature of protection against risk to bodily integrity, the world of work is marked off, especially in highly risk exposed environments, in a realm of differential treatment from the regimes operative in most other aspects of society. In large part this reflects a view of industrial seigneury, that a different system applies inside the factory gate and within the office than outside. In past times it was encapsulated by the doctrine of 'voluntary assumption of the risk', namely that a worker by coming to, and remaining at, work assented to the (at least obvious) dangers of his or her workplace. While less stark today, working life is still characterised by vast asymmetry of power and control over the working environment (including its risks) and differential consideration of the harms resulting from exposure to such risks.

Such differential consideration became embedded, during the course of the nineteenth century, within the woof and warp of the practice of the industrial inspectorate administering the British Factory Acts. While infraction of the provisions of the Factory Acts were plainly crimes (offences proscribed by law) they came to be regarded as 'quasi' or 'technical' crimes, for which respectable factory owners should not be held accountable, except perhaps, in particularly egregious circumstances. The result was, in Kit Carson's phrase, the 'conventionalisation' of factory crime with the effect that:

> "offences against the Factory Acts moved to a position where, today, they are accepted as customary, are rarely subjected to criminal prosecution and, indeed, are often not regarded as constituting crimes at all"[17]

This attitude became firmly entrenched within the mindset of the senior inspectorate. An illustration is the view of Paul Prior, the head of the Department of Labour and Industry in Victoria at the time of introduction of the Occupational Health and Safety Act 1985. He stated:

> "A concept in the minds of many people is that the inspector is there in the workplaces to detect breaches of the law and to prosecute offenders. Some even regard the number of successful prosecutions as a measure of the success of the inspectorate.

Most inspectorates would take the opposite view. They see as a failure any inspector who constantly has to launch prosecutions in order to obtain compliance. They see the legislation they administer as

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[16] C Tingvall, 'The Swedish 'Vision Zero' and how parliamentary approval was obtained', Proceedings of the Road Safety Research, Policing Education Conference, vol 1, 6-8, Wellington: Land Transport Safety Authority, 1998, at p.8.

[17] W G Carson, "The Conventionalisation of Early Factory Crime" (1979) *7 International Journal of the Sociology of Law*, 37 at p 38.

remedial rather than punitive in nature, ie they are there to improve the conditions of work, not to make the employer or employee suffer penalties for breaches of the law."[18]

While current views may have retreated somewhat from that position, nevertheless, there remains the legacy that occupational health and safety offences are dealt with in a different fashion to functionally equivalent features of other aspects of social life. Thus the criminal law recognises and enforces the citizen's right to be protected against the infringement of their bodily integrity through a whole range of offences, including assault and battery, reckless behaviour involving grievous bodily harm and the like. Such infringements are treated as serious violations of the social code and the perpetrators of these actions face a range of sanctions including incarceration for significant periods.

4. GUIDING POSTULATES FOR A NEW SYSTEM

Against this background, how should a modern system occupational injury and disease prevention system be constituted; or, to invoke a famous political question, what is to be done? However, before attempting a concrete answer, it is perhaps appropriate to set out the particular values and assumptions – guiding postulates - that underpin or inform the approaches or measures proposed.

1. There needs to be a clear articulation of the goals and strategies of the system

The accretion of habitual practice often provides the unexamined rationale for action for many organisations and systems. It is important that the raison d'etre, aims, goals and strategies of the system be openly examined and clearly articulated. For instance, is it accident prevention or injury prevention that is the goal? All injuries and illnesses or those with severe health consequences? Such an examination necessarily requires matters of prioritisation. Are all injuries and exposures to be accorded equal priority, or are some be regarded as meriting expedited attention? If the latter, then what is the basis for the choice/s made? We know that occupational risks are not randomly distributed but are highly skewed towards a range of especially hazardous exposures and highly exposed groups. It is possible to quite accurately map, given appropriate and accurate data, the nature of such risks in terms of incidence, severity and consequences. Just as the 'Vision Zero' strategy eschews that of the prevention of minor injuries but is founded squarely on eliminating severe consequences (death and serious injury), it is contended that the focus of occupational injury and illness prevention should be centred on very high and hazardous exposures that similarly result in severe health consequences.

2. The system must be structured in a manner that can deliver those goals

Relationship with Workers' Compensation System

There are a number of system imperatives necessary for the actualisation of these goals. Mapping and targeting of harmful exposures requires a comprehensive, accurate and unpolluted data source. The only information coverage that meets this need comes from the occupational injury compensation (workers' compensation) system. Data quality can only be guaranteed where there is single data capture across the system. Thus the existence of a single, comprehensive, state compensation fund is an imperative for the effective operation of the injury prevention system.

One of the limitations of this data capture, however, even where a state fund is operative, is the effective restriction in coverage of the workers' compensation system. That is, such coverage is effectively contingent upon persons falling within the statutory definition of 'worker'. One of the features of the changing nature of the labour force, in Australia as elsewhere, is the increase in precarious, contingent or non-standard' employment, including 'fake' self-employment. A result is that a not insignificant portion of persons, particularly those in highly risk-exposed activities, are not represented in the workers' compensation data as they do not fall within the statutory definition of 'worker'. Accordingly, again for the effective operation of the occupational health and safety system, there needs to be significant expansion of the coverage of the Australian workers' compensation schemes. The current coverage arrangements had their origins in the structural basis of these schemes developed at the beginning of the twentieth century. There is

[18] P F Prior, "Enforcement: An Inspectorate's View" in W B Creighton and N Gunningham (eds), *The Industrial Relations of Occupational Health and Safety*, Sydney: Croom Helm, (1985) at p 54.

a need to move to a more comprehensive formulation of coverage represented by modern social insurance schemes or in New Zealand's accident compensation arrangements.

Such an extension of coverage does not amount to any form of panacea. Questions of scheme coverage throw into relief the distinction developed by more sociologically minded jurisprudential writers in the United States, known as the American Realist School, between "law in the books" and "law in action". That is, there is often a significant gulf between what amounts to formal juridical coverage under the relevant workers' compensation statute and what actually transpires in practice in the reality of the working environment.

Both Australian and United States studies indicate that a high proportion of compensable injuries and illnesses (that is, work-related injuries or illnesses within the definitional bounds of the workers' compensation statute suffered by persons falling within the statutory definition of 'worker') do not find their way into the workers' compensation system and hence into the claims statistics. The claiming rate tends to be even worse amongst certain groups,[19] for certain types of injuries, and among areas of precarious employment where there is often well founded fears of victimisation and dismissal.[20] Consequently, there needs to be careful attention to anti-discrimination measures, with effective compliance arrangements, that can provide some levers of countervailing power, particularly for workers in conditions of precarious employment.

Division between the Advisory and Compliance Functions of the System

A very important issue for consideration is the appropriate structure for enforcement of the provisions of the occupational health and safety statute. Currently the occupational health and safety inspectorate wears two hats: advisers and assistants to employers in dealing with workplace hazards and as police enforcers of the provisions of the statute. This results in role confusion for the inspectors, ambiguity and tension in their relationship with employers and means that both functions are discharged in a sub-optimal fashion.

It is suggested that these functions should be split. It is possible that different persons within the one organisation could discharge the separate roles. However, there is an inevitable problem of credibility associated with 'Chinese walls' and it is far more straightforward, transparent and efficient for the distinct roles to be vest with two separate bodies. This is the situation that exists within the French system with the helping function being carried out by highly skilled engineers and hygienists in the compensation agencies, the Caisse Regionale de l'Assurance Maladie (CRAM) and the compliance role being undertaken by officers with a largely legal and enforcement background in the Ministry of Labour. Such a separate arrangement, as well as dispelling the cognitive dissonance and role confusion endemic to a single inspectorate, also allows the recruitment of persons with the training, experience and temperament best suited to undertake each body's dedicated mission.

3. The system must explicitly recognise the right of all persons not to be killed or severely injured at work

This principle is simply the reflection in the work health protection system of that articulated in Vision Zero for the road transport system and also an assertion that the conditions of occupational life must be treated in a similar fashion to those of other aspects of day-to-day living. It is then a matter as to how this protection should be recognised. One basis would be recourse to international instruments that speak to the protection of human and civil rights. However, these often speak indirectly to this issue. The Universal Declaration of Human Rights speaks of "the right of life, liberty and security of person" (Article 3) and some employment rights including the right ". . . to just and favourable conditions of work and to protection against unemployment" (Article 23). The preamble to the Constitution of the International Labour Organisation (ILO), a body created soon after the carnage of World War One, declares that "the protection of the worker against sickness, disease and injury arising out of his employment" as a precondition to

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[19] For instance, adolescent workers. A study of claims of adolescent workers in Minnesota found that only a third of eligible claims actually translated into lodged claims; D Parker, W Carl, I French and F Martin, "Characteristics of adolescent work injuries reported to the Minnesota Department of Labor and Industry", (1994) 84 *American Journal of Public Health*, 606.

[20] Michael Quinlan and Claire Mayhew, "Precarious Employment and Workers' Compensation", (1999) 22 *International Journal of Law and Psychiatry*, 491.

"universal and lasting peace". Many of the various ILO conventions and recommendations are directed to minimum standards in respect to protection against work hazards. Measures such as ILO conventions, of course, remain aspirational in nature unless they are ratified by governments and their provisions are then translated into instruments of domestic law. Even then such efforts are purely symbolic unless there is an effective regime of enforcement.

In domestic law, human and civil rights may be entrenched in some form, usually as a form of constitutional protection, or may form the subject of a bill or charter of rights. Neither approach has been the Australian jurisprudential way. Accordingly, short of some major initiative at the federal level, pragmatically, the most amenable building blocks for a new approach are, first, specific measures for protection against work hazards (occupational health and safety legislation and regulations), perhaps supplemented by recourse to the provisions of the general criminal law.

5. LEGISLATIVE FRAMEWORK

Introduction

Legislation simply sets up a framework of enforceable rules for a system. It provides no guarantee of success. No piece of paper, even an Act of Parliament, has ever prevented an injury. Positive outcomes in this area, measured by features such as reduced incidence and severity of occupational trauma and illness, are dependent upon a myriad of factors. Many of these factors (such as quality of leadership and management, organisational morale, innovation) are highly intangible and resistant to quantitative assessment.

However, legislation (using that term compendiously to include regulations) is important as a point of reference for both regulators and the regulated. For the regulators, it serves as an enabling mechanism that provides authority, and sometimes guidance, to system actors charged with a duty of improvement ('white hats') and similar authority, and usually sanctioning weapons, to those system actors vested with the responsibility of compliance with statutorily articulated standards and norms ('black hats'). For the regulated, legislation sets out the nature and standards of expected conduct and, often more importantly, proscribed conduct.

Duties and Responsibilities

The legislation should explicitly set out the duties and responsibilities of each of the 'system designers' to use the language of 'Vision Zero'. The statement of duties has been a feature of the adoption of Robens-type legislation with their elaboration of general duties (principal based standards) for a range of system players including employers, including designers, manufacturers, importers, erectors or installers and employees.

However, these principle-based standards suffer from the problem that they provide duty holders with little guidance as to what they need to do to comply with the duty of care cast upon them by the legislation. The answer to what is needed is usually provided by a court judgment in the case of a prosecution, usually as a reactive measure following a serious workplace injury. A priori guidance as to duty holder's obligations is left to regulations and industry codes of practice.

As well, in the various Australian jurisdictions, the duty is generally qualified by the expression "so far as is practicable". The notion of 'practicability', in this respect, has been considered by English and Australian courts and is, in fact, defined in the Victorian Act. The essence of these decisions and the statutory definition is a notion that an employer is required to balance the likelihood of the risk of a harmful occurrence and the severity of any resulting harm from such an occurrence against the availability and cost of appropriate countermeasures for removing or mitigating the risk. It is suggested that this balancing calculus should be removed and that the statement of duty stand unqualified. Furthermore, it is contended that the nature of the duty statement should move towards that contained in the European Community's Framework Directive and Daughter Directives.

Thus, for employers, the statement of duty should reflect articulation in Article 5(1) of the Framework Directive that they have a "duty to ensure the safety and health of workers in every aspect related to work". The employer cannot delegate that duty. As well, if the employer does not have staff competent to carry out these duties, then the employer must enlist competent services or persons after consulting workers.

Furthermore, the statement of duty should be changed from a principle-based standard, as is currently the Victorian case, to a process-based standard (or process requirement) as it is under the EC regime. This prescribes a process, or series of steps, that must be followed by a duty holder in managing specific hazards, or occupational health and safety matters generally.

It is important that the standards to be adopted by duty holders are clear and are based on scientific-based evidence of prevention of mortality and morbidity. Such standards should be as specific as possible to the exposure, equipment, environment and operational procedures that exist in particular industry settings. A model for setting and updating such standards are the 'committees of experts' of the German Berufsgenossenschaften. These committees are divided into 32 different areas of technical expertise. This does not mean necessarily a return to highly prescriptive standards, although in some instances, (for example, explosives factories), this may be appropriate. More often it will be an outcome standard that a company needs to achieve. Indeed, a study by Olsen of the Nordic fibre glass industry that the statement of clear, independent, solely health-related standards, leads to problem-solving innovation, improved technology and dramatic changes to the work environment.[21]

General Penalties

One of the design principle suggestions made earlier was that there be a distinct separation between the assistance inspectorate ('white hats') and the compliance inspectorate ('black hats'). This would allow the compliance inspectorate to conduct its activities in the 'law and order' manner of the regular police force. It may be objected that prosecutions are an extremely resource intensive process and that the compliance inspectorate would need to be extremely large and well funded or else would need to be extremely selective in its enforcement. However, this assumes a continuation of the present system of offences that need to be prosecuted in the courts. It is submitted that provision also be made for a system of administrative penalties or on-the-spot fines. In New South Wales on-the-spot fines for occupational health and safety violations have operated since 1991 and, similarly, in the Northern Territory since 1996.[22] Again, this would bring the occupational health and safety domain in line with developments in other areas of social life. By the early 1990s, around 88 percent of offences in Victoria were dealt with by the mechanism of on-the-spot fines.[23] While this percentage is overwhelmingly comprised of parking and speeding fines, the on-the-spot fine system has been extended to a wide range of other areas as disparate as those of littering, dog offences and registration and reporting requirements in business.

Concerns have been expressed that administrative penalties may trivialise occupational health and safety offences, that there could be a lack of consistency between inspectors in their application and they could be seen as a revenue-raising rather than safety-promoting measure.[24] However, a recent study found that such measures had "considerable potential to prevent workplace injury and disease" and endorsed their further development.[25] Among the recommendations from that study for future development among policy makers were that:

- a tiered system of on-the-spot fines might be introduced under which the most serious offences merited a more serious penalty than less serious offences;
- increased penalties might be imposed for repeat offences of the same type within a given period; and
- authorities consider limiting on-the-spot fines to circumstances of a clear-cut nature, thereby limiting inspectors' individual discretion and judgment.

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[21] Study by P B Olsen, cited by J Kronlund and T J Larsson, 'The Prevention of Occupational Injuries – a New Case for the Swedish Model' in T J Larsson and A Clayton (eds) *Insurance and Prevention*, Stockholm: IPSO, 1994, p82, n5.

[22] See Neil Gunningham, Darren Sinclair and Patricia Burritt, *On-the-spot Fines and the Prevention of Injury and Disease: The Experience in Australian Workplaces*, A report prepared for the National Occupational Health and Safety Commission, May 1998.

[23] R Fox, *Criminal Justice on the Spot: Infringements in Victoria*, Australian Studies in Law, Crime and Justice, Australian Institute of Criminology, Canberra, 1995.

[24] Matters raised by some respondents in the study by Gunningham et al (1998), *op cit*.

[25] *Ibid*, p 36.

Many of these consideration have already been developed in the system of administrative penalties in the British Columbia workers' compensation system. These supplement other compliance measures including prosecutions and closure of part or all of the worksite.[26] In regard to the administrative penalties system, there is provision for mandatory application of such sanctions in specified high-risk work situations (known as the deadly sins), where workers have knowingly been exposed to serious hazards and in situations of previous non-compliance with regulations and orders and where persuasive means have failed.

The eleven (now twelve) deadly sins are enumerated work practices which have a high risk of death, serious injury or industrial disease. They include:

- working in an excavation over 4 feet deep without adequately supporting or sloping the sides of the excavation;
- working within the specified minimum distance from unguarded overhead energised high voltage electrical conductors;
- working on equipment which is not locked out when required;
- permitting workers to be exposed to situations or conditions which are immediately dangerous to life or health;
- using domino falling procedures; and
- failing to take appropriate measures to control the fall of trees, such as not leaving sufficient holding wood, carelessly cutting off corners of holding wood, not placing the backcut higher than the undercut, failing to use wedges or failing to have wedging equipment immediately available.

The British Columbia system is one of mandatory consideration of penalty assessment in the situations enumerated above. A decision to recommend such sanctions is guided by considerations as to whether management has been actively pursuing a compliance programme, whether there has been proper training and supervision of workers and whether or not the particular employer is generally safety-conscious and compliant with regulations. Where sanctions are applied, there is a minimum penalty of $1,500 and a maximum of $30,000 for each violation, depending on its nature and the firm's payroll. Repeat and multiple violations can lead to penalties in excess of $30,000.

Some systems have gone beyond mandatory consideration of penalties to mandatory application of such penalties. A leading exemplar of this approach is the US Labor Department's Mine Safety and Health Administration (MSHA). Under the Federal Mine Safety and Health Act of 1977, MSHA inspectors are required to issue a citation or order for every violation of a health and safety standard found by them. Each of these acts results in a penalty, set by the MSHA's Office of Assessments, that can range up to $55,000 for each violation. Where relatively minor violations are quickly remedied there is usually a base $55 fine imposed. However this minimum penalty cannot be assessed in respect of mining activities that have a significant history of health and safety violations, nor in relation to "serious and substantial" (s&s) violations. The setting of penalties involves recourse to a formula that embodies six factors, namely:

- the enterprises previous violations history;
- the size of the operations;
- whether there was negligence on the part of the operator;
- the seriousness of the violation;
- the extent or otherwise of prompt corrective action by the operator; and
- the effect of the penalty upon the operator's economic viability.

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[26] K M Rush and N A Ashford, *Occupational Safety and Health in British Columbia: An Administrative Inventory*, Richmond, BC: Workers' Compensation Board of British Columbia, 1992.

However, this formula can be departed from where it would not lead to an appropriate penalty. This is particularly the situation in cases of death or serious injury. In these situations a special assessment can be made. The penalties are assessed against the mine operator. However the agents of corporate operators can also be individually fined for violations that they knowingly caused or permitted. As well, individual miners can be fined for violations of smoking prohibitions.

Such a 'law and order' approach, as well as being consonant with that taken in other areas such as road safety, has been shown to be particularly effective in reducing the incidence of injuries.[27] It must be noted, however, that mining inspectorates tend to have a greater number of inspectors for a given number of regulated workers than other inspectorates and are dealing with well-known, fixed, workplaces. However, these results are consistent with United States research on the effect of more general OSHA inspections that has shown that even relatively small fines brought about changes in employer behaviour.[28] For a variety of reasons, then, it is submitted that the inspectorate that is vested with policing the operation of the statute should carry out its functions in a manner similar to that adopted by the general police force in seeking to uphold the law.

Other Measures and Industrial Manslaughter

There needs to be a far greater armory of compliance measures than presently exists. The present system is overwhelmingly reliant upon monetary fines. The semiotics of this position is that occupational health and safety violations are essentially "purchasable commodities" rather than socially intolerable offences. This is even more the case than for individuals in other areas of life (eg motor car offences) since in most circumstances the fine can be passed on to consumers, employees or shareholders of the company. As well, in the case of the motor car offence, an individual can face other sanctions, including imprisonment, where the seriousness of the offence is seen as warranting that action.

Thus, if there is to be any level of equivalence between work and non-work situations, the continuum of compliance options has to include the possibility of jailing senior corporate officials in cases of egregious disregard of the health and safety of their workers. However, the sanctions armory has to be flexible to meet a range of contingencies and to maximise the effectiveness of compliance.

Corporate entities expend a lot of money creating an image of being good corporate citizens. Accordingly, an ability to require corporations in breach of occupational health and safety provisions to publish these details in specified ways can contribute to general deterrence, at least with larger, market-oriented enterprises. Other measures can include supervisory orders and corporate probation, under which a company could be required to regularly report on its efforts to develop a compliance programme, and a disqualification from tendering for government contracts.

The question, in relation to the legislative framework, is whether the occupational health and safety statute should be the vehicle for the more serious offences, particularly manslaughter and related offences, or whether recourse should be made to the general criminal law. Carson and Johnstone have taken the view that recourse to the general criminal law for the very serious cases may further entrench the view that occupational health and safety offences are 'quasi-criminal' in nature and support the inclusion within the occupational health and safety statute either of an offence of causing death through breach of the Act or a specific offence of 'industrial manslaughter'.[29] It could also be argued, however, that proceeding through the general criminal law establishes that workplace violations are treated through the same mechanism as culpable deaths in other circumstances. However, it is submitted that the Carson and Johnstone approach be endorsed on the basis that the occupational health and safety statute establishes a single code and hierarchy of offences. It also allows the form of the provision creating such an offence to be drafted in a fashion that is cognizant of the exigencies of the working environment.

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[27] M Lewis-Beck and J R Alford. "Can Government Regulate Safety? The Coal Mine Example, (1980) 74 *American Political Science Review*, 745.

[28] J T Scholz and W B Gray, "OSHA Enforcement and Workplace Injuries: A behavioral approach to risk assessment", (1990) 3 *Journal of Risk and Uncertainty*, 283; W B Gray and J T Scholz, "Analysing the Equity and Efficiency of OSHA Enforcement", (1991) 3(3) *Law and Policy*, 185.

[29] W G Carson and R Johnstone, "The Dupes of Hazard: Occupational Health and Safety and the Victorian Sanctions Debate in Historical Perspective" (1990) 26 *Australian and New Zealand Journal of Sociology*, 126 at p. 140.

6. SPECIAL APPROACHES

Major Hazards

There is also the question of the necessary skill sets of the inspectorate. Not only are work relations becoming more diffuse but also technological processes are becoming far more complex. There is thus a widening gulf between backyard, low technology processes and highly complex arrangements in areas such as the petrochemical industry. The high technology sector is the realm of extremely large corporate entities, many of whom, in terms of the level of economic activity, are larger than nation states. Indeed, of the 100 largest economies in the world, 51 are now corporations and only 49 are countries.[30] General Motors now represents the 22nd largest economy in world and, in terms of economic activity, Exxon is larger than either Finland, Poland or the Ukraine. The conventional wisdom is that these sectors should be essentially self-regulating through sophisticated safety management systems. However, given the vast asymmetry of knowledge between a poorly resourced inspectorate and these corporate bodies, there is the issue how workers in these plants and the public can be assured that the safety management system is, in fact, being implemented or whether it is simply a mechanism of paper compliance.

One way for this to be accomplished is for the occupational health and safety regulator to establish its own specialist core body of expertise, with the ability to call upon more sophisticated technical expertise as is needed. This has already occurred in Victoria, following the Longford explosion, with the establishment of a body to oversee the operation of the proposed Major Hazard Facilities Regulations. Operators of such facilities are required to be licensed and need to prepare a 'safety case', demonstrating that the operator has established the appropriate systems and measures to ensure that it can control the risk of a major incident. The licensing requirement provides a very powerful weapon in the hands of the regulator in terms of ensuring compliance by the operator with the agreed conditions under which the facility will operate. If there is substantial non-compliance or recalcitrance, then, the regulator can revoke the licence, or at least suspend its operation, until satisfied that the objectionable malfeasance or nonfeasance has been rectified. Similarly, an ongoing system of internal and external audit, paid for by the operator, provides some guarantee of the credibility of the safety management system process.

Ex Ante vs Ex Post Regulation

The issue of licensing raises a related question of approaches to regulation. That is the matter of *ex ante* versus *ex post* regulation. There are a host of new machines, chemicals and other products entering the market every day. In some areas, such as pharmaceuticals and other drugs, there is usually a system of prior sanction whereby a product will not be approved for use until the regulator has given its imprimatur. This usually requires that the regulator be convinced that it has been presented with sufficient research evidence, from trials conducted with a requisite level of methodological rigour, in order for it to be satisfied that the new product does not present (at least in its recommended dosage) a danger to the end user. In other areas, for instance many consumer products, there is a form of *ex ante* regulation in that there is a specification that such products must conform with prescribed standards of manufacture, usually promulgated by the national standards association.

Ex ante regulation is a far more effective and cost efficient approach than is alternative. There is a strong case for its wider application. However, unfortunately, it has fallen into general disfavour as amounting to government 'red tape'. Indeed in the world of transnational trade agreements, such as North American Free Trade Agreement (NAFTA), and the international regime spearheaded by the World Trade Organisation (WTO), such approaches may be prohibited as a form of 'disguised protection'. Even in more localised settings this approach has been downgraded; for instance, the action of local municipal authorities in privatising and outsourcing the approval of building plans. In this environment, more market-oriented approaches could be considered. One would be for the establishment of one or more recognised testing laboratories that would provide information upon the range of, for instance, plant and machinery used in particular industries and settings. The published test results would provide a guide to employers and others purchasing such goods, together with workers and others affected by their use, as to safest products available

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[30] S Anderson and J Cavanagh, *Top 200: The Rise of Corporate Global Power*, Washington, DC: Institute for Policy Studies, 2001.

for the use that they require. Such knowledge, particularly by those affected by the use of products, may provide some influence and leverage when purchasing decisions are being made.

Augmentation of the Role of the Inspectorate

Alternatives, or supplements, to the industrial inspectorate are difficult to find, at least in the Australian context. One possibility would be to have some supplementary responsibility for enforcement and compliance placed with the industry parties. This has not been largely developed in Australia, although the New South Wales occupational health and safety legislation does specifically authorise a secretary of a trade union to bring a prosecution for the breach of provisions of the Act, together with providing trade union representatives with powers to investigate violations of the Act. A major difficulty for developments along these lines, putting aside ideological and related issues, is the fragmented and patchy coverage by both employer and union organisations. In Australia there is a multiplicity of employer organisations that rarely, even in conjuction, achieve total industry coverage. Similarly, the level of union coverage is around a quarter of the workforce and concentrated in particular areas of activity (eg larger manufacturing, public sector). Union activity is weakest, and usually non-existent, in the emerging, disparate areas of work activity.

In this situation, where it is difficult to physically inspect operations, an alternative may be a mechanism of responding to complaints about workplace conditions. This is a significant aspect of the modus operandi of national OSHA in the United States. The problem is that the inspectorate may become bogged down in responding to a large number of, often minor, calls and be deflected from a programme of targeted inspections. It may be possible to have some alternative supplementary mechanism. In some industries – for instance, banking and telecommunications – there is an industry ombudsman. However, the powers of such officials are highly circumscribed and usually related simply to moral suasion. In cases where the company ignores the recommendations of the industry ombudsman there is usually little that can be done apart from, perhaps, some public reporting of this fact.

Although it would require some significant adjustments, a better response would be to align these tasks, or at least some of them, with a body that has full industry coverage. Perhaps the best model would be that of the German Berufsgenossenschaften. That is, an industry body, whose governance is representative of the industry parties, that could police conditions in the entire industry. Such a body would be in a better position than the existing industrial inspectorate to monitor the protean creation and demise of organisations in the industry. It would also be able to develop the industry-specific expertise concerning the nature of hazards in the particular industry and best control measures that can be implemented, given the nature of particular enterprises.

There will always be problems of occupational health and safety regulation in the highly marginalised, twilight, areas of industrial activity. Such areas are often highly secretive, avoiding for good reason the scrutiny of a range of government agencies and may not be known to an industry body. As well, they may often employ persons, such as visitors on overdue visas, who may similarly be reluctant to become known to authorities and hence not pursue complaints or lodge claims for injury. There is consequently a strong need for means of developing forms of 'countervailing power' that can provide some opportunity for monitoring and the prospect of regulatory control.

An analogy may be the international maritime industry where seafarers upon flag of convenience vessels often work in very oppressive, dangerous and squalid conditions upon vessels that are often highly unseaworthy. It is an area that epitomises the notion of the 'race to the bottom'. In this environment, the only real element of countervailing power is that which is represented by 'port state control', that is the agency with responsibility for maritime safety in a particular jurisdiction. In Australia, it is the Australian Maritime Safety Authority (AMSA) a body that arrests for unseaworthiness, up to one in every 14 overseas ships that visit Australian ports.[31]

Community Approaches

While this involves a state agency, charged with executing precisely that function, the notion of 'countervailing power' through the activities of church and community groups is worthy of exploration,

[31] See the ship detention list at the AMSA website, http://www.amsa.gov.au

particularly in respect of the operation of the twilight economy. For instance, in the case of outworkers in the clothing industry, there is the example of the 'Fair Wear Campaign', mounted under the auspices of the Uniting Church and involving a coalition of church, union and community groups. This campaign was successful in getting leading retailers (such as Coles-Myer and Sportsgirl) to sign union agreements on the use of outworkers.

A broader version of a community role in prevention is represented by the 'safe communities' movement. This began, in the early 1970s with a group at Lund University in Sweden pioneering a community oriented injury prevention programme in Falkoping that is credited with reducing injuries by almost thirty percent on average after two years of intervention. The 'safe communities' concept now forms part of the World Health Organisation's global, and Sweden's National Institute of Public Health's national, injury prevention programme. A much more occupationally-oriented version of this programme operates in Ontario and Alberta where an extremely active Safe Communities Foundation, in close co-operation with the Departments of Labour in those two provinces, has established partnerships with 19 communities in Ontario and Alberta. These initiatives are strongly focused upon small business with the Foundation working with community organisations to bring occupational health and safety expertise to small business and to link them with other community-wide safety initiatives. As well, funds are raised to support locally developed injury prevention programmes.

7. CONCLUSION

This paper is an attempt to sculpt the possible contours of an approach to occupational health and safety regulation that is relevant to the needs of the contemporary environment of work and that has some prospect of effective implementation. It comes from a perspective set out in the New Zealand Woodhouse report of 'community responsibility', one that is seen the Swedish 'Vision Zero' approach, and from a human rights position that all workers have a right and expectation that their health and wellbeing will be respected, regardless of social and economic position. This may seem a somewhat Pollyannish position given the rise to general orthodoxy of neo-liberal market philosophy which, in this area, is concerned with determining what is an 'appropriate' level of safety so that in this conception of the world there can be too much as well as too little safety. However, the author still maintains a belief that, in the market place of ideas, it is still possible for bad ideas to be displaced by better ideas. Such better ideas still face the challenge and task of implementation. That is the realm of public policy formulation and politics. This conference brings together leaders in research and policy development. The ideas presented in the paper are presented for debate within this community.

While this discussion has been cast within the context of occupational health and safety regulation, there is a recognition that such a framework can ultimately only ameliorate – although significant amelioration is nonetheless a significant step forward – the conditions of the imbalance in power relationships in working relationships generally and, in particular, those of contingent employment and other aspects of contemporary developments such as the resort to wholesale outsourcing of operations. That is the arena for a wider – though vitally important - debate which lies outside of the subject of this paper.