



The Enforcement of Health and Safety Standards in Mines

Policy Statements and an Organisational Approach
to Enforcement, Assessment of Mining Operations,
Investigation of Accidents or Incidents
and Prosecution

January 1999



POLICY STATEMENT CONCERNING PROSECUTION

Prosecution will be considered in all instances where a significant breach of legislation is discovered by the NSW Department of Mineral Resources. Significant breaches of legislation will include, but may not be limited to breaches which:

- cause, or are likely to cause, death, or serious injury or ill health; or
- continue to occur after other representations or interventions by the Department; or
- which interfere with the proper investigation of causes and circumstances surrounding an event.

Where there is a significant breach, and a prima facie case, together with a reasonable prospect of conviction, then the public interest expects that a prosecution will result.

With the Occupational Health and Safety Act as the principal health and safety legislation, charges and defendants under that Act will be considered first. This means that actions will most likely be against corporations (as the employer) but that individuals, whether management, contractors or employees who commit significant breaches may also be proceeded against.

The Department intends to effectively use prosecution as an integral part of its overall Enforcement Strategy. To do this the Department will:

- (a) prepare, publish and implement prosecution guidelines and keep them under review;
- (b) train and support investigating officers required to prepare and conduct prosecutions including the gathering, assessment and presentation of evidence and relevant law relating to offences, investigation and evidence;
- (c) consider prosecution as a matter of course, and in a fair, consistent and timely manner, where a significant breach of legislation has occurred
- (d) keep a record of all decisions whether or not to prosecute and of the reasons for such decisions; and
- (e) publish information on prosecutions undertaken, appropriate to the stage that the prosecution has reached at the time of publication while keeping in mind the importance of timely and relevant information being made available to industry for preventative purposes.

A Coutts
Director General

FOREWORD

This document primarily concerns the enforcement functions of the Department of Mineral Resources relevant to health and safety in mines and addresses related issues.

The Department provides, amongst other things, active encouragement for mines to meet community expectations in relation to the health and safety of people engaged in, or affected by, mining. It expects the mining industry to achieve significantly continuing improvement in safety and health performance and wants to make it clear that unacceptable levels of performance are not allowable.

The importance of the contribution of individuals and organisations across the industry will become greater as there is a move towards higher levels of responsibility within industry itself for safety and health in the workplace. An inevitable consequence of increased flexibility for operations is an increased level of accountability and a changing, less controlling role for the Department with greater involvement by miners and their representatives.

The publication of this policy is the first step in a process of greater awareness and consistent application of strategies and actions by Departmental Officers.

I trust that this document will serve to focus attention on those strategies and actions, while placing a clear expectation on others in the industry to make similar, related progress.

A Coutts

Director General

1 January 1999

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INTRODUCTION

The level of safety and the risk to health in mines have improved over time. However, we should never lose awareness that they are still potentially hazardous and unhealthy places.

Parliament has recognised this by enacting statutes to regulate health and safety in the NSW mining industry. The *Occupational Health and Safety Act 1983* is the principal Act with the *Mines Inspection Act 1901* and the *Coal Mines Regulation Act 1982* being associated legislation specific to parts of the industry. Where a conflict arises the Occupational Health and Safety Act prevails.

The Occupational Health and Safety Act creates a general duty of care which requires employers to ensure the health safety and welfare of their employees and others. Manufacturers and suppliers are to ensure health and safety as regards plant and substances for use at work. Employees, in turn, are to take care of others and co-operate with the employer.

Under the legislation, responsibility for health and safety in mining lies with those closest to the problem and thus best able to solve it, namely with industry itself. The Department of Mineral Resources has the responsibility of administering the legislation. As a result the Department has an important role in protecting and improving the health and safety

of mine workers and others affected by mining.

The more important means at the Department's disposal include licensing, approval, certification and assessment processes; education, advice and persuasion; and, the principal subject of this document, enforcement of acceptable health and safety standards in the legislation and other sources.

The legislation is complex. It takes at least two different approaches to promoting health and safety in mining.

The first, exemplified by much of the *Coal Mines Regulation Act*, is to license or certify individual position holders, such as mine managers, and make them responsible for compliance with detailed prescriptive rules.

The second approach, exemplified by the *Mines Inspection General Rule 1994* (made pursuant to the *Mines Inspection Act*) and s.15 of the *Occupational and Health Safety Act*, is to make particular persons, such as the mine manager or the employer, responsible through a broad duty of care for ensuring particular outcomes such as the health, safety and welfare at work of all its employees. The Occupational Health And Safety Act also extends the duty of care to cover non-employees, such as contractors and the general public. The side by side existence of different legal approaches, the particular characteristics of mining workplaces, and the variety of

circumstances which face the regulator, call for sophisticated and flexible approaches to enforcing compliance with the legislation. Different circumstances may require different responses by the Department.

This is why the legislation provides inspectors and other officers of the Department with a wide range of powers and sanctions that they can use to enforce the legislation. They also have wide discretions as to which powers and sanctions they should invoke in particular circumstances and as to how they should use such powers and sanctions.

The power to prosecute is an important and, some would say, the most significant response available to the Department. In appropriate circumstances the Department will prosecute. However, prosecution is by no means the only response and often it will not be the most effective one. Moreover, for prosecution (and the potential to be prosecuted) to be an effective means for promoting health and safety, it is important that decisions whether or not to prosecute be made on the basis of a careful assessment of known criteria, fairly, consistently and in the context of the Department's wider enforcement approach.

The object of this document is to provide guidance - for the benefit of departmental officers, industry and the wider public - on the principles the Department applies in enforcing the legislation and, in particular, on the principles according to which discretions are

exercised, including the discretion as to whether or not to prosecute. These principles provide a foundation on which Departmental procedures and guidelines will be built and lead to consistency.

The separate policy statements within this document are intended to 'stand alone' so that they may be published elsewhere. This approach has led to apparent repetition in certain areas as the policies build on contextual material earlier presented.

The Department intends to keep its policies and practice surrounding enforcement under review and welcomes comment. The Department will appropriately publicise any changes in this area of its stewardship of the Mineral Resources of New South Wales.

A.1 PURPOSE OF THIS DOCUMENT

The purpose of this document is to support an open and consistent approach by the Department to the enforcement of health and safety standards in mines through assessment of mining operations, investigation of accidents and incidents, and, where appropriate, prosecution.

A.2 THE CONTEXT OF ENFORCEMENT

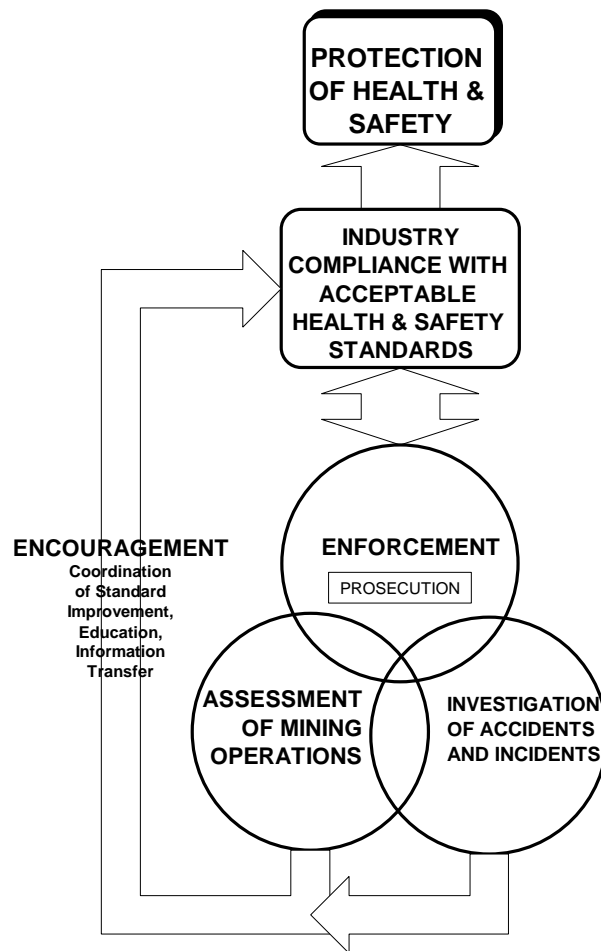
The primary objective - health and safety in mines

A.2.1 One of the Department's primary objectives is to promote the protection of the health and safety of people employed in or affected by mining in New South Wales. The Department's Corporate Plan 1998-2001 objective this way: to ensure that "the mining industry eliminates unsafe work practices and achieves a safe working environment". The Department pursues this primary objective by a number of means (or strategies) which include the various assessment, licensing, approval and certification processes, education, advice, persuasion and enforcement. All these strategies are subservient to the primary objective. The Department seeks to apply all the strategies fairly and impartially.

A.2.2 In order to achieve the primary health and safety objective and to implement and monitor its work towards that end, the Department seeks to have the mining industry operate in conformity with acceptable standards of health and safety management. These standards are discussed in paragraph A.2.4 below.

The conceptual approach to enforcement

A.2.3 The following diagram illustrates the relationship between this outcome and the primary health and safety objective. It also shows the relationship between each of the processes of assessment, investigation and enforcement. The diagram further attempts to note how assessment or investigation can also lead, with or without enforcement, to improved standards and to greater conformity with standards through standard improvement, education and information transfer with industry. These are processes of encouragement. Finally, the diagram illustrates that prosecution is only one means of enforcement.



Acceptable standards of health and safety management

A.2.4 Acceptable standards of health and safety management are derived from many sources and expressed in different forms. Some such standards are expressed in the provisions of the legislation. Additional "quasi-legislative" standards are created by conditions of licences, approvals or notices issued pursuant to legislation. Other sources for acceptable standards may include International Standards Organisation (ISO) standards; International Electrotechnical Commission (IEC) standards; Australian Standards (AS); particular codes, conventions or guidelines; and, in a few instances, broadly accepted industry custom and practice.

A.2.5 Standards can be as large and complex as comprehensive Hazard Management Systems and as narrow and precise as the specification of critical clearances in parts of machinery. Standards are not always clear or accessible. Indeed, in some circumstances, legislation enables Departmental officers to determine what are acceptable standards for particular situations.

A.2.6 The role of the Department is shifting from one of determining standards through to one of coordinating the improvement of standards, towards one of checking the currency and comprehensiveness of industry-set standards - where standards are set by means of a process which takes full and proper advantage of all people who have a direct connection with the issue.

A.2.7 It must remain, however, that where consensus cannot be reached, or where the Department has superior knowledge or data, then it will retain a lead role in standard setting.

Elements of a Safe System of Work

A.2.8 The Department considers that the following elements will always be present in a safe system of work:

- sufficient numbers of competent people to perform the tasks required;
- an adequate supply of fit for purpose equipment;
- adequate procedures for the work to be undertaken; and
- effective management of the overall work environment¹.

¹ This includes both the physical environment and the management environment such as a safety management system, an example of which may be found in AS/NZS 4804:1997 "Occupational health and safety management systems - General guidelines on principles, systems and supporting techniques".

A.2.9 The Department will look for the presence and adequacy of these elements in assessing mining operations and in its investigation of accidents and incidents at mines.

Enforcement as a Strategy

A.2.10 Enforcement of the legislation is one strategy for obtaining or maintaining conformity of mining operations with acceptable standards. Other strategies are listed in paragraph A.2.1 above.

A.2.11 The primary aim of enforcement by the Department is always to achieve this outcome (of conformity to acceptable standards) and ultimately, the primary objective i.e. protection of health and safety. In order to enforce the legislation, the Department assesses and investigates examples of actual practices and compares them with acceptable standards. Whenever the Department detects a failure to comply with acceptable standards, industry should expect an enforcement response from the Department.

A.3 THE RANGE OR HIERARCHY OF ENFORCEMENT RESPONSES

A.3.1 Possible responses by the Department to an apparent failure to comply with acceptable standards may include, in roughly ascending order of severity:

- (a) giving advice;
- (b) expressing concern orally;
- (c) issuing an instruction;
- (d) giving a direction;
- (e) issuing a written notice of concern;
- (f) issuing an improvement notice;
- (g) issuing a prohibition notice (a “stop work” order);
- (h) reviewing and/or upholding a notice;
- (i) a formal warning;
- (j) seeking a court order;
- (k) prosecution.

Responses at the earlier end of the spectrum have the advantage of immediacy. Responses outside the spectrum are also possible although they go beyond dedicated health and safety legislation. These responses are toward questioning a lease holder’s ‘right to mine’ through review of licences.

A.3.2 The appropriate response will depend on the particular circumstances, the relevant legislative provisions and the appropriate exercise of discretions. The broad range of sanctions available allows the Department to tailor responses to particular circumstances including the nature of the breach, the actual or possible consequences of the breach and the relative immediacy of any danger. Responses may be directed to the mining company, to the mine manager, , to particular mine workers, or to a combination of these persons. A failure to respond (within a given time frame) or an inadequate response to an intervention by a Departmental officer will lead to a more serious sanction being applied.

A.4 THE RESPONSIBILITY OF INDUSTRY

A.4.1 This document is principally about enforcement by the Department. It should be emphasised, however, that primary responsibility for ensuring conformity with acceptable standards rests upon industry itself: upon mining companies, mine management, the mining workforce, and manufacturers and suppliers of plant and substances. This is clearly stated in the legislation.

A.4.2 Mines should have clearly understood and accepted processes of 'self-enforcement' through means such as compliance programs.² The Department's enforcement role, as the responsible regulator, is to take steps to ascertain whether or not industry is complying and to take appropriate external enforcement action where it is not.

² An example of this approach is Australian Standard AS 3806 - 1998 "Compliance programs".

A.5 ASSESSMENT AND INVESTIGATION

A.5.1 The Department's enforcement role is closely linked with the Department's other roles of assessment of safety and health standards of mining operations and investigation of accidents or incidents occurring at mines.

A.5.2 "Assessment" is the set of surveillance activities intended to detect deviations from acceptable health and safety standards. Investigation, on the other hand, is the collection and analysis of information about the causes and circumstances of accidents or incidents at mines.

A.5.3 Amongst other things, "assessment" may include actual physical inspection, audits, site surveys, verification of safety systems or inquiries. It may in some circumstances be carried out by persons other than Departmental officers. For example, industry self reporting to the Department of internal audits or other activities may be considered a form of assessment as might audits conducted by accredited third parties. Likewise, investigations may be carried out by industry itself or a third party, and reported to the Department although this would be restricted to less serious events at mines. These arrangements must, of course, also be the subject of an appropriate level of control as to completeness and objectivity.

A.5.4 Both assessment and investigation support enforcement. However, they are not synonymous with enforcement and they may also serve other purposes. Thus assessments may be carried out for the purpose simply of gathering information³ and investigations may occur in response to representations or complaints by the work force or the general public.

A.5.5 Information obtained in an investigation may be used in a number of contexts, including: an inquest; a prosecution or other legal proceedings; other investigations or inquiries; or, outside the legal arena, for the improvement of standards and practices.

A.6 CONCLUSION

The set of policies which follow are intended as a guide for industry and the wider public on how the Department seeks to attain the objective of health and safety and compliance by industry with acceptable standards. The policies re-state and build upon many of the principles outlined so far.

³ Examples of this in the coal area have been inspections conducted across industry to ascertain the status of conveyor systems, explosion barriers or remote control equipment and to provide information on which subsequent interventions were developed.

B. ENFORCEMENT

B.1 OUTCOME SOUGHT

The principal outcome sought is the compliance by industry with acceptable standards for the management of health and safety.

B.2 PRINCIPLES

The Department adopts the following principles in relation to its enforcement strategy:

- (a) Enforcement is a means of achieving the ultimate objectives of protecting the health and safety of the mining workforce and those who may be affected by mining.
- (b) Enforcement is a means to achieving the outcome of having all in the mining industry comply with acceptable standards for the management of health and safety.
- (c) "Acceptable standards" include not only those standards required by legislation but also standards derived from a broader body of codes, standards and guidelines.
- (d) The Department has an important role, as regulator, in the coordination of the development of, and the review and promulgation of acceptable standards.
- (e) Primary responsibility for compliance with acceptable standards lies with industry; the role of the Department is to obtain compliance and take enforcement action in cases of non-compliance.
- (f) Sanctions, applied from the wide range of available responses, should be applied consistently, fairly, be commensurate with the seriousness of a situation and should escalate where previous responses have not been complied with.
- (g) Every instance of non-compliance detected should result in a timely and effective response from the Department.
- (h) In the first instance, subject to the seriousness of a situation, a cooperative response would usually be preferred.

- (i) There should be records maintained of non-compliance with acceptable standards detected by the Department and resulting enforcement action by the Department.
- (j) There should always be follow-up action on the part of the Department to ascertain whether requirements imposed or requested have been complied with.
- (k) Records should be kept of the follow up action and its results.
- (l) Information should be published and available to the public about detected non compliance, enforcement action, follow up action and the results of such actions.
- (m) Prosecution is an integral part of the Department's overall enforcement strategy.
- (n) The assessment and investigation activities of the Department support the Department's enforcement strategy.
- (o) Enforcement activities should be carried out by persons trained in, and competent for, particular tasks and in accordance with established procedures.

B.3 ENFORCEMENT POLICY

The Department will:

- (a) develop and maintain a strategy for the enforcement of acceptable health and safety standards in industry ("an Enforcement Strategy");
- (b) improve and promulgate acceptable health and safety standards;
- (c) consider response in every instance where non-compliance with the relevant standards becomes known;
- (d) respond in a fair and consistent manner, taking into account the seriousness of the non-compliance or the imminence of danger, in a cooperative manner where appropriate;
- (e) respond in an escalating fashion where previous responses have themselves not met with satisfactory responses;
- (f) make a high level response where the severity or imminence of danger warrants such action;
- (g) maintain records of non-compliances detected and of the Department's responses; follow up to ascertain remedial actions taken by industry; maintain records of the remedial action (or inaction) and of the Department's follow up of the action (or inaction);
- (h) prosecute as appropriate as a part of the enforcement strategy;
- (i) develop and maintain mining operation assessment and investigation programs in support of the enforcement strategy;
- (j) develop and maintain the competency of its officers and operating procedures to effectively administer the enforcement strategy.

C. INVESTIGATION

C.1 OUTCOME SOUGHT

The principal outcome sought is the effective collection, analysis and presentation of relevant information about the causes and circumstances of accidents or incidents in a manner which best supports the Department's enforcement strategy and provides information for enhancement of industry standards.

C.2 PRINCIPLES

The Department accepts the following principles in relation to investigation:

- (a) The investigation of events provides an important opportunity to find information about what went wrong or might go wrong with a view to preventing the occurrence of similar or related events in the future.
- (b) Information from an investigation may be obtained and used for a variety of purposes;⁴ the information should be collected and presented in a form which best serves the purpose, or purposes, for which it is being obtained or for which it is expected to be used.
- (c) Investigations should be conducted impartially, diligently, and in a timely manner.
- (d) All investigations should establish the causes and circumstances⁵ of the event under investigation.
- (e) All investigations should result in a report which should include whether, in the investigator's opinion, there have been any breaches of legislation.
- (f) The Department's overall investigative response to an event should be principally determined by the seriousness of the event and the anticipated safety benefit that might result from the investigation.

⁴ These include: for a Coroner; for legal proceedings; input for other investigations or inquires beyond the immediate incident; and, outside the legal arena, information so that practices and standards can be improved to prevent a recurrence of similar events.

⁵ The terms "causes" and "circumstances" should be interpreted broadly so that matters beyond the immediate event are taken into account where they may be relevant to that

- (g) Investigation of more serious events should, wherever practicable, be undertaken by a team rather than an individual.
- (h) Early and effective response to notification of an event requiring investigation should be made, with particular emphases on the preservation of physical evidence and the timely collection of initial oral evidence.
- (i) The continuing response to an investigation should be planned and conducted to best capture and ultimately present all available relevant information.
- (j) The integrity of evidence collected during the course of an investigation should be assured.
- (k) Where appropriate, the confidentiality or sensitivity of information collected during the course of an investigation should be respected.
- (l) Records of the results of investigations should be kept.
- (m) The results of investigations should be published.
- (n) Relevant information arising from investigations should be made available to industry in a form which will help prevent the occurrence of events similar to the one investigated.
- (o) Investigation activities should be carried out by persons appropriately trained and competent for particular tasks and in accordance with established procedures.

event, for example as a contributory cause.

C.3 INVESTIGATION POLICY

The Department will:

- (a) maintain an up to date Investigation Program in support of the Enforcement Strategy;
- (b) investigate in a planned way with an overall view to obtaining information which will assist in prevention in the future, and in a way which best serves the purpose(s) for which information from an investigation is likely to be used;
- (c) investigate with impartiality, diligence, and in a timely manner;
- (d) discover through investigation the causes and circumstances of events and the occurrence of direct or indirect breaches of legislation;
- (e) respond in an investigative sense to an event in a way consistent with the seriousness of the event and the likelihood of there being benefit from that response;
- (f) respond to events to be investigated in a manner which preserves, respects and maintains the integrity of evidence and other relevant information;
- (g) make available relevant information from investigations to industry, unions and the public in the interests of future prevention, unless there is some overriding requirement for confidentiality⁶ in which case reasons for non-disclosure will be made available to relevant parties;
- (h) develop and maintain the general competency of officers and currency of procedures to effectively administer the Investigation Program;
- (i) develop and maintain a core group of specialist officers to support aspects of the Investigation Program requiring additional expertise, rigour, resources and/or independence; and
- (j) have the core group of specialist officers under the strategic control of the Director General and reporting on the Investigation Program to the Director General.⁷

⁶ For example a pending prosecution which would justify deferring public dissemination of information.

⁷ While strategic direction and reporting will be to the Director General day to day operating arrangements for the group will be through Departmental line management.

D. INDUSTRY ASSESSMENT

D.1 OUTCOME SOUGHT

The principal outcome sought is to carry out effective surveillance of industry in order to detect non compliance with acceptable health and safety standards and to best provide information for the improvement of industry standards.

D.2 PRINCIPLES

The Department accepts the following principles in relation to industry assessment:

- (a) "Assessment" includes a range of industry surveillance activities including physical site inspections, audits, site surveys and examinations.
- (b) The range of assessment activities should be planned, on a prioritised and structured basis, with the number one priority being the minimisation with a view to elimination of risk to the mining workforce and general public. The degree of response should be weighted to the imminence of danger.
- (c) Risk to the mining workforce should be assessed giving significant weight to the management of Major Hazards and the maintenance of Emergency Preparedness in industry.
- (d) The assessment regime should include a sufficient pattern of announced, un-announced and back shift inspections to detect non compliance with acceptable standards at any site and on shifts other than day shifts. An expectation should be created that a mine may be visited at any time.
- (e) Where practicable, Departmental expertise should be spread across industry sectors by the conduct of cross-sector assessments.
- (f) A report of the results of any assessment, including any concerns arising from the assessment, should be provided to the site concerned as soon as practicable and in such a form that it may be examined by the workforce.
- (g) A report of the results of any assessment, including any concerns

arising from the assessment, should be prepared and maintained within the Department.

- (h) A response to the assessment report is expected from the relevant company.
- (i) All reports requiring remedial actions should be followed up.
- (j) Records should be kept of company responses to assessment reports, of remedial action (or inaction), of follow up action by the Department and of the results of such follow up action.
- (k) All such records should be accessible to the company, the workforce and the public, unless an overriding factor, such as consideration of prosecution, requires that open access be deferred or restricted.
- (l) assessment activities should be regularly reviewed in the light of such records.

D.3 INDUSTRY ASSESSMENT POLICY

The Department will:

- (a) develop and maintain an up to date Industry Assessment Program in support of the Enforcement Strategy;
- (b) include in the Industry Assessment Program a range of activities to provide effective surveillance of industry;
- (c) plan on a prioritised basis the activities of the Industry Assessment Program;
- (d) provide a report to assessed sites on the results of the assessment and maintain records of all assessment reports, of the results of all assessments, of company responses to assessment reports, of remedial action or inaction, of follow up action by the Department and of the results of such follow up action;
- (e) provide company, workforce and public access to such records and publish information about outcomes while maintaining necessary confidentiality.

E. PROSECUTION

E.1 OUTCOME SOUGHT

The principal outcome sought is the effective use of prosecution as an integral part of the Department's Enforcement Strategy.

E.2 PRINCIPLES

The Department of Mineral Resources accepts the following principles in relation to prosecution:

- (a) Prosecution is an important part of the overall Enforcement Strategy both as an actual response in some cases and in order that industry may have a perception of the possibility of prosecution sufficient to act as a deterrent to bolster the efficacy of other responses and sanctions.
- (b) The Department will use the most effective means of promoting compliance with acceptable standards — which will not be prosecution in all cases.
- (c) Prosecution is only one of a wide range of responses available to the Department and that full range of responses should be used to best effect in the Department's overall enforcement strategy.
- (d) Prosecution should be considered in all instances where a significant breach of legislation is discovered by the Department. Significant breaches of legislation will include, but may not be limited to:
 - breaches causing, or likely to cause, death, or serious injury or ill health;
 - or
 - breaches continuing to occur after other representations or interventions by the Department; or
 - breaches which impede or interfere with the proper investigation of causes and circumstances surrounding an event.
- (e) The Department should maintain arrangements and procedures to enable possible prosecutions to be considered in a fair, consistent and timely fashion, including the formalising of processes of considering recommendations for prosecution.

- (f) Reasons for the decision to prosecute or not to prosecute should be recorded and made available to relevant parties at an appropriate time; and
- (g) No prosecution should be commenced without the concurrence of the Director General acting on the advice of officers of the Department.

E.3 PROSECUTION POLICY

The Department will:

- (a) prepare, publish and implement prosecution guidelines and keep them under review;
- (b) train and maintain investigating officers in the general skills, and specialist officers in particular skills, required to prepare and conduct prosecutions including the gathering, assessment and presentation of evidence and relevant law relating to offences, investigation and evidence;
- (c) consider prosecution as a matter of course, and in a fair, consistent and timely manner, where a significant breach⁸ of legislation has occurred
- (d) keep a record of decisions whether or not to prosecute and of the reasons for those decisions, and make the reasons available to relevant parties at an appropriate time; and
- (e) publish information on prosecutions undertaken, appropriate to the stage that the prosecution has reached at the time of publication while keeping in mind the importance of timely and relevant information being made available to industry for preventative purposes.

⁸ Those breaches considered significant are outlined in the previous section on Principles, E.2.

F. PROSECUTION GUIDELINES

F.1 PURPOSE OF GUIDELINES

The purpose of these guidelines is to identify:

- (a) the basis on which the Department will make a decision to prosecute;*
- (b) the factors to be taken into account in deciding which persons⁹ are the appropriate defendants;*
- (c) the factors to be taken into account in deciding which charges to lay;*

The Guidelines are not law but a means to support the policy of the Department and will provide guidance in applying the policy

F.2 PROSECUTION: THE CONTEXT

The Department's decision whether or not to prosecute a particular breach of the legislation

⁹ In this context a 'person' may include a corporation, employer, manager, or individual.

will always be made in the context of the Department's health and safety objective¹⁰ and standards compliance outcome¹¹ as well as the Department's enforcement policy. Thus consideration will usually be given to the availability, efficacy and appropriateness of other sanctions.

F.3 EVIDENCE

Before prosecution can properly be considered there must be both

- (a) a prima facie case¹²; and
- (b) a reasonable prospect of conviction¹³.

F.4 THE DECISION TO PROSECUTE

F.4.1 It has never been the case that all suspected offences are automatically the subject of prosecution. The following quotation clarifies the important principles in

¹⁰ The protection of the health and safety of those in, and affected by, mining.

¹¹ Compliance by the industry with acceptable health and safety standards.

¹² In a technical legal sense, prosecution evidence sufficient, in the absence of any other evidence, to prove each element of the offence.

¹³ This factor requires an exercise of judgement in the light of what is known about possible defences, evidence to support a defendant's case and the anticipated course of proceedings.

the decision whether or not to prosecute and provides guidance on how that decision will be reached.

“The resources available for prosecution action are finite and should not be wasted pursuing inappropriate cases, a corollary of which is that the available resources are employed to pursue with some vigour those cases worthy of prosecution.

The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made. A wrong decision to prosecute or, conversely a wrong decision not to prosecute, both tend to undermine confidence of the community in the criminal justice system.

It follows that the objectives previously stated - especially fairness and consistency - are of particular importance. However, fairness need not mean weakness and consistency need not mean rigidity. The criteria for the exercise of this discretion cannot be reduced to something akin to a mathematical formula; indeed it would be undesirable to attempt to do so. The breadth of the factors to be considered in exercising this discretion indicates a candid recognition of the need to tailor general principles to individual cases.”¹⁴

¹⁴ Prosecution Policy of the Commonwealth. Guidelines for the making of decisions in the prosecution process. Commonwealth Director of Public Prosecutions. 1996 Reprint.

F.4.2 In addition to the two evidence based criteria for prosecution identified above there is another criterion, described generally as ‘the public interest’ which is made up of a number of factors. These factors are not a means through which individuals or corporations will not be appropriately brought to account. They are not excuses not to prosecute, nor are they to circumvent the Judiciary exercising its proper function.

F.5 PUBLIC INTEREST FACTORS

F.5.1 The factors which should properly be taken into account in deciding whether the public interest requires a prosecution will vary from case to case. Often some factors will militate against prosecution, while others will operate in favour of prosecution. The decision maker(s)¹⁵ must give the various factors appropriate weight. Generally speaking the more serious an offence, and the more serious its actual or potential consequences, the more likely it will be that the public interest will lead to prosecution.

F.5.2 With this in mind the normal public expectation would be that where a significant breach has occurred, and a prima facie case and reasonable prospect of conviction exist, then a prosecution should follow. In these circumstances the public interest factors, when properly applied, are most likely to lead to the same conclusion.

¹⁵ In order that the important decisions around prosecution can be properly made the Department will convene a high level group with external oversight at appropriate times.

F.5.3 Factors which arise for consideration in determining whether the public interest supports a prosecution include:

- (a) the relative seriousness or triviality of the alleged offence;
- (b) the actual or potential harm or danger caused to the health or safety of any persons by the alleged offence;
- (c) the extent to which such harm or danger was reasonably foreseeable;
- (d) any mitigating or aggravating circumstances;
- (e) the degree of culpability of the alleged offender in relation to the offence;
- (f) the availability, efficacy and appropriateness of any alternatives to prosecution within the context of the enforcement strategy;
- (g) whether or not the alleged offender has been dealt with previously by non-prosecutorial means and, if they have, how the alleged offender has responded on each occasion;
- (h) whether the breach is a continuing or second offence;
- (i) the prevalence of the alleged offence or type of offence and the need for deterrence, both specific (of the alleged offender) and general (of

others associated with the site and in the industry generally);

- (j) the length of time since the alleged offence;
- (k) the age, physical or mental health or special infirmity of the alleged offenders or witnesses;
- (l) the length and expense of a Court hearing;
- (m) the likely outcome in the event of a conviction having regard to the sentencing options available to the court;
- (n) any precedent which may be set by not instituting proceedings;
- (o) whether the consequences of any conviction would be unduly harsh or oppressive;
- (p) whether prosecution proceedings are to be instituted against others arising out of the same incident by the Department or by another agency.

F.5.4 A decision whether or not to prosecute must not be influenced by:

- (a) the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;
- (b) personal feelings concerning the alleged offender or the victim;

- (c) possible political advantage or disadvantage to the Government or any political group or party;
- (d) possible industrial advantage or disadvantage to any group or party in industry; or
- (e) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

F.6 SELECTING THE APPROPRIATE DEFENDANT AND THE APPROPRIATE CHARGES

General Principles

F.6.1 One incident may be the result of or connected with a number of offences which may in turn arise pursuant to one or more pieces of legislation. Such offences may have been committed by one or more of a number of persons which may include, for example, the mining company, directors of the company, the mine manager or other statutory officer, or other company employees. Once a decision has been made to prosecute, the choice of offences and defendant will always be made in the public interest and in the context of the enforcement policy.

F.6.2 This choice will proceed in the order of the implied standing and the content of the available statutes as follows.

Occupational Health and Safety Act

F.6.3 This is the principal piece of legislation under which the Department's policy will operate. It places the onus on an employer to ensure the health and safety of people at the workplace. In most cases employers are corporations. There is potential for liability under this Act to be sheeted home to directors of corporations and other people connected with the management of corporations.

Mines Inspection Act and Coal Mines Regulation Act

F.6.4 These two statutes relate specifically to safety and health issues in mines. They are "associated occupational health and safety legislation" for the purposes of the Occupational Health and Safety Act. Generally these Acts put an onus on mine managers to take specific steps aimed at workplace safety with part of the overall responsibility flowing to others through requirements to comply with such things as managers' Rules and Schemes or safety programs. They also create specific and general offences.

The Choice of Defendant

F.6.5 The Department takes the view that 'ownership' of the obligation to provide a safe workplace lies with mine owners and begins at the top. This is consistent with the relevant legislation. Accordingly, potential

prosecutions will, in the first instance, be considered in light of the Occupational Health and Safety Act.

F.6.6 The circumstances of an alleged offence may nevertheless call for an examination of whether a prosecution should be brought against identified individuals, whether management, contractors or employees, either because of a connection with the management or running of a mine, or because a specific offence under the associated legislation merits being brought to account.

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