THE *INDUSTRIAL SAFETY HEALTH AND WELFARE ACT* 1977 — A NEW APPROACH?

by

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In recent years, there has been considerable activity on the part of the Departments of Labour of all States to promote reforms while at the same time achieving uniformity in matters affecting the health safety and welfare of workers in industry. Changes in the law have taken place in South Australia and, now, in Tasmania in the passing of the *Industrial Health Safety and Welfare Act* 1977. However, since similar legislation is contemplated in other States, comments made about Tasmania are of more general application.[1]

It is the purpose of this article to examine the new legislation, to see how far it departs from the previous law, to consider the problems it leaves unsolved, and to question the philosophy on which it rests.

A. *The Need for Change*

A model Act was drafted by the States in 1974 following agreement by the inter-State working party of the Departments of Labour. This body, and the parliamentary select committee[2] on whose recommendation the *South Australian Industrial Safety Health and Welfare Act* 1972 was introduced, were both strongly influenced by the work, report and results of the committee appointed in the United Kingdom in 1970 known as the Robens Committee.[3] This was set up to examine the whole field of accident prevention at work.

Since both Australian and English systems had evolved in much the same way, and on the same principles, it is understandable that the main reasons for reform were similar.[4] First, in the words of Mrs.

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1 Each State has been left free to make its own approach based on the objects of the model Act, but it has been agreed that any future revision of legislation in any State will, as far as practicable, follow the guidelines established by the Model Act.

2 *Report of the Select Committee of the House of Assembly on Occupational Safety and Welfare in Industry and Commerce.* 1971-2 (S.A.).

3 *Safety and Health at Work:* Cmnd 5034 (Robens Committee) (1972).

4 An additional reason in Australia has been the concern of State Ministers for Labour over the number of matters dealing with physical working conditions being included in Federal Awards. Section 109 of the Commonwealth Constitution renders State laws inoperable in respect of matters dealt with by Federal awards. It is hoped that a greater degree in uniformity between the States will persuade the unions to omit matters of safety and health from claims under federal awards, and that the States will thereby maintain control over all health and safety issues.

Barbara Castle in appointing the Robens Committee, traditional legislation:

> has not succeeded in bringing down the number of industrial accidents to a level any of us would find acceptable . . . I have been convinced that the old approach to these problems is inadequate, that we ought to be asking some far-reaching questions about our safety legislation . . . we need to get away from the conventional approach.

Second, industrial safety legislation has evolved in a piecemeal fashion, and agencies have been established with overlapping areas of competence. Successive statutes have attempted to cover specific contingencies without regard for the overall coherence of the law. As manufacturing methods and processes have changed, many statutory provisions have been rendered obsolescent. They nevertheless remain in force to create a labyrinth of legal rules that are impossible to rationalise.

Both England and Tasmania have sought an answer to the second problem in a new comprehensive but skeletal Act, which sets out principles applicable to all employment in industry and commerce and authorises the making of detailed provisions by regulations. The regulatory power is sufficiently wide that, without amendment to the Act, it will be possible to make regulations to protect employees from the dangers of any new technology.

The solution to the first problem rests on the assumption that the most important single reason for accidents at work is apathy, and upon Robens's contention that there are severe practical limits to the extent to which progressively better standards of safety and health at work can be brought about through negative regulation on the lines previously adopted. That system had encouraged too much reliance on external regulation and rather too little on personal responsibility and voluntary effort. The cure then, is more effective safety awareness, both on the part of those who create the risks and those who work with them. To this end the new Act creates a statutory duty on every employer to consult with his employees or their representatives on measures for promoting safety and health at work and to provide arrangements for the participation of employees in the development of such measures. On the assumption that many breaches are caused by incomprehensible requirements, it creates a simplified approach involving a clear statement of general duties for both employers and employees, supported by codes of practice and regulations easily understood by all.

B. *The New Legislation*

The existing piecemeal coverage of safety health and welfare in Tasmania, provided by the *Factories Shops and Offices Act* 1965, the *Inspection of Machinery Act* 1960 and the *Scaffolding Act* 1960, will be replaced. However, these Acts will remain in effect for a short time until all the matters with which they deal and which are not incorporated directly in the 1977 Act either become the subject of new regulations

under that Act, or are discarded as no longer appropriate. This will avoid the anomalies and compartmented administration, facilities and technical expertise of the existing system.[5]

The general framework of the 1977 Act includes, with modifications, the main provisions of Sections 3-22 (Administration), 34-35 (Factory Welfare Board) and 86 (Appeal Tribunal) of the *Factories Shops and Offices Act* and some definitions from the *Inspection of Machinery Act* and the *Scaffolding Act*. More than a hundred sections of those Acts are eliminated. Some are obsolete others will be the subject of regulations under the second schedule of the Act. Items in this schedule with the exception of items 20 (Safety Supervisors) and 45 (Employees' Safety Representatives) are all matters dealt with under existing legislation, although in a fragmentary and therefore confused manner.

The Industrial Safety Health and Welfare Board, which includes the Secretary for Labour, the Director of Public Health, the Director of Mines and representatives of employers and employees, will have responsibility for making recommendations on standards and procedures.

The provisions of the Act, except those relating to pressure vessels, do not apply to mines within the meaning of the *Mines Inspection Act* 1968, and existing co-ordination of the respective inspectorates will continue. Separate legislation (in addition to the 1977 Act) will continue to operate in respect of dairy produce, environment, inflammable liquids, explosives, poison, weights and measures and local government.

The main changes brought about by the 1977 Act are as follows. The definition of 'scaffolding' is extended by section 3 (1) to include scaffolding used for the purpose of erecting and dismantling machinery, plant or equipment, or stacks of goods or materials. The definition of 'shop' is confined to 'premises' and the effect is that registration requirements will apply to shop premises only. Places where goods are sold by retail from a stall, tent or vehicle are subject to the Act as workplaces but do not have to be registered. The definition of 'factory' contained in the *Factories Shops and Offices Act* continues except for the omission of certain classes of premises to which the provisions of the Act had never been applied.[6]

Authorised officers' wide powers of inspection and examination to carry out tests, to take samples for analysis, contained in sections 11 and

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5 For example, a code on safety health and welfare under the pre-1977 legislation relating to machinery, scaffolding and the use of protective devices in construction work, required to be separated into the three areas dealt with by the *Inspection of Machinery Act, Scaffolding Act* and the *Factories Shops and Offices Act*. This is most difficult for an employer to comprehend, particularly since three different inspectors may be involved and attitudes and policies can easily become mixed, confused or misleading.

6 These are 'a particular clay pit, sand pit, gravel pit or brick yard that is declared by the Secretary, with the Minister's approval, by notice in writing to the occupier to be subject to the provisions of the Act relating to factories'; 'premises in which steam, water, gas, oil, electric or atomic or nuclear power is used in preparing or manufacturing articles for trade or sale or for the purpose of gain, or packing them for carriage'; and exclusions relating to collieries and mines and works which are separately excluded from the operation of the Act by Clause 7.

12, are similar to existing provisions.[7] Section 13 empowers an authorised officer in respect of safety or health risks to serve notice requiring an occupier to take such specified steps as the authorised officer thinks fit, to remedy or alleviate those circumstances, or to require an activity to cease forthwith. This reflects the kind of power given to inspectors under the *Inspection of Machinery Act* and the *Scaffolding Act* to require the remedying of dangerous circumstances. It is both wide and effective in that the requirement to cease an activity forthwith halts production and gives an occupier a strong economic incentive to remedy the defect immediately. This section also introduces provision for revocation by the Secretary of any notice issued by an authorised officer and provides for appeals against such notices or any substituted notice of the Secretary.

The prohibition on the use of unregistered premises and the requirement for periodic renewal of registration continue existing provisions, except that it is no longer necessary to secure prior registration of a change of occupier of registered premises. Section 25, which enables revocation of registration, is a safeguard against the risk of a new industry being established in unsuitable premises which have been registered as suitable for other purposes. These sections also ensure that premises do not become so dilapidated that they become a hazard.

Section 29 modifies the notice of commencement of construction work from seven days notice to one day only. Section 30 alters requirements for notification of work injuries so that only injuries causing death or incapacity for three days or more shall be reported, and employers are required to keep, for at least three years, a record of all work injuries. This record will be available for inspection and will enable attention to be directed to the cause of injuries.

Sections 32 and 33 embody the most crucial changes in the Act and follow the recommendation that the Act should contain a clear statement of general principles of responsibility for health and safety. By s. 32:

> Every occupier of a workplace and every person carrying on an industry shall take reasonable precautions to ensure the health and safety of persons employed or engaged at that workplace or in that industry.

This section raises a number of issues. First, employers can now be prosecuted not only for infringing specific duties contained in Acts and regulations, but also for breach of the general duty to take reasonable precautions. This may prove particularly useful where no specific or detailed regulation exists, but where there is reason to believe that a health or safety hazard exists.

Secondly, although the duty is less specific than the employer's common law duty of care,[8] its importance is that whilst the civil liability

7 Except for omission of provisions relating to out workers, public health requirements, police assistance, signing of statements and other matters considered unnecessary.

8 This requires an employer to provide a competent staff, adequate staff, a safe place of work, proper plant and appliances and a safe method of work.

arises only where a person has breached his duty and caused injury to his neighbour, the section 32 duty imposes criminal sanctions irrespective of whether injury results. This in itself could encourage the prevention of injury and illness.

Thirdly, it is also arguable that the section gives a right of action to an engaged or employed person to sue his employer (or 'occupier' or 'person carrying on an industry') for breach of statutory duty if he can prove injury. The English *Health and Safety at Work etc. Act* 1974, s. 47 explicitly states that nothing in the general duty provisions confer any right of action in any civil proceedings. Although there is no similar provision in the Tasmanian legislation, it is submitted that no such statutory right is given.

For such a right to be created, the proper construction of the Act must be that Parliament intended to protect a class of persons of whom the injured person is one, and intended that a sanction in support of that protection should be a civil claim for damages. Since the duty is less specific than the common law right of an employee,[9] since it only requires 'reasonable precautions' (*i.e.* no higher requirement than in negligence), and since the class of persons to whom it could extend is no wider than under the common law, it is most unlikely that such a tort was intended to be created. Only in New South Wales, where the *Statutory Duties (Contributory Negligence) Act* 1945, applies to prevent contributory negligence being a partial defence to a breach of statutory duty, could such a section possibly provide an employee with additional rights.

Fourthly, the duty imposed on the employer is not an absolute one, but only one to take 'reasonable precautions'. Similar phrases in comparative legislation have been criticised[10] for reflecting the economic convenience of industry, and for permitting industrialists to avoid some of the costs of production. Whether such an interpretation will be made in Tasmania remains to be seen.

Finally, it is important to realise the scope of the obligation, which is owed by every 'occupier' and 'every person carrying on an industry'. These phrases are extremely wide.[11] The former includes independent contractors, 'persons employing or causing persons to be employed', and persons in charge of a workplace 'manager, foreman, agent or other

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9 Ibid.

10 The comparable requirement in Britain has been to use the phrase 'best practicable means' or 'so far as is reasonably practicable'. See Hansard (Commons) vol. 871, 3 April 1974 col. 1331, and J. Bugler, *Polluting Britain*, (1972).

11 'Industry' means any industry, trade, business, undertaking, profession, calling, function, process, or work in which persons are employed or engaged, and includes the use of machinery in an educational or training establishment; 'occupier' in relation to a work place means the person employing or causing persons to be engaged in any industry carried on in or on that work place and includes a manager, foreman, agent, or other person acting in the general management or control of that work place.

person acting in the general management or control of that workplace'. The latter extends to all kinds of activities in which persons are employed or engaged.

Although most significant areas of employment were covered by one or other of the previous piecemeal statutes, s. 32 is designed to protect *all* employed persons.[12] By s. 3 (1) 'employee':

(a) in relation to an industry includes any person employed or enengaged in that industry, whether or not the person is so employed or engaged under a contract of employment;
(b) in relation to any education or other training establishment includes any person who uses machinery in that establishment.

Thus an occupier or person carrying on an industry will have responsibilities towards persons working under other contracts for services and being in a similar position to employees such as agents, apprentices, independent and sub-contractors and their employees, including persons engaged in an industry on their own behalf.

Some doubt exists as to whether an independent contractor is an 'employee' for the purpose of s. 3 (1). It is submitted that such a person comes within the definition by virtue of being 'engaged in that industry'. However, in South Australia in 1976 it was felt necessary to amend the similar definition of 'worker' in section 3 (d) of the *Industrial Safety Health and Welfare Act* 1972-6, by adding the phrase 'and whether or not the relationship of master and servant exists between that person and any other person'. This phrase puts beyond doubt that, in South Australia, independent contractors comply with the same safety and health requirements as workers who are employed under the master and servant relationship.

In Tasmania, there is no requirement that an employee be 'engaged for reward' and thus pupils and students in educational establishments are also covered in appropriate circumstances under Part (b) of the definition.

Section 33 imposes obligations on employees not to render less effective any action taken by a person for the purposes of giving effect to s. 32, including the carrying out of any procedure or use of any form of protective clothing or equipment so as to achieve the purposes of s. 32.[13]

Section 34 imposes a new statutory duty on employers to consult employees or their representatives on measures for promoting safety and health at work, and to provide arrangements for participation of employees in developing such measures. More specifically, s. 34 provides for the election of an employee's safety representative where 10 or more

12 Commonwealth employees are covered by the *Code of General Principles on Occupational Safety and Health in Australian Government Employment.*

13 Thus, for example, all persons working on a construction site will be required to observe the appropriate requirements of the *Construction Safety Regulations* (when in force) whether or not they are employed by the constructor or independent contractors.

employees are employed or engaged at a workplace. If the Secretary is satisfied that a safety committee consisting wholly or partly of employees' representatives is established, he may exempt a workplace from this requirement. The section also ensures that a safety representative will remain subject to the ordinary terms of his employment.

A new provision is introduced by s. 36 whereby:

> No person shall sell or let on hire or offer to sell or let on hire or advertise for sale or letting on hire, either as principal or agent, any machinery, gear, hoisting appliance or scaffolding unless it complies with the prescribed requirements.

This will place the onus of compliance with design requirements on manufacturers and distributors of machinery etc. instead of the previous unsatisfactory piecemeal approach to safety by individual improvement notices.

Section 39 provides for appeals against notices of the Secretary under s. 37 (for the prevention of accidents) or s. 38 (to remedy defects) to be made to the appeal tribunal. The latter were previously dealt with by magistrates. The appeal tribunal, whose powers and constitution are defined by s. 44, will consist of one of the magistrates and be appointed by the Governor. The decision of the appeal tribunal on the hearing of an appeal is final (s. 46). This tribunal has been appointed for many years but has not had any appeals referred to it, though the additional scope of appeals introduced by the Act may result in its future use.

Section 49 simplifies existing regulation-making requirements and extends the power to include regulations relating to Safety supervisors and employees' safety representatives.[14] Section 49 (2) empowers the Governor to make 'such regulations as he may consider necessary for the purpose of securing the health, safety or welfare of employees in workplaces'.

The new definitions have filled a number of loopholes and anomalies in the coverage of the previous legislation, but some gaps remain. There is no general duty to protect persons other than persons 'employed or engaged' against risks to health or safety arising out of or in connection with the activities of persons at work. Thus persons who do not come within this definition but who are at the workplace (for example those who use premises made available to them as a place of work, or as a place where they may use plant or substances provided for their use) are not protected by the Act.

Similarly the general public are not protected by the Act against being exposed to risks created by the activities of persons at work — for example, against excessive noise emanating from a factory. Nor could a person carrying on an industry be compelled to resite a crane that is in danger of collapsing onto a public highway outside the boundary of the building site. However, the regulation-making provision of the Act

14 Model regulations on a majority of matters have already been drafted Future regulations are likely to follow the recommendations of the Industrial Safety Health and Welfare Board.

includes the power to make regulations for the protection of persons in the vicinity of work places, which it is hoped will be used to give protection in such situations.

It is unfortunate that the statement of general duties contained in the English *Health and Safety at Work etc Act* 1974 was not adopted. Under that legislation every employer has not only general duties to his employees (stated in more detail than the Tasmanian legislation) but also a duty under s. 3 to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not exposed to risks to their health and safety. Section 3 also requires every self-employed person to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that he and other persons not being his employees, are not exposed to risks to their health and safety.[15]

The self-employed person may present a particular problem under the Tasmanian Act. If no safety standards are imposed upon him, he may create hazards for others — for example, by bringing onto a site or erecting unsafe equipment which, when used, causes injury. Such persons generally come within the definition of 'employee' and therefore owe limited duties under s. 33, not to render less effective any action taken by a person for the purposes of giving effect to s. 32. However, self-employed persons who employ no labour are not 'occupiers' of a workplace and it is unclear whether they 'carry on an industry' in order to owe a general duty to take reasonable precautions under s. 32. A clause similar to s. 3 of the 1974 English legislation, would have resolved the ambiguity.

A further problem which the Act is unable to resolve is the effect of s. 109 of the Commonwealth Constitution. This renders State laws inoperative in respect of matters dealt with by Federal awards, which sometimes include provisions for amenities, safety and first aid. Thus there can be destruction of the detailed body of State law on a particular industrial safety health or welfare matter by agreement of bargaining bodies, or by the decision of the Conciliation and Arbitration Commission.

> There are two possibilities for preserving the uniform application of State laws in this area. One would be for all trade unions and employer organisations who are respondents to Federal awards, to agree to remove safety, health and welfare provisions from these awards, and to refrain from making claims on such matters. The other, suggested by the majority of the High Court in *Re Clarkson*,[16] was the possibility of a Federal Award being made or varied

15 The section appears to have a threefold object. First, it imposes a duty upon employers and contractors to safeguard persons not in their employment; secondly, its aim is apparently to create safe systems of work when two or more organisations or individuals are each conducting part of a joint operation, or are conducting separate operations in close proximity to each other; and thirdly, to protect the public.

16 *Re Clarkson; Ex parts General Motors Holden Pty. Ltd.* ( ) 50 A.L.J.R. 46.

> so as to include a clause preserving such rights and benefits as may flow from State law (except in cases involving direct inconsistency of State and Federal law).

One surprising omission, in view of Tasmania's adherence to the Robens' approach, is that there is no requirement for employers to set out written statements of their safety policy. According to Robens:

> Safety and health activities at the workplace need a central focus. Employers should be required to set out written statements of their safety and health policy and provisions. These statements should be made available to all employees... [they are] a frame of reference for positive safety and health activity within the firm, and a stimulus to interest and participation by all personnel.[17]

The South Australian Department of Labour has been sufficiently impressed with the potential of safety policies to amend the *Industrial Safety Health and Welfare Act* 1972 to provide for such statements.[18]

In sum, the Act replaces the mass of legislation by a simple statute of general application, enhances understanding by replacing detail with a few simple easily assimilated duties of general application, involves the workforce in the safety effort through committees and representatives, introduces a high degree of flexibility and improves and simplifies administration. These are valuable contributions, but they do not represent any radical departure from existing policies.

In particular the role of the Industrial Safety, Health and Welfare Inspectorate remains unchanged. The Inspectorate already operates according to a philosophy that conforms closely to that embodied in Robens[19] and which is closely paralleled by similar agencies in other States and jurisdictions.[20] Thus advice, guidance and persuasion are preferred to prosecution, which is very rarely used. Departmental policy is to use inspections, informal and (if necessary) formal communications to employers reinforced by follow-up visits. Threats and prosecution are only used as a last resort.

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17 *Safety and Health at Work*, op. cit., para 460-462.

18 *Industrial Safety Health and Welfare Amendment Act* 1976 (S.A.) s. 29 (a).

19 Robens saw apathy and lack of safety awareness as the prime cause of accidents. Both employers and employees have a common interest in reducing them, and therefore the emphasis should be placed on measures to create more safety awareness. Persuasion and education, rather than coercion are tools to achieve this goal. Nevertheless, although Robens recommended that prosecution should be a matter of last resort, he did stress that the remedies available should be adequate to ensure compliance, and that the law should, if necessary, be firmly enforced.

20 A detailed account of the working of the Factory Inspectorate in England is contained in Carson and Wiles (eds.) *Crime and Delinquency in Britain*, (1971). The pattern that emerges from Carson's study is one of substantial violation countered almost exclusively by the use of formal administrative procedures other than the prosecution of offenders. No detailed studies have been made in Australia but discussions with the Chief Inspector of the South Australian Department of Labour, together with statistics of prosecutions contained in the annual reports of the Department of Labour and comments made in those reports, confirm Carson's view. Far less than one percent of reported accidents result in prosecution. For a summary of prosecution statistics in the Australian States see A. Hopkins, "A Working Paper on White Collar Crime in Australia". Australian Institute of Criminology, June 1977.

Even if the Inspectorate wished to follow a policy of rigorous enforcement supported by prosecution, this would not be feasible in view of the time consumed by such a process in a period of overstretched resources. Thus in 1975, for the second consecutive year, the Department noted

> The limited workforce of the inspectorate and the increasing incidence of special investigations makes it an extremely difficult task to maintain a completely satisfactory program of regular inspections or to carry out the follow up inspections which are desirable to ensure compliance with the requirements of the legislation.[21]

Consequently, the Inspectorate does not represent any real threat to an employer who is indifferent to his obligations. If he ignores the law, he is most unlikely to be prosecuted. If he is prosecuted, the fine is likely to be minimal. Because of its resources, the Inspectorate's enforcement work can only be a bluff and this knowledge is likely to dominate its thinking. According to Woolf, discussing the similarly placed English Inspectorate 'it has to operate by persuasion and co-operation with employers to the maximum extent, accepting whatever they offer as signs of an intention to come into compliance, in order not to have its bluff called sufficiently often to expose its untenable position'.[22]

As we shall see, the consequences of the inspectorate's role and resources on the operation of the new Act, are crucial.

C. *Philosophy and Administration — Coercion or Co-operation?*

There is general agreement on the need to reduce industrial accidents, the question is on how best to achieve this aim. The fundamental and underlying philosophy of both the British and new Australian legislation is summed up by the Robens committee. The most important simple reason for accidents at work is apathy. This is to be overcome by persuading everybody concerned to make a greater voluntary effort to overcome it. In doing so, there is no conflict between employers and employees, both have a common interest in reducing accidents.

> there is a greater natural identity of interest between the two sides in relation to safety and health problems than in most other matters. There is no legitimate scope for 'bargaining' on safety and health issues.[23]

In Australia this view appears most clearly in the Woodhouse Report[24]

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21 *Annual Report of the Secretary for Labour on the Administration of the Factories Shops and Offices Act* 1965.

22 Woolf 'Robens Report — The Wrong Approach' (1973), 2 Industrial Law Review 88.

23 *Safety and Health at Work*, op. cit. para. 66.

24 *Compensation and Rehabilitation in Australia*. Report of the National Committee of Inquiry (1974).

of 1974, and is adhered to in the model State legislation on which the Tasmanian Act is based.[25]

If this philosophy is correct, then what is needed is not coercion, but persuasion and education. Much of non-compliance arises from inability to comprehend requirements,[26] the majority of employers will wish to make a voluntary effort, so the emphasis must be shifted to methods that will enable them to do so effectively.

Thus a greatly simplified approach, with a clear statement of general duties contained in a single statute of general application supported by practical codes of practice and regulations available and understood by all, is a prime aim. Employees too, are to be involved in the voluntary safety effort and their awareness of safety issues sharpened, by introducing safety representatives or committees.

To an extent, this view is valid. Employers, particularly smaller ones, may be unaware of the legal requirements, unaware of some of the dangers to which they are exposing their workers, and unaware of the best methods of reducing those hazards. Where the hazard can be removed or reduced without excessive expenditure, then there is indeed a community of interest between employers and employees in creating a safer workplace. If the employers can be made aware of the hazards, and the economic costs to them which accidents impose (in terms of disruption to production, loss of trained personnel, damage to machinery, increased insurance premiums and to a lesser extent, damages claims) then enlightened self-interest should dictate that voluntary measures be taken to reduce accidents.

It follows that the existing policies of the inspectorate, the safety and education programmes conducted by the Department of Labour and Industry and other organisations, and the new measures introduced by the Act should be an effective way of reducing the number and severity of industrial accidents.[27]

However, perhaps because the Robens committee did not consider the relationship between costs and safety, their approach is substantially misconceived. By assuming a community of interest between employers and employees in reducing accidents, by relying almost entirely on voluntary self-reliance, they fail to deal adequately with the very sub-

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25 This view was supported by the chief inspectors of the State Department of Labour who formed the committee which drafted the model Act:— Personal Communication. Mr R. Broughton, Chief Inspector, South Australia.

26 Tasmanian Department of Labour and Industry. Second Reading Notes.

27 A strong case for deploying extra resources on sending inspectors to study a company's safety performance and making follow-up visits comes from the report of the U.K. Health and Safety Executive Accident Prevention Advisory Unit 'Success and Failure in accident prevention' (1976). Much positive action was achieved as a result of this approach.

stantial range of circumstances in which industry does *not* have an economic incentive to reduce accidents.

Safety precautions cost money and impair productive efficiency. Often the costs to the employer of implementing accident prevention measures would not be offset by the savings resulting from a reduced accident rate. A vivid U.K. example is that of the British Steel Corporation who would be required to spend an estimated $300,000 in making improvements to a rolling mill to comply with the legal standard:[28]

Moreover, management have difficulty in planning the concrete and immediate costs of health and safety benefits against their often indeterminate and long term effects. Short term and known considerations, particularly where investment of capital is required, often win out. According to Ashford's detailed account of American industry:

> this often means that actions are taken to limit injuries, which are dramatic and whose costs are reflected in immediately perceived pain and in Workers' Compensation premiums, but that improvements relating to health are limited. The impact of health hazards is often deferred for many years and employers dislike internalising costs whose benefits — the possible absence of diseases at some future time when employees may be working elsewhere or retired, do not appear to accrue sufficiently to the employer.[29]

If an industrialist is not convinced that he will save money by implementing safety measures, then he cannot be expected to do so voluntarily. In a competitive market economy he must produce an adequate rate of return to remain economically viable, and competition amongst firms results in a constant pressure to reduce costs.[30] However humanitarian or altruistic an individual manager or industrialist might be, ultimately management decisions must be vindicated in the market.

This view is in keeping with Grayson and Goddard's survey of the performance of British employers under the 'voluntary' system before the *Health and Safety at Work Etc. Act* 1974 in England. They maintain that the mounting toll of deaths and accidents in recent years is the clearest indictment of that system. Although some firms introduced changes in their safety policies and developed rudimentary safety machi-

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28 *Scunthorpe Evening Telegraph* (UK) 20 June 1975. In another case a firm was fined £5,000 for not installing safety equipment at a cost of £25,700; Paul Rose M.P. in *New Society*, 22 July 1976.

29 Ashford, *Crisis in the Workplace: Occupational Disease and Injury* (1976).

30 Particularly competition from those who do not internalise the costs of health and safety — either foreign competitors who are not subject to regulation, or from those in this country who, because of lack of effective enforcement mechanisms, are able to evade the health and safety requirements.

nery, they did so only when they perceived it as profitable[31] and the authors conclude that 'the determining factors are profits and costs'.[32]

If this is correct then only where an industry is made aware of, or perceives itself as having an economic self-interest in promoting safety will the Robens approach of voluntary self-regulation be effective. Otherwise, strong legal or economic sanctions will be necessary to compel industry to incur the costs or reduce the productivity necessary to improve safety.[33]

A further question is whether, and to what extent, coercive action is justified in view of the costs involved — higher overheads of a manufacturer will eventually be met by the consumer, expenditure on safety may affect wages as well as profits, and in some cases lead to unemployment.

Despite these costs, there are strong economic and equitable justifications for compelling employers to take measures to reduce industrial accidents. A disproportionate bulk of risk falls on workers employed in hazardous occupations and industries. Though it may be expedient for the rest of society (who benefit from the products of their labour) to subject workers to special occupational risks, it can by no means be considered just. As John Rawls puts it, principles of equity and fairness, 'rule out justifying institutions on the grounds that the hardships of some are offset by the greater good in the aggregate. It may be expedient but it is not just that some should have less in order that others may prosper.'[34] The argument that wage differentials incorporate the appropriate level of workplace risk is totally unconvincing.[35]

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31 'In private industry [in Britain] some firms have instituted changes in safety policies to cut costs. Babcock and Wilson (Operations) Ltd., actually tried to cost the financial implications of accidents at their Renfrew plant employing 2,750 workers and they arrived at a conservative estimate of £106,005 in 1972. Perkins Engineering claim to have saved money by their policy of 100% reporting of accidents and a 'total loss control' system covering fire, accidents, security, personal injury and property damage. It is claimed that "Employers liability insurance cost Perkins half the current 'book' rate for other comparable industries, and the premium savings cover the entire operational expense of total loss control."
But it is clear that the determining factors are profits and costs. Few, if any, private firms would consider, because of its financial implications, the NCB's view that designing for safety is the real answer . . .
Most firms prefer the "posters and competition" view of accident prevention.' Grayson and Goddard. *Studies for Trade Unionists,* Vol. 1 No. 4 (1976).

32 Ibid.

33 Against this, it can be argued, following Robens's 'homespun philosophy', that the majority of accidents are caused by apathy, and that since employers do not make a calculated choice, economic deterrence or incentives have no part to play.
However, the strong weight of evidence contradicts Robens and confirms the view that accidents are an integral part of the production process. See Phillips 'Economic Deterrence and Prevention of Industrial Accidents' (1976) 5 I.L.J. 150. Two recent case studies also support this view:
National Institute of Industrial Psychology. *2000 Accidents* (London 1971) Nichols and Armstrong. *Safety or Profit* (Bristol 1973).

34 J. Rawls, *A Theory of Justice* (1971) at p. 15.

35 *Infra,* n. 37.

The economic argument is based on the market paradigm and the role of incentives.[36] This rests on the belief (upon which most capitalist economics are based) that in conditions of 'perfect competition' society would produce precisely those goods and services which the consumer wants in the proportions in which he wants them, and that this ideal — the 'optimum allocation of resources' is theoretically attainable through the use of the price mechanism. According to classical economic theory a competitive economy naturally tends to bring the supply and demand for goods and services into equilibrium.

If the price of a product is too low because certain charges which properly belong to that product have not been taken into account, it follows that the demand for that product will be too high. Too much of that product will therefore be produced, and resources which ought to be devoted to producing other goods will be diverted to the production of this low priced product. The diversion of these resources means that too few other goods will be produced. Thus we end up with too much of one type of goods, too few of another, and a misallocation of resources.

If the cost of harm or damage done by an activity is charged to that activity, and is therefore reflected in the price of the product, this will tend to optimize the allocation of resources, just as reflecting the cost of the raw materials in the price of the product does the same thing.

In the case of occupational disease and injury, the reason that the free market results in too much workplace injury and illness is because market incentives are 'wrong' from society's point of view. Employers are not held financially accountable for the full human and social consequences of their failure to provide safe working conditions. A disproportionate share of the damages associated with occupational illness and injury thus befalls working people, their families, and society at large, without ever directly entering a corporate profit-and-loss statement. As a result, business has insufficient incentive to improve job health and safety, and the total costs of production enter neither the price nor the wage equations. The problem of public policy then becomes one of finding ways to make the market more effective in obtaining the socially desired level of job-related hazard. This approach suggests that public policy should be geared toward intervention in the market system to make it function in such a way that all prices reflect true social costs and all 'externalities' are 'internalized'.

The market paradigm is helpful in determining the usefulness of market incentives for dealing with occupational safety and health problems although its imperfections, in relation to health matters particu-

36 This account is indebted to P. S. Atiyah, *Accidents, Compensation and the Law* (2nd Ed. 1975) Ch. 24 and to Ashford *op. cit.*

larly, are inherent and severe.[37] These serve to emphasise the importance of social policy in forcing employers to internalize more of the total costs associated with occupational health and safety hazards.

This is already done to an extent through workers' compensation premiums (which are collected from employers according to classifications that attempt to assess the risks in each industry) and by the imposition of liability in tort on the careless employer. Neither of these mechanisms, however, has had any significant deterrent effect,[38] and both involve a post hoc rather than a preventative approach.

Another argument made is that since a substantial proportion of the costs of accidents are paid out of general taxation, the public has both a right and an interest in reducing the costs of accidents. This could be achieved by public spending on accident prevention, provided the gains in terms of reduced accident costs, are greater than the expenditure involved. However, only appropriate internalisation of the costs by those responsible for creating them, will lead to the proper allocation of resources referred to earlier.

It may be concluded that if a firm has to bear the full costs of any accidents, either directly or through insurance, it will be prepared to spend up to that amount to prevent such an accident; but if it bears less than the full cost, as at present, it is likely to spend less. The ideal is a system that will achieve the 'optimal' level of accidents. This is achieved when any further reduction in accident rates can only be

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37 Ashford *op. cit.* n. 19, points out that

> 'the deficiencies in the knowledge of the nature and severity of health hazards are the most serious imperfections, since market analysis assumes adequate knowledge of costs and benefits. The problem of chronic disease that manifests its harm (costs) far into the future presents a 'discounting' problem for even the most far-sighted management. This discounting problem for future harm (costs) is paralleled by a discounting problem for future benefits as well. Even if a firm thought it profitable in terms of conserving its scarce human resources to reduce chronic disease, the uncertainty of future benefits would make it less likely that action would be taken. There are serious reasons for questioning the notion that the existing level of workplace hazards represents working people's free-market "choice" regarding the assumption of job-related risk. Beyond important informational problems, a wide variety of other forces — including social, cultural, psychological and environmental factors — influence workers' decisions regarding the assumption of job-related risks. An inability to assess or relate to low-probability, large-harm contingencies is a behavioural trait common to many, if not most, individuals. Further, many workers are socialized to accept the hazardous nature of certain jobs and are convinced of the necessity of performing them in order to earn their livelihood. The Puritan work ethic and the notion that work has to be hard and unpleasant contributes toward the willingness to accept hazardous conditions.'

38 Writing of Workers Compensation premiums, the Woodhouse Reports, both in New Zealand and Australia, concluded 'we have found no evidence here or overseas which shows that the process has any significant effect on the interests of safety'. Similar conclusions, were reached in respect of tort claims, which are only made in respect of about ten percent of accidents, compensation being paid by insurers whose premium differences are minimal.

See also P. S. Atiyah 'Accident Prevention and Variable Premium Rates for Work-Connected Accidents — II' (1975) *I.L.J.* 89.

achieved at a cost greater than the estimated benefits.[39] One significant cost which must be taken into account is that of administration of whatever system is adopted.

D *Internalising Costs — Enforcement of a Legal Standard*

Whilst in practice, any system is necessarily imperfect, an approximation of these aims could be achieved either through insurance, taxation or enforcement of a legal standard. Insurance has been generally discounted as an adequate economic incentive.[40] Taxation has not been tried in this field in Australia, and there are severe doubts as to its effectiveness, though there is not sufficient empirical evidence available to take more than an essentially agnostic position.[41] The alternative is to use statutory regulations backed by criminal sanction.

In order for this approach to succeed, the criminal law must establish minimum standards in such a way that it is both unattractive and unprofitable to fall below them. The prospects of detection, prosecution and conviction must be too high and the resultant penalties too unpleasant for the great majority of citizens to be willing to run the risk.

This has never been achieved in Australia where the ineffectiveness of legislative standards can be presumed to be a result of inadequate resources, laws and enforcement procedures.[42]

An example of the legislative standards approach now exists in the U.S.A. in the *Occupational Safety and Health Act* (OSH Act) of 1970, which is a Federal Act 'to assure safe and healthful working conditions for working men and women; by authorising enforcement of the standards developed under the Act; by assisting and encouraging the States in their efforts to assure safe and healthful working conditions; by providing for research, information, education, and training in the field of occupational safety and health and for other purposes'.

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39 L. Williamson, J. Olson and L. Ralston 'Externalities, Insurance and Disability Analysis' (1967) 34 *Economica* 235 and L. Calabresi, *The Costs of Accidents, A Legal and Economic Analysis* (1970). Quoted in L. Phillips 'Economic Deterrence and the Prevention of Industrial Accidents' (1976) 5 *Industrial Law Review*, 150.

40 Atiyah *op. cit.* However, Phillips *op. cit.* 148-163 argues for economic incentives in the form of experience rating. One variant of this, 'penalty' rating, has been the subject of research by Atiyah. This system involves the imposition of an additional premium on an employer with a 'bad' record where the additional sum is greater than is commensurate with the addition risk. His data on the Ontario system of penalty rating suggests that it had a substantial effect on accident rates, though he objects to the principle on which the method is based.

41 Settle, *The Welfare Economics of Occupational Safety and Health Standards* (1974) concludes from a detailed study in America that 'there is no efficiency presumption in favour of taxes as an instrument for improving job safety and health'.

42 The position is similar in the U.K., and in the U.S.A. before 1970. The American National Commission on Workmen's Compensation stated that 'the strong consensus of testimony before Congress on the 1970 Federal occupational safety legislation was that State standards usually are ineffective. The source of this ineffectiveness typically is presumed to be inadequate regulatory resources rather than the inherent nature of such regulation.' Compendium on Workmen's Compensation (Washington D.C., U.S. Commission on State Workmen's Compensation Laws 1973) 290. For an alternative view, see Phillips *op. cit.*

Section 5 of the Act imposes an unprecedented general duty whereby each employer:

> shall furnish to each of his employees employment and a place of employment which are free from recognised hazards that are causing or are likely to cause death or serious physical harm to his employees;

In addition, each employer must comply with occupational safety and health standards promulgated and enforced under the Act by newly established Occupational Safety and Health Administration (OSHA) in the Department of Labour. OSHA has the authority to enter any workplace without advance notice and to propose penalties upon discovery of violations.

It is too soon to tell how effective the OSH Act's approach will be. Ashford's detailed and comprehensive account reveals that the 'general duty' obligation, which could in principle encourage general preventive responses to injury and illness, is being underemphasised by OSHA. As a consequence, workers are being left virtually unprotected in cases where there is reason to believe that excessive exposure to a given agent may be harmful, but where no standards have been established. Moreover, the previously inadequate levels of inspector manpower and training have still to be overcome, the probability of a firm's being inspected is still relatively low, and fines are often far too low to serve as an incentive to improve working conditions.[43]

Nevertheless, Ashford suggests that the OSH Act is slowly serving to raise the consciousness of both management and labour and that the requirement to comply with health and safety standards is causing management to internalize costs in such a manner as to place emphasis on prevention of health and safety hazards. Further, it is providing an important stimulus to labour unions in collective bargaining activities with regard to job health and safety.

We should be wary of drawing too close a parallel between the OSH Act and the Australian legislation, since there are significant legal, political and constitutional[44] differences. In particular, legal action taken by public interest groups, union and employer groups, has played an important role in the implementation of the OSH Act,[45] whereas in Australia, unions, consumers and public interest groups do not have the

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43 Up to 1974 the OSH Act had 'failed to live up to its potential for reducing job injury and disease, for fostering the internalisation of the social costs of health and safety hazards, for encouraging technological innovation, or for stimulating job redesign'. Ashford *op. cit.* at p. 13.

44 Federal involvement in health and safety issues in Australia is limited to Federal awards under the Commonwealth *Conciliation and Arbitration Act*, and to Commonwealth employees.

45 In the case of the three health standards adopted through the procedure established by section 6 (b) (petition to the Secretary to commence the procedure for promulgating standards) petitions or litigation were filed by unions, public interest groups and employer groups.

locus standi to bring this sort of action[46] and the legal system is not geared to this type of process. Moreover, consumer and public interest groups are not sufficiently strong, organised or concerned with safety and health issues to have any significant contribution to make.

Nevertheless, the general principles on which the OSH Act is based, of coercion rather than co-operation, are relevant to Australia. Industrialists are subject to the same market forces, and are likely to have similar responses to the type of action that is taken against them. The degree of success which the OSH Act achieves will have clear and direct implications for Australia.

To adopt a coercive approach in Tasmania would not require any radical legislative change, since the Inspectorate already has sufficient teeth[47] to pursue a policy of rigorous enforcement. The main impediments are the often derisory fines imposed by magistrates for breaches of industrial safety laws, coupled with the infrequency (as a matter of policy) with which the law is invoked.

Fines will not act as a deterrent until employers have more to lose by infringing the regulations than by complying with them. Only when the whole philosophy of the Inspectorate has been changed from one of co-operation and persuasion of industry, to one of industrial police force, can this be achieved. This will require not only allocation of substantially increased resources, supported by court action and stiffer fines, but also the breakdown of the cultural tradition on which the Inspectorate operates.[48]

A further stumbling block is the tendency of the courts to interpret such phrases as the 'reasonable precautions' requirement in s. 32, so as to allow economic factors to colour technical judgments. The danger here is that, in judicial terms 'a quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in time or trouble) is placed on the other'.[49] Thus employers

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46 Under the *Industrial Safety Health and Welfare Act* 1977, s. 13 (Tas.), if an authorised officer *properly* exercising his discretion chooses not to bring a prosecution for breach of the legislation or regulations thereunder, then the only available action (if any) is one in tort against an occupier or person carrying on an industry, for breach of statutory duty, brought by an individual who has suffered damage as a result of that breach. Unions can include matters concerning working conditions in their claims for determination under Federal award procedures. A limited right is given to the Secretary of an industrial union of employees under s. 145 of the *Factories Shops and Industries Act* 1962 (N.S.W.).

47 Maximum fines have been increased by the 1976 Act, and authorised officers have the power to serve notice requiring an occupier to cease an activity forthwith if he is of the opinion that the safety and health of persons is endangered. Contravention of the Act, or failure to comply with a direction given by an authorised officer makes the offender liable to a penalty of $500 and a further daily penalty of $200. If death or serious injury occurs as a consequence of the failure or contravention, an offender is liable to a penalty of $5,000 and a further daily penalty of $200.

48 See Carson *op. cit.*

49 Lord Asquith in *Edwards* v. *N.C.B.* 1949. Quoted in *Labour Research* (Sept. 1972) at p. 196.

will use as a defence, the high cost to them of securing the safety of their workers, yet, according to the economic arguments made above, these are costs which they should be made to bear.

These obstacles and, in particular, the political unlikelihood of sufficient resources being allocated to the Inspectorate, means that *full* reliance on law and market incentives to encourage fulfilment of obligations (to the exclusion of other mechanisms) is impossible in any practical sense, though to recognise this is not to detract from the valuable role they still have to play.

E. *Self-Help-Workers' Rights*

No single policy instrucent is likely to attain total success in reducing industrial accidents and the simultaneous application of a number of approaches is preferable. One such mechanism which would be likely to provide equal progress is to enable workers and their representatives to function in interaction with and as a necessary check on employers. This means providing them with *enforceable* rights under the Act, which could be achieved through the regulation-making power in s. 49 whereby the Governor 'may make such regulations as he may consider necessary for the purpose of securing the health safety or welfare of employees in workplaces'.

The sorts of powers that would be required can be found in the OSH Act, which has been described as a 'worker's environmental bill of rights'. Amongst the most important of these rights are an employee's right to require an inspection,[50] or to notify OSHA of violations of standards or of the general duty obligation of his employer. In practice, the Tasmanian Inspectorate is likely to respond to a request for an inspection made by an employee, concerned about a workplace hazard but an employee cannot compel one.

In addition, the OSH Act gives employees the so-called walkabout right, enabling their representative to accompany the inspector on his inspection of the workplace. Such practice is not encouraged in Australia, perhaps understandably since it opens the possibility of victimization of an employee who takes advantage of this facility, and for this reason is not advocated here unless surrounded by clear safeguards for the employee.

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50 Any employee or employee representative who believes that a violation of a safety or health standard, or of the general duty obligation, has occurred which threatens physical harm or which is imminently dangerous, may request in writing an inspection by the Occupational Safety and Health Administration. A signed letter must be sent to OSHA detailing specific information about the alleged violation. OSHA gives a copy to the employer prior to the inspection and the employee need not notify the employer of his request to OSHA. Moreover, the employee's name must be withheld by the Secretary if the employee so requests. A special investigation must be made if the Secretary determines that there are reasonable grounds to believe that a violation or danger exists. However, if the Secretary finds that there are no reasonable grounds to believe that a violation exists, notification of this finding must be given to the complainant.

Other important rights under the OSH Act are the rights to observe the monitoring of harmful substances and to have access to records of monitoring, the right to have all citations posted so that employees will know of any violation found by an inspector, the right to obtain review within the Labour Department if an inspector fails to issue a citation after employees have provided a written statement of alleged violations, the right to appeal if the time allowed for abatement of a violation seems unreasonably long, the right to participate in the standard-setting process by offering evidence and comments on proposed standards, the right to request the Department of Health to determine whether substances found in the workplace are toxic, and the right to have the Secretary of Labour seek redress for discrimination resulting from the exercise of rights under the Act.

The *Employees' Health and Safety Act*, 1976 (EHS) in Ontario, Canada contains even more extensive provisions whereby an employee is allowed to refuse to work where he has reasonable cause to believe that a condition is unsafe, likely to endanger himself or another employee, or is in contradiction of the Act or any regulations under it.[51]

If such rights were given to workers, then they would acquire a substantial measure of protection despite the weakness of an inspectorate of very limited resources, unable and unwilling to prosecute. Moreover, these rights would enable action to be taken to *prevent* accidents, in contrast to the present limited post hoc right to sue in tort for negligence or breach of statutory duty.

However, no such rights have been incorporated in regulations under the South Australian *Industrial Safety Health and Welfare Act* 1972, although there is provision for safety supervisors in construction work and for the appointment of workmen's inspectors under the *Mines and Works Inspection Act*.[52]

The only provision in the Tasmanian Act giving workers enforceable rights is that in s. 34 for the appointment of employees safety representatives who may consult with employers. In principle, this general duty to consult has persuasive force. However, the lack of specifications as to what constitutes 'consultation' provides considerable latitude to an employer for only minimal fulfilment of this legal obligation. Nor is he required to disclose information concerning health and safety issues relevant to his firm, and without this information the power of safety representatives will be further weakened.

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51 Once an employee has exercised this right a prescribed procedure is to be followed in which reporting to the employer occurs, followed by investigation by the latter in company with the employee and another appropriate representative. The procedure goes on to detail the further actions where the employee remains dissatisfied at the remedial action taken. The calling in of an inspector, with subsequent reporting and the posting 'in a conspicuous place' of a copy of the inspector's decision or report, the rights of appeal of both employer and employee when threatened with dismissal, discipline or suspension of the employee by the employer, then follow.

52 In New South Wales limited power is also given to the secretary of an industrial union of employees under the *Factories Shops and Industries Act* 1962, s. 145.

The very limited legal right given to employees is consistent with the existing philosophy of self regulation at the plant level, which hinges on more *voluntary* management — labour interaction rather than on legal restraint. Voluntary self-regulation is untenable for the reasons previously stated, but appropriate regulations embodying workers' rights are not likely until this philosophy is re-assessed.

F. *The Safety Bias*

Neither full enforcement, nor workers' rights would give complete protection against health hazards. Unlike safety hazards, the effects of health hazards may be slow, cumulative, irreversible and complicated by non-occupational factors. The toxic effects of exposure to chemicals may not be evident for years. The very nature of health hazards has meant that a pervasive safety bias has affected legislation, the setting of standards, enforcement, manpower developments, employer/employee education and technology developments.

Thus the select committee of the South Australian House of Assembly commented:

> The committee considers it essential that the safety and health of persons who work with new materials and new processes should be safeguarded. Up to now the labour inspectorate has tended to lag behind in this respect. We consider that some safety and health problems could be avoided if the inspectorate was in a position to give advice and direction to industries in early stage of the development of new processes and the use of new materials. The labour inspectorate needs continuously to improve its skill and professional expertise to carry out its functions. There is still much to be done in health questions and the proliferation of more subtle hazards must be the subject of continuous vigilance.[53]

In Tasmania, the Department of Labour makes a number of investigations each year concerning vapours, gases, fumes and dusts, and many problems associated with dusts are referred to the Department for investigation and advice. In August 1976 an occupational health group was formed comprising officers of the Occupational Health Service of the Division of Public Health. Officers of the Department of Labour have been conducting investigations into industrial noise and deafness, asbestos and dust problems.

However, systematic researching and establishing of 'safe levels' of exposure for every chemical product in commercial use is impossible in any practical sense, not least because of problems of establishing causation and the expanding range of new chemicals (there are already over 12,000 materials of known toxicity in commercial use today). Clearly an independent national body of sufficient resources and specialisation devoted to the establishment of standards, coupled with an adequate system of enforcement is a minimum requirement. Until then, the danger remains of special interests withholding or distorting potentially damaging information. Perhaps, partly for this reason, the Woodhouse Com-

53 Report of the Select Committee *op. cit.*

mittee recommended that annual reports of registered companies should be required by law to include prescribed information about accidents and occupational diseases suffered by the companies employees, and about preventive measures taken by the company.

In the meantime, the related policy question remains of whether to prohibit use or consumption of a material until it is proven safe, or to allow its use until it is proven harmful.

Conclusion

The effectiveness of safety and health policies in the long term can only be gauged by continued observable improvement in the workforce. Whilst the gross inadequacy of statistics on health and safety in Australia makes measurement extremely difficult, it is clear that the traditional system operated in the Australian States has not succeeded in reducing industrial accidents to anything like an acceptable level. Indeed, the Tasmanian statistics suggest an increase in accidents, though the Department of Labour claim that, 'it would be quite wrong to conclude from these figures that the industrial accident situation in the State has deteriorated as suddenly or alarmingly as the statistics suggest. In fact the experience of this Department suggests an overall improvement of this area'.[54]

Although the *Industrial Safety Health and Welfare Act* 1977 introduces some welcome changes, it is little more than a statement of faith in existing principles — since the law was rarely invoked before the Act (as a matter of policy) it is not expected that changes in the law will have much impact except on those employers who are already willing and able to comply with the legal standard, and who only require legislative guidance in order to pursue voluntary self-regulation.

The alternative advocated is of enforcement of statutory regulations, backed by criminal sanction where necessary. Such an approach has never been applied to industrial safety in Australia or in Britain. In the United States it is too early to appreciate its full results. What is clear is that unless legislation or other methods (*e.g.* insurance or taxation) are employed to exert pressure on industry from outside, then the safety performance of an industry will be restricted by market forces to what is commercially expedient. Only to the extent that economic benefits exceed costs, are industrialists likely to implement safety measures.

If we are not prepared to devote sufficient resources to force compliance with the law, then at least some success could be achieved by giving workers the rights to 'police' the workplace themselves. But this in itself is no panacea for reducing health and safety problems.[55] In-

54 1974 *Annual Report of the Secretary for Labour on the Administration of the Factories, Shops and Offices Act 1965.*

55 In South Australia only limited interest has been shown by workers in their (albeit limited) rights under the Act. Safety representatives have not been elected, nor committees formed in many firms. The problem is particularly acute in construction work, where different unions or trades may be involved, and where co-operation between them is very limited.

deed, reliance cannot be placed on any simple policy instrument, whether it be enforcing the law, market incentives, the generation, dissemination and utilisation of knowledge, self-regulation, the importance of psychological factors[56] or the development of personnel of the various professions in unions, management and in government with the requisite knowledge of the issues.

Each of these strategies has a part of play, and they must not be looked upon as alternatives. The *Industrial Safety Health and Welfare Act* 1977 therefore, despite its shortcomings, is a welcome improvement to the previous legislation. It provides us with a comprehensive Act, increased flexibility, enhances understanding by its clear statement of general principles and duties, involves the workforce in the safety effort through committees and representatives, and improves and simplifies administration. Inasmuch as safety factors can be accommodated without higher capital investment or expenditure of labour and money, then the Act might yet play a valuable role.

56 Research has consistently shown the importance of psychological factors and the effects of education, and the influence of such factors as age, experience and fatigue on safety levels. See Hale and Hale, *A Review of the Industrial Accidents Research Literature*, (1972).