

## **Working Paper 13**

# **Thinking Laterally: Restorative and Responsive Regulation of OHS**

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## **Introduction**

This paper argues for six propositions to advance a lateral approach for the restorative and responsive regulation of occupational health and safety (OHS). These propositions are as follows.

1. Very high maximum financial and other penalties are needed for OHS offences. These need only be used rarely but they need to be large enough to allow big penalty discounts for good OHS management and to pay for large bounties to workers or unions who launch successful private prosecutions.
2. Because Australians support severe punishment of OHS offenders, innovative OHS agency heads (in the manner of former Australian Competition and Consumer Commission Chair Allan Fels), can publicise egregious under-punished cases in ways that make successful calls for very high maximum penalties.
3. In a world of very high maximum penalties with large penalty discounts for credible OHS management, most firms can be nudged to establish credible OHS management.
4. In a world with large penalty discounts for credible OHS management, workers and unions would rarely find it lucrative to launch private prosecutions against employers with impressive OHS performance.
5. Under laws which only allow private prosecutions by unions and workers where the state OHS agency fails to take enforcement action, business would support a well funded state OHS agency and would call them in whenever a serious breach occurred.
6. The above set of five propositions are conditions where business and OHS regulators could be expected to commit to restorative and responsive justice where business takes active responsibility for restorative justice inscribed in enforceable undertakings.

After making a case for each of these propositions in turn, I will briefly describe the kind of restorative and responsive justice they might enable. The lateral aspect of the proposal is about the connections between the propositions. A ‘Naderesque’ approach is seen as the path to more innovative (in Australian terms, Allan ‘Felsesque’) OHS enforcement. ‘Naderism’ and ‘Felsism’ are seen together as ways of securing credible sanctions that are actually used by the courts. Credible sanctions enable credible discounts for excellent OHS management and credible bounties for private enforcement. All this paradoxically opens a path to a restorative justice approach to OHS based on collaborative problem solving among employers, workers and government. In this vision, the agent that needs to think laterally in order to trigger such a set of cascading possibilities is the trade union movement. It has both the triggering capability and an interest in pulling the triggers for the six propositions as a path to enhanced relevance and union membership.

## **Community Support for Very High Maximum OHS Penalties**

Australians, like citizens of all other countries from which I have seen evidence on this question (Grabosky, Braithwaite and Wilson 1987), think OHS offences are very serious matters which should be very severely punished. In an Australian Institute of

Criminology survey of 2551 Australians in 1986 (Grabosky, Braithwaite and Wilson 1987), the respondents thought serious OHS offences deserving of considerably more punishment than armed robbery, child-bashing, wife-bashing and burglary. Of course convicted offenders of the latter type then, as now, get much heavier punishment and are vulnerable to longer maximum prison terms than OHS offenders. Of the 14 offences rated in that survey, only stabbing a victim to death and heroin trafficking were rated as more serious. Substantial minorities of up to 32 per cent of Australians thought the serious OHS offences should attract long prison terms. These were offences of a type which had never resulted in anyone going to prison up to that time. Most recommended fines, however. The average fine recommended for one offence that was based on a real South Australian OHS case was 200 times higher than that actually imposed by the South Australian court concerned. So why don't democratically elected governments punish OHS offences at the level the community wants?

OHS penalties are considerably higher today than they were then, though they are still much lower than in many other countries. New South Wales has the highest penalties – a maximum penalty of \$825,000 for a repeat offence by a corporation or \$550,000 for a first offence. By very high penalties, in my Proposition 1 above, I am thinking of penalties that might reach \$100 million, so we might see the eight figure penalties that we now quite frequently see under the Australian *Trade Practices Act*. In the next section, I will try to tell the story of how the Australian Competition and Consumer Commission (ACCC) came to acquire such enforcement capabilities. However, the Allan Fels story is not the only one of this kind one could tell. There is also the story of Michael Carmody, the Australian Commissioner for Taxation. In the 1986 study, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies*, Grabosky and Braithwaite's (1986, p. 221) multivariate analysis classified most state OHS agencies alongside the Australian Taxation Office in one of the 'token enforcer' groups. These agencies initiated a steady flow of prosecutions that led to "derisory average penalties which can only be interpreted as a slap on the wrist" (Grabosky and Braithwaite 1986, p. 226). However, the sharp end of tax enforcement has become much sharper, in comparison to OHS. In 2003 a father and son were fined a record \$53 million for tax evasion by their family business and in a separate court case ordered to repay \$9.2 million in evaded tax plus interest (Sydney Morning Herald, 28 June, 2003). Sixty people were imprisoned for Commonwealth tax fraud in 2002 and that number is expected to be much higher for 2003. How many OHS offenders have gone to jail this year? Are there any? The most aggressive campaign of Michael Carmody has been against the non-compliance of the legal profession. We have seen the spectacle of a judge being sent down from Queensland to try a Victorian judge amid a flurry of media interest in 'white wig criminals'. His honour had had six prior tax convictions when he was appointed to the bench, something he did not disclose at the time of the appointment (The Age, 9 March, 2001).

The problem has been worst in New South Wales where 160 barristers have been referred, by the Commissioner, for investigation with a view to criminal prosecution. In the media, this enforcement campaign has been extremely popular with the people of New South Wales and also seems to have been effective. The amount of tax paid by New South Wales barristers increased by 36 per cent in 2001 in terms adjusted to the consumer price index, compared to 1998 (Commissioner of Taxation 2001, p. 61). Multi-million dollar tax penalties for Australia's richest individuals and corporations

have become much more common. Mr. Carmody attracted particular interest and support from the Australian community when he took Australia's richest man, without much success, right up to the High Court.

What can the political logic be of this new phenomenon of a Carmody or a Fels even taking on the most powerful media barons in Australia? Why has that not proved politically fatal for them? In 1986 Australians gave serious OHS offences more than three times the seriousness score of serious tax evasion. Yet OHS enforcers still rarely put the most rich and powerful Australians in the dock.

### **Allan Fels and His Merry Men and Women**

I will tell in some detail the story of the rise of Allan Fels's fame as a slayer of corporate dragons from the perspective of a semi-insider. An argument against doing this is that it makes me appear full of my self-importance. However, for someone who writes about the significance of hope and self-efficacy in struggles to change the way we respond to powerful corporations, there is some virtue mixed up in the vice of having too much of a sense of one's self-importance. OHS enforcers tend to have an impoverished sense of their self-efficacy. If they see merit in my six point proposal, they will tend to be devoid of any hope for the political feasibility of overcoming the resistance it would engender from powerful business interests. My colleagues in the consumer movement felt that way in 1982 about the impossibility of putting backbone into the enforcement of the *Trade Practices Act* when I became Director of the Australian Federation of Consumer Organisations (AFCO). So I tell the story as a semi-insider's account to enliven my attempt to instil hope among fatalistic thinkers about regulation. Nonetheless, I want to emphasise at the outset that my personal contribution to shaping these events was very minor indeed in comparison to all the other people I will mention in my account and a great many others who are not mentioned.

At AFCO we made it one of our campaigning priorities to highlight the abysmally infrequent and low penalties imposed by both state consumer affairs agencies and the ACCC (then the Trade Practices Commission). The total consumer protection (Part V of the *Trade Practices Act*) penalties imposed by the Commission during its first ten years ranged from \$500 in the lowest year to \$289,400 in its record year for total fine collections (1980-81). In the 1970s the then federal labour Attorney-General, Lionel Murphy, had put imprisonment into the *Trade Practices Act* as one of the available sanctions, but this was never used and was excised from the Act by the subsequent conservative government's Minister for Business and Consumer Affairs, John Howard. Aggregate penalties for competition (Part IV) breaches of the Act between 1974 and 1984 ranged from zero in the two lowest years to \$320,000 for the most aggressive year in the first decade of the Act. Of the recommendations in Braithwaite, Vale and Fisse's (1984) AFCO Report - increased cash fines, equity fines, corporate probation, adverse publicity orders, community service orders, enforcement training and improved resourcing of enforcement - all but equity fines have now been implemented at the ACCC and in its statute, although the last of these reforms was not put in place until 2001. The report was much discussed in the media and some of the discussion in state parliaments, such as Queensland, led to minor change - the Bjelke-

Petersen government introduced almost immediate increases in cash penalties for consumer protection offences. However, nothing was happening on the federal front.

Part of the AFCO campaign for a more aggressive approach by the Trade Practices Commission was to lobby the Attorney-General for a consumer movement representative as a part-time Commissioner who could sit in on enforcement decision-making. After repeated rebuffs, we got our chance when two part-time Commissioners were appointed from companies that had been successfully prosecuted by the Commission. The AFCO launched its 'putting foxes in charge of the chicken coup' campaign which attracted bad publicity for the government. On the next occasion, a part-time Commissioner was appointed it was a former Australian Consumers' Association Council Member who AFCO had nominated to the government, Professor David Harland. A year later, I was appointed as a part-time Commissioner, which commenced a period of more than 10 years when the consumer movement had placed two of its leaders on the Commission.

While Attorney-General Gareth Evans did much to strengthen the enforcement capabilities of the Act, Prime Minister Hawke was keen to please the Business Council with the Chairman he appointed. Their nominee, Bob McComas, was a Director of Australia's largest tobacco company and was not aggressive in his enforcement of the Act. McComas' worst mistake came after a complaint from anti-tobacco groups about a Tobacco Institute advertisement arguing that inhaling passive tobacco smoke was harmless. In a considerable feat of poor judgment, McComas personally negotiated a remedial advertisement with the Tobacco Institute. (He negotiated it in a 'smoke-filled room' as the joke in the Commission went). McComas not only had been a Director of the leading tobacco company, he became its Chairman when he left the Commission. My argument within the Commission was that McComas either should have removed himself from negotiating the remedial advertisement or at least had another Commissioner in the room from the other side of the fence, when the deal was negotiated. Moreover, the claims in the remedial advertisement he approved were still false, so he had approved a further breach of the *Trade Practices Act* in the process of supposedly enforcing it. Others in the Commission were also angry and a front-page story appeared about dissatisfaction in the Commission with the way the Chairman handled the settlement. This emboldened AFCO and Action on Smoking and Health (ASH) to launch a private action in the Federal Court that argued the Commission had approved a remedial advertisement in response to their complaint which itself was a breach of its Act. The Federal Court accepted this argument and in finding that the evidence did indicate that passive smoking was dangerous to health. The decision had a substantial national and international impact in banning smoke-filled rooms! The case was the beginning of the end for McComas with the government deciding he would not be reappointed. His successor Bob Baxt, while also a nominee of the Business Council, was a more aggressive enforcer of the Act and his successor, Allan Fels, much more aggressive again.

In the middle of McComas' term John Wood, the Director of the Federal Bureau of Consumer Affairs, led an argument to the government that there should be a full-time Trade Practices Commissioner from a consumer movement background. Alan Asher, former Public Affairs Director of the Australian Consumers' Association, was appointed and later promoted to Deputy Chairman. Asher had a huge impact on

enforcement thinking at the Commission, particularly on the use of enforceable undertakings (Parker 2003a&b), adverse publicity and higher penalties. The Fels-Asher team, with extremely competent support from an ACCC staff led by CEO Hank Spier, told the story to the Australian people of why specific acts of corporate misconduct were egregious and why enforcement should be much more aggressive than it had historically been. They were both good storytellers on the media. Leading consumer advocates of the period – like Robin Brown (who later worked for the Commission), Liza Carver (who later served as a part-time Commissioner) and Louise Sylvan (nominated by the government to succeed Asher as Deputy Chair) – came in behind the Commission press releases adding more zest to the story. Fels and Asher proved to have what I would call a responsive regulatory imagination. They used the spectre of the publicity and multi-million dollar fines in their big cases to motivate highly creative informal settlements and then enforceable undertakings after they were introduced in 1993 (for a discussion of this strategy at the Commission see Parker 2003a&b, Ayres and Braithwaite 1992, especially chapter 1, Fisse and Braithwaite 1993). The undertakings often involved large compensation payments (in one case of \$100 million) and independent review, revision and external monitoring of trade practices compliance systems. The strategy spawned a new trade practices compliance consultancy industry and a new trade practices compliance professionalism (see Parker 2002).

Asher's appointment to the Commission, like mine, had attracted howls of protest from the business community and the financial press. In contrast, the appointment of Allan Fels was smooth, pushed by the leadership of the Australian Council of Trade Unions and consequently embraced by both the Prime Minister and Treasurer. It was an appointment from the other side of the big end of town and we in the consumer movement were marginal, probably irrelevant, in supporting the Fels appointment. However, Louise Sylvan in particular had been working hard at educating the ACTU leadership on why the *Trade Practices Act* was important. The consumer movement also worked with the ACTU in lobbying for a Prices Surveillance Authority, which Fels served as Chairman before joining the ACCC, and whose staff was later absorbed into the ACCC, becoming the heart of its utilities pricing work. With ACTU leaders, I had been a member of the committee chaired by Paul Keating from the National Economic Summit that drafted the Prices Surveillance Act. The consumer movement had not worked effectively with the ACTU on many things. In his early years, the backing Fels enjoyed from the ACTU, particularly his former friend Bill Kelty, was obviously much more important than the support he continued to enjoy from the consumer movement as we sung his praises to the government. Like Taxation Commissioner Carmody, Fels was generally deeply resented, even hated, by big business. Again, like Carmody, this was not politically fatal. Even after the Howard government was elected and support from the ACTU became a minus rather than a plus, Howard reappointed Fels. The political genius of Fels is that he used his initial support from the ACTU and the consumer movement, combined with his position as head of an independent statutory authority, to cultivate support through the media from small business and from ordinary Australians who saw him as their consumer champion, the only regulator with the guts to stand up to big business. Being hated by big business was popular with the Australian people. The Howard government didn't much like what Fels was doing, but he was too popular to sack. Fels's final triumph was to persuade Prime Minister Howard to include imprisonment as a sanction under

Part IV of the *Trade Practices Act*. In the 1970s John Howard as Minister for Business and Consumer Affairs had taken imprisonment out of (Part V of) the Act.

Pessimists about putting backbone into enforcement capability against big business might say there is a lot of contingency in this story. Fels was not on his own. The push for effective enforcement from Alan Asher, John Wood, Liza Carver, Robin Brown and others from the consumer movement who found themselves in governmental positions was also important but this is not so contingent a story. It is a standard story of social movements infiltrating the state that is well documented in other literatures such as on the infiltration of the Women's Movement to become 'femocrats' (Sawer 1990). Compared to the women's movement, the trade union movement and the environment movement, the consumer movement was able to accomplish this as a comparatively weak political force. The business appointees to the agency made some mistakes that the consumer movement was able to exploit. While the particular mistakes were contingencies, all actors make mistakes that NGOs can expose in the public arena. Fels was lucky to have an outstanding group of senior staff to work with. However, good leaders who do not inherit such riches can create them, as one could argue is closer to the story of Michael Carmody in taxation. Having a degree of independence through heading a statutory authority, as opposed to answering to a minister, was doubtless an important contingency that NGOs must keep in mind with the enforcement institutions they lobby for (see Goodwin 2003).

### **Ralph Nader as an Alternative to Allan Fels**

During those long periods when NGOs like trade unions fail to get Allan Fels style enforcers in charge of the key OHS agencies, the best strategy is to give the agency a hard time, as in alleging they are 'putting the fox in charge of the chicken coop'. This needs Ralph Nader like figures who not only expose the failure of the agency to honour its legislative mandate (as in the passive smoking case), but also pre-emptively expose companies' misdeeds, forcing the regulator onto an agenda that is directly reactive to the NGO's agenda. Governments can be presented with a tacit bargain by the trade union movement over OHS enforcement policy: either put an Allan Fels type in charge of the OHS agency or we will invest in creating a Ralph Nader to discredit the work of a more benign regulator who is popular with business. The message to government is that "you must choose between being tough and unpopular with noncompliant businesses or being benign and unpopular with us, and we will make it our business to make you unpopular with the broad mass of the people". At the time when top appointments are made to regulators, NGOs should make this threat an explicit one. This is one kind of threat an NGO can make with greater credibility than can business. It can be made with greater credibility in a country like Australia than in larger economies that have larger numbers of Nader-like figures competing for media attention. And for the same reason it can be more easily done at the state level than at the national level. Australian NGOs generally get more done by mostly working with governments and business to shape policy. So the thoroughly combative Nader-like niche is not such a crowded one that there is a shortage of media interest when an NGO jumps into it from time to time. An attractive social movement strategy in the Australian context is to organise splinter NGOs that are 'hard cops', attacking the collaboration with governments of 'soft cop' NGOs.

## **Tough Enforcement and Compliance Systems**

Imposing bigger penalties delivers no guarantee that companies will protect themselves from them with corporate compliance systems. The agency must give signals that in deciding whether to prosecute, serious account will be taken of the existence and quality of their compliance program. These signals were explicitly part of the Fels/Asher strategy. Justice French in *Trade Practices Commission v CSR Ltd* (1991) ATPR 41-076, a former ACCC part-time Commissioner, explicitly indicated that compliance programs would be taken into account in the process of his court handing down penalties as well, a decision vindicated by subsequent ACCC cases before the courts which emphasised that penalty discounts would depend on the quality of compliance programs (see Parker 1999, Parker 2002, pp. 249-50).

The next part of the strategy was to negotiate softer settlements with companies that had broken the law when they undertook to move the state of the art of implementing trade practices compliance systems to a new level of rigour. With the assistance of ACCC insiders like Bill Dee and business and law firm outsiders like Brent Fisse, Asher nurtured the creation of the organisations and professionals that came to be the heart of the Australian Compliance Institute (a number of whose member compliance consultants are former ACCC staffers) and the Society of Consumer Affairs Professionals in Business (where John Wood was the consumer movement leader who played a catalytic role). These built trade practices compliance professionalism in Australia and helped build a pool of the professionally competent to assist companies with compliance programs.

While OHS lags behind competition and consumer policy in the sanction capabilities available to it, with respect to OHS professionalism it is ahead of the game. Training in OHS compliance systems is well developed, so there is no need to create it from scratch in the way there was with trade practices compliance. It is just a matter of the regulatory agency increasing explicit demand for the use of OHS management consultancies in the aftermath of major problems and as an expectation if companies wish to avert future prosecutions.

## **Private Prosecutions**

Gunningham and Johnstone (1999, p. 335) argue that “OHS prosecutions might be *initiated by parties affected by poor OHS management* (for example, trade unions and public interest groups) if the OHS agency does not, and if the alleged contravention falls within the OHS agency’s prosecution guideline.” My suggestion is to make this policy more aggressive by not only allowing it but encouraging it, by enabling private parties who launch successful prosecutions to claim a healthy proportion (say half) the very large fines available under my proposal. On the other hand, I would make the private prosecution policy more restrictive by barring it if the OHS agency takes any enforcement action consistent with its enforcement policy even if that is not a prosecution. So if the OHS agency takes the restorative justice route and successfully negotiates an enforceable undertaking that is credible to the court in terms of the agency’s published enforcement policy, then the court would strike down the private prosecution. The idea of this is to give the firm an incentive to call in the OHS

agency and start negotiating an enforceable undertaking that is credible in order to fend off private prosecutions. Of course, this will backfire for the firm when the OHS agency decides to reject all leniency and prosecute with the full force of its powers. When there are large sentence discounts for internal management systems, the credibility of which has been regularly certified by independent outside auditors, having such systems in place is another way of staving off private prosecutions. The large sentence discount makes the private prosecution less economic because of the discounted recovery but also less likely to succeed because of the greater difficulty of proving that a corporation has a culture of OHS recklessness when there exist audit reports that independently testify to the contrary.

In the large firm sector where OHS inspections are frequent, private prosecutions can be a check and balance on capture of the regulator. As in the passive smoking case at the McComas' Trade Practices Commission, an important motivation in taking the risks of large legal costs from a private action is the desire to expose a captured regulator and thereby create the conditions for the appointment of more aggressive enforcers of the law. In the small firm, outwork and underground sectors, the value of private prosecutions is to create some deterrence in conditions where neither regular OHS inspections nor OHS management systems are likely to be operative. In the conditions of our contemporary deregulated labour market, it might make sense to make multi-pronged union legal attacks on lawless firms in these sectors viable by also allowing for private prosecutions and treble damages for underpayment of minimum wages, absence of workers compensation insurance and other breaches of all labour laws.

A structural analysis of such robust private prosecution capability is that it might attract union litigation not so much to make money as to spearhead unionisation pushes in workplaces, where the costs of this might be fully or partially funded by the treble damages from the legal actions. The other side of the structural analysis is that it would create conditions where employers actually lobby for the resourcing of government inspectorates to displace 'rogue' union enforcers.

### **Tripartite Restorative and Responsive Justice**

From a restorative justice perspective, there can be virtue in allowing private prosecutions. Restorative justice is partly about empowering victims in criminal justice and qualifying historically recent state monopolies of enforcement. It is restorative justice thinking in German criminal law, for example, that sees today rape trials often with two prosecutors present – one representing the state, the other the victim (often funded by state legal aid). Restorative justice philosophy is about equal consideration for the justice claims of defendants, victims and communities affected by the alleged crime.

With OHS, the idea of the state, workers and employers all being able to take credible enforcement action against each other is that each will display an enforcement pyramid to the others that will motivate all to sit together in the restorative justice circle to engage in a genuine way with conversational regulation (Black 1997 and 1998). The state displays a hierarchy of state enforcement actions that might range from improvement notices to mandating the preparation of a safety case, to

prosecution and deregistration and a good many things in between. There is virtue in workers having more rungs in their enforcement pyramids than go slow, work to rules and stop work meetings, with private prosecutions as a less draconian possibility before resorting to a fully-fledged strike. Employers have the most subtle range of enforcement tools, from reprimands to reassignment to less attractive tasks, withholding bonuses or promotions, up to dismissal. Both NGOs (like unions) and employers also have a range of ways they can regulate the state. Enforcing the Nader strategy discussed in the last section is an example of how NGOs can regulate the state, just as big business complaining to the Prime Minister about the need to trim Alan Asher's wings is one of their regulatory strategies.

The more clear it is that business, NGOs and government all have quite a range of escalatory options to deploy against the other two, the more sense it makes for the three to sit down together and see if they can discover a path to a win-win-win solution. In *Responsive Regulation*, Ayres and Braithwaite (1992, especially chapter 3) argue that the logic of tripartite responsive regulation is that it creates incentives for dialogic problem-solving, as opposed to punitive regulation. The paradox of the pyramid is that capability to escalate to really severe sanctions is necessary to motivate restorative justice at the base of the pyramid.

Restorative justice means a process where all the stakeholders in an alleged injustice have an opportunity to discuss its consequences and what might be done to right the wrong. It is about sitting in the circle discussing who has been hurt and then the victim being able to describe in their own words how they are coping with the hurt and what they are looking for to repair that harm and prevent this from happening again. It is about the virtue of active responsibility as opposed to the passive responsibility of holding someone responsible for what they have done in the past (Braithwaite 2002). Active responsibility means taking responsibility for putting things right in the future. So a common strategy in preparing for a restorative justice conference is to encourage everyone before the conference to think of any ways they might be willing to own a bit of responsibility for the past by offering to do something to make things better for the future.

Often restorative justice conferences break down because no one wants to own responsibility. When that happens, the skilled facilitator of a business regulatory conference adjourns. S/he then widens the circle again and again until s/he finds someone who will own responsibility. If an executive who was directly responsible for an OHS violation digs his/her heels in, claiming neither s/he nor the company has any responsibility, then we can widen the circle to include the executive's boss. Perhaps the boss proves to be an even tougher nut in refusing to accept any responsibility on the part of the employer. Then the circle can be widened to that person's boss or their boss. The advantage the facilitator has as the circle is widened is that statistically s/he is likely eventually to hit a softer target who can be motivated by shame or moral suasion to offer to take some steps to fix the problem and prevent recurrence. The disadvantage the recalcitrant offender has is that s/he knows that the facilitator deploying this strategy is likely eventually to reach a level of the organisation where good relations with the government over a conflict that is spinning out into something larger than it should be going to result in them being told to fix the problem at the end of the process. So why not avoid all that grief and be a constructive problem-solver up front?

So conceived, the circle is a more efficient strategy than iterated prosecutions against workers, manufacturers, suppliers, designers, franchisors, contractors, subcontractors, managers, directors, *all duty holders* (Gunningham and Johnstone 1999, p. 330) to own whatever bit of the responsibility for what went wrong is rightly theirs. The circle is about avoiding holding actors to totalising conceptions of responsibility: “It was your fault, not mine.” It is about trying to create a contagion of someone starting the ball rolling by saying “Well I think I should take responsibility for ensuring that next time this is done, because if I had done that on this occasion, the spillage of the chemical may never have happened.” Over-determined multiple responsibility for acting in the future to prevent what has gone wrong in the past is also the best hope for taking safety ‘beyond compliance’ (Gunningham and Sinclair 2002), for forging together creative problem solving strategies that might never have been seen in a process that focuses on deciding who to single out for blame.

In criminal law, the evidence from randomised controlled trials that restorative justice prevents future crime better than courtroom prosecutions is becoming moderately strong, at least with violent offences (Braithwaite 2002, Strang and Sherman 2003). However, I have argued that this is only so, at least in some contexts, because the restorative justice circle occurs against a background of the perceived inexorability of escalation to seriously punitive justice if an offender tries to just walk away from their responsibility. So my argument in *Restorative Justice and Responsive Regulation* (Braithwaite 2002) is that restorative justice needs a regulatory pyramid, even if it is only the implicit one of a parent or teacher saying that bullying another child is not something that will be allowed to stand. The safety of the bullied child will be addressed and the harm repaired, one way or another. The parent or teacher projects an image of invincibility. S/he may not be sure what form escalation will take, but whatever it takes, s/he is not going to walk away and leave this child unprotected from bullying and the injustice of the bullying unchallenged. The attitude we should want workplace OHS inspectors to adopt to OHS abuses (whether they are from government, unions or business itself) should be no less than that inexorable will to confront and solve the problem, and learn from it.

Learning leads to the final virtue of the restorative justice circle. The evidence is that communication problems, which often means failure to learn from the same mistake being made many times before, underlies many serious OHS violations (Braithwaite 1985). Having all the stakeholders in the circle sharing their experience of the problem in their own voice is a better way of promoting learning than having the problem reduced to legal concepts in the words of lawyers who act as mouthpieces for the stakeholders in a courtroom.

## **Conclusion**

We have come a long way from an Allan Fels media conference about some egregious wrongdoing and why stiffer and more creative sanctions are needed to deal with such matters in future. My argument is that such a high publicity strategy is the first step and creates the climate toward stakeholders wanting to jump into owning their bit of the responsibility for what happened. Restorative justice has not been subject to the rigorous experimental evaluation with OHS that we have been able to

implement with common crimes in Canberra and elsewhere. Nonetheless, it does seem to hold out hope of a richer dialogue that takes us beyond compliance to genuinely insightful learning from our mistakes. In these learning circles, the state is just one stakeholder. Most of the work of repair and future prevention is done by the other stakeholders who are closer to the action. For all that, the 'Felsesque' media conference announcing the mega-penalty is suggested as the crucial enabling event for the warm and fuzzy work of restorative OHS.

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