TWO CHEERS FOR PRESCRIPTION? LESSONS FOR THE RED TAPE REDUCTION AGENDA

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I INTRODUCTION

The Australian Federal Government's red tape reduction strategies and comparable initiatives to reduce regulatory burdens at state level[1] (exemplified by Queensland's claim to be 'aggressively tackling overregulation')[2] have prompted renewed focus on the role of regulation. In particular, what *type* of regulation should most appropriately be invoked to address various economic and social challenges '[i]n every facet of life, from aged care to agriculture, schools to small business, visas to veterans'?[3] Further, is it possible to substantially reduce the volume of such regulation without threatening the very social purposes that legislation was developed to protect?

The main target of red tape reduction strategies involves rules that specify in detail what is required of duty holders ('what to do and how to do it') variously described as: 'overly prescriptive regulations that add to business costs';[4] 'unnecessarily burdensome and *prescriptive* administrative requirements';[5] and 'the regulatory burden that is strangling Australia's economic prosperity and

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1 See, eg, a statement by the Queensland Attorney-General that 'the previous Government's view on workplace health and safety was all about regulation and red tape, which strangles business and reduces productivity and flexibility': 'Queensland Canvasses Less Prescriptive WHS Act', *OHS Alert* (online), 30 August 2012 <https://www.ohsalert.com.au/nl06_news_selected.php?selkey=48841>.

2 'Safety Concerns Raised about Deregulation Committee: And Much More', *OHS Alert* (online), 13 September 2012 <https://secure.ohsalert.com.au/nl06_news_selected.php?selkey=48951>.

3 Josh Frydenberg, 'We Must Loosen the Ties That Bind', *The Herald Sun* (Melbourne), 19 March 2014, 25.

4 Mark Stone, Victorian Employers' Chamber of Commerce and Industry, 'Federal Government's Red Tape Cuts a Win for Victorian Business' (Media Release, 19 March 2014) <http://www.vecci.org.au/policy-and-advocacy/news/media-releases/2014/03/19/federal-government%E2%80%99s-red-tape-cuts-win-victorian-#sthash.XEOL1NLa.dpuf>.

5 Management Advisory Committee, *Reducing Red Tape in the Australian Public Service* (Report, Australian Public Service Commission, 2007) iii <https://resources.apsc.gov.au/2007/redtape.pdf> (emphasis added).

development'.[6] Such standards are better known by students of regulation as specification standards. They are seen by their detractors as imposing an unreasonable and onerous burden on business, prompting the Commonwealth Government to commit to cut 8000 purportedly redundant pieces of legislation[7] at a purported saving of $1 billion.[8] The Council of Australian Governments has also identified 'reducing red tape' as an ongoing priority.[9]

The Commonwealth and state government initiatives are hardly the first of their kind. The themes they expound are familiar ones, particularly within the Anglo-Saxon world,[10] and represent readily recognisable strands of neoliberalism – essentially the enterprise of embedding market values and structures within economic *and* social and political life.[11] This worldview has permeated the political agenda in Anglo-Saxon countries for a considerable period, usually gaining most traction under right-leaning governments which have sought to deregulate, to privatise and in various related ways, to 'roll back the state' and free up markets. The titles of the reports produced by official inquiries into regulation over this period tell their own story. In regulatory terms, probably the most influential has been the United Kingdom's ('UK') Hampton Review in 2005: *Reducing Administrative Burdens*.[12] This was followed up by the Better Regulation Task Force's report entitled: *Regulation – Less Is More: Reducing Burdens, Improving Outcomes*.[13] The bureaucracies that such governments set up similarly portray their misgivings about regulation and their sympathy with 'over-regulated' business. This is evident in the fact that the various 'Better Regulation' initiatives in the UK were located in the Department for Business,

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6 Liberal Party of Australia and National Party of Australia, *The Coalition's Policy To Boost Productivity and Reduce Regulation* (Policy Document, July 2013) 2 <http://lpaweb-static.s3.amazonaws.com/Policies/ProdPolicy10Jul13.pdf>; see also Liberal Party of Australia, 'The Coalition's Deregulation Reform Discussion Paper' (Discussion Paper, 2 November 2012) <https://lpaweb-static.s3.amazonaws.com/12-11 02%20The%20Coalition%E2%80%99s%20Deregulation%20Reform%20Discussion%20Paper.pdf>.

7 As to the related question of whether any form of legislative regulation is needed in workplace health and safety ('WHS') the arguments are so well rehearsed that they do not bear repetition, but see generally Neil Gunningham, *Safeguarding the Worker: Job Hazards and the Role of the Law* (Law Book, 1984), 276; for a contemporary collection, see Theo Nichols and David Walters (eds), *Safety or Profit: International Studies in Governance, Change and the Work Environment* (Bayswood Publishing, 2013).

8 Ian Macfarlane and Josh Frydenberg, 'More Savings through Red Tape Cuts' (Media Release, 15 May 2014) <http://minister.industry.gov.au/ministers/macfarlane/media-releases/more-savings-through-red-tape-cuts>.

9 See 'COAG Commits to Reducing "Red Tape" in Model WHS Act', *OHS Alert* (online), 6 May 2014 <http://www.ohsalert.com.au/nl06_news_print.php?selkey=51657>.

10 Primarily Australia, Canada, New Zealand, the United Kingdom (noting the constraints imposed by European Union directives) and the United States.

11 For an overview of neoliberalism as a collection of political ideas, a political movement, a set of policy practices, and a way of organising the capitalist economy: see Damien Cahill, Lindy Edwards and Frank Stilwell (eds), *Neoliberalism: Beyond the Free Market* (Edward Elgar, 2012).

12 Philip Hampton, HM Treasury, *Reducing Administrative Burdens: Effective Inspection and Enforcement* (Final Report, March 2005) <http://webarchive.nationalarchives.gov.uk/20090609003228/http://www.berr.gov.uk/files/file22988.pdf>.

13 Better Regulation Task Force, *Regulation – Less Is More: Reducing Burdens, Improving Outcomes* (Report, March 2005).

Enterprise and Regulatory Reform, or that the Australian Office of Regulatory Reform was for a long time located within the Productivity Commission.

During the same period, governments have also experienced considerable pressure from industry to reduce the economic burden of complying with regulation. Although on most calculations the financial costs of compliance are relatively modest,[14] industrial lobby groups have argued strongly, and often successfully, that the imposition of such regulation puts industry at a competitive disadvantage. In the era of expanded globalisation in which the flight of capital to low taxing and low regulating jurisdictions is becoming increasingly plausible (though far less often demonstrated), governments have listened particularly closely to industry concerns and frequently responded sympathetically. Accordingly, the finding of the 2013 Australian Institute of Company Directors' *Directors Sentiment Index*, that company directors see too much regulation and red tape as the top economic challenge facing Australian business,[15] forms a contemporary example of a theme with a long lineage.

Against this backdrop, it is timely to revisit the questions of what types of social regulations are most appropriate and whether prescription is indeed the villain of the piece. Specifically, are all prescriptive regulations suitable targets for a red tape taskforce, or are only certain subcategories of them suitable? If the latter, how can one determine which prescription is unnecessary and which is not? In terms of designing good public policy, how should regulation be designed to best deliver efficiency, effectiveness and equity in terms of regulatory outcomes, and what would be the implications for prescriptive regulation? More broadly, is government policy straying substantially from where evidence-based policy would take it, why is it doing so and what are the likely consequences?

A Methodology

This article will explore these questions through a sector-specific examination of contemporary workplace health and safety ('WHS') regulation in Australia. WHS regulation is a primary target of red tape taskforces, and indeed more than 70 per cent of directors cited in the *Director Sentiment Index* above, identified WHS (and preparing and paying taxes) as the aspects of their business most affected by red tape.[16] A sector-specific analysis is desirable

14 The actual costs of WHS-compliance in Australia are not known: Access Economics, 'Decision Regulation Impact Statement for a Model Occupational Health and Safety Act' (Report, Safe Work Australia, 9 December 2009) i <http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/465/DecisonMakingRIS_Dec09.pdf>. As regards the closely related area of environmental protection, see Allen Consulting Group, 'The Cost of Environmental Regulation in Victoria' (Final Report, Victorian Competition and Efficiency Commission, March 2009) <http://www.vcec.vic.gov.au/files/5abd9243-c456-4875-843b-a35d00e75f30/ACG-Final-Report-The-cost-of-environmental-regulation-in-Victoria.pdf>.

15 Australian Institute of Company Directors, *Director Sentiment Index: Research Findings* (Publication, November 2013) 13 <http://www.companydirectors.com.au/General/Header/Media/Media-Releases/2013/~/media/Resources/Media/Media%20Releases%20and%20Speeches/2013/0401513NATDSISecond%20Half%202013_v6.ashx>.

16 Ibid 18, 62.

because different industries with different characteristics may be suited to different types of regulation. Such an approach not only facilitates comparisons between different industry sectors but also enables a more fine-grained and grounded analysis than would be possible though an 'across the board' study.

The sector chosen for analysis is coal mining, not only one of Australia's most important industries[17] but also one of the most dangerous, with a fatality rate well above the national average and a history of multiple fatality disasters.[18] Although Australia's coal mine safety record has improved markedly in the last decade (due in no small part to regulation)[19] it still pales in comparison with that of some other high-hazard industries. The global chemical industry, for example, has a fatality rate some 10 times lower than the Australian coal industry.[20]

Two other sectors with different characteristics will then be compared with coal mine safety regulation to show how industries with different characteristics might require the application of a different standards mix. This analysis also demonstrates that while neoliberalism criticises prescription's one-size-fits-all approach, it is itself open to criticism for failing to recognise that prescription is far better suited to some circumstances than others.

The success of different types of regulation will be assessed against the Organisation for Economic Co-operation and Development's ('OECD') widely accepted evaluation criteria of effectiveness (in delivering its social objectives), efficiency (doing so at least financial cost to duty holders, government and others) and equity (in ensuring fairness in burden sharing).[21]

In addition to a conventional desk analysis, the article also draws from 28 semi-structured interviews conducted with industry stakeholders (primarily business executives, government regulators, trade union representatives and industry consultants) either explicitly for this project or as a by-product of a series of related projects on how the hazards of work are managed and regulated within the coal mining industry.[22] Since the writer's ethics clearance and undertakings given to interviewees preclude their identification, only general descriptions of their employment status are provided below.

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17 Mining overall accounts for almost nine per cent of Australia's gross domestic product, although the precise figure fluctuates substantially according to the commodity cycle. For current statistics, see Australian Bureau of Statistics, *Australian National Accounts: National Income, Expenditure and Product* (Publication No 5206.0, 3 June 2015) 35 <http://www.abs.gov.au/ausstats/meisubs.NSF/log?openagent&52060_mar 2015.pdf&5206.0&Publication&F03A46CF7EE15E38CA257E5800149ABF&&Mar 2015&03.06.2015&Latest>.

18 For a statistical overview, see Neil Gunningham and Darren Sinclair, *Managing Mining Hazards: Regulation, Safety and Trust* (Federation Press, 2012) 11–17. For current statistics, see SafeWork Australia, *Work-Related Fatalities* <http://www.safeworkaustralia.gov.au/sites/swa/statistics/work-related-fatalities/pages/worker-fatalities>.

19 Gunningham and Sinclair, above n 18, 11–16.

20 Jim Joy, 'A Review of Global Industry Health and Safety "Voluntary Initiatives"' (Research Report No C22042, Australian Coal Association Research Program, 2014) 70.

21 Cary Coglianese, 'Measuring Regulatory Performance: Evaluating the Impact of Regulation and Regulatory Policy' (Expert Paper No 1, Organisation for Economic Co-operation and Development, August 2012) 18 <http://www.oecd.org/gov/regulatory-policy/1_coglianese%20web.pdf>.

22 See Gunningham and Sinclair, above n 18.

As indicated above, the developments described in this article are similar to those taking place in various other parts of the Anglosphere. Particular reference will be made to the approach taken to regulation and deregulation in the UK, both under New Labour and under the recent Conservative–Liberal Democrat Coalition Government, since these serve to illuminate contemporary deregulatory initiatives in Australia.

B Outline

The article will proceed as follows. Part II examines the four main types of regulatory standards, the relationship between them and whether there is any single 'best' approach to standard setting. Part III asks whether there are circumstances where prescription (in the form of specification standards) remains necessary to secure high standards of WHS and if so, what these circumstances might be and how far they extend. Part IV examines the circumstances of three different industry sectors to argue that context counts and the desirability of different standards mixes. Part V discusses the implications of red tape reduction and whether it may be counterproductive in terms of its impact on WHS outcomes. It also examines the deregulation debate through the lens of social constructionism. Part VI concludes.

II REGULATORY OPTIONS

Few would challenge the need for regulation of WHS in the coal mining industry. The industry is hazardous and its long history of preventable fatalities, injuries and disease demonstrates, often tragically, the inadequacies of both voluntarism and of weak regulation. However, what is less clear is what form contemporary WHS regulation should take. In particular, what types of standards should be applied to the coal mining sector?

WHS laws incorporate four main, conceptually distinct, types of standards aimed at influencing behaviour though a variety of techniques. Following Bluff and Gunningham's classification, these are: (1) prescriptive; (2) principles; (3) performance; and (4) process-based standards.[23] A *prescriptive approach* (also known as a 'specification standards' approach) tells duty holders precisely what measures to take and requires little interpretation on their part. Such a standard identifies 'inputs', that is, the specific preventive action required in a particular situation. General duties (sometimes referred to as 'goal setting' regulation) set out *principles* which duty holders must follow, such as ensuring health and safety as far as practicable, leaving it to the discretion of the duty holder how they achieve those principles or goals. A *performance standard* specifies the outcome of the WHS improvement or the desired level of

23 Elizabeth Bluff and Neil Gunningham, 'Principle, Process, Performance or What? New Approaches to OHS Standards Setting' in Liz Bluff, Neil Gunningham and Richard Johnstone (eds), *OHS Regulation for a Changing World of Work* (Federation Press, 2004) 12.

performance but leaves the concrete measures to achieve this end open for the duty holder to adapt to varying local circumstances. *Process-based standards* identify a particular process, or series of steps, to be followed in the pursuit of safety, and range from the requirement to identify hazards and assess and control risks (found in many national standards), to the more ambitious requirement to engage in a systemic approach to WHS at the organisational level. Other, less important standard types include documentation and notification standards.

The deficiencies of prescriptive regulation are well documented, and were identified in the UK as long ago as Lord Robens' report of 1972.[24] The report pointed out that prescription tends to result in regulatory overload because so many individual obligations are imposed that they become impossible to comprehend, let alone to implement and keep up to date.[25] Under a prescriptive approach, inspectors become adept at identifying breaches of specific regulations that require little interpretation on their part, but are far less capable of addressing broader issues such as systemic problems or major hazards and significant risks. This is because prescription, by focusing on specified, clearly identified problems, results in unspecified (but serious) problems often being overlooked.[26] Typically, because it is difficult to keep up-to-date, it also results in the over-regulation of old hazards and the under-regulation of new ones. Moreover, prescriptive standards do not allow duty holders to seek alternative solutions, may stifle innovation and may be less cost-effective than alternative approaches. Prescriptive standards are also less suited to controlling risks that change over time, for example those arising from the organisation of work.

In the American context, Bardach and Kagan's classic text *Going by the Book* documents how inflexible, legalistic enforcement of prescriptive regulation discourages responsible behaviour and generates resistance that undermines regulatory objectives.[27] Standardised rules, they conclude, are ill-suited to the diversity, complexity and fluidity of the real world. More recently, the consequences of focusing on prescription and failing to identify deeper systemic failures (common precursors to low probability but high consequence events) was tragically illustrated in the United States ('US') by the US Chemical Safety Hazard Investigation Board analysis of the BP Texas oil disaster of 2005 in

24 Committee on Safety and Health at Work, *Safety and Health at Work: Report of the Committee 1970–72*, Cmnd 5034 (1972) 16–24 ('*Robens Report*').

25 See also on prescriptive regulation Bluff and Gunningham, above n 23, 18–19.

26 Robert Baldwin, Colin Scott and Christopher Hood, *A Reader on Regulation* (Oxford University Press, 1998) 15.

27 Eugene Bardach and Robert A Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Transaction Publishers, 2nd ed, 2002).

which 15 people were killed,[28] and by the Presidential Commission of Inquiry into the Macondo (Deepwater Horizon) oil blowout.[29]

In the case of coal mining where there is considerable variation between the circumstances of different coal mines, prescriptive standards, which by their nature apply the same standard across the board, may be unnecessary and inappropriate. For example, while explosion protection requirements are necessary for any diesel engine used underground in gassy mines it is doubtful whether they should be imposed in non-gassy mines where the risk of explosion from this source is minimal or non-existent. As one senior site executive put it, 'prescription can't keep up … If you have prescription it's one size fits all but each mine is different so there is a constant process of seeking exemptions from the inspectorate'. The problem is exacerbated by the dynamic nature of coal mining (hazards change as the mine develops) and by the failure of controls to keep pace with technological change within the industry. Accordingly, there is a need for an approach that can readily accommodate to change and does not freeze rules at a particular point in time. That approach moreover, should take account of the fact that one size does not fit all and that different mines face different challenges and require different solutions. What are the options?[30]

There is considerable scope for process-based standards in the form of requirements to engage in systematic and risk-based WHS management and these standards moreover, provide strategies for proactively and systematically improving WHS performance, accommodating to organisational and technological change, and allowing preventive measures tailored to the organisation. This is not to suggest that a systemic risk-based approach will necessarily succeed. On the contrary, the absence of a supportive culture to underpin formal processes and procedures, lack of motivation on the part of the duty holder or inadequate regulatory drivers, may fatally undermine it.[31] However, the coal mining industry, driven by social license pressures, a compelling business case, and a genuine passion for safety on the part of individuals within all stakeholder groups, has already advanced substantially down the path of systemic risk-based regulation and management. The industry has also demonstrably achieved impressive reductions in serious injuries and fatalities over the last 15 years.[32]

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28 US Chemical Safety and Hazard Investigation Board, 'Refinery Explosion and Fire (15 Killed, 180 Injured)' (Final Investigation Report No 2005-04-1-TX, US Chemical Safety and Hazard Investigation Board, 20 March 2007) 19 <http://www.csb.gov/assets/1/19/csbfinalreportbp.pdf>.

29 United States of America, National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling* (2011) 251–2; see also Andrew Hopkins, *Disastrous Decisions: The Human and Organisational Causes of the Gulf of Mexico Blowout* (CCH, 2012).

30 The following paragraphs draw upon Bluff and Gunningham, above n 23, 27–42.

31 See Christine Parker and Sharon Gilad, 'Internal Corporate Compliance Management Systems: Structure, Culture and Agency' in Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar Publishing, 2011) 170.

32 See generally Gunningham and Sinclair, above n 18, chs 1–2.

Nevertheless, systematic risk-based standards have limitations. Because they are based on process rather than performance or outcome, they offer no benchmark of acceptable compliance and so ideally should be underpinned by some other form of standard that does. Principles-based standards provide very generalised benchmarks (for example, do what is reasonably practicable) and provide a valuable complement to process standards. Performance standards also complement process standards and provide more specific benchmarks (for example, emit no more than 100 parts per million of substance X), though there are only limited circumstances in which such standards can be developed.[33] However, prescription will commonly hinder rather than complement the implementation of systemic risk-based regulation – usually by detracting from the role of a proper risk assessment approach. One respondent gave the following example:

> The inspectorate focuses on stone dusting [a technique for minimising the risk of explosion underground] and on whether we were following the recognised standard. And this is pages of prescriptive detail. But really we should be auditing our mine site OHS management systems – is that system appropriate to manage the risk? But the only way the inspectorate knows how to test [if we are performing safely] is to do it with the recognised standard. So it gets down to whether we have done the petty things, not the important ones.

The result is that commonly systematic risk-based standards, read in conjunction with general duties, provide an imperfect but nevertheless best available strategy.

This is increasingly recognised both by companies and regulators within the Australian coal mining industry, and by a number of official inquiries, including those following the Gretley and Moura mining disasters. The Gretley Inquiry and the New South Wales Mine Safety Review of 1997 recommended largely replacing prescriptive regulations with a systemic risk-based management approach,[34] while the second reading speech on the Coal Mining Safety and Health Bill 1999 (Qld) and the Mining and Quarrying Safety and Health Bill 1999 (Qld) stated:

> It has been found throughout the world that change quickly makes the methods dictated by legislation outdated. Therefore, the new legislation focuses on the standards of safety and health that must be met and allows the mine operator to use the most appropriate methods and technology to achieve these standards.[35]

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33 This is a problem familiar to many areas of social regulation. As one senior regulator in the related area of environmental protection pointed out to the writer: 'we can be performance based until we go into an individual company. But the minute you go inside the plant, it becomes input and output based. Inputs and outputs may impact on outcomes and you want to leverage the inputs and outputs, but usually you can't require outcomes directly'. Similarly, according to an interviewee in the UK Food Standards Authority: 'We could go for outcome based but it's not practicable – you can't test for horsemeat across the board. It's not practicable, you couldn't afford it'. The fact is that there are relatively few performance standards in WHS legislation: see Bluff and Gunningham, above n 23, 22–3.

34 Acting Judge J H Staunton, *Report of a Formal Investigation under Section 98 of the Coal Mines Regulation Act, 1982* (1998).

35 Queensland, *Parliamentary Debates*, Legislative Assembly, 24 March 1999, 734 (Tony McGrady).

Today, the Australian coal mining industry has advanced substantially down the path of systemic risk-based management and regulation (*process standards* in the terminology above) under regulatory regimes that include: (i) general risk management approaches (such as those which require duty holders to identify hazards, assess and control risks); (ii) more detailed and onerous risk-based provisions (such as obligations to establish major/principal hazard management plans including specified critical controls); (iii) a more holistic and systemic approach to managing WHS through the creation of safety and health management systems;[36] (iv) underpinned by general duties to ensure WHS as far as reasonably practicable or to bring about a level of risk as low as reasonably achievable.

This approach is attractive as it provides flexibility to enterprises to devise their own least-cost solutions to WHS, of facilitating their going 'beyond compliance' with minimum legal standards, and of being applicable to a broad range of circumstances and to heterogeneous enterprises. However, these regimes are far from fully risk-based and still retain remnants of their prescriptive predecessors. It might be anticipated that these prescriptive components will be the principal target when red tape taskforces are unleashed upon the mining sector. Would the widespread repeal of these provisions be justified or is their continuing operation necessary to successfully manage mining hazards?

III TWO CHEERS FOR PRESCRIPTION?

Contrary to conventional wisdom (or at least wisdom according to neoliberalism) there are a range of circumstances where prescription (in the form of specification standards) remains necessary to secure high standards of WHS. In essence, as one chief mines inspector put it:

> There are cases where there is only one way to deal with a particular problem. It comes down to physics, engineering, even logistics of an activity. For example we know the laws of physics, we know the explosive range of a gas, and we can design ventilation accordingly. It's the same with mechanical and electrical engineering. We know what is intrinsically safe. So there are a range of things where we can be prescriptive because we know the physical properties of what we are dealing with and we can set down with clarity what can be safely done and not safely done mindful of those properties. But there are other things where you know at least one safe way to do it but there may be others – and since each mine encounters different circumstances, it's appropriate to allow them to design their own safe practices. We require them to do what is reasonably practicable but what that means may vary with the particular circumstances they encounter – so we create codes of practice setting out one safe way of doing something but allow them discretion to find another way to achieve that standard. They are best situated to figure out the best way to manage their particular risks.

Accordingly, as Hayes points out, there will be circumstances 'in which the appropriate action to ensure continuing safe operation in a given situation is

36 Neil Gunningham, *Mine Safety: Law, Regulation, Policy* (Federation Press, 2007) 12.

something that can be completely specified in advance in the form of a rule'.[37] Similarly, Hopkins argues that rules are important because the risk-management approach (with some exceptions, such as quantitative risk assessment) does not provide much guidance to those faced with these decisions or as to whether the risk is acceptable or not, and decision-makers need rules to guide their decisions.[38]

Some prescriptive rules, for example, need to be based on engineering or design considerations which are outside the operational manager's capabilities:

> such as the integrity of the process equipment or the response of the process itself to severely abnormal conditions. These issues are the domain of specialist engineers, not operations staff. Fixing such limits is the primary way that these design considerations are transferred from one group of specialists (those who designed the facility) to another (those who operate it).[39]

Another reason for developing standards is to encapsulate and preserve the knowledge gained through past mistakes. According to one engineering manager interviewed:

> Some things are prescriptive for good reason. There are lessons to be learned from disasters. If you were not directly affected by that disaster, if you have no experience of that hazard the learning gets lost if you don't embed it in regulation. *Prescription compensates for loss of corporate memory* (emphasis added).

And prescription can be well suited to routine work undertaken by those with low skill levels, for learners and for infrequently conducted tasks where the risks are well understood.[40] However, rules, as Hayes points out, only take you so far. For high-uncertainty, high-risk domains,

> replacing staff by automatons that simply follow the rules would not improve safety performance in complex systems … The human ability to learn, adapt and innovate in unforeseen circumstances save[s] the day on many occasions. *A better approach is to see rules as a way to support staff at the limits of their professional competence*, for example to transfer design information into an operational environment.[41]

Extending the logic of this statement, rather than rules providing a straightjacket from which duty holders cannot escape, even when they would be capable of devising cheaper and safer alternatives, we should seek solutions that provide the best of both worlds – the clarity and direction which some duty holders require, while facilitating innovation and flexibility to develop their own safety solutions on the part of others. Or as Black puts it, we need 'the right

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37 Jan Hayes, *Operational Decision-Making in High-Hazard Organizations: Drawing a Line in the Sand* (Ashgate, 2013) 93–7.

38 Andrew Hopkins, 'Risk-Management and Rule-Compliance: Decision-Making in Hazardous Industries' (2011) 49 *Safety Science* 110. Hopkins goes on to suggest that 'unless the end point decision-maker is confronted with a prescriptive technical rule and unless there is some mechanism to ensure compliance with that rule, the relentless pressure to minimize costs is likely over time to erode commitments to safety': at 119.

39 Hayes, above n 37, 99.

40 Andrew Hale and David Borys, 'Working to Rule or Working Safely' in Corinne Bieder and Mathilde Bourrier (eds), *Trapping Safety into Rules: How Desirable or Avoidable Is Proceduralization?* (Ashgate, 2013) 43, 59.

41 Hayes, above n 37, 104 (emphasis added).

combination of principles or outcome-focused norms and sufficient "scaffolding" through more detailed guidance provisions to indicate to firms how to comply, and assure themselves and regulators that they have done so'.[42]

Such a 'win–win' solution was provided by the *Robens Report*, through the vehicle of codes of practice, standards and guidance material. In its contemporary form, the attraction of an approved code of practice ('ACOP') under the *Work Health and Safety Act 2011* (NSW), and similar legislation elsewhere,[43] is that it describes one acceptable way to satisfy the general duty to do what is reasonably practicable or to satisfy a regulation. Such a code is an appropriate choice when it is important to provide clarity about an acceptable way to comply with the WHS statute or regulations. However (as with the equivalent Queensland mechanism of recognised standards) this approach permits the duty holder to identify some other means of discharging the general duty that achieves at least an equivalent degree of safety. For this reason, it facilitates flexibility and does not constrain innovation. So too does guidance material, albeit that unlike an ACOP it has no particular legal status.

Accordingly, the large majority of rules are most appropriately included in codes of practice, standards or guidance material. The exception, where a regulation should be imposed mandating what to do and how to do it, is where there is a known effective solution and alternative courses of action are not desirable because of the need to control specific and significant risks in a particular way. Such rules, while necessary in a limited range of circumstances such as those referred to at the beginning of this Part, might have the consequence of precluding risk management if they allow the defence that, because the law prescribes certain controls, it was not necessary or appropriate to do a risk assessment. Fortunately, legislation makes clear that no such defence exists.[44]

IV CONTEXT COUNTS

To summarise the arguments made above, in the circumstances of the Australian coal mining industry:

1. there are only limited circumstances that lend themselves to the application of performance standards;
2. there are many differences between the circumstances of different mines (gassy, non-gassy, strata control issues, risk of in-rush of water, ventilation challenges etc) with the result that one-size-fits-all

42 Julia Black, 'Learning from Regulatory Disasters' (Working Paper No 24/2014, London School of Economics and Political Science, 6 November 2014) 13. See also Colin S Diver, 'The Optimal Precision of Administrative Rules' (1983) 93 *Yale Law Journal* 65.

43 For the harmonised jurisdictions, see generally Safe Work Australia, *Model Work Health and Safety Act* (at 23 June 2011) pt 14 div 2.

44 Safe Work Australia, *Model Work Health and Safety Act* (at 23 June 2011) pt 14 div 3; Safe Work Australia, *Model Work Health and Safety Regulation* (at 9 January 2014) reg 9.

(prescriptive) solutions only have value in a limited range of circumstances described above;

3. since one is dealing with heterogeneous conditions (if not heterogeneous firms), there may be no viable alternative to the application of process-based standards (underpinned by general duties). While such standards are not dependable in all circumstances, in the context of the coal mining industry, they provide strategies for proactively and systematically improving WHS performance, accommodating to organisational and technological change, and allowing preventive measures tailored to the organisation.[45] The effectiveness of such standards is considerably enhanced by the motivation and capacity of the industry to engage with this type of regulation;
4. even in the coal mining industry there remain some limited circumstances where prescriptive standards are appropriate; and
5. except where there is a single best way of achieving safety that can be best articulated in a prescriptive rule, codes of practice provide a more flexible middle path facilitating flexibility and innovation but providing clear guidance to those who need it.

However, it would be dangerous to generalise from the coal mining industry to other industries. Context counts and it counts a great deal. To illustrate this point, take another industry sector with an exceptional safety record. In marked contrast to the coal mining industry, air traffic controllers have a thick rule book specifying in great detail all rules for communicating with pilots and controlling air traffic. This is entirely appropriate because in the circumstances of that industry, as Vaughan points out, '[t]he goal is to produce an air traffic controller whose behaviour is as standardized and predictable as the system in which they are to work'.[46] The aim of this is the quick identification and correction of errors and mistakes in the movement, direction, speed, altitude and so on of aircraft who deviate from the clearly defined parameters (rules) with which they must conform to for the skies to remain free from catastrophe.[47]

Much the same is true for pilots, who also operate in a highly prescribed world, within which procedures, checklists, to-do lists and so on are central, enabling them to work with any other pilot as a consequence of their

45 Bluff and Gunningham, above n 23, 30–5.

46 Diane Vaughan, 'Organizational Rituals of Risk and Error' in Bridget Hutter and Michael Power (eds), *Organizational Encounters with Risk* (Cambridge University Press, 2005) 33, 48.

47 Ibid.

standard environment.[48] There are prescriptions as to: 'what to do … when to do it (sequence, synchronization) … how to do it … who should do it (organized task sharing) … what to observe and what to check [and] what type of feed-back is provided to the other crewmember'.[49] Taken to an extreme, the neoliberal approach to reducing red tape would make the commercial airline industry a primary target – after all, where else would you find such a thick, detailed and prescriptive rule book? But it would be a courageous politician who would risk a radical attack on the prescriptive regulation of an industry sector that exemplifies a high reliability organisation with a remarkable safety record.[50]

A further illustrative contrast to coal mining is the construction industry. Taking Victoria as an example, the construction sector employs 10 per cent of the state's workforce and generates 8 per cent of its economic output. However, it has been responsible for 25 deaths in the last five years, injures nearly 10 workers every day, and costs the workers' compensation scheme on average $186 million per year.[51] Influencing WHS in this industry is particularly challenging. The reasons for this are well rehearsed[52] and include: a low level of standardised work performance; devolved decision-making (including safety) to low levels in the organisation; the dynamic and changing nature of the building process (making many hazards transient and so difficult to respond to); the physical distance of projects from the central organisation; the multiple contractors who may be present on site; cut-throat competition between firms (making the tension between safety and production particularly acute); and the fact that 'the costs of lack of safety are always shifted to the weakest party, the subcontractor'.[53]

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48 Claire Pelegrin, 'The Never-Ending Story of Proceduralization in Aviation' in Corinne Bieder and Mathilde Bourrier (eds), *Trapping Safety into Rules: How Desirable or Avoidable Is Proceduralisation* (Ashgate, 2013) 13, 13. However, the engineering side of air traffic control ('ATC') is much less proceduralised, being managed in much the same way as coal mine safety, through general duties supported by risk assessment and management systems. This is understandable given that the compelling reasons for proceduralisation, identified above, are not applicable to the engineering component of ATC. This may be, as an anonymous referee speculates: 'because the communication side of ATC is global with well-known risks and yet the engineered systems that support it in any jurisdiction are idiosyncratic and hence need system specific risk assessments to deal with interactions and complexity'. I am grateful for this insight.

49 Ibid 16.

50 It should be noted that in November 2013, the Minister for Infrastructure and Regional Development announced that the Government had established an independent review of aviation safety regulation in Australia by a panel of leading aviation safety experts. The review reported in mid-2014: see Australian Government, *Aviation Safety Regulation Review* (Report, May 2014) <http://www.raaa.com.au/industry/_pdf/ASRR_Report_May_2014.pdf>.

51 Statistics supplied by the Victorian WorkCover Authority Advisory Service, averaged over the five reporting years 2008/09, 2009/10, 2010/11, 2011/12 and 2012/13: Email from Victorian WorkCover Authority Advisory Service to William Mudford, 25 June 2014.

52 See, eg, Paul Swuste, Adri Frijters and Frank Gulenmund, 'Is It Possible To Influence Safety in the Building Sector?' (2012) 50 *Safety Science* 1333; Dolores Martínez Aires, Carmen Rubio Gámez and Alistair Gibb, 'Prevention through Design: The Effect of European Directives on Construction Workplace Accidents' (2010) 48 *Safety Science* 248.

53 Swuste, Frijters and Gulenmund, above n 52, 1337.

Accordingly, there are compelling reasons why the sort of systemic risk-based approach that is well suited to the coal mining industry will be inappropriate, and greater prescription better suited to engaging with both the duty holders and the risks. One senior safety manager in an international construction company, interviewed for a related project, summed up the situation admirably:

> You need a level of prescription to ensure a level playing field … For some things the *[Building Industry] Code* should be a construction manual. Construction is a business with tight margins. People may cut corners. If you ask them to manage risk then this gives them an opportunity to say 'beauty, we just have to do a risk assessment', and in most jurisdictions the inspectorates have been cut so you can't just get them to come on site anymore to clarify. There are well known areas of high risk, like working at heights. These are areas where you need prescription because people will not drive risk reduction themselves. The industry is not mature enough. Even in a global business we are not happy to see an outcomes-based approach. People will take advantage of the looseness of the controls. If you give them freedom it's the freedom to do nothing. And you can't be half prescriptive. Either you should be entirely prescriptive or entirely outcome driven and for high risks it needs to be prescription.

Unlike coal mining, there will be a 'race to the bottom' in safety performance in the absence of clearly defined and firmly enforced standards. Whereas in coal mining there are powerful drivers for improvement (not least, social licence pressures and potential cost savings)[54] this is far less the case with construction. Also, unlike coal mining, the construction industry is not remotely mature in its approach to risk management. Indeed, the many small and medium-sized enterprises ('SMEs') in the industry, like SMEs elsewhere, are inclined to say 'just tell me what to do and I'll do it'. These organisations lack the skills, knowledge or sophistication to devise their own least-cost solutions to WHS problems and require detailed practical guidance. Indeed,

> the effective operation of systematic approaches to [WHS management] are largely restricted to the internal affairs of larger organizations in which the will and capacity for their development already exists, and where organized labour has also managed to maintain some of its presence and influence.[55]

The coal mining industry has these characteristics, the construction industry does not.

V DISCUSSION

Against this backdrop, what are we to make of the various state and federal red tape reduction strategies and the specific targeting of prescriptive regulation

54 See, eg, ibid.

55 David Walters et al, *Regulating Workplace Risks: A Comparative Study of Inspection Regimes in Times of Change* (Edward Elgar Publishing, 2011) 330.

under 'red tape reduction', judged in terms of the OECD criteria of efficiency, effectiveness and equity?

In terms of equity, the most fundamental question is: who should be responsible for mitigating the incidence of work-related injury and disease? The conventional answer is that without some form of compulsion imposed by the state, some enterprises in a market economy (where the imperfections of the market include information gaps, externalities, disparities in bargaining power, and so on) would disregard the health and safety of their workforce, driven by the pressures to increase profits and productivity[56] (which are often in tension with minimising the hazards of work). This was precisely what happened under the laissez-faire philosophy of the 19th century.[57] In short, equity demands intervention to ensure that enterprises rather than workers are responsible for minimising these risks or at least reducing them, in the time-honoured phrase of the common law, 'so far as is reasonably practicable'.[58]

In terms of effectiveness, policymakers should choose the form of regulation that is most likely to reduce the level of work-related injury and disease, this being the principal social objective of WHS legislation. Which form of regulation will best achieve this outcome will vary with the context and will depend in substantial part on the characteristics of target industry sectors. No single approach is likely to work best 'across the board'. As argued above, while systematic risk-based (process) standards are likely to deliver the best results in the mining sector, a more prescriptive approach will be necessary for industries such as commercial aircraft safety or construction work. Even for mining, there will be a residue of circumstances where prescription is likely to deliver best results.

In terms of efficiency, there should be a preference for forms of regulation that encourage, reward and facilitate enterprises achieving specified safety outcomes at least cost. In the abstract, approaches that encourage innovation, facilitate flexibility and allow each duty holder to determine their own cost-effective means of achieving compliance or going beyond compliance, are to be preferred to prescriptive one-size-fits-all approaches. Nevertheless, as indicated above, in some industries and in some contexts, prescription may be preferable, in which case efficiency would dictate that it be designed to reduce costs so far as practicable, consistent with its broader WHS objectives.

Judged against these criteria, how would the red tape reduction agenda stand up? Much depends on how it is interpreted and implemented. Will there be a rigorous case by case assessment involving a careful weighing of the OECD criteria, or a slash and burn approach based on generalised assumptions about the adverse consequences of 'over-regulation'?

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56 Gunningham, above n 7, 276.

57 Ibid 35.

58 This is now encapsulated in preventive safety legislation: Safe Work Australia, *Model Work Health and Safety Bill* (at 23 June 2011) cl 19.

On the one hand, one might point to the role of the (freshly rebadged) *Australian Government Guide to Regulation*, which provides plain English guidance as to how to ensure that 'regulation is never adopted as the default solution, but rather introduced as a means of last resort'.[59] This includes questions to ask, and processes to go through (including a formal regulatory impact statement) before determining whether a better alternative to regulation exists[60] and suggests a measured, rational and evidence-based approach.

On the other hand, numerous statements made by the Prime Minister, other members of the Government and its associates suggest an 'across the board' approach to 'red tape reduction' and a slippage from targeting 'unreasonable' regulation to targeting regulation per se. For example, Prime Minister Abbott talks of making 'the biggest bonfire of regulations in our country's history', and of the virtues of 'trusting your common sense' rather than relying on government regulation to make choices about life.[61] Others have talked in very broad terms about repealing '*unnecessary* and *counter-productive* pieces of legislation and regulations'[62] usually without reference to what this might involve or explaining ways in which the regulation is 'counter-productive'. For example, Josh Frydenberg, Parliamentary Secretary to the Prime Minister, provided only a minimalist framework for decisions around removal of regulation when he stated in parliament that he 'identified five key areas which [the Coalition Government] need to tackle in our deregulation fight'[63] and elsewhere he has stated that 'in every facet of life … we are facing an *avalanche of regulation* that is stifling investment and innovation, and impeding the creation of thousands of new jobs'.[64] Taken together, the overall sentiment of the Coalition Government appears to be one of removing any form of regulation, regardless of its form or effectiveness at achieving legitimate goals.

Some of the specific measures the Federal Government contemplates also point to an all-embracing approach. For example, to target $1 billion of reduction in regulation without examining the substance suggests that the Government is working backwards: first work out your monetary saving, then find regulations up to that amount to abolish, irrespective of any assessment of the relative costs and benefits of doing so. The proposal to provide incentives to drive the public service to cut red and green tape, such as linking remuneration of Senior Executive Service public servants (including future pay increases and bonuses) to

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59 Department of Prime Minister and Cabinet, *The Australian Government Guide to Regulation* (Guide, March 2014) i <http://cuttingredtape.gov.au/sites/default/files/documents/australian_government_guide_regulation.pdf>.

60 Ibid 4.

61 Tony Abbott, quoted in Sid Maher, 'Big Business Backs Repeals, Charities See Red', *The Australian* (Sydney), 20 March 2014, 4.

62 Prime Minister and Parliamentary Secretary to the Prime Minister, 'Reducing Red Tape To Build a Strong and Prosperous Economy' (Media Release, 19 March 2014) (emphasis added) <http://www.pm.gov.au/media/2014-03-19/reducing-red-tape-build-strong-and-prosperous-economy>.

63 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 2014, 3261–2 (Josh Frydenberg, Parliamentary Secretary to the Prime Minister).

64 Frydenberg, above n 3, 25 (emphasis added).

quantified and proven reductions in regulation, also suggests putting the cart before the horse.[65] Some of the Government's business allies seem to be similarly inclined. For example the Australian Industry Group has used the results of its annual chief executive officer ('CEO') survey to demand less onerous WHS laws on the basis of their high 'regulatory cost burden' on industry, notwithstanding that this survey shows that only 2.7 per cent of CEOs in the mining services sector nominated regulatory burden 'as one of their top three growth inhibitors for 2014'.[66]

Perhaps insight as to where the Government's red tape initiative is headed and the likely consequences can be gained from the experience of a similar initiative underway in the UK under the Cameron Coalition Government. In the four years since that Government was elected, cuts to the funding of the Health and Safety Executive, widely regarded as a best practice regulator, have amounted to some 40 per cent, and a wide range of industrial activities including some with high fatality, injury and disease rates, have been redefined as low-risk and therefore as not requiring proactive inspection.[67]

Yet the Löfstedt Review, commissioned by that same Government and reporting in November 2011,[68] found no evidence of excessive regulation. The parallel Red Tape Challenge, which involved asking businesses what health and safety regulations could be culled, far from generating a flood of suggestions, prompted the large majority of respondents to either express support for existing regulation or to suggest improvements.[69] However, undeterred by such unwelcome feedback, the Government pushed ahead with a far-reaching deregulatory agenda. Legislation on tower cranes has been repealed notwithstanding a number of crane collapses and associated fatalities. Specific regulations with regard to the use of hard hats on construction sites have also been repealed and a number of codes of practice have been abolished notwithstanding the concerns of unions and safety professionals. As the Trades Union Congress has pointed out:

> What all these changes have in common is that at no time has the government ever attempted to claim that a measure will improve health and safety. In some cases it is clear that it will have the opposite effect. They are simply an attempt to increase the number of regulations that have been repealed or 'burdens' that have been removed.[70]

65 Liberal Party of Australia and National Party of Australia, above n 6, 12.

66 'Safety Laws Are a Burden but Don't Affect Growth, CEOs Say', *OHS Alert* (online), 28 March 2014 <https://www.ohsalert.com.au/nl06_news_selected.php?selkey=51588>.

67 See Steve Tombs and David Whyte, 'Transcending the Deregulation Debate? Regulation, Risk, and the Enforcement of Health and Safety Law in the UK' (2013) 7 *Regulation & Governance* 61, 75.

68 Ragnar E Löfstedt, *Reclaiming Health and Safety for All: An Independent Review of Health and Safety Legislation*, Cm 8219 (2011).

69 Trade Union Congress, 'Toxic, Corrosive and Hazardous: The Government's Record on Health and Safety' (Report, Trade Union Congress, April 2014) <http://www.tuc.org.uk/sites/default/files/Government_Record_On_Health_And_Safety_2014_LR_Single_Pages.pdf>.

70 Ibid 16.

In short, if the experience in the UK is replicated by an Australian federal government with strikingly similar views as regards the evils of red tape and the desirability of deregulation, then one can anticipate sweeping 'reforms' with far-reaching consequences.

What might these consequences be? In terms of the OECD criteria, 'root and branch' deregulation is likely to be seriously *inequitable*. It will make workers – and especially the ever-growing numbers of people in precarious employment – vulnerable to greater threats from the hazards of work by removing regulatory protection and exposing them, in some cases, to the mercies of unscrupulous employers and contractors. Indeed, it was precisely because of the practices of exploitative employers that WHS legislation was introduced and statutory protection afforded to the workforce.[71] For similar reasons, deregulation is also likely to be *ineffective* in saving lives and reducing work-related injury and disease. On the contrary, there is considerable evidence both of the positive impact of regulation in reducing the hazards of work and of the minimal impact of self-regulatory and voluntary initiatives in doing so.[72]

Finally, there is the issue of *efficiency*, which implies that the social objectives of regulation should be achieved at least cost. Accordingly, there is indeed value in scrutinising regulation to identify the imposition of unnecessary costs in general and to reduce any unnecessary degree of prescription in particular. In New South Wales, the use of a red tape taskforce could helpfully remove unnecessary prescriptive requirements with regard to non-flameproof diesel engines (in non-gassy mines);[73] restrictions on the use of aluminium underground that have no regard for the risks involved;[74] and a variety of other provisions including those which relate to mandatory plant registration, prescribed widths of roadways and collision avoidance systems (all irrespective of the risks). Opportunities for reducing unnecessary prescription in Queensland are also available.[75] Equally, the enterprise of simplifying and consolidating regulations should be applauded. Evidence-based policy would recognise the desirability of all the above proposals as part and parcel of reducing unnecessary regulatory burdens at least cost without compromising regulatory objectives.

However, the assault on regulation engaged in by the Cameron Government in the UK, and it would appear, the Abbott Government in Australia, goes much further than such evidence-based reforms in two crucial respects.

First, as we have seen, its ambition is sweeping deregulation, often irrespective of the particular merits of individual regulatory provisions. For

71 See Gunningham, above n 7, 35.

72 See Nichols and Walters, above n 7, 205–16.

73 Mine operators argue that the prohibition on non-flameproof diesel engines in non-gassy mines is unjustified given they do not present a risk of explosion in such mines. Queensland has already addressed this issue through the *Coal Mining Safety and Health Regulation 2001* (Qld) reg 261, which makes the necessary exemption.

74 See *Coal Mining Safety and Health Regulation 2001* (Qld) regs 254 (aluminium), 261 (diesel).

75 See especially Queensland Resources Council, Submission to Department of Natural Resources and Mines, *Regulatory Impact Statement on Consistent Mine Health and Safety Legislation*, 11 November 2013.

example, reducing the length of ACOPs without regard to the context of individual codes may simply result in the removal of valuable specific guidance, particularly for SMEs. If their mantra is 'just tell me what to do and I'll do it', the converse may be 'don't tell me and I won't do it'. Even with regard to large sophisticated enterprises, prescriptive requirements, in the circumstances documented in Part III above, still play a valuable role. Removing these prescriptions, many of which codify the safety lessons learnt from past disasters risks the loss of this cumulative knowledge. Such knowledge may only be rediscovered by repeating the mistakes of the past, with disastrous consequences. Similarly, the seemingly indiscriminate replacement of ACOPs (which have evidentiary status) with guidance material (which does not) will, in the view of the large majority of inspectors interviewed for a related study[76], seriously weaken their capacity to ensure WHS. Typical views were that this approach is 'bizarre', 'half-arsed', and 'horrific' in its implications for WHS.

Secondly, the current UK and Australian Governments are now engaged in a reframing of where WHS (and other types of social regulation) fits within the broader neoliberal agenda. Since the *Robens Report* of 1972 (on which almost all subsequent WHS legislation in the UK and Australia has been based), policymakers have almost invariably accepted the view that 'there is a greater natural identity of interest between "the two sides" in relation to safety and health problems than in most other matters'.[77] Further, as a result employers and other duty holders should have no objection to WHS legislation, provided it is efficiently designed. However, under the recent reframing, no such concordance of interest exists and *all* WHS legislation is to be seen a burden on business.[78] Moreover, on this framing, where there is a stark choice between safety or workers or the profits of business, the latter should prevail, on the basis that the economic prosperity of the nation (and in the UK its very survival) depends upon its freeing up of markets and *nothing, including social regulation, should get in the way of this objective*. If this means sweeping away legislative provisions built up over many decades in response to multiple fatalities, and a high incidence of work-related injury and disease, this is a price worth paying. As Nichols and Walters (writing of the UK in 2013) put it:

> such is the emphasis on the importance of business being free to act … that the state must be shrunk … regulation is inimical to enterprise, growth and profit … the issue, for the government, is not health and safety; it is profit and the alleged barriers to its augmentation. … [T]he neo-liberal rhetoric on health and safety at work is not driven by an overwhelming concern with the health and safety of workers: it is driven by an overwhelming concern with the economic welfare of

76 The study is contained in Neil Gunningham, Joel Dennerley and Mary Ivec, 'The Efficacy of Codes and Guidance Material' (2015) (unpublished, copy on file with author).

77 *Robens Report*, above n 24, 21 [66]; cf Gunningham, above n 7, 265.

78 See Steve Tombs and David Whyte, 'Safety, Profits and the New Politics of Regulation' in Theo Nichols and David Walters (eds), *Safety or Profit: International Studies in Governance, Change and the Work Environment* (Bayswood Publishing, 2014) 97.

> the supposed real risk takers, the entrepreneurs, who must be freed from the [supposed] Nanny State and its petty restrictions.[79]

Yet as will be apparent from the earlier discussion, there is very little evidence that broad brush WHS deregulation is justified either on social or on economic grounds. This however, has not deterred governments in both the UK and Australia from 'seek[ing] to tar all regulation of health and safety with … seemingly asinine examples of "overregulation"'.[80] Indeed, so extreme has this process become that the UK Health and Safety Executive now devotes a section of its website to health and safety myths and has launched a Myth Busters Challenge Panel. Its 'top ten myths' include: office workers being banned from putting up Christmas decorations, hanging baskets being banned in case people bump their heads on them, schoolchildren being ordered to wear clip on ties in case they are choked by traditional neckwear, park benches being replaced because they are three inches too low, and graduates being ordered not to throw their mortarboards in the air.[81]

The above description raises some broader questions: why has the debate departed so far from an evidence-based approach, and what has this to do with the broader neoliberal agenda? The short answer to the latter question is 'everything'. Central tenets of neoliberalism include the superiority of free markets over state intervention, rejecting the idea of 'the public good' and replacing it with 'individual responsibility', the desirability of reducing public spending and the virtues of deregulation. Deregulation in particular, implies reducing government intervention in every area where it threatens private profits, including WHS.

These and related arguments have been promoted with great vigour and with remarkable success over the last four decades. The deregulatory initiatives of the Cameron and Abbott Governments and their fellow travellers are the latest manifestations of this longer-term political and ideological agenda. In the terminology of constructionist social problems theory, what these Governments and their fellow travellers are engaged in is best seen as 'claims-making' rather than as evidence-based policymaking. By this, constructionists mean that social actors (particularly powerful ones such as prime ministers and their governments) are responsible for defining how some phenomena, but not others, come to be regarded as social problems and how certain 'solutions', but not others, develop a 'taken-for-granted' character that makes them difficult to challenge. For example, the claims of neoliberalism as to the 'problem' of over-regulation and the 'solution' of deregulation and freeing up markets are social constructions. Such claims involve, as Berger and Luckmann in their seminal work on the

79 Nichols and Walters, above n 7, 206–7.

80 Ibid 207.

81 Health and Safety Executive, *Top 10 Worst Health and Safety Myths* <http://www.hse.gov.uk/myth/top10myths.htm>.

sociology of knowledge have argued, the manufacture of people's beliefs about the world, or in their words, 'the social construction of reality'.[82]

This construction involves a social process through which 'ideas or practices secure an aura of objective factual existence through repetition and broadened adoption by more and more members of the relevant social group'.[83] From this perspective, the claims of politicians, bureaucrats, business and others, concerning the virtues of deregulation and the efficiency of free markets should be seen first and foremost as attempts to frame an issue in a particular way that justifies a particular course of action rather than as objective reality. Since what is perceived to be real is real in its consequences,[84] such attempts to control the discourse surrounding the attributes, origins and available solutions to a particular 'social problem', have profound importance in shaping social and economic outcomes.

Some claims-makers are more successful than others. Those who are powerful and media-savvy, for example, are likely to be more effective in having their social constructions take on the nature of 'taken-for-granted' reality than those who are not.[85] Now is not the place for a disquisition on the nature of power, which is a complex and multifaceted concept, instrumental power being only one of its dimensions. Nevertheless, asking who benefits is not a bad place to start.

The perceived self-interest of many in the business community and their associations in the neoliberal agenda in general, and deregulation in particular is readily apparent.[86] A number of Australian sociologists and political scientists have traced the influence of neoliberalism from the 1970s on, and how it has increasingly sought to dismantle the Keynesian welfare state.[87] There are multiple strands to this story, and just as there are multiple varieties of capitalism,[88] so some of these are specific to particular countries. In the Australian context, the large majority of economics faculties within the universities were persuaded of the intellectual merits of neoliberalism and their views shaped the thinking of a

82 Peter L Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Anchor Books, 1966).

83 Timothy F Malloy, 'The Social Construction of Regulation: Lessons from the War against Command and Control' (2010) 58 *Buffalo Law Review* 267, 275. See also ibid 20, 35, 60.

84 This maxim is known as the Thomas theorem. See William I Thomas and Dorothy Swaine Thomas, *The Child in America: Behavior Problems and Programs* (Alfred A Knopf, 1928) 571–2.

85 Andy Alaszewski and Patrick Brown, *Making Health Policy: A Critical Introduction* (Polity Press, 2012) 152–8.

86 See, eg, Stephen Bell, 'Victim of Its Own Success: Internationalization, Neoliberalism, and Organizational Involution at the Business Council of Australia' (2006) 34 *Politics & Society* 543; Drew Cottle and Joseph Collins, 'WorkChoices: Ruling Class Mobilisation in Contemporary Australia' (2008) 12 *Journal of Economic and Social Policy* 1.

87 See, eg, Michael Pusey, *The Experience of Middle Australia: The Dark Side of Economic Reform* (Cambridge University Press, 2003); R W Connell, *Ruling Class, Ruling Culture: Studies of Conflict, Power and Hegemony in Australian Life* (Cambridge University Press, 1977); Dennis Woodward, *Australia Unsettled: The Legacy of 'Neo-liberalism'* (Pearson Education Australia, 2005).

88 Peter A Hall and David Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001).

generation of young economists, serving, albeit unintentionally, to cement ideological unity within a key discipline.[89] Senior decision-makers in the public service, partly as a result of this, partly through other influences, also became enamoured of neoliberalism. As Pusey has ably demonstrated, economic rationalists came to dominate in key portfolios including Treasury.[90] The Liberal Party, a number of neoliberal think tanks (not least the Institute of Public Affairs)[91] and News Corp have also been important in disseminating the neoliberal agenda.[92]

Here, as elsewhere, ideology and power go hand in hand. While the Liberal Party has its own distinctive ideology that is inextricably intertwined with neoliberalism,[93] it is also fair to point out the close and well-documented links between the Liberal Party and the business community (particularly big business) and the demonstrable influence of the latter on the former.[94] The Australian Business Council, representative of the top 100 wealthiest businesses in the country, has played a particularly influential role.[95] Indeed, Cottle and Collins have gone so far as to argue that 'the Australian ruling class has created a social environment in which its aims become those of the state'.[96]

In the case of WHS, the arguments of business, although more nuanced than a century ago, have not changed in their essential nature.[97] They argue health and safety regulation is costly and inefficient, puts individual businesses at a competitive disadvantage (particularly to largely unregulated overseas competitors) and is often unnecessary, since responsible businesses would undertake the necessary action voluntarily. This in turn implies the need to

89 See generally, Damien Cahill, 'Contesting Hegemony: The Radical Neo-liberal Movement and the Ruling Class in Australia' in Nathan Hollier (ed), *Ruling Australia: The Power, Privilege & Politics of the New Ruling Class* (Australian Scholarly Publishing, 2004) 87.

90 Michael Pusey, *Economic Rationalism in Canberra: A Nation Building State Changes Its Mind* (Cambridge University Press, 1991).

91 See generally Damien Cahill and Sharon Beder, 'Neo-liberal Think Tanks and Neo-liberal Restructuring: Learning the Lessons from Project Victoria and the Privatisation of Victoria's Electricity Industry' (2005) 24 *Social Alternatives* 43; Cahill, above n 89, 87. The Institute of Public Affairs was instrumental in the formation of the Liberal Party, demonstrating a long-term ideological interaction between the two entities: National Archives of Australia, *Robert Menzies: In Office*, Australia's Prime Ministers <http://primeministers.naa.gov.au/primeministers/menzies/in-office.aspx>.

92 Daya Kishan Thussu, *News as Entertainment: The Rise of Global Infotainment* (Sage Publications, 2007) 63, 113–32; David McKnight, 'Rupert Murdoch's News Corporation: A Media Institution with a Mission' (2010) 30 *Historical Journal of Film, Radio & Television* 303.

93 See generally Cahill, Edwards and Stilwell, above n 11. In this context it should be noted the Australian Labor Party, particularly under the Hawke–Keating Government, also embraced a range of neoliberal policies. See generally Joe Collins and Drew Cottle, 'Labor Neoliberals or Pragmatic Neo-Laborists? The Hawke and Keating Labor Governments in Office, 1983–96' (2010) 98 (May) *Labour History* 25.

94 See, eg, Guy Pearce, *High and Dry: John Howard, Climate Change and the Selling of Australia's Future* (Penguin, 2007).

95 See Cottle and Collins, above n 86.

96 Ibid 1.

97 For a historical overview, see Gunningham, above n 7, 35. For a contemporary analysis, see Nichols and Walters, above n 7.

reduce the burden of WHS regulation, particularly that which is prescriptive in its approach.

In contrast, the principal political critics of neoliberalism, the trade unions (whose membership is falling and which are in rapid decline) and the 'left' of the Australian Labor Party (which is usually the subordinate faction and rarely succeeds in promoting a competing agenda of greater state intervention)[98] have gained very little traction during the time of the neoliberal ascendency. In the case of the former, the position has been further muddied, particularly during the time of the Hawke–Keating Government, by the extent to which the unions have been persuaded to act in accord with business, rather than in opposition to it.[99]

Such a combination of interest, power and ideology is a potent brew. Indeed, so successful has neoliberalism been in displacing competing ideologies, at least within the Anglosphere, that it is not only the dominant but also arguably the hegemonic paradigm.[100] So it is that not only the parties of the political 'right', but also the 'left' under New Labour in the UK and the Hawke–Keating Labor Government in Australia, have embraced a range of neoliberal policies.[101] Power, as Lukes has argued, is at its greatest when it shapes perceptions and preferences to such an extent that those subjected to it do not even recognise that it is being exercised or that there is any alternative to the existing order.[102] It may well be that neoliberalism is fast attaining this degree of influence in Australia and the UK.

VI CONCLUSION

Government statements and the experience in the UK over the last four years suggest that the debate about the future of regulation – in WHS, as in other areas of social regulation – may be straying some distance from where an evidence based approach might take it. Some statements by government decision-makers described above, seem to assume that any form of prescriptive regulation (or even evidentiary standards) is undesirable, without any interest in investigating whether this is the case. However, as the discussion above should make clear, whether prescription is a desirable approach, and if so how much of it there should be, will depend substantially on the context, with the result that reducing prescription might be appropriate in one area, but disastrous in another. In short, it cannot be assumed that removing prescription, or deregulation, is desirable. On the contrary, this needs to be demonstrated, with the likelihood that findings in one area or sector cannot readily be transposed to another.

98 See, eg, Mark Latham, 'Foley Is Right for Labor but He's Wrong for NSW', *The Australian Financial Review* (Sydney), 6 January 2015, 30.

99 Cottle and Collins, above n 86.

100 Ibid.

101 See, eg, Nichols and Walters, above n 7, 205–16.

102 Steven Lukes, *Power: A Radical View* (New York University Press, 1974).

Indeed, at least at this stage, there is not much evidence to suggest that the red tape agenda has been thought through and its implications for practice understood. A government directive to reduce the length of codes of practice for example is puzzling, because, in point of fact, ACOPs are not prescriptions but simply provide practical guidance to assist duty holders to meet their regulatory obligations.[103]

Other codes (or parts of codes) are written as process-based standards which one might have anticipated would not be in the line of fire. For example, part of the Building Code contemplated that duty holders would develop detailed work health, safety and rehabilitation ('WHSR') requirements, including the obligation to develop a WHSR plan that outlines how the contractor intends to improve its safety practices over time. However, this too is to be removed even though it is not a specification standard.[104]

So it would appear that almost any form of prescriptive regulation (and rules that are not remotely prescriptive) runs the risk of being branded as 'unnecessary', 'burdensome', 'redundant', and so on, without an adequate investigation as to whether this is indeed the case.

Were the proponents of current red tape reduction initiatives to pause and look for evidence they might be surprised at what they found. For example, far from finding that Australian business is being rendered less productive ('strangled' in the vernacular) by unnecessary red tape they might find a wealth of studies suggesting that what makes for high productivity and profitability workplaces (high-performing workplaces ('HPWs') with profit margins nearly three times higher than low-performing workplaces) are, as Thomson demonstrates, characteristics such as high levels of trust and respect radiating between all stakeholders, excellent communications, high information flows, extensive employee participation in decision-making, all-stakeholder contribution to innovation, a safe working environment, reasonable pay and working conditions, a skilled workforce, a general sense of fairness, and a good business plan for the long haul.[105] Remarkably enough, there is no suggestion in this literature that HPWs are constrained by the existence of prescriptive regulation. Perhaps we are looking in the wrong place and perhaps this is one reason why there are so few HPWs in Australia.

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103 Richard Johnstone and Michael Tooma, *Work Health and Safety Regulation in Australia: The Model Act* (Federation Press, 2012) 35–6.

104 'Proposed Code Drops Detailed Safety Requirements', *OHS Alert* (online), 22 April 2014 <https://www.ohsalert.com.au/nl06_news_selected.php?selkey=51630>.

105 Clive Thompson, Submission to the Review Panel, *Fair Work Act Review*, March 2012 <https://submissions.employment.gov.au/empforms/Archive/Fair-Work-Act-Review-2012/Documents/Thompson_Clive.pdf>. See also Christina Boedker et al, University of New South Wales, 'Leadership, Culture and Management Practices of High Performing Workplaces in Australia: The High Performing Workplaces Index' (Report, Society for Knowledge Economics, October 2011) <http://industry.gov.au/skills/SkillsForIndividuals/Documents/SKEHPW.pdf>; Jody Hoffer Gittell, *The Southwest Airlines Way: Using the Power of Relationships To Achieve High Performance* (McGraw Hill, 2005); Great Place To Work, *What Is a Great Workplace?* <http://www.greatplacetowork.com.au/our-approach/what-is-a-great-workplace>.

But returning specifically to the issue of WHS, the stakes are high and red tape reductions can do substantial damage, which may only manifest years later. The *Health and Safety in Employment Act 1992* (NZ) was a consequence of a similar neoliberal initiative in New Zealand. Its aim was to achieve 'the highest possible level of self-management by employers and the lowest level of compliance cost' without any substantial underpinning of detailed regulations and codes of practice.[106] Indeed, the Royal Commission investigating the Pike River mine disaster of 2010, concluded that '[i]nstead, the opposite happened: such regulations as existed were repealed when the [Health and Safety in Employment] Act came into force'.[107] The Royal Commission went on to document how 'the special rules and safeguards applicable to mining contained in the old law, based on many years of hard-won experience from past tragedies, were swept away by the new legislation, leaving mining operators and the mining inspectors in limbo'.[108] In this context, it is not entirely comforting to find that the Queensland Government proposes not only to 'aggressively tackle overregulation' but also that it will be trusting businesses to 'do the right thing' on WHS under a less prescriptive WHS Act.[109] Even a cursory reading of the Pike River Royal Commission's report reveals that, in multiple ways, the owners and manager of Pike River Coal (who ignored at least 48 warnings of high methane levels in the weeks preceding the disaster) did not 'do the right thing', and under a remarkably light-handed regulatory regime, 29 miners paid with their lives.

It will be interesting to see how far enthusiasm for reducing red tape, and in some cases, for deregulation more broadly, will take us. Will we find a red tape taskforce enthusiastically arguing for the abolition of the highly prescriptive rule that requires us all to drive on the left-hand side? Why not have a process standard (conduct ongoing risk assessments in determining which side to drive on), or perhaps a principles-based standard under which each driver would do what they deem reasonably practicable to avoid accidents (driving on whatever part of the road might best balance cost against risk). Or perhaps we should abandon road rules altogether and simply deregulate entirely? Those of us who survive such an experiment might be grateful for a little prescription, used wisely and well, after all.

106 New Zealand, Royal Commission on the Pike River Coal Mine Tragedy, *Final Report* (2012) vol 1, 32.
107 Ibid.
108 Ibid.
109 'Pike River Report a "Damning Indictment" of OHS Self-regulation', *OHS Alert* (online), 6 November 2012 <https://www.ohsalert.com.au/nl06_news_selectede.php?selkey=49315>.