

**IN THE MATTER OF  
The Hazelwood Coal Mine Fire Inquiry**

**STATEMENT OF LEONARD NEIST**

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My full name is Leonard James Neist. My professional address is 222 Exhibition Street, Melbourne, Victoria.

I am the Executive Director Health & Safety, in the Executive Director Division, at the Victorian WorkCover Authority (**VWA**) based at 222 Exhibition Street, Melbourne, Victoria.

I have been in this role since January 2014. My primary responsibility involves managing and leading the promotion and enforcement of health and safety in Victorian workplaces under the *Occupational Health & Safety Act 2004 (OHS Act)*. VWA has a team of more than 450 field officers, investigators, work-site technical experts and support staff, spread throughout a network of city, suburban and regional offices responsible for improving workplace safety through implementing the VWA's comprehensive constructive compliance strategy which focuses on information and education, incentives, enforcement, investigations, prosecutions and penalties.

I have completed a Bachelor of Engineering (Mechanical) and a Master of Science (Logistic Management). I am a member of the Australian Institute of Company Directors and have obtained the following certifications:

- Master Project Director - Australian Institute of Project Management
- Executive Leadership Coach – Dr Cecily Moreton, Moreton Executive Coaching Sydney
- Lead Investigator ICAM process – Safety Wise Australia
- Health & Safety Investigator – Safety Wise Australia
- Certificate IV in Assessment & Workplace Training
- Apollo Root Cause Analysis investigation processes

I first commenced employment with VWA in January 2014 in my current position. Prior to this, my employment history is as follows.

- May 2009 to Jan 2014 - Chief Executive at the NSW Independent Transport Safety Regulator (**ITSR**).
- Jun 2010 to Nov 2013 - Principal Risk Advisor, Abu Dhabi Department of Transport (held concurrently with position at ITSRR)
- Jun 2008 to May 2009 - Executive Director Transport Safety Regulation, NSW Independent Transport Safety and Reliability Regulator (ITSRR)
- 2006 to 2008 - Risk and Safety technical specialist member, ITSRR Advisory Board
- Jun 2000 to Jun 2008 - Principal Risk Consultant, Booz Allen Hamilton
- Jan 1999 to May 2000 - Senior Systems Engineer, TDA Systems Engineering
- Feb 1977 to Oct 1998 - RAAF Aerospace Engineering Officer and Rank Wing Commander, Department of Defence

This Statement has been prepared pursuant to the request made by Justine Stansen, Principal Legal Advisor on behalf of the Hazelwood Coal Mine Fire Board of Inquiry by letter of 6 May 2014.

I make this statement in my position as Executive Director Health & Safety at VWA and am duly authorised to provide this information on behalf of VWA. I make this statement from my personal knowledge and understanding, and from the inquiries that I have made in my position at VWA.

## **BACKGROUND INFORMATION**

1. The Hazelwood coal mine is an open-cut brown coal mine, where coal is extracted and conveyed to the power station. The fire at the Hazelwood coal mine occurred in the sections of the previously worked South West field Northern Batters, East Field Northern Batters, East Field Eastern batters, South West Field Southern batters and areas of the mine floor.
2. On 9 February 2014, VWA was notified that there were fires in the mine. In addition to the fires in the previously worked areas of the mine, there was also ‘fire spotting’ in the north/west corner of the mine (operational area). The ‘fire spotting’ was extinguished by the duty holder’s mine fire services personnel and the mine was able to continue operating.

## **REGULATORY RELATIONSHIP WITH DSDBI**

3. Since January 2008, DSDBI and VWA have shared regulatory oversight, compliance and enforcement functions in relation to mines.
4. DSDBI is responsible for overseeing mine operator compliance with requirements under the *Mineral Resources (Sustainable Development) Act 1990 (MR(SD) Act)*. DSDBI has oversight and enforcement functions in relation to the environmental management,

geological information, adjacent land use information, mining method information, and rehabilitation of land pursuant to the MR(SD) Act. VWA exercises its functions and responsibilities pursuant to the OHS Act and the *Occupational Health & Safety Regulations 2007*.

5. The responsibilities of DSDBI and the VWA overlap to some degree. At the time that responsibility for occupational, health and safety was transferred to the VWA, DSDBI's predecessor in functions under the MR(SD) Act and the VWA entered into a memorandum of understanding (MOU) in order to work out how to regulate those areas where their responsibilities overlap.
6. Under the MOU, DSDBI and VWA agreed to take on the roles of either lead or support agency in relation to a number of different issues.
7. The current MOU, entitled "Memorandum of Understanding- Victorian WorkCover Authority and Department of Primary Industries", expired on 31 December 2013 (Attachment 1) [\[WSV.0002.001.0001\]](#). VWA and DSDBI are in negotiations to enter into a new MOU. Under convention, the MOU continues to apply notwithstanding that the operation date has expired, as it has not been expressly revoked.

#### **VWA'S GENERAL APPROACH TO REGULATION**

8. The VWA's principal responsibilities include facilitating the avoidance or prevention of work place injuries and enforcing compliance with Victoria's occupational health and safety laws.
9. The VWA has regulatory oversight over approximately 250,000 worksites throughout Victoria. Through a risk-based approach, VWA seeks to achieve the best impact by allocating its resources to focus on workplace hazards identified as having the greatest potential for harm. As a regulator that employs a risk-based approach to compliance and enforcement, VWA utilises a risk prioritisation that balances historical and emerging risk and the consequences of risk to direct attention and resources to health and safety risks that have the greatest potential for injury and harm.
10. To ensure that VWA allocates and utilises its resources in the most effective and efficient way, VWA prioritises its interventions in areas where they have the greatest impact on controlling and reducing risk and hence on improving workplace safety.
11. Generally, Victorian OHS laws are based on the 'Robens model' of regulation. The recommendations made by Robens' Committee in 1972 (in the UK) resulted in widespread legislative reform in health and safety regulation. In essence OHS laws shifted from detailed, prescriptive standards to a more self-regulatory and performance-based approach. Instead of prescribing how to do (or not do) something, the OHS Act requires the owner of the risk (the duty holder) to take responsibility to achieve the desired outcome. In other words, the Act identifies the outcome (a safe workplace) but places the responsibility on the duty holder to identify the risks and the controls needed to achieve the outcome.
12. At present in Victoria, a combination of prescriptive and performance based regulatory elements exist in our legal framework as the Regulations do contain some prescriptive requirements.

*Approach in relation to mining hazards*

13. A 'mining hazard' is 'any activity, procedure, plant, process, substance, situation or other circumstance that could pose a risk to health or safety' in relation to any one of a number of listed mine related hazards, including:
- (a) ground control;
  - (b) slope stability;
  - (c) rock falls;
  - (d) rock bursts;
  - (e) susceptibility to seismic activity;
  - (f) inrush of water or semi-solids;
  - (g) shaft sinking or winding;
  - (h) mining plant, including mobile plant and remote control equipment;
  - (i) heavy transport equipment;
  - (j) mine fires or explosions;
  - (k) gas outbursts;
  - (l) loss of ventilation;
  - (m) airborne dust;
  - (n) radiation from rock strata or other sources;
  - (o) proximity to dangerous openings;
  - (p) tailings dams; and
  - (q) exposure to sodium cyanide and its reaction products.
14. A 'major mining hazard' is a mining hazard that has the potential to cause an incident that could result in more than one death.
15. VWA's primary operational focus in relation to mining is on the control of risks to health and safety associated with 'major mining hazards'.
16. VWA's first priority as the Victorian OHS regulator of mining is to ensure that duty holders have identified and eliminated or reduced the risks associated with major mining hazards, so far as is reasonably practicable. This is for the obvious reason that the more serious the consequences of a hazard, the more important it is to avoid exposure to its consequences. For this reason, VWA takes the view that it is more important to ensure

that duty holders are addressing hazards that have the potential to cause death or serious injury, than it is to ensure that they are addressing hazards that may result in minor injuries.

### ***Compliance measures used by the VWA***

17. The VWA performs its oversight role by ensuring that the duty holder is assessing the potential for incidents involving mining hazards, and providing control measures to prevent or to mitigate against such incidents.

18. VWA's mine oversight processes include:

- Risk ranking prioritisation of mine sites;
- Identification of the 12 highest health and safety risk ranked sites and subjecting those mine operations to a verification process on an annual basis;
- On site verification of control measures identified in the duty holder's Safety Assessments in relation to major mining hazards and associated elements of the mine's Safety Management System;
- Oversight inspection visits focusing on reviewing workplace hazards, incident trends and emerging issues; and
- Incident response and service requests.

### ***Risk ranking prioritisation of mines***

19. In 2009, the VWA undertook a risk ranking prioritisation of all mine sites in Victoria. This was based on four criteria:

- number of employees;
- complexity of hazards;
- expertise on site; and
- inspector assessment.

20. Subsequently, the risk methodology has developed to its present form which includes an additional six criteria:

- annual productions rate;
- number of incidents;
- total number of hours;
- number of lost time injuries;
- number of notifiable incidents; and
- hazard severity.

21. The Hazelwood coal mine is ranked as one of the highest 12 risk ranked sites. The risk ranking is reviewed annually. Due to it being in the top 12, the Hazelwood coal mine is subject to an annual verification process.

### ***Reasonable practicability***

22. In assessing the adequacy of the health and safety risk control measures adopted by a duty holder, VWA has to consider the criterion of “reasonable practicability” in respect of what the duty holder can be expected to do to control the risk. The requirement of reasonable practicability qualifies all of the main duties imposed by the OHS Act, including those imposed by sections 21, 23 and 26. This means that a duty holder is only required to adopt control measures if their implementation can be considered “reasonably practicable” in light of the risk to health and safety. Reasonable practicability is not defined in the OHS Act, but s 20(2) indicates that in determining whether a particular control measure is reasonably practicable to adopt, a duty holder should take into account:
- (a) the likelihood of the hazard or risk concerned eventuating;
  - (b) the degree of harm that would result if the hazard or risk eventuated;
  - (c) what the duty holder knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk;
  - (d) the availability and suitability of ways to eliminate or reduce the hazard or risk; and
  - (e) the cost of eliminating or reducing the hazard or risk.
23. Each of these factors has to be taken into account when determining whether or not the control measures adopted by the duty holder are adequate.
24. To take an example relevant to this Inquiry, there is a known risk with open cut coal mines that the exposed coal is susceptible to catching fire. Past experience in Victoria supports that this is likely to happen from time to time. However, past experience also shows that a brown coal fire in an open cut mine is unlikely to result in death or serious injury. For example, the Hazelwood mine was able to continue operating throughout the period of the fires this year.
25. Where a coal fire occurs in a non-operational part of an open cut coal mine, the risk to mine employees is much less than if the fire occurs on operational plant in the worksite, such as the fires that occurred at the Hazelwood mine on 1 August 2011 and 21 January 2012. This is for two reasons. First, because there are more possible sources of ignition with both mobile and fixed plant, so that the risk of a fire occurring is greater. Secondly, if a fire occurs on plant – such as a dredger – an employee could be trapped by the fire, or the plant may collapse, thereby placing the employee at risk of death or serious injury.
26. The situation is quite different with underground mines, where a coal fire presents a more serious health and safety risk, including the risks associated with gas explosion, or that the fumes from the fire could asphyxiate people working in the confined environment of an underground mine.
27. The consequences associated with coal fires in the non-operational parts of open cut coal mines include the discharge of smoke and carbon monoxide. These have the potential to become a health hazard both to people fighting the fire, and to people living and working near mine depending on levels of exposure to the smoke and carbon monoxide. However,

the degree and likelihood of harm from such a fire is much less than the degree of harm that is likely to result from <sup>major</sup> mining hazards, given that these hazards do not represent an immediate or identified risk of death or serious injury. Rather, the degree of risk of harm associated with these hazards is typically a function of the level and length of exposure. In the case of firefighters, for example, the exposure to the hazard must be properly managed and limited through a combination of rostering, monitoring and personal protective equipment such as breathing apparatus.

28. The VWA's position is that in OHS, the primary focus is on eliminating or reducing those mining hazards that have the potential to cause the greatest degree of harm, such as death or serious injury.
29. The degree of harm that may result from a particular hazard also informs the question of whether or not a particular control measure is "reasonably practicable" to implement by a duty holder within the terms of the OHS Act. For example, the best way of eliminating or reducing the risk of fire in a non-operational part of a mine might be to rehabilitate the land. However, given the cost or feasibility of rehabilitation, compared with the likelihood of a fire and degree of harm that might result from it, rehabilitation is unlikely to be considered a "reasonably practicable" control measure for dealing with this particular hazard in the context of occupational health and safety.
30. Similarly, the cost of installing and maintaining, across the entire non-operational part of a large open cut coal mine such as Hazelwood, a mine fire services system that would be effective in controlling a coal fire, is likely to be disproportionate compared to the degree of harm that could result from such a fire. Accordingly, such a risk control measure whilst valid and effective, would not be considered reasonably practicable to enforce, even if it might be considered desirable or reasonable in order to prevent or control lesser consequences.

### ***Improvement notices***

31. The same issues arise in relation to issuing improvement notices. In order to issue an improvement notice to a duty holder, an inspector has to have reasonable grounds for believing that the duty holder is in contravention of the OHS Act, in other words is not controlling the risk to health and safety so far as is reasonably practicable. Where the notice is to be based on a reasonable belief of a contravention of a section like sections 21, 23 and 26, it effectively means that:
  - (a) The inspector has to be able to identify a risk to the health and safety of employees (for section 21) or persons other than employees who may be exposed to risks to their health and safety from the conduct of the undertaking of the employer (for section 23);
  - (b) The inspector is able to suggest suitable risk control measures that the duty holder could adopt that would eliminate or reduce that risk; and
  - (c) The implementation of such control measures is reasonably practicable, taking into account all of the factors in section 20(2).
32. This is because unless there is a measure available to control the risk so far as is reasonably practicable, the duty holder is not considered to be in breach of sections 21, 23

and 26. For this reason, improvement notices usually identify one or more control measures that the duty holder could implement to comply with the notice, leaving the decision and the choice up to the duty holder.

33. However inspectors do not usually require the duty holder to adopt a particular control measure (even though they have the power to do so under section 111(3)). This is because it is the responsibility of the duty holder to decide which control measure they should implement, after carrying out their own risk assessment, including a risk assessment of any additional risk control measures they may have independently identified.

### ***Conclusion***

34. VWA has not identified any shortcomings in its regulation of the mine hazard of mine fire. VWA has not made any changes to our response to such an incident following the fire on 9 February 2014 at Hazelwood coal mine.
35. VWA has not identified any gaps within the OHS legislative framework concerning the regulation of the OHS hazards of mine fire at open cut brown coal mines.

### **INVESTIGATION INTO THE FIRE**

36. In carrying out inspections and site visits, VWA Inspectors form a view in real-time about any safety issues present at a workplace, and on that basis, decide whether or not to issue a statutory notice such as an improvement notice or prohibition notice.
37. By contract through VWA Enforcement Group, comprehensive investigations are carried out for the purposes of establishing whether a breach of the OHS Act has occurred; gathering evidence in support of statutory action such as prosecution; and determining whether or not a potential prosecution has reasonable prospects of success and is required in the public interest.
38. As the Enforcement Group at VWA is not under my direction, I am not informed of ongoing investigations and I do not have any knowledge whether VWA has commenced or intends to commence an investigation into potential breaches of compliance with OHS legislation by duty holders or emergency response providers.

### **SAFETY OF MORWELL WORK PLACES**

39. VWA undertook several activities which provided information to employers and employees operating in the Morwell area during the Hazelwood Coal mine fire with respect to workplace safety.
40. VWA External Affairs representatives participated in the State's Emergency Management Joint Public Information Committee (EMJPIC) and the Regional (Gippsland) EMJPIC. Participation in the EMJPIC enabled VWA to identify relevant community engagement activities, including:
- (a) Providing material for community newsletters and public information advertising;



- (b) Providing an Advisory Service staff member at the community information centre; and
  - (c) Determining the need for guidance/information for workplaces in the region affected by the coal mine fire.
41. On 18 February 2014, VWA issued a media release in relation to air quality and workplace safety in the Latrobe Valley (Attachment 2) [\[WSV.0002.001.0013\]](#).<sup>1</sup> Also on this day, I participated in a local radio interview where I discussed air quality and workplace safety.
42. A VWA Advisory team member was located in the Morwell Community Information Centre from 5 March 2014 offering advice to employers and employees regarding the impact on health and safety in workplaces as a direct result of the mine fire.
43. On 7 March 2014, I attended a Morwell Business Leaders breakfast forum to listen to issues and provide OHS advise as necessary. I was not asked nor required to address any specific OHS issues.
44. An information sheet offering practical advice on the cleaning of workplaces affected by the ash from the fire was launched on the VWA website on 14 March 2014 (Attachment 3) [\[WSV.0002.001.0014\]](#).<sup>2</sup> This website address and information concerning VWA's Advisory Service was also publicised in local media.

Dated

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**Leonard J. Neist**

<sup>1</sup> The media release can be accessed at <http://www.worksafenews.com.au/component/k2/item/362-poor-air-quality-signals-a-call-for-workplace-safety.html>

<sup>2</sup> VWA's information sheet can be accessed at <http://www.worksafe.vic.gov.au/about-worksafe-victoria/hazelwood>.