

TRENDS IN PROSECUTIONS UNDER OCCUPATIONAL HEALTH AND SAFETY LEGISLATION IN NSW AN OVERVIEW

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INTRODUCTION

The primary purpose of this paper is to provide basic empirical information on prosecutions under the NSW *Occupational Health and Safety Act* and associated legislation. The fact that such information has not been readily accessible has made evaluation of the effectiveness of the legislation, at least at the level of prosecutions, a difficult task. More generally it can be argued that the unavailability of such information is part of a wider problem of the consistent lack of information available to workers on issues of health and safety in the workplace.

A subsidiary purpose of the paper is to place the empirical data available on prosecutions within the context of attitudes to the prosecution of companies for breaches of health and safety legislation. Braithwaite and Grabosky³ have shown convincingly that there existed an overwhelming rejection of adversariness or strict punitive enforcement of health and safety legislation among the 19 Australian agencies whose responsibility was the enforcement of such legislation. The authors concluded from their survey that the views expressed by senior management in such organisations reflected a view of business as socially responsible and law abiding. However a majority of the senior officials interviewed also thought that the penalty imposing powers of their agencies were important. The authors concluded that "the majority preference is to walk softly and carry a big stick".⁴ It is, therefore, legitimate to question the severity and nature of penalties if they are imposed within an ideological framework of the **last resort**.

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3 Grabosky, P. and Braithwaite, J., *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (1986)

4 *ibid.*

An essentially non-prosecutorial view has also been at the centre of a new style health and safety legislation which has concentrated on consultation with industry and has also considered prosecution as the 'last resort'. Such attitudes have also been reflected in administrative changes within government departments whose role it is to administer health and safety law.

PROSECUTIONS

Until the introduction of the *Occupational Health and Safety Act* in NSW in April 1983, the major legislation under which prosecutions were mounted were the *Factories Shops and Industries Act* (1962) and the *Construction Safety Act* (1912).⁵ Table 1 shows the total number of prosecutions under the *Factory Shops and Industries Act*, the *Construction Safety Act* and (after 1983) the *Occupational Health and Safety Act* for the 13 year period from 1975/76 to 1987/88. Table 1 also shows the total number of convictions and the number of cases which were withdrawn or dismissed.

**Table 1 Prosecutions Under NSW Health and Safety Legislation
1975/76 to 1987/88**

Year	Convictions		Dismissed/ Withdrawn		Total	
	No.	%	No.	%	No.	%
1975/76	180	61.0	115	39.0	295	100
1976/77	111	71.3	47	29.7	158	100
1977/78	145	79.7	37	20.3	182	100
1978/79	170	82.1	37	17.9	207	100
1979/80	203	87.1	30	12.9	233	100
1980/81	208	81.3	48	18.7	256	100
1981/82	165	76.8	50	23.2	215	100
1982/83	189	77.1	56	22.9	245	100
1983/84	219	76.3	69	23.7	291	100
1984/85	391	81.3	90	18.7	481	100
1985/86	291	73.5	105	26.5	396	100
1986/87	237	64.1	133	35.9	370	100
1987/88	184	73.6	66	26.4	250	100

Source: DIRE Annual Reports

The information provided shows that there was a dramatic increase in prosecutions in 1984/85. However, since that period there has been a consistent decline in the number of prosecutions to the point where, in 1987/88 the number of prosecutions at

5 There were also a limited number of prosecutions under the *Dangerous Goods Act* (1975) which were determined in the Local Courts. Between 1975/76 and 1982/83 there were an average of five prosecutions each year under this legislation.

250 was below the thirteen year average. The average number of prosecutions over the period was 275 per year, with an average conviction rate of 76 per cent.

The increase in prosecutions in 1984/85 might have been expected with the introduction of the *Occupational Health and Safety Act* in 1983. However as Table 2 shows the new legislation has made a relatively small contribution to the overall number of cases brought before the court. Indeed it is clear that the bulk of matters dealt with have been prosecutions laid under the *Factory, Shops and Industries Act*. Furthermore the decline in prosecutions over the last three years has occurred primarily as a result of the declining use of the *Factory, Shops and Industries Act*. In 1987/88 the *Factory Shops and Industries Act* comprised 50 per cent of prosecutions, while the *Construction Safety Act* and the *Occupational Health and Safety Act* each made up a further 25 per cent of the total.

Table 2
Prosecutions Under the
Factories, Shops and Industries Act (FSI),
Construction Safety Act (CSA), and
Occupational Health and Safety Act (OHS)
1975/76 to 1987/88

Year	FSI		CSA		OHS		Total	
	No.	%	No.	%	No.	%	No.	%
1975/76	255	86	40	14	-	-	295	100
1976/77	105	66	53	34	-	-	158	100
1977/78	148	81	34	19	-	-	182	100
1979/80	147	71	60	29	-	-	207	100
1979/80	204	87	29	13	-	-	233	100
1980/81	218	85	38	15	-	-	256	100
1981/82	185	86	30	14	-	-	215	100
1982/83	173	71	72	29	-	-	245	100
1983/84	228	78	60	21	3	1	291	100
1984/85	377	78	88	18	16	4	481	100
1985/86	267	67	98	25	32	8	396	100
1986/87	224	60	103	28	43	12	370	100
1987/88	126	50	63	25	61	25	250	100

Source: DIRE Annual Reports

The proportional increase in the use of the *Occupational Health and Safety Act* has occurred at a time of a decline in the total number of prosecutions. In summary, while the proportional use of the *Occupational Health and Safety Act* has grown from 1 per cent of total prosecutions in its first year of operation to 25 per cent over five years, the context in which this has occurred has been a short term increase then a longer term decline in the total number of prosecutions by the Department.

CASES WITHDRAWN OR DISMISSED

It has been mentioned that the average conviction rate over the thirteen year period was 76 per cent. Not surprisingly this rate was most strongly influenced by convictions gained under the *Factory, Shops and Industries Act* which made up the majority of prosecutions. It is however worth considering how the *Occupational Health and Safety Act* has fared in the courts since 1983. Of the 155 cases mounted by the Department under the *Act* to 30 June 1988, some 37 per cent of the cases were withdrawn or dismissed. There is some indication that more cases are proceeding to conviction in recent years with the percentage of those withdrawn or dismissed falling from 53 per cent in 1986/87 to 28 per cent in 1987/88. The use of the *Construction Safety Act* in the courts has also fared relatively badly in recent years. In 1985/86 the 42 per cent of cases were withdrawn or dismissed, while in 1986/87 the percentage was 40 per cent and in 1987/88 it was 38 per cent.

In instances where cases are dismissed from the court it is worth considering the use of section 556a of the NSW *Crimes Act* (1900). Section 556a allows the court, after finding the offence proven, not to proceed to a conviction. On the basis of the defendant's good character or antecedents, or extenuating circumstances or the trivial nature of the offence, the court may dismiss the charge. Of the 463 cases which were withdrawn or dismissed between 1983/84 and 1987/88 some 195 or 42 per cent were dismissed under section 556a of the NSW *Crimes Act*. Clearly while there has been extreme reluctance to lay criminal charges against companies, there has been no reluctance to use the provisions of the *Crimes Act* to dismiss proven offences.

FINES FOR CONVICTIONS UNDER HEALTH AND SAFETY LEGISLATION

The following information relates to fines for convicted breaches of various regulations under the *Factory Shops and Industries Act*, the *Construction safety Act* and the *Occupational Health and Safety Act*. The information refers to the calendar years of 1985, 1986, 1987 and 1988 and was calculated from information supplied through the monthly summaries made available to the NSW Occupational Health Safety and Rehabilitation Council by the DIRE. An acknowledged problem with the information is that, for an unknown reason, it does not include all prosecutions if the figures supplied in the Annual Reports are taken to be correct.⁶

The averages fines shown in Table 3 are calculated on information concerning 740 successful prosecutions over the four year period. Several points are noteworthy. Firstly average fines under the *Occupational Health and Safety Act* are consistently higher than the other legislation. The lowest average fines consistently occur under the *Construction Safety Act*. Secondly there is considerable difference between the maximum and minimum fines imposed. For instance in 1987, while the overall average fine was \$782, the lowest fine was \$50 under the *Construction Safety*

⁶ Figures for the Annual Reports are supplied by the courts. Figures supplied to the occupational Health, Safety and Rehabilitation Council are made available by the Department's Legal Branch. A likely reason for the discrepancy relates to record-keeping practices within the Department.

Act and the maximum fine imposed was \$5000 under the *Factory Shops and Industries Act*. In 1988 the overall average fine was \$771, however the minimum fine was \$100 and the maximum fine was \$3500.

**Table 3 Average Fines Under Health and Safety Legislation
1985 to 1988**

Act	1985 \$	1986 \$	1987 \$	1988 \$
Factory Shops Industries	445	471	764	856
Construction Safety	264	228	447	496
Occupational Health & Safety	907	700	1398	1119
Total Average Fine	436	427	782	771

It is clear that the overall level of fines under health and safety legislation had increased somewhat between 1986 and 1987, however it is also clear that the average fine is quite low. The low level of fines is particularly apparent if we consider the maximum penalties which are available under the various pieces of legislation. The NSW legislation was amended in 1987 to provide for fines of up to \$10,000 in the Industrial Magistrate's Court or up to a maximum of \$100,000 in the case of a breach of the *Occupational Health and Safety Act* if determined in the Industrial Commission. Yet in 1988 the average fine was \$771 and the maximum fine imposed was \$3500.

WORKPLACE FATALITIES AND FINES IMPOSED

An area that has been of considerable concern has been accidents which have involved both a fatality of a worker and a breach of health and safety legislation. Table 4 shows fines involved for breaches which have involved a fatality over the four year period from 1985 to 1988.

**Table 4 Average Fines for Accidents Involving Fatalities
1985 to 1988**

Year	Breaches Involving Fatalities No.	Average Fine \$	Max Fine \$	Min Fine \$
1985	3	1800	3500	400
1986	2	875	1250	500
1987	12	1750	3000	200
1988	5	1800	3500	1000

A number of points can be made concerning the information in Table 4. Firstly there is a relatively low number of successful prosecutions involving fatalities given that there are around 100 workplace fatalities that are reported to the Department annually as required by legislation. Secondly the fines are no where near the maximum penalty which could be imposed. Thirdly the minimum fines in some years were extraordinarily low.

REGULATIONS ENFORCED UNDER SPECIFIC ACTS

Some comment can also be made on the specific regulations used under the health and safety legislation in the courts. Of the 747 proven cases which were analysed between 1985 and 1988 it was apparent that the bulk of successful prosecutions were conducted under a few regulations. Sections 27 of the *Factory, Shops and Industries Act* covers a breach of "failure to fence dangerous machinery". The regulation has been in force basically unchanged since the nineteenth century. For all convictions under all the regulations of the three health and safety acts in NSW, section 27 comprised 46 per cent of the total. The average fine for failure to fence dangerous machinery over the four year period was \$731.

Two other regulations also widely used related to the failure of employers to notify workplace accidents to the Department. Failure to notify accidents under specific conditions are breaches of section 48 of the *Factory, Shops and Industries Act* and section 18 of the *Construction Safety Act*. Convicted breaches of these two sections accounted for 24 per cent of all successful prosecutions. What is significant is that almost a quarter of all convictions gained by the Department in reality derive from outside the inspectoral process. The usual method of detecting that an accident has not been notified is when solicitors representing claimants in compensation cases contact the Department of Industrial Relations for further information in relation to an accident and it is revealed that the Department has no record of the accident ever being notified by the employer. The average fine under these two sections was \$257. If the chance of detection is low, and if upon detection the penalty imposed is minimal, then one can appreciate the potential for massive under-reporting of workplace accidents in NSW.

SUMMARY AND CONCLUSION

After an immediate increase in prosecutions with the introduction of the *Occupational Health and Safety Act* there has been a long term decline in prosecutions. The decline in prosecutions has occurred because of a decline in the use of the *Factory Shops and Industries Act* but has not been counter-balanced by an increase in the use of the *Occupational Health and Safety Act*. However, most prosecutions are still mounted under the *Factory Shops and Industries Act* rather than the *Occupational Health and Safety Act* although the latter was designed to replace the use of the former legislation.

There is generally a low conviction rate under health and safety legislation. One point which needs to be considered is the widespread use of s. 556a dismissals.

Fines imposed as a result of convictions have increased slightly in recent years, however fines are still extraordinarily low given the potential penalties available.

While it might be argued that the introduction of the *Occupational Health and Safety Act* has been successful in its role of fostering consultation and co-operation with industry for the provision of safe places to work, it is also clear that for those companies that do offend and are convicted in the courts the penalties imposed are light. While the "big stick" of potentially heavy fines is available in the legislation, the reality is that the level of fines imposed is light. The point is important because the potential for heavy fines is seemingly irrelevant, if the day-to-day practice of the court is not to treat corporate offenders seriously. Occasionally, a heavy fine is imposed on a company, usually where an accident has generated particular media and/or trade union attention. While such occasions may have an ideological function by giving the appearance of active regulation, I would suggest that the normal practices are a declining level of prosecutions and a continuation of low penalties.

