THE ROLE OF PROSECUTIONS IN ACHIEVING A SAFER WORKPLACE

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For most of this century the major pieces of industrial safety legislation (with the exception of legislation relating to safety in coal mines and metalliferous mines) have fallen within the administration of the Department of Industrial Relations and Employment, for many years known as the Department of Labour and Industry.

On 13 April 1989, the Minister for Industrial Relations and Employment announced that occupational health and safety responsibilities in this State would be combined with workers' compensation and rehabilitation under a single authority. He said:

> Development in the areas of accident prevention, rehabilitation and compensation are closely related and should be brought together under the responsibility of a single authority.

Transfer of administration occurred on 1 July 1989. In the near future prosecutions for occupational health and safety legislation will be discharged by the Work Cover Authority.

The major change of direction with regard to regulation of hazards in the workplace in New South Wales came with he adoption of the Robens style legislation. The broad thrust of the Robens Report was adopted in 1981 by the Commission of Inquiry into Occupational Health and Safety (the Williams' Report). One of the major recommendations of the Williams' Inquiry was that a single body be responsible for the administration of occupational health and safety, but the autonomy of the then Workers' Compensation Commission should be preserved.

Safety legislation had up to that point followed the style of nineteenth century legislation developed to meet the workplace hazards produced by the Industrial Revolution. It was highly detailed and prescriptive. It was, however,in the opinion of Robens and Williams, ineffective in reducing the toll of industrial accidents. The legislation was fragmented and difficult to follow, and could not respond quickly enough to fresh hazards in the workplace. By setting minimum standards it induced employers to do the minimum in achieving safety.

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The Robens Report stated that legislation should not be concerned

> ...with detailed prescriptions for innumerable day-to-day circumstances but with influencing attitudes and with creating a framework for better safety and health organisation and action by industry itself....Legislation should provide a framework for self-regulation of the workplace by partnership of employers and employees working together.[2]

I do not propose to deal with the recommendations of the Robens and Williams Inquiries as they have already been the subject of excellent analyses by authors in the field. I will attempt to give a brief account of the practical operation of the legislation from the point of view of the prosecutor. In short, the *Occupational Health and Safety Act* 1983 was the result of these Inquiries, prescribing broad general obligations on employers and others. The *Act* was a complete departure in style from earlier legislation. Section 15(1) of the *Occupational Health and Safety Act*, under which most prosecutions are brought, states "Every employer shall ensure the health, safety and welfare of all his employees." The Industrial Commission in *Carrington Slipways Pty. Ltd. v. Callaghan* (1985) 11 *IR* 467 held that duty to be absolute. Such a strict and broad duty is, however, balanced by broad defence provisions defined in s.53. Subsection (2) spells out a number of the components of an employer's common law duty of care to employees:

> (2) Without prejudice to the generality of subsection (1), an employer contravenes that subsection if he fails -
> (a) to provide or maintain plant and systems of work that are safe and without risks to health;
> (b) to make arrangements for ensuring safety and absence of risks to health in connection with the use, handling, storage or transport of plant and substances;
> (c) to provide such information, instruction, ccccccc and supervision as may be necessary to ensure the health and safety at work of his employees;
> (d) as regards any place of work under the employer's control -
> (i) to maintain it in a condition that is safe and without risks to health; or
> (ii) to provide or maintain means of access to and egress from it that are safe and without any such risks;
> (e) to provide or maintain a working environment for his employees that is safe and without risks to health and adequate as regards facilities for their welfare at work; or
> (f) to take such steps as are necessary to make available in connection with the use of any plant or substance at the place of work adequate information -
> (i) about the use for which the plant is designed and about any conditions necessary to ensure that, when put to that use, the plant will be safe and without risks to health; or
> (ii) about any research, or the results of any relevant tests which have been carried out, on or in connection with the substance and about any conditions necessary to ensure that the substance will be safe and without risks to health when properly used.

Contrast to this the style of the earlier legislation at its most prescriptive where regulation 86(4) and (5) of the Construction Safety Regulations requires the provision of guard rails:

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2 Robens Report p 7

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(4) **Guard Rails and Toe Boards - Where Required.** - Guard rails and toe boards shall be provided on the outer edges and ends of all scaffolding from which a person or object could fall a distance of 2 m or more.

(5) **Guard Rails.** - Guard rails shall be of equivalent strength and rigidity to oregon pine timber of cross sectional dimensions 100 mm x 50 mm and shall be 1 m in height.
Guard rails of metal piping shall be not less than 33.7 mm external diameter and if of rape not less than 24 mm in diameter.
All guard rails shall be secured to uprights at intervals of not more than 2.4 m.

The main benefits of the older style of legislation were certainly precision and direction. It claimed, however, to serve as both a penal code and safety code. In this it was less successful, frequently falling between these two stools, being too rigid for guidance on site and too loose for successful prosecution. Technical details can often be difficult to prove. For example, in the regulation quoted above, establishing that materials used in the construction of a faulty guard rail were of equivalent strength and rigidity to oregon pine timber 100 mm x 50 mm may be difficult to substantiate in court.

The *Occupational Health and Safety Act* presents difficulties in prosecuting due to its lack of precision. It would amount to an abuse of the prosecution discretion to issue a summons merely on the basis of a failure by an employer to comply with the primary obligation imposed upon an employer by s.15(1), namely the failure to ensure the health or safety of a worker. That obligation is so wide and strict that in practice prosecutions are not launched until an assessment is made that the prosecution evidence can substantiate negligence or fault, generally particularised as a specific failure to comply with the requirements of subsection (2). Moreover, it is the practice to consider on the available evidence whether a defence might be made out under s.53 which provides:

53. It shall be a defence to any proceedings against a person for an offence against this Act or the regulations for the person to prove that -
(a) it was not reasonably practicable for him to comply with the provision of this Act or the regulations the breach of which constituted the offence; or
(b) the commission of the offence was due to causes over which he had no control and against the happening of which it was impracticable for him to make provision.

Section 15 essentially represents a codification of the common law duty of care, with the defence bearing the onus of proving issues of reasonable practicability. It is not surprising that much reliance is placed at first instance and by the Courts on appeal on negligence cases to determine whether or not a breach of the *Act* has occurred.

For the purposes of the shop floor one might question what guidance is given by such broad duties. For the leading hand, safety officer, or production supervisor, it would be of little benefit to refer them to the vast body of law on employers' liability in negligence. Indeed when the *Act* was first promulgated my Legal Section received numerous enquiries from employers and management personnel as to what were their obligations under the *Act*. The enquirers almost had an air of expectation that

somehow we could read into the legislation how many toilets and wash basins they should provide, how scaffolding should be constructed, and so on.

I believe the *Occupational Health and Safety Act* has achieved a general increase in awareness about safety issues. This is probably evidenced by the far greater media and academic interest in the area. From my observations I am certain the *Act* also forced many employers to look afresh at their systems of work. Prosecutions under the *Act* do provide examples to industry of what can go drastically wrong if a safe system of work is not implemented and enforced. I believe its other main achievement is the provision of a framework for workplace safety committees.

A great deal of faith was placed in the new legislation, perhaps understandably in light of the enormous toll of industrial accidents and the consequent desire for an effective solution. The emphasis on self-regulation and education had an effect of reducing in some areas of the administration the importance placed on prosecutions. However, in my view such a direction overlooked the fact that prosecution had always been considered as a final tool of enforcement. If co-operation or forms of coercion short of a summons (such as directions or prohibition notices) could be effectively employed, they would be preferred.

There was also pressure that prosecutions be brought under the *Occupational Health and Safety Act* rather than the associated or old legislation. The rationale for this was that until precedents had been developed, the broad, general obligations would not be fleshed out in detail. That reasoning was not particularly sound because a host of prosecutions involving different factual situations would provide no more guidance to the shop floor than the existing authorities on common law negligence.

The reality was that prosecutions continued at broadly the same rate. In the case of recalcitrant employers, employees who ignored directions, or who failed to rectify a hazard which had been perfectly illustrated by an accident, the only answer lay in prosecution. There continued to be a social demand where serious accidents had occurred due to negligence, or breach of the regulations under the associated legislation. Considerable criticism has been directed at the Department for investigating and prosecuting on accidents. An employer with any degree of safety consciousness will rectify the immediate cause of accidents. The horse has bolted. Prosecutions should be aimed at prevention. While this criticism has merit, I am of the view that an enforcement agency cannot be seen to allow accidents due to negligence to occur without sanction. To do otherwise could be read as an official acceptance that accidents are an inevitable consequence of industry. Most occupational injuries that I have been involved with were preventable.

Most prosecutions continue to be taken under the associated legislation. The precise elements of an offence generally make investigation and prosecution easier. Some of the original criticism of that legislation by the Robens and Williams Reports

are not, in my view, completely valid. It was said that minimum standards resulted in minimum level of safety. From my experience, employers do not indulge in an exercise of reviewing their individual legislative obligations and sailing as close to those requirements as possible for the purpose of cost cutting. An employer might engage in that exercise if, for example, directed by an inspector to install dust extraction equipment costing many thousands of dollars. Generally, however, unsafe workplaces are more realistically likely to result from a combination of apathy or ignorance, or an overall disregard for safety in pursuit of profit.

The traditional legislation was said to be defective in that it directed itself to physical hazards rather than the organisational deficiencies in the system of work that allowed the hazard to occur. However, workers are injured by physical hazards, by machinery, electricity, chemicals, and falls, and if the legislation takes an easy direct course in removing that hazard it has achieved something.

One of the most common cause of accident is workers being caught by machinery. Section 27 of the *Factories, Shops and Industries Act*, which derives from the earliest Factories Act of the 1840's provides simply that "the occupier of a factory shall securely fence all dangerous parts of machinery...". It is a simple effective provision. It cares nothing for corporate management systems, but directs an employer to guard dangerous machinery by whatever means he may wish. That is the section's strength, and the strength of much of the associated legislation. The section is also highly adaptable. For example, the introduction of work robots created a number of hazards where rogue robots set upon passing workers. Section 27 provided a simple solution in the form of a fence around the robot's work area with interlocking gates for access.

What has become apparent since the passage of the *Occupational Health and Safety Act* is that there is no easy answer to the high numbers of occupational injury and disease. Australian Bureau of Statistics figures for 1986-87 reveal a total of 79,674 compensatory injuries resulting in three or more days absence from work. The number of occupational diseases was 13,510.

The new legislation covers all workplaces, is broad in application and an employer, if he is to comply with it, is required to look at his organisational and management structure to ensure safe systems of work are put and kept in place. The legislation's weakness is that it does not tell anyone exactly what should be done. It is hoped that defect will be addressed by the implementation of Codes of Practices under the *Occupational Health and Safety Act*. Section 44B of the *Act* provides:

> 44B. In any proceedings under this Act in which it is alleged that a person contravened or failed to comply with a provision of this Act or the regulations -
> (a) an approved industry code of practice which is relevant to any matter which it is necessary for the prosecution to prove in order to establish the alleged contravention or failure is admissible in evidence in those proceedings; and
> (b) the person's failure at any material time to observe the approved industry code of practice is evidence of the matter to be established in those proceedings.

The associated legislation in directing itself at physical hazards fails to look at the system of work that allows the hazard to occur.

What is required in my view is a balanced use of both the new and old styles of regulation.

Most employers have in my experience some commitment to safety. They are generally socially responsible. In my experience it is not so much the penalty which concerns an employer (perhaps largely due to the size of the penalty), but the mere fact of being brought before the Court. It is exceptionally rare for an employer to fail to answer a summons in a prosecution. Self-regulation, education and co-operation provide the ideal solution to occupational safety. However, where corporate apathy or non-commitment to safety predominates at the workplace there is a role for prosecution. Any further diminution of that role in my view would be wrong.

I do not, however, believe that too much emphasis should be placed on what may be achieved by individual prosecutions. A prosecution cannot redress a death or serious injury. Across the workplaces in the State there exist a myriad of hazards. Circumstances may combine to produce an accident in any one of them. When an employer does not assume the responsibility that is primarily his, it is the function of the enforcement agency to use prosecution action, which may be viewed as the last resort. It is not the use of heavy sanctions on limited and isolated occasions that will promote safety, but a consistent prodding and pushing across the board, where apathy prevails.