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Reflections on General Deterrence and OHS Prosecutions

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Introduction

On Friday 11 December 2009, The Workplace Relations Minister's Council met in Melbourne. Its Communiqué stated that the Australian and all of the State and Territory governments, except for Western Australia, agreed to adopt a model occupational health and safety statute. Its full title is the *Work Health and Safety Act*, and the consenting governments will enact this statute so that together with the regulations, it will commence operation on 1 January 2012. Even Western Australia has agreed to work towards a national OHS regime from the Pacific to the Indian oceans.

It is not our purpose in this brief paper to detail the many advantages which will flow from a uniform approach to workplace health and safety. Suffice to note that it will most assuredly raise productivity, and hopefully will lead to a reduction in workplace injuries and death. Our purpose here is to comment upon the prosecution of offenses under the *Work Health and Safety Act* (the "WSH Act"), drawing on our empirical research on the deterrent effect of OHS prosecutions in NSW and Victoria, and specifically the general deterrent impact of these prosecutions. Together with Associate Professor Suzanne Jamieson, Professor Ron McCallum and Associate Professor Toni Schofield were awarded an Australian Research Council Discovery Grant to examine the effects of prosecutions under NSW and Victorian OHS legislation. This grant was awarded before Deputy-Prime Minister Julia Gillard commenced initiatives in April 2008 to establish a model OHS law which would be uniformly enacted into law right across the nation.

As part of our research, we interviewed two groups of employers in Victoria and New South Wales. The first group of employers had been prosecuted for offences under the relevant OHS statute, while the second group had not been prosecuted. We undertook these interviews in an endeavour to throw some light upon the specific and general deterrent effects of OHS prosecutions. Our study of the first group of prosecuted employers has been published as T Schofield, B Reeve and R McCallum, "Deterrence and OHS Prosecutions: Prosecuted Employers Responses", (2009) 25 (4) *The Journal of Occupational Health and Safety Australia and New Zealand*, pp 263-276. Our study of the second group of non-prosecuted employers has been submitted for publication. Our research on both specific and general deterrence convinces us that prosecutions under the new model Act, in situations where there is a risk of death, or serious

injury or illness, will play an important role in reducing workplace injuries and fatalities. We also argue that although prosecutions may have a general deterrent impact in line with classical deterrence theory, more significant is their constitutive and symbolic effects. In making this argument we begin by outlining the health and safety duties found in the WSH Act, the offences created by the Act and their attendant sanctions. We then describe our theoretical position before moving to an examination of the empirical research supporting our reframing of deterrence theory. We conclude by arguing that regulators must use prosecutions under the WSH Act routinely (but judiciously) in order to effectively construct or constitute employers as having the primary responsibility for ensuring workplace health and safety under the new legislation.

The Health and Safety Duties and the Three Categories of Offences

Part 2 Divisions 2, 3 and 4 of the WSH Act specify the health and safety duties. Section 18, which is the sole provision in Division 2, specifies the primary duty of care. Refreshingly, this primary duty is not confined to employers; rather it is placed upon persons conducting businesses. This provision is too long to be set out in full; however, its first two sub-sections will give the reader the essence of this duty. Section 18(1) an (2) provide:

> *Primary duty of care*
>
> (1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:
>
> (a) workers engaged, or caused to be engaged by the person; and
>
> (b) workers whose activities in carrying out work are influenced or directed by the person, while the workers are at work in the business or undertaking.
>
> (2) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.

Division 3 of Part 2 places health and safety duties upon persons having management or control of workplaces, and also what are colloquially known as "upstream duties" on manufacturers, designers and importers of plant, substances and structures. Division 4 of Part 2 places health and safety duties on officers, on workers and on other persons at workplaces.

From an examination of the Australian case law on the current Robens/style OHS statutes, it does appear that in a clear majority of instances where fatalities and serious injuries have occurred, prosecutors have alleged that the employer has breached its general duty. In other words, in NSW most OHS prosecutions are brought under s 8(1) of the Occupational Health and Safety Act. Therefore, it is fair to conclude that when the WSH statutes are in operation, most incidents concerning workplace death or injury will relate to the primary duty, that is to allegations that the person or persons conducting the business or undertaking have breached their primary duty to ensure the health and safety of workers etc, so far as is reasonably practicable.

Division 5 of Part 2 of the WSH Act specifies three categories of offenses which may be charged against persons who breach any of the duties, including the primary duty placed upon persons conducting a business or undertaking. In this paper, our focus will be on category 2 offences, however, it is important to unpack each of the three categories.

A category 1 offence will be made out where it is proved beyond reasonable doubt that the duty holder engaged " ... in conduct that, without reasonable excuse, [exposed] an individual to whom that duty [was] owed to a risk of death or serious injury or illness" ... and the person was " ... reckless as to the risk of death or serious injury or illness to that individual." (1) The penalties are significant: maximum fines of three million dollars for bodies corporate, and for officers and persons conducting businesses or undertakings, maximum fines of six hundred thousand dollars or five years imprisonment or both. The essence of this offence is akin to industrial manslaughter, or to the workplace serious injuries or deaths duties in the present Victorian and NSW OHS statutes. (2) In our view, instances where category 1 prosecutions are brought are likely to be rare.

A category 2 offence will be made out where it is proved beyond reasonable doubt that the duty holder failed " ... to comply with the duty" ... and the failure exposed " ... an individual to a risk of death or serious injury or illness." (3) Here the penalties are for an individual a maximum fine of one hundred and fifty thousand dollars, for officers or individuals conducting businesses or undertakings maximum fines of three hundred thousand dollars and for bodies corporate one million five hundred thousand dollars. Category 2 offences are likely to be brought where

situations have arisen where there was a risk of death or of serious injury or illness. Put another way, category 2 offences are likely to be the work horses of the system by policing occurrences of risk to workers where there is no reckless conduct or behaviour.

A category 3 offence will be made out where it is proved beyond reasonable doubt that the duty holder simply failed to comply with the duty. (4) The maximum penalties are fines of fifty thousand dollars for individuals, one hundred thousand dollars for officers or for persons conducting businesses or undertakings, or three hundred thousand dollars for corporations. In our view, category 3 offences will be brought, in the main, where breaches of duties are serious, but where no risk of death or serious injury or illness is evident.

The Role of Prosecutions Where There is a Risk of Death, Serious Injury or Illness

Our concern in this paper is to explore the role which prosecutions should play under the WSH Act where there is a risk of death, serious injury or illness. In other words, what should be the role of category 2 offences in the federal, State and Territory uniform OHS regimes? Will prosecutions be used to deter duty holders, and especially primary duty holders? Will they be instituted as part of a program of general deterrents? Alternatively, will such prosecutions play second fiddle to enforceable undertakings which the WSH Act calls "WSH undertakings"? (5)

Part 13 of the WSH Act deals with prosecutions by the regulator, that is by the federal, State and Territory Workcover or Worksafe authorities. Section 229 makes it clear that proceedings for offences which includes category 2 offences, may be brought by the regulator or by an inspector. Importantly, sub-section (3) of section 229 obliges the regulator to set out general guidelines on prosecutions and on WSH undertakings. Sub-section (3) says:

> (3) The regulator must issue, and publish on its website, general guidelines for or with respect to:
> (a) the prosecution of offences under this Act; and
> (b) the acceptance of WSH undertakings under this Act.

When these guidelines are published, we should have a clearer idea of the role which the regulators envisage for prosecutions. However, as argued by two of the authors elsewhere, it

seems likely that in light of the range of sentencing options available under the Act, prosecutions will very much be thought of as "last resort sanctions," by regulators, to be rarely used, but taken very seriously when applied. (6)

The Role of Prosecutions in General Deterrence: Advancing a New Understanding

Given the uncertain or potentially reduced role of prosecutions under the WSH Act, it is timely to examine the deterrent impact of OHS prosecutions, particularly considering that deterrence is the central purpose of prosecutions under current OHS regimes. So did our research find that OHS prosecutions deter other companies from offending? Well, as is often irritatingly the answer in social scientific research, it all depends on what you mean by general deterrence. Nevertheless, from our perspective, yes, prosecution *did* play a decisive role in deterring non-prosecuted employers from offending but not necessarily in ways that prevailing understandings of the problem would suggest. Let us elaborate and explain what we have come to understand by general deterrence theoretically speaking, and how OHS prosecution plays a significant role in advancing it.

Deterrence is defined very generally as "the avoidance of criminal acts through fear of punishment." (7) Typically deterrence is divided into specific and general, with the former referring to the application of sanctions to prevent offenders from reoffending and the latter to discouraging would-be offenders from breaking the law. (8) You will all be familiar with understandings of general deterrence that are strongly associated with what is widely called "classical deterrence theory". Heavily influenced by rational choice theory, individuals and companies are conceptualised as rationalist materialists or utility maximisers who calculate the costs and benefits of compliance, choosing to comply only if it will provide them with maximal benefits and minimal costs. (9-11) From such a perspective, the certainty, swiftness and severity of punishment are crucial, as they are factored into potential offenders' weighing of the costs and benefits of crime. (12)

Classical deterrence theory also assumes a linear causal relationship between an organisation's knowledge of enforcement actions against other companies, actions taken to ensure compliance and, in the case of OHS legislation, decreased injury and fatality rates. (13) This kind of

relationship is based on the assumption that organisations and their agents actively seek out information about enforcement activity, that knowledge of cases increases the perceived risks associated with non-compliance, and increased risk perception will then result in changes to compliance-related behaviour. (13) Using this framework, a significant body of contemporary research attempts to analyse deterrence as a "perceptual process", i.e., it measures offenders' perceptions of the certainty, severity and celerity of punishment. (14, 15) In comparison, "objective research" (which forms the majority of studies on corporate crime deterrence) uses indicators from official crime statistics such as arrest rate and average sentence lengths, to measure correlations between increased certainty and severity of sanctions and changes in crime rates. (14, 16) Whatever the approach, there are surprisingly few studies examining the relationship between OHS prosecutions and general deterrence. Researchers are forced to draw tentative conclusions about this relationship from a small number of studies conducted mainly in North America and the UK and including research on other regulatory crimes (see, for example, 17-23).

Based on this research as a whole, we can conclude that the empirical support for a traditional model of general deterrence is not robust. (24) The evidence in favour of general deterrence is not as strong as that supporting specific deterrence, partly because of the difficulties associated with causally linking a reduction in injury rates and fatalities to sanctions. (25, 26) Workplace accidents and injuries are the result of a range of interacting causes, and changes in injury rates can reflect factors such as the impact of the economic cycle and employment levels within industries. (27) Furthermore, methodological weaknesses and the inaccuracy of existing workplace injury statistics make it difficult to isolate the effects of sanctions from these other influences. (24)

There are other leads, however, for addressing the analytical vacuum created by the limitations of classical deterrence theory. These derive in the first instance from sociological and organisational studies, and propose an understanding of the law as a social or institutional process that actively constructs organisational behaviours and norms (29-32) Organisations are thought to adopt certain practices (such as compliance with OHS legislation) because the socio-legal environment renders these practices as proper and legitimate (29). This perspective can be

used to build on the work of OHS scholars who argue that OHS legislation is a form of "constitutive regulation" (26) which uses legal norms to define compliant forms of conduct rather than prohibiting particular positive acts. (28) In other words, although OHS legislation may try and stop non-compliant behaviour through fear of sanctions, its main aim is to modify companies' behaviour so that they act positively in ways that promote safe workplaces. This approach means compliance is an on-going process, although it may be difficult for companies to know exactly what they must do to comply. This may be particularly so in the case of performance standards found in OHS legislation, which require employers and other duty holders to undertake positive tasks to ensure (so far as is reasonably practicable), safe places of work. (33)

On the other hand, the legal process is not straightforward or uni-dimensional in constructing compliant behaviour in relation to OHS. It does, in fact, punish OHS offences with criminal convictions, large fines and the possibility of imprisonment. In the process, criminal prosecutions for OHS offences operate to *symbolise* moral blameworthiness and condemnation of employer' actions (or inactions), and this does not fit with the view that OHS offences are simply regulatory breaches that involve little moral culpability on the offender's part (25, 34). Yet this symbolic process is not a one-way street. As an established body of sociological scholarship on the law and public policy suggests, it is a *discursive* and dynamic *political process* open to *contestation* by multiple groups, but especially employers, employees and their representatives, administrative agencies and the courts. (24) Accordingly, the extent to which OHS legislation and prosecution deter other businesses from offending – general deterrence - is also shaped by the meanings and actions that prevail among them in relation to OHS law and prosecution.

We propose that the routine use of prosecution has powerful symbolic effects, and is an important way of constructing or bringing employers into being as the principal bearers of *responsibility* for preventing workplace injuries and deaths. In other words, such a process bestows a particular kind of responsibility-bearing *identity* that renders employers agents required to act in specific ways towards their workplaces and their employees in terms of OHS. Conferral of such an identity for employers simultaneously confers an identity on employees as having *entitlements* to health and safety, even involving significant constraints on their freedom

in order to prevent employees injuring themselves. Thus the process may be understood as double-edged insofar as the construction of employers' responsibilities simultaneously renders employees as bearers of the right to a safe and healthy workplace. However, given the contested political nature of the process, this is not to suggest that employers necessarily acquiesce to the identity accorded them; as our empirical research will show, many dispute the courts' interpretation of the their duties under the legislation and the onerous obligations such an interpretation entails. In this context, routine prosecution for significant OHS offences continues to be a crucial mechanism in deterring serious workplace injuries and deaths because of its constitutive and symbolic effects. We turn now to the recent research findings that have informed the development of our approach and understanding of prosecution and general deterrence.

Non-Prosecuted Employers, Prosecution and Deterrence: Our Findings

We conducted in-depth interviews with 19 employers – 12 from NSW and 7 from Victoria. In NSW, participants were drawn from a variety of industries including construction, local government, labour hire and mining [see Table 1 at the end of this paper]. In Victoria, all the small business participants were members of the farming community, but there were also large organisation participants from the public sector and the construction industry [see Table 2 at the end of this paper]. Overall the majority of participants comprised employers from medium to large organisations (NSW = 9/12, Victoria = 4/7), with a quarter of the NSW participants and just under half of Victorian participants being micro/small businesses. Our explicit purpose was to explore what non-prosecuted employers knew about OHS prosecution, what it meant to them and the actions they took, if any, in relation to it. There were several key themes that emerged from employers' accounts.

1. Knowledge, awareness and workplace interventions

All but two employers (1 in NSW and 1 in Victoria) were aware of at least one prosecution in any industry. Although a general knowledge of cases was widespread, there were significant differences between small and large organisations in how they acquired and operationalised information about prosecutions. Generally small-company participants had heard about high-profile cases through stories in large newspapers, personal contacts or occasionally through

newsletters from their employer representative bodies. The owner of a small NSW company said that:

> *…the only [prosecutions] I hear of…is when they hit the media and the news and they are on the news at night…*

In contrast to small companies, larger organisations regularly employed specialist OHS staff who carefully monitored prosecutions through, for example, subscriptions to news services, OHS publications, professional networks and forums and checking the websites of regulatory agencies. The Health and Safety Manager of a large NSW power company drew on his legal background to keep on top of any prosecutorial developments:

> *… I am a member of the Law Society in NSW and the similar body in Victoria. They send me regular updates each week which flag out…key prosecutions occurring, particularly in the safety field…I get their monthly magazine and again there is usually key prosecutions…A thing I have also formed a habit of doing is going to the Industrial Relations Website and just bringing up…some of the prosecutions that have occurred in current times, looking at the ones that come up under WorkCover and particularly looking at ones which relate to like industries and looking at what has happened there…*

All large-organisation participants had comprehensive pre-existing safety measures in place, so for most of these interviewees prosecutions were used to revise their procedures, or check that their systems addressed the particular issue arising from the prosecution, rather than to make significant changes. The OHS Manager of a Victorian government agency said that awareness of what was happening with other relevant organisations:

> *… makes you reassess where are your gaps. [It makes you think] does that actually apply, do we do that business or do we have similar works? And yeah, you …think about your own vulnerability and try and close [the sources of it] … off.*

For another participant working for a Victorian government organisation, knowledge of prosecutions did not determine particular actions, but was used to "direct and emphasise" existing safety plans, as research in the US by Neil Gunningham and his colleagues has also found (13,23).

Because large-organisation participants systematically monitored the prosecutorial activities of regulatory authorities, on occasion they were able to target particular issues for change and sometimes make very specific improvements on the basis of prosecutorial information. In one Victorian government organisation, the current chief executive had come from a similar

organisation that had been prosecuted under OHS legislation and this had contributed to a change in risk-assessment practices in the organisation:

> *…We have certainly changed the way we do [risk assessment for staff members] and we have certainly got some very well documented procedures now around the introduction of patients into a home based treatment programme. So yes, there has been an impact.*

The Health and Safety Manager of a NSW power company (previously referred to) changed the type of equipment the company used after hearing of a prosecution involving a worker who had been electrocuted after touching a power line with a metal tape-measure:

> *…One of the things we did here was we had a group go and investigate some types of measuring tapes we could use in that environment. We have actually got fibreglass measuring tapes, and again that came out of that prosecution. We looked at that and thought we are in a similar industry. Here is an opportunity to learn from somebody else's mistake, and we ran with it and now we issue fibreglass measuring tapes to anybody working in those sorts of environments.*

2. <u>Acknowledging and resisting responsibility for workplace injuries and deaths</u>

For participants from organisations of all sizes, knowledge of particular prosecutions stimulated an understanding of employers' responsibility for, and ownership of, the problem of workplace injury and death. One participant, employed by a large Victorian construction company, said that he responded to hearing of prosecutions of NSW construction companies by involving senior executive staff more fully in safety management. He believed that by involving company leaders, other employees would understand that the company took safety seriously and had taken "ownership" of the problem:

> *We have made our senior management, our directors…a lot more aware of their responsibilities, that the safety is not an add-on but it is now an integral part of the whole system… We get our directors [to] actually come in when we do talks with say project management, site supervisors, and things like that…*

Although this company was motivated by prosecutions against other companies in the same industry, other participants responded to cases they had heard of even when the company involved was in a different industry to their own. The participant owner of a small NSW pest extermination business said that hearing of a high-profile case against a construction company:

> *…certainly makes you think about your responsibilities to your employees and to your client. It makes you think about that to make sure you comply, because the last thing we would ever want would be an accident of any kind.*

Although prosecutions heightened employers' awareness of their responsibilities under OHS legislation, many participants disputed the scope of this responsibility, and again there were differences here according to company size. Before going into the detail of these findings it is helpful to outline the essence of the Robens approach which underpins contemporary OHS legislation. According to this approach, those who control the creation of OHS risks should take responsibility for removing or reducing those risks, including employers, self-employed persons, controllers of premises and even manufacturers and designers.(35) For employers, this principle is embodied in their duty to ensure the safety and health at work of their employees, so far as is reasonably practicable.(36) As the case law in Victoria and NSW makes clear, this duty extends to taking measures to protect employees from their own risky, careless or inadvertent behaviour.(37-41) According to Bauer J in *WorkCover Authority of NSW v Maine Lighting Ltd*: (42)

> *The very purpose of the Act was to introduce safe working practices so that accidents are prevented. The Act was designed to protect against human errors including inadvertence, inattention, haste and even foolish disregard of personal safety as well as the foreseeable technical risks in industry.*

Thus the actions of employees should be considered as one aspect of the risk-control strategies that employers are responsible for implementing, the implicit message being that through effective OHS measures employees can be prevented from harming themselves. However some small participant-employers did not know of, or rejected this legal formulation of employers' broad responsibilities to their employees. One small employer in the Victorian farming industry said that:

> *…accidents will always happen somewhere along the line but most of the time we are the cause as a person ourselves…Most of the time we have to be responsible for our own actions really.*

Similarly, many employers said that workers' own actions were the central cause of accidents. Participants described incidents where workers did not follow explicit safety instructions that had been given to them, took short-cuts or had a laissez-faire attitude to safety. Accordingly, from the perspective of some employer-participants, accidents could be primarily prevented by employees using their "common sense". As one medium-sized employer participant in the construction industry put it:

> *…OH&S in itself is common sense…you know what you should and shouldn't do if you have common sense.*

For some small employers, their frustration at the difficulties faced in getting employees to take safety seriously was related to the fear that they would be prosecuted for something that was not their fault, but instead that of a "careless worker". Concern about workers' behaviour was also connected to the fact that employers were, as they saw it, "guilty until proven innocent" if case was brought against them under OHS legislation. Although legislation and employers' efforts could make workers more aware of safety risks, it was impossible, as one employer put it, "to legislate against stupidity." Employees' attitudes towards safety were thus identified as a key concern and a critical barrier to injury prevention. (43) If prosecuted, small employers felt that they would inevitably face a criminal conviction for a serious injury or death not of their making.

Larger companies also described employees' behaviour as a problem, but framed it in different terms to small-company participants. Rather than espousing responsibility for accidents caused by employees, large-employer participants saw workers' actions as another risk to be managed and controlled, if a particularly problematic one. The Health and Safety Manager of a large mining company described risk management in these terms:

> *…Within any incident there are… systematic failures, there are people-type failures, and there are environmental or engineering type failures. So we can do a lot on those two, we can have great systems and we can do lots of work on having proximity sensors on our machines and all those sorts of things, but the loose cannon always is the person in there, the unpredictability of the human being. So we do a lot of work on behavioural safety, about…thinking about what you are doing and assessing risks…*

The problem of managing employees' safety behaviours tended to be framed in terms of "safety awareness," sometimes referred to as one component of workplace culture. Under this conception of accident causation, employees' attitudes and behaviours were still a concern, but could be managed through implementing effective "safety systems." The OHS Adviser for a NSW government organisation put it in these terms:

> *Barriers tend to be people's negativity about OHS. I have a saying with people…nothing happened yet by good luck, rather than by good management, and…people say, oh I have been doing this job this way for the last twenty years and nothing has happened, you know? Why should you come in here and tell me how to do this job? As I said, good luck rather than good management. So again we try and reinforce a systematic approach about safety and just have processes and things in place to support that.*

3. *Fear of sanctions, normativity and organisational compliance as an ongoing process*

For most of the participants, and all of the large employer-participants, the new prosecutorial provisions introduced by OHS legislative changes themselves, particularly in Victoria where new legislation had been passed relatively recently, were significant in terms of ensuring that their organisations operated to secure safe workplaces for employees. The OHS adviser of a NSW local government agency, like other participants, linked legislative developments to changes in safety culture and the kinds of work practices that were expected in companies:

> *…To me, the OHS Act 2000… it changed the culture of a lot of organisations…by virtue of some of the fines and the potential fines that you would have out of the OHS Act, and what your requirements were to comply with that Act, as opposed to the previous Act of 1983…Because we are a self-insurer we are required to comply with not only the Act, but the requirements of WorkCover to maintain our self-insurance licence. But just generally across the state I think that it was a major transforming piece of legislation.*

In some instances participants made "cosmetic" changes to bring their practices in line with new legislation, but for others, legislative reform meant hiring new OHS staff or an entire overhaul of their existing systems. The Health and Safety Manager of a large power company (referred to above) recounted how his company had ensured they were compliant with new legislation:

> *... I monitored the drafts that were being developed and looked at what was proposed to occur particularly within regulation itself because there were quite some significant changes within the regulation…. [It] provided advice to management here that this is what they are about to do and made recommendations that what we should be doing is taking steps to, you know, meet that standard before the new regulation comes into effect. And the new act came into effect, and we did that.*

Rather than refer to a specific case, many participants said their organisations complied with OHS legislation to prevent the negative financial consequences associated with prosecutions generally. The OHS Director in one Victorian government organisation indicated that an increase in fines following the passage of the 2004 Occupational Health and Safety Act was one of the factors that had increased the organisation's focus on safety, especially at the board level, with the board wanting to "know more than they were previously interested in." He described the increase in penalties as a positive development because:

> *…if you have got a fifty thousand dollar impact or you have got a million dollar impact in a [government organisation] that is strapped for cash, if there is a potential million dollar impact they are going to stand up and take notice of that, so the increased penalties are certainly a disadvantage to doing it wrong.*

The OHS Adviser for a NSW local government organisation mentioned that the increase in financial penalties found in the most recent NSW Act "had a shock effect" on the managers of the organisation, particularly because of the perception that these managers could be personally liable under the legislation:

> *...If you remember the fines for the prosecutions went up from I think it was 165,000 to 1.6 [million dollars], that affected us in so far as... we ensured that we wanted to get the message across that the government of the day is taking this seriously and that you could be fined and lose your house and everything because of the fine.*

Similarly, an OHSE Consultant in the NSW automobile industry suggested that one reason why the board directors of the company were particularly safety conscious was because of the fact that the directors themselves faced heavy penalties (including, potentially, incarceration) if the company did not comply with safety legislation.

Although a number of companies mentioned the financial effects of prosecution, other participant-companies were concerned about reputational effects. This was particularly the case for larger companies, who had to ensure that they were compliant with OHS legislation if they were to win tenders for jobs from other large companies or government organisations.. Large-employer participants told us that if they faced an OHS prosecution, their clients "wouldn't touch them." As one participant in the construction industry put it:

> *[W]e don't want to be fined because it just impacts on the whole business...once you have got a good name you want to keep it. You know people know you are safe. One of our clients is the NSW Government and it is hard to get on their list...*

Overall, a fear of being prosecuted, in some cases compounded by increased penalties in new OHS legislation, kept many organisations focused on compliance and safety improvements. Neil Gunningham and his colleagues refer to this general fear of prosecution as an "implicit general deterrence effect," where compliance is determined by "the threat of legal sanctions implied by the mere promulgation or history of enforcement of laws and regulation." (44) Thus the operation of regulation in companies, the courts and regulatory bodies can create a "culture of compliance" where it is unthinkable that companies and their officers would intentionally break the law (45).

Conclusions

It is evident from our findings, then, that OHS prosecutions in NSW and Victoria did deter other employers from offending but not in conformity with prevailing understandings of how general deterrence works. Certainly, as the results pertaining to employers' knowledge and awareness of OHS prosecutions show, there was a relationship between an organisation's knowledge of enforcement actions against other companies and actions taken to ensure compliance that suggest a simple cause-and-effect relationship. Yet there was a significant difference between large and small employers that indicates this relationship was not as straightforward as classical deterrence theory suggests. Large organisations were much more likely to systematically monitor OHS prosecutions and use the information conveyed by prosecutions to revise their safety systems or make specific changes. As small businesses found out about prosecutions through the media or personal contacts (and sometimes their industry body) they tended to respond only to the emotionally or financially traumatic effects of accidents and prosecutions, producing a "chilling" effect on their business operations.

Our second major finding suggests that, by contrast with classical deterrence theory, general deterrence is a discursive institutional process in which the meanings of OHS law and prosecution involve a constitutive and contestant dynamic between the courts and employers. While OHS law and prosecution confer responsibility on employers for non-injurious workplaces, our study found significant resistance by employers, especially small-medium participants, to accepting this "identity." Many believed that workers or "fate" were responsible. In the face of such a contested process, it was evident that OHS prosecution plays a significant role in deterring non-prosecuted employers from offending insofar as it communicates precisely that they are the legitimate bearers of responsibility for safe workplaces who will be punished if they are found to have failed to fulfil the obligations associated with such responsibility. OHS prosecution thus served as a dominant constitutive force in the political struggle involved in the symbolic organisation of responsibility for workplace safety and, in turn, for deterring OHS breaches.

Finally, as our third key finding suggests, the prosecutorial provisions of OHS legislation in NSW and Victoria deterred non-prosecuted employers from offending through the role they

played in generating compliance with the norms and practices required to secure a safe workplace as an ongoing organisational process. OHS law and prosecution played a constitutively normative and regulatory role in shaping management and workplace cultures that embraced compliance as a routine feature of workplace life. Clearly, general deterrence as played out in the ways disclosed by this finding is not consistent with linear cause-and-effect conceptualisations. Indeed, such a finding cannot be easily explained by the theory of classical deterrence. Yet it is apparent that the responses of most employers to OHS prosecutions suggest that such prosecutions operate to constitute a "culture of compliance" and as such, deter offences. In relation to the new WSH Act, although we support the broadening of the range of sanctions used by regulators and the courts, our research suggests that prosecutions must be used routinely under the Act in order to deter non-compliance by non-prosecuted companies, because of the important constitutive and symbolic effects associated with such prosecutions.

Table 1: NSW employers industry and company size*		
Industry	Size	Number
Health and community services (public)	L	1
Transport (sales)	L	1
Transport	S	1
Building/construction	L	1
Building/construction	S	1
Manufacturing	L	2
Energy/power	L	1
Mining	L	1
Labour hire	L	2
Pest control	S/M	1
Total		12

*L = large employer, S/M = small/medium employer, S = small employer

Table 2: Victorian prosecuted employers' industry and company size*		
Industry	Size	Number
Health and community services (public)	L	3
Farming	S/M	3
Building/construction	L	1
Total		7

*L = large employer, S/M = small/medium employer, S = small employer

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2. *Occupational Health and Safety Act* 2004 (Vic), s 32; *Occupational Health and Safety Act* 2000 (NSW) ss 32A-32B.
3. *Work Health and Safety Act*, s 31.
4. *Work, Health and Safety Act*, s 32.
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