

‘Another Brick in the Wall’: Responses of the State to workplace fatalities in the New South Wales construction industry

Peggy Trompf



Photograph courtesy of CFMEU C and G Division NSW

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Abstract

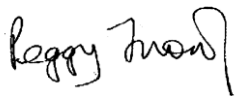
The construction industry is characterised by complex contracting and sub-contracting arrangements, relatively short-term working phases and high levels of occupational injury and death. This thesis examined judgements brought by the New South Wales WorkCover Authority under the NSW *Occupational Health and Safety Acts* 1983 and 2000 for offences in regard to workplace fatalities, and which were heard in the Industrial Court of New South Wales from 1988-2008. It demonstrated that penalties were low, representing approximately 18 per cent of the maximum penalty allowable. This figure is commensurate with other research on penalties for workplace death, and the thesis reflects on procedures of judicial sentencing and if the de-contextualising of workplace crime in the court process and in the wider community acts to result in punishments that are questionable as deterrent measures. The thesis considers these questions through the lens of a broad political economy, addressing the social construction of penalties through the perspective of judicial rules and norms, regulatory policies, state legislation and ideological constructions about workplace health and safety offences as essentially non-criminal events.

Statement of originality

This is to certify that to the best of my knowledge, the content of this thesis is my own work. This thesis has not been submitted for any other degree or other purposes.

I certify that the intellectual content of this thesis is the product of my own work and that all the assistance received in preparing this thesis, and all sources have been acknowledged.

Signed:

A handwritten signature in black ink, appearing to read "Peggy Brown". The signature is written in a cursive style with a large, looped initial 'P'.

Date: 29 August 2012.

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I also want to acknowledge the families of those workers represented on the Wall of Remembrance, and all families of those killed while going about their daily work. In a very small way, I feel that I have come to know a little of these workers as I read about the circumstances of their needless death.

*To Jo,
who gave me the chance she never had.*

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Abbreviations

ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
AiG	Australian Industry Group
ASCC	Australian Safety Compensation Council
C and G	Construction and General Division
CFMEU C and G	Construction Forestry Mining and Energy Union Construction and General Division
COAG	Council of Australian Governments
IGA	Intergovernmental Agreement for Regulatory and Operational Reform in OHS
NOHSC	National Occupational Health and Safety Commission
NSW	New South Wales
NSW IC	New South Wales Industrial Court
NSW IRC	New South Wales Industrial Relations Commission
OHS	Occupational Health and Safety
SWA	Safe Work Australia
WRMC	Workplace Relations Ministers Council

CHAPTER ONE

Introduction

For any way of thought to become dominant, a conceptual apparatus has to be advanced that appeals to our intuitions and instincts, to our values and desires, as well as to the possibilities inherent in the social world we inhabit.¹

Part One

In 2006, the New South Wales (NSW) branch of the Construction and General (C and G) Division of the Construction Forestry Mining and Energy Union (CFMEU C and G) built a Wall of Remembrance at the union's state branch office in the Sydney suburb of Lidcombe to commemorate those killed at work on construction sites. On it were inscribed the names of one hundred and twenty nine men who suffered a fatal traumatic workplace injury, over a nineteen-year period from 1988 to 2007. These injuries were caused by crushing, electrocution, falls from heights and being hit by moving vehicles or machinery.² Their ages ranged from 17 to 65 and, where available, court records show that instrumental in their deaths, were failures of comprehensive and legally required safety management systems. These deaths raise many questions regarding the adequacy of health and safety systems, compensation, the delivery of justice to relatives and friends of the deceased, the punishment of perpetrators and the adequacy of deterrence measures. Furthermore, they call into question the role of state occupational health and safety (OHS) regulators, the functions of the judicial system and the impact of neo-liberal ideologies on work health and safety.

This thesis focuses on the building and construction sector because, as will be shown, it ranks as the third most dangerous industry in Australia. Furthermore, I argue that its complex structure incorporates multiple contracting levels, and short term, contingent labour requirements that contribute to high rates of mortality, injury and disease. This thesis asks the broad research question – why has there been no

¹ Harvey D, *A Brief History of Neo-liberalism* (Oxford: Oxford University Press, 2005 at 5).

² The CFMEU Wall of Remembrance Project also provides free legal assistance and support to widows and families of deceased workers. CFMEU *Wall of Remembrance Project* <http://www.cfmeu-construction-nsw.com.au/wallremembrance.htm> (6/9/10)

significant decline in fatalities in the NSW construction industry over this nineteen-year period? This period has seen significant changes to OHS regulation in NSW yet the rate of fatalities remains largely constant. In developing an explanation for the stable rate of workplace fatalities this thesis considers the hegemonic ideologies that inform thought and action around the regulation of health and safety and asks what effect they have on penalty outcomes, deterrence and legislative effectiveness. It asks, how are penalties framed for crimes against OHS legislation? It explains the empirical phenomenon of the penalty quanta by considering theories about judicial sentencing, arguing that the de-contextualising of workplace crime in the court process acted to dilute punishment. That is, it explores how actions, activities and behaviours at work are isolated or disconnected from their structural and political environment so that economic imperatives that may drive unsafe behaviours are not considered, rendering the structural causes of injury and fatalities at work as obscured or ignored. The thesis also asks if laws and policy positions pertaining to the industrial relations of the construction industry which affected its representative trade union, had any bearing on workplace health and safety.

The thesis examines these issues through a systematic examination of 127 court judgements³ of the New South Wales Industrial Commission (NSW IC) related to 76 workplace traumatic injury incidents in NSW from 1988 to 2008. This period saw changes to industrial relations and health and safety legislation that affected the workplace and these changes form part of the overall analysis of events. The data collected from the examination of judicial decisions was supplemented with informal discussions with senior legal officers, union and industry representatives and senior regulatory officers in order to gain background information. In the course of researching this topic, government and regulatory responses to union activities around occupational health and safety (OHS) in one of the four most dangerous industries in Australia were also assessed.⁴

This thesis begins with the position that occupational health and safety cannot be removed from the arena of industrial relations (IR), in that decisions relating to corporations' or businesses' strategic planning and activities have at least some

³ There were 114 cases resulting in 127 individual prosecutions in the matter of 76 fatalities. That is, most cases involved multiple defendants.

⁴ Safe Work Australia. *Notified fatalities statistical report 2008-2009*, (Commonwealth of Australia 2010)

bearing on OHS. Consider, for example, the use of employment strategies such as shift work, overtime, bonus and incentive payments, contractual arrangements, labour hire, casual and part time work, and the employment conditions of precarious or contingent workers. There are health and safety implications for workers arising from each of these practices.⁵

The industrial relations literature was, historically, relatively silent on work health and safety issues, other than discussions about OHS committees and union campaigns that included OHS. By the late 1980's, traditional labour collectivism was on the decline, due to structural and legislative changes, and the interrelationship between IR and OHS as a field of academic interest, was largely passed by, with some exceptions, for instance the work of Lobel and Tucker in Canada.⁶ The relative absence in the industrial relations literature of 'institutional and regulatory inter-linkages' between industrial relations and OHS was also noted by Australian researchers.⁷ This is an absence with both theoretical and practical implications, especially given the 'de-collectivist' regulatory changes during the years of the Liberal-National Party (LNP) federal government of 1996 to 2007. These changes had a concomitant effect on other industrial structures, such as increases in flexible labour arrangements, de-unionisation and the undermining of OHS, due to these labour arrangements.⁸ This academic oversight has not assisted the discovery of underlying causes of illegal or dubious OHS or IR practices. Furthermore, the separation of IR and OHS both institutionally and ideologically aids the portrayal of health and safety as an area of mutual benefit⁹, in opposition to the contested arena of IR.

⁵ See, for example. Michael Quinlan and Claire Mayhew (nd) 'Evidence versus ideology: lifting the blindfold on OHS in precarious employment' [http://www.docs.tce.unsw.edu.au/orgmanagement/Working Papers/WP138.pdf](http://www.docs.tce.unsw.edu.au/orgmanagement/Working%20Papers/WP138.pdf). (14/09/2010). See also Mayhew C, Quinlan M and Ferris R, 'The Effects of Subcontracting/Outsourcing on Occupational Health and Safety: Survey Evidence from Four Australian Industries,' *Safety Science*, (1997) Vol 25, No 1-3 at 163-178.

⁶Quinlan M and Johnstone R, 'The implications of de-collectivist industrial relations laws and associated developments for worker health and safety in Australia, 1996-2007', *Industrial Relations Journal* (2009) 40:5, 426-443, p.426.

⁷ Ibid.

⁸ Ibid 3.

⁹ That is, reflective of Robens OHS philosophy of mutual interests and cooperation between labour and capital.

The approach

This thesis establishes relationships between OHS and IR both empirically and theoretically. First, it empirically connected the two by an analysis of the NSW IC judgements arising from fatal traumatic workplace incidents. Secondly, it examined relevant literature, policy documents, legislation, regulatory guidelines and reports to build a picture of the broader influences on health and safety at work. By situating the discussion around court decisions, not least of which is the low penalty amounts imposed, as a ‘centrepiece’, it was possible to show how other social, political, economic and cultural forces contribute to a diminution of workplace protections.

The thesis finds that penalties for workplace fatalities in the construction industry were never exacted in full in NSW, nor did they come close to the maxima available. The analysis of decisions shows that for fatality prosecutions under the NSW *Occupational Health and Safety Act 1983 (OHS Act 1983)* and the NSW *Occupational Health and Safety Act 2000 (OHS Act 2000)*, the average penalties represented 18% of the maximum penalty allowed, a finding that is in accord with other national and international research.¹⁰ This finding raises legitimate questions as to the deterrent effect of the law.

¹⁰ See Chapter Four.

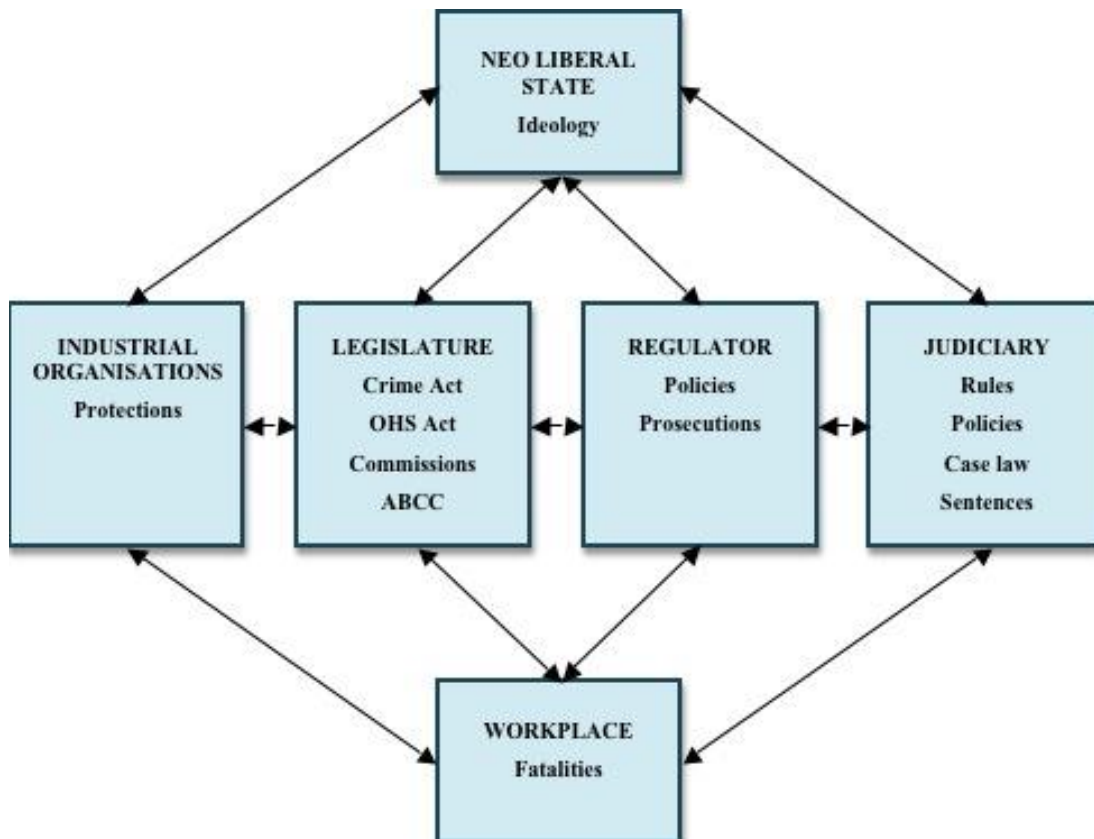


Figure 1.1. Conceptual model

There are no simple or straightforward explanation for the discrepancy between maximum legislated penalties for breaches of health and safety laws and the level actually imposed on offenders, which then has consequences for the effectiveness of deterrent mechanisms in the current regulatory model. The model in figure 1.1 demonstrates the dialectical relationships between the State and civil society, represented by the regulatory body (WorkCover), the federal and State legislature (government), the judiciary (Industrial Court), industrial organisations and the construction workforce. The promulgation of laws and regulations around IR and OHS influences the decisions of OHS regulators in their enforcement and administration of OHS laws, which in turn shapes the functions of the judiciary in their administration of these laws. These influences are not unidirectional, with judicial decisions in turn shaping the decisions the regulator makes concerning prosecution targets, as well as government views on the effectiveness of legislated penalties. The model shows some of the inter-linkages between IR and OHS regulation, which as the thesis will demonstrate, addresses some aspects of the social relations of production that impact on construction fatalities, and the contest between labour and capital in labour’s attempt to improve workplace health and safety.

Worker organisations (construction unions) are included in the model, because they are part of the regulatory machinery of both OHS, through their role in Australia's tripartite consultative mechanisms, and IR legislation as agents in the arbitration system¹¹ both being institutions of the State.¹²

Implicit in Gramsci's theory of the hegemonic State¹³ is not only its own relative autonomy, but also the relative autonomy of its different institutions and the inevitable areas of conflict between them. That is, empirically, the State is comprised of different institutions that operate autonomously and the interactions among these institutions have inevitable consequences for their behaviour. These are dynamic rather than unilinear interactions, which mean that there is always a degree of disorder, even confusion, surrounding the interactions between each.

Significance of the thesis

The thesis considers the propositions posed in the previous section through the lens of a broad political economy approach. It addresses the social construction of penalties through the perspective of judicial rules and norms, regulatory policies and state legislation. It also considers how ideological constructs, confusing legislative definitions and the absence of OHS as a category in governmental literature show how workplace health and safety offences are constructed as essentially non-criminal events. The OHS prosecution process is situated in social relations reflective of capitalist relations of production. This process is 'narrowly constructed', workplace inequalities are 'left unchallenged' and it plays 'a part in an ideologically significant fashion in the political process of shoring up hegemonic social structures'.¹⁴

Key in understanding the relationships between crime (fatalities), courts (including the State apparatus as a legislator and enforcer) and punishment (penalties for offences against OHS legislation, enforcement, effectiveness, suitability), is an analysis that seeks to discover the mechanisms through which a hegemonic class

¹¹ See Gardiner M and Palmer G, *Employment Relations: Industrial Relations and Human Resource Management in Australia*, 2nd ed. (Australia: MacMillan 1997); while Althusser and Gramsci saw they are part of the institutions of the State.

¹² Following Pusey, State is spelt with a capital 'S' when referring to the government, legislature and bureaucracy, and with a lower case 's' when referring to the geographic entities of for example NSW. See Pusey M, 'Australia: state and polity' in J.M Najman and J.S Western (eds) *A Sociology of Australian Society: Introductory Readings*, (Melbourne: Macmillan, 2003) at 28.

¹³ As discussed in Chapter Three.

¹⁴ Johnstone R, *Occupational Health and Safety, Courts and Crime: The Legal Construction of Occupational Health and Safety in Victoria* (Sydney: The Federation Press, 2003) at 276.

obtains the consent of others through alliances brought about by political and ideological struggle. The movement of the intersecting forces of capital, state and labour at one time or another will have common or opposing interests and therefore court processes alone are not sufficient in explaining low penalties, as they are framed by outside mechanisms and structures, which among other things, isolate OHS regulation and OHS as a concept, but which are intrinsic to the realities of the workplace.

The thesis characterises the management of risks and hazards associated with the construction industry in terms of hegemonic modes of governance. As Pearce and Tombs suggest, this approach allows ‘... an appreciation of the limits of the possible in terms of the regulation and management of such risks, both historically and in the present...it indicates the significance of competing and allied social groups and forces, some of which have been counter-hegemonic, some of which have been integral to various hegemonic groups’.¹⁵

The ‘competing’ and ‘allied’ groups that figure in this research include corporations and their managers, industry groups, state regulators, the judiciary, workers, trade unions and community groups who whether consciously or not, are engaged in struggle ‘over contested and changing ideological and material terrain’, which in this case is health and safety at work.¹⁶ Radical theory sees these contests as underlying all forms of industrial relations, and all forms of social existence, as classes struggle to assert themselves in the unequal social relations that characterise capitalist societies. As Hyman observes ‘industrial relations (are) ...an element in the totality of social relations of production’.¹⁷ It is from this standpoint that the thesis proceeds, in order to examine one aspect of the forces and relations of production that impinge on the safety and health of workers and their working environment, and which privileges capital and its allies in the process. Chapter Three introduces and develops the theoretical paradigms that are used in the thesis.

¹⁵ Pearce F and Tombs S, ‘Hegemony, risk and governance: ‘social regulation’ and the American chemical industry’ *Economics and Society*, (1996) 25:3,428-454 at 446

¹⁶ Ibid.

¹⁷ Hyman, in Bray M, Waring P and Cooper R, *Theory and Practice: Employment Relations* (North Ryde: McGraw-Hill Australia, 2009) at 62.

This research builds on Richard Johnstone's¹⁸ study of the prosecution of OHS offences in the Victorian state magistrates' courts. It examines how prosecutors, defence lawyers and judges of the NSW IC construct OHS issues where prosecutions under OHS legislation were brought by the state regulator, WorkCover Authority of NSW (WorkCover NSW), in relation to traumatic injuries causing death at a workplace. Like Johnstone, the analysis of court decisions uses Mathiesen's¹⁹ 'pulverisation' typology that positions the silencing of opposing forces or viewpoints as a tool to deconstruct the discourse of the courts which, in this study, is that of the NSW Industrial Court (NSWIC). However, this study differs from Johnstone in several ways. His was an historical examination of outcomes for all OHS prosecutions from the late 19th century to the 1990s, in all industries where prosecutions occurred in both fatal and non-fatal incidents. He observed numbers of prosecutions in the Victorian Magistrate's Court, noted the tactics of the court officers during those proceedings, conducted follow up interviews with these officers, and interviewed members of the regulator's inspectorate.

In contrast, this thesis focuses mainly on a textual analysis of the decisions,²⁰ and draws its conclusions as to the tactics of the defence, the prosecution and the judge's reasoning from them. Its focus is solely on traumatic fatalities in the NSW building and construction industry, which provides solid ground for considering NSW OHS legal procedures and practices within the broader context of the contested terrains disputed by agents of the state, the interests of capital and of the working class. As will be demonstrated, these contests are amplified in the construction industry, because of its unique position in the economy, its particular mode of production and a strong union presence. It shows how the structures of the state, the legislature, the regulator and the judiciary interrelate to silence or pulverise, not just penalties, but also the nature of workplace OHS offences generally. In addition, the thesis adds new information to the literature on OHS in the construction industry in relation to workplace fatalities and provides new insights into the question of why the rate of annual fatalities remains constant. It also goes some way to redress the theoretical

¹⁸ Johnstone, above note 13.

¹⁹ Thomas Mathiesen T, *Silently Silenced: Essays on the Creation of Acquiescence in Modern Society* (Winchester: Waterside Press, 2004).

²⁰ The terms 'decisions' and 'judgements' are used interchangeably.

separation of IR and OHS literatures and to highlight the importance of a radical sociological approach to the study of work, employment, health and the law.

Part Two

Method

The aim of the methodological approach taken in this thesis was to examine how courts treated and penalised offenders over a certain period of time. This involved examining the quantum of the penalties to look for consistencies, as well as examining the reasoning and rhetoric adopted by the courts in rationalising these penalties, through a textual analysis of the cases. This thesis uses qualitative and quantitative methods. This ‘mixed method’ approach allows for data triangulation, enhances and strengthens ‘conceptual linkages’²¹ and broadens the investigative process. Quantitative analysis of judgements was carried out using the computer spreadsheet application *Excel* to code elements related to the judgement decisions, to perform simple descriptive statistics and create tables, graphs and charts.

Quantitative data analysis

A database was built using information gleaned from judgements. Judgements were coded according to 19 criteria that served as the basic data elements in the database (see Table 1.1). Fatalities were coded according to the ASCC’s *Type of Occurrence Classification System* 3rd Edition.²² The mechanism of incident classification was used to ‘identify the overall action, exposure or event that best describes the circumstances that resulted in the most serious injury or disease’.²³ Univariate statistics were used to provide information about the central tendency and variability of the empirical data. Thus, summary statistics are given for the mean, minimum and maximum metrics, standard deviation and *p* values where applicable.

²¹Berg B, *Qualitative Research Methods for the Social Sciences* (Boston: Pearson, 2004) at 6; see also Buchanan J, ‘The Multi-method approach: benefits and challenges’, in Kelly D (ed) *Researching Industrial Relations* 2nd ed. (Leichhardt: The Federation Press, 1999) at 152.

²² Australian Safety and Compensation Commission *Type of Occurrence Classification System* 3rd Edition, (Commonwealth of Australia).

²³ *Ibid* 143.

Table 1.1. Data elements selected from cases.

1	Name of deceased
2	Name of judge
3	Name of defendant
4	Company size
5	Plea–guilty/not guilty
6	Prosecutions under the <i>Occupational Health and Safety Act 1983</i>
7	Prosecutions under the <i>Occupational Health and Safety Act OHS Act 2000</i>
8	Prescribed penalty
9	Penalty imposed
10	Penalty discount amount
11	Percentage of prescribed penalty paid
12	Appeal yes/no
13	Appeal outcome- upheld/dismitted
14	Appellant’s name
15	Years to judgement (time elapsed from fatal incident to judgement)
16	Date of the fatal incident
17	Incident type
18	Mechanism of injury
19	Occupation of deceased

Qualitative analysis

Analysis of judgement texts was undertaken using the computer software *NVIVO 9*, which aids in the analysis of large amounts of rich text based information and enables trends and concepts to be more easily identified, classified and sorted.

The categories (or nodes, as they are termed in NVivo) chosen to analyse texts of the NSW IC decisions were drawn from Mathiesen’s²⁴ original typology, in which he demonstrated the mechanisms that resulted in the ‘pulverisation’ of information and facts that were implicated in a major oil spill disaster.²⁵ With some modifications, this conceptual tool was later used by Richard Johnstone, when researching OHS prosecutions in the Victorian magistrates’ courts.²⁶

Decisions of the NSW IC were captured from electronic databases and the texts were also analysed by coding according to NVivo nodes. Categories were chosen to reflect

²⁴ Mathiesen above note 18.

²⁵ See Appendix A.

²⁶ Johnstone above note 13.

the elements of the Mathiesen pulverisation model, with the relevant nodes shown in Table 1.2 below.

Table 1.2. Mathiesen pulverisation model

Pulverising Technique	Application
Blame-shifting	<ul style="list-style-type: none"> a) Worker b) State c) Other parties – manufacturer, supplier, installers
Anthropomorphising defendant	<ul style="list-style-type: none"> a) Good character of defendant ‘morphed’ into characteristics of company b) Corporate defendant could receive benefits of its good managers/owners c) Corporation given human qualities – company active in community; company has “good heart”; company members “respectable” citizens
Corporate citizenship	<ul style="list-style-type: none"> a) Responsible, good record b) In business many years c) Numbers of workers d) No priors e) Cooperation with WorkCover f) Awards g) Low compensation premiums h) Good policies, procedures, practices
Individualising event	<ul style="list-style-type: none"> a) Event unique, incomparable, special, abnormal b) Essential to scrutinise event without reference to OHSM system c) Often linked to good corporate citizenship
Normalising event	<ul style="list-style-type: none"> a) Event normal, usual, general b) Removed from context and made normal in another c) Use of analogies to place event in context of the everyday d) Emphasis on similarity of event features with common experience of others (magistrate) e) Work practice common across industry
Isolating from the future	<ul style="list-style-type: none"> a) Ignore future consequences of event
Isolating in the present	<ul style="list-style-type: none"> a) Emphasis on what employer did for injured worker b) Defendant traumatised by event c) No priors d) Defendant rectified situation e) Defendant now acting appropriately f) Used in tandem with good corporate citizenship.
Relegating to outmoded past	<ul style="list-style-type: none"> a) Past is an aberration and now rectified b) Similar to isolating in the present, but different time scale c) No concern to current circumstances or likely future d) Not transferable to other parts of company activity

Categories were also chosen to collect text referring to different elements of the sentencing hearings, as seen in Table 1.3 below.

Table 1.3. Elements of the sentencing hearings

Element	Element
Charge	Judges summation
Company size	Mitigating pleas
Contractors	Objective features
Defence submission	Subjective features
Prosecution submission	Penalty
Penalty discounts	Objective features
General deterrence	Subjective features
Specific deterrence	Utilitarian factors
Incident particulars	Verdict

Fatality data collection

In the early part of 2000, the C and G Division of the CFMEU requested WorkCover NSW to provide details of persons who had sustained fatal traumatic injury in the workplace, starting at the year 1988. On behalf of the union, WorkCover then invited families to give permission for the names of their deceased family member to appear on a Wall of Remembrance constructed by the union at their state offices at 12 Railway Street Lidcombe, New South Wales. In total, one hundred and twenty nine names of deceased workers, their occupation, and cause of death were inscribed on the Wall, which was officially opened in 2004. These details formed the basis of the sample, and attempts were made to retrieve judgements in relation to these workers. Judgements could not be retrieved for all 129 persons, for reasons stated below, and the final sample resulted in the retrieval of judgements relating to 79 fatalities.

Prosecution data collection

In 1999, the electronic database, NSW Caselaw,²⁷ was launched through the NSW Industrial Relations Commission (NSWIRC) to provide on-line judgements and decisions for Courts and tribunals in NSW. This resource covers material from 1999 to the present time. Another electronic source, again from the NSW IRC and linked through the Australian Legal Information Institute (AustLii) data base,²⁸ contains judgements and decisions from 1985 to the present. Most judgment decisions were obtained through this medium. In addition, hard copies search of the NSW IC judges'

²⁷ See <http://caselaw.lawlink.nsw.gov.au/index.htm>. Note that case names are displayed as taken directly from the electronic source and not as usually seen when cited from hard copy law index.

²⁸ See <http://austlii.edu.au/au/cases/nsw/NSWIRComm/>

decisions in the IRC Library provided a further six decisions. Of the total number of names inscribed on the Wall, details of about 50 fatalities were unable to be located in the NSW IRC electronic databases or in hard copy from the IRC library. Case references are cited as they appear on the electronic databases and not in the more usual law report citation style. All other citations in the thesis and bibliography follow the *Australian Guide to Uniform Legal Citation*.²⁹

The search for hard copy records relating to decisions in fatal construction incidents that are held in the NSW IRC library was undertaken by examining all judgements held according to the name of the presiding judicial officer. Very few judgements were retrieved in this way. The reasons for inclusion in hard copy form are due to selection by judicial officers because of their legal interest so judgements would need to be deemed of interest or would otherwise be excluded, or more mundanely, the matter may have been physically removed and not returned.

The availability of judgements and decisions displayed on NSW Caselaw is usually within 24 hours after completion of court deliberations. However, delays may occur due to administrative arrangements concerning court-reporting variations. Of interest are those matters that do not appear on the NSW Caselaw site. These include instances where a member of the court or a judicial officer decides against publishing the matter on NSW Caselaw. This decision may be made because the matter contains a ruling on evidence given during a criminal trial; because the matter is private or because it is a minor decision made in a continuing case. In some cases, decisions and judgements are temporarily removed from NSW Caselaw, as in the case of a jury trial where a prior judgement mentioned the accused. These are normally reinstated at the expiration of the trial.³⁰

Where a matter is unavailable in either electronic or hard copy form, it may be able to be retrieved by application to the Industrial Registrar of the Industrial Relations Commission, who in turn would seek the file from the relevant judge. However, relevant details are required for this such as file numbers, case numbers and the name of judge. Judgements and decisions are not retrievable if the only information is the name of the deceased worker, which effectively means that only those parties

²⁹ Rozenberg P, *Australian Guide to Uniform Legal Citation*, 2nd ed. (Pymont: Lawbook Co., 2003)

³⁰ See *NSW Caselaw* 'Statement of availability'

http://www.lawlink.nsw.gov.au/lawlink/caselaw/ll_caselaw.nsf/pages/cl_soa

directly involved in the court proceedings have access to that information. Further information regarding the case particulars could be sought from WorkCover NSW, which could be used to seek access to files from the Industrial Registrar.³¹ However, both time limitations and costs involved in seeking permission have made this access unviable for this research.

WorkCover NSW does not prosecute in certain circumstances: there may be insufficient evidence to establish a breach; or an event may not be considered a workplace incident, but rather one of public safety. Other circumstances include fatalities that occur in a recreational incident; the deceased is a member of a family business; the deceased is the only defendant; where difficulties exist in establishing place of work; and in cases of suicide.³²

The twenty year time frame of 1988 to 2008 was chosen as it marked the beginning of the records available to the CFMEU C and G Division and the cut off date of 2008 was chosen due to the time lag of court hearings (anywhere between 2-8 years). It is likely that fatalities recorded by WorkCover Authority NSW up to 2004 had been finalised through the court process (in the event that a prosecution followed the workplace death) by 2008. The period also presented the most easily accessible record of electronic and hard copy transcripts of judgements of the NSW IC and it coincided with changes to OHS and IR legislation, both of which were significant factors affecting the lives of workers in NSW and Australia. A review of legal documents, specifically around sentencing policy guidelines and relevant legislation was undertaken to enable comparisons with other studies on penalty quanta for occupational health and safety prosecutions.

Informal background discussions were held with CFMEU C and G Division union officials and delegates and with senior safety officers of the Master Builders Association (MBA) of New South Wales. These discussions sought to gain opinions on government policies and legislation in respect of health and safety in the industry and their views on prosecutions for fatalities, appropriate penalties, and sentencing and deterrence options. Other discussions were held with the convenor and president of the NSW Workplace Tragedy Support Group (WTSG) to gather insights about the

³¹ Information from clerical staff, Industrial Registrar New South Wales.

³² Advice from WorkCover New South Wales to Secretary C and G Division CFMEU, received 22/10/03.

impact of fatalities on families, effectiveness of deterrent measures and issues of restorative justice. Discussions were also held with senior legal officers (one judge, three barristers, and two solicitors) about questions of penalty, prosecution and defence procedures and deterrence, and informal discussions were conducted with senior WorkCover inspectors. Three NSW IC hearings concerned with prosecutions related to fatalities on site were attended to gain insight into the court process.

The researcher is a long-standing and experienced tertiary qualified health and safety professional, specialising in the fields of occupational hygiene. Much of her work is conducted on building sites, particularly acting in the role of independent peer reviewer, advisor and educator to workers, unions and management, in matters relating to workplace hazardous substance exposures. In this capacity, she has a firsthand view and intimate knowledge of the complexities and constraints involved in maintaining safe and healthy construction sites. The researcher was not involved in a professional capacity with any of the fatality cases discussed in this thesis. The emic approach that the researcher brought to this thesis allowed a depth of technical and 'insider' knowledge to enhance the analysis. However, this approach also posed a potential source of bias because of this 'cultural participation', and so it was important for the researcher to observe a form of reflexivity, which aided in questioning assumed knowledge and beliefs. This was achieved through the literature and policy document review, as well as conversations with a wide range of personnel. All research was undertaken with the approval of the Human Research Ethics Committee at the University of Sydney.

Chapter outline

Chapter Two establishes the empirical problem, that is, the rate of injury and death in the construction industry and its relative stability over the last 20 years, and its context through an overview of some characteristics of the building and construction industry. It comments on the industry's economic contribution to the country, and some negative effects of that contribution seen in its high rates of workplace injury, illness and death. It discusses the complex web of sub-contractual relationships, and some of the negative aspects of those relations, such as sham contracting and 'phoenix' companies. The role of the regulator, WorkCover NSW and the NSW IC is considered, especially in relation to the level of penalties imposed in cases of

traumatic work fatalities. Finally, the chapter looks historically at the contribution made to safety by the building trades unions, principally the CFMEU C and G, and examines how regressive government policies have diminished their legal capacity to address health and safety.

Chapter Three draws on a range of literatures to identify the theoretical tools useful in explaining the problems posed in this thesis. It focuses on the theories of the State, of criminology and on social harm theory as a useful means of considering OHS crimes. It considers the problem of how serious OHS crimes are positioned as regulatory, rather than criminal offences and the possible consequences of that view as being detrimental to deterrence.

Chapter Four presents the analysis of the empirical data concerning decisions of the NSW IC from 1988 to 2008 for prosecutions against individual employers and corporations in relation to breaches of the NSW health and safety legislations of 1983 and 2000. It shows that penalties for workplace traumatic fatality are commensurate with other studies that also demonstrates penalty leniency. The second part of the chapter begins to identify reasons for the lenient penalties imposed for these breaches by describing some of the social rules and social norms that shape and influence judges and their judgements.

Chapter Five advances this discussion, where the argument is situated at the level of state structures and state apparatus. The elements of Mathiesen's model of 'pulverisation' are used to illustrate the ways in which crucial structural elements contributing to workplace fatalities are silenced. It also considers other factors such as state policies and regulatory rules, arguing that they are also implicit in low penalty outcomes.

Chapter Six examines more closely specific legal rules, such as those regulating sentencing and considers some reasons behind the 'silencing' of OHS crimes in general discourse. It re-introduces the theme of conflict between labour and capital as it explores attempts by the State (federally and local level) to impede the ability of unions to protect and monitor health and safety provisions on building sites.

Chapter Seven explores a series of important recent developments in OHS at state and federal level, which, it is argued, will have consequences for workers, unions and the judiciary. These changes reflect a policy agenda informed by neo-liberal ideology

where ‘market efficiency’ is prioritised ahead of worker safety in OHS reforms. These changes, it is argued, will weaken the agency of workers and their representatives. Furthermore, changes that the government has made to judicial jurisdictions in hearing OHS prosecutions in NSW have uncertain implications for future penalties and by corollary, deterrence value.

Chapter Eight concludes the thesis by discussing some ways in which deterrence of OHS harms might be enhanced; the continuing problem of the ‘softer’ perspective of OHS crimes as essentially non-criminal, and the future role of the NSW courts in dealing with OHS prosecutions. It suggests recommendations and avenues of future research.

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CHAPTER TWO

Structure of the building and construction industry

The building and construction industry in Australia is characterised by its scale and complexity. This chapter identifies a number of factors considered relevant to understanding and explaining injury and illness in this industry. It is important to identify these factors as they are often overlooked in the judicial processes surrounding prosecuting and sentencing under OHS laws. The chapter begins by establishing the place of the construction industry in relation to the overall Australian economy. It is an important vehicle for public and private capital investment. It has a large and relatively well-paid workforce, a condition won through determined union action since the mid 19th century.¹ It then moves to describe the fragmented nature of the industry, which is characterised by multiple tiers of contracting and sub-contracting arrangements, and illegal or dubious practices that, among other things, affect industrial relations and workplace health and safety. Building companies are fragmented across time and space because of their varying locations, trades and labour skills, ethnicities and different building stages. In the industry, labour is obliged to move where capital dictates. Labour faces both internal risks (actual dangers) and external risks (economic, social relations of production). The dangers of the industry can be partly attributed to these characteristics, as well as to the inherent risks and hazards present in the materials and methods used in construction.

These characteristics are mediated by wider social relations, which ultimately have a detrimental effect on workers' health and safety. The chapter concludes by taking an historical view, examining how building unions have shaped the industry, and how the interaction between unions, the State and the regulator have at times been harmonious and consultative, and at other times, antagonistic. State legislation has been influenced by its own economic concerns and by the interests of private capital. This section of the chapter argues that the Robens philosophy of mutual interests

¹ McQueen H, *We Built This Country: Builders' Labourers and Their Unions* (Port Adelaide: Ginninderra Press, 2011).

between capital and labour and the self-regulatory regime on which it was built has not proved as beneficial to workers as was anticipated.² This is particularly so due to the growth of subcontracting in the industry.³ The changes in the political landscape over time from the principles of social democracy to neo-liberalism have affected not only the economy but also ideological notions about work, its organisation and representation of its workforce. The relations between and among these superstructural elements are important to consider if we are to gain a deeper understanding of the forces affecting thought and action around the regulation of health and safety.

Economic characteristics

The construction industry is one of Australia's largest employers, providing major infrastructures through civil, commercial and residential construction. The Australian and New Zealand Standard Industrial Classification (ANZSIC) 2006 defines the industry as '...those businesses mainly engaged in the construction of residential and non-residential buildings (including alterations and additions), engineering structures and related trade services...'.⁴

For the three sectors (residential, non-residential and engineering structures), it was estimated that the value of construction work was AU \$40.5 billion in 1996-97 Australia wide.⁵ In NSW alone, it was estimated to be worth AU\$18 billion per annum in 1998/99, with Government spending about \$6 billion annually in construction works.⁶ In 1998, it was estimated that there were 88,000 construction enterprises in Australia and about 25,000 in New South Wales. Of these, 65%

² Safe Work Australia estimates that the cost of OHS fatalities, injury and disease is \$60.6 billion annually, representing 4.8% of GDP, with workers bearing 74% of the cost in loss of current and future income, social and medical costs and non-compensated medical expenses. Safe Work Australia, *'The Cost of Work-related Traumatic Injury Fatalities, Australia 2009-10'*, (Canberra: Safe Work Australia, 2012)

³ Mayhew C and Quinlan M, 'Subcontracting and Occupational Health and Safety in the Residential Building Industry' *Industrial Relations Journal*, (1997) Vol 28, No.3.

⁴ Australian Bureau of Statistics, *'Feature article: a statistical overview of the construction industry'*. (Australian Bureau of Statistics, 2008)
[⁵ Lingard L and Rowlinson S, *Occupational Health and Safety in Construction Project Management* \(London: Spon Press, 2005\) at 1.](http://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/1350.0Feature%20Article1Aug%202008?opendocument&tabname=Summary&prodno=1350.0&issue=Aug%202008&num=&view(2/2/2009) at 2.</p></div><div data-bbox=)

⁶ New South Wales Government White Paper, *Construct New South Wales: seizing opportunities to build a better construction industry* DPWS report NO. 98022 (New South Wales Government 1998)

employed two people or less and only 1% employed more than 50 people. Eighty eight percent earned less than \$500,000 per annum, with 1.3% earning \$20 million or more.⁷ As will be shown, the industry continued to remain an economically important factor in the state's economy.

At that time, the NSW Labor government of the day saw itself as a leader in the industry through its status as a major client, influencing 'standards of behaviour' as well as rewarding excellence, leading debate and providing guidance.⁸ The government noted the diverse and dynamic nature of the industry, which contributed to its being 'highly competitive', and commented on its '...adversarial nature, short-term relationships, low margins and levels of capitalisation, and a generally fragmented approach'.⁹ The adversarial nature of the industry arose from competitiveness among 'organisations, enterprises, individuals, clients and service providers',¹⁰ usually culminating in litigation. Under capitalisation was identified as leading to '...well known problems such as poor "security of payment", neglected research and development or training, and the so-called "cost plus" (incurred costs plus a profit allowance irrespective of productivity) view of transactions between parties'.¹¹ The problem of running on low margins increases the vulnerability and viability of firms if uncertainties arise. The necessity to ensure flexibility in meeting demand is achieved by subcontracting, which in itself reduces opportunities to develop strong business relationships, producing '...a tendency for self interest to dominate, (and) a reliance on short term expedience rather long term planning'.¹² The government's views on fragmentation in the industry are worth noting.

The industry structure is biased toward the traditional approach to building, based on craft practices. This means that work is organised into small, almost isolated packages. The outcome is a fragmented approach... where multiple levels of small specialist subcontractors and suppliers are used. This fragmentation...limits opportunities for efficiency gains and encourages the pursuit of singular interest.'¹³

State government projections estimated that by 2005, the value of the three areas of construction would exceed \$45 billion in annual output with non-residential and

⁷ Ibid.

⁸ NSW Government Green Paper, *The Construction Industry in New South Wales: Opportunities and Challenges* (NSW Government, 1996) at 1.

⁹ Ibid at 2. See generally Lingard and Rowlinson, above note 5.

¹⁰ Ibid at 15.

¹¹ Ibid.

¹² Ibid at 16.

¹³ Ibid at 16.

engineering construction expected to be \$24 billion annually.¹⁴ The government predicted that the industry's service providers, the 'small, diversified, specialist contractors, sub-contractors' and other suppliers would 'link up in longer term consortia, partnerships, and similar arrangements', in contrast to the 'largely unconsolidated and fragmented' industry of the mid 1990s. Then, approximately 20,000 subcontractors supplied 75 to 85 per cent of the value of production in the industry.¹⁵ However, as will be seen, the government's hopes for a less fragmented industry were not realised, though the industry continued to thrive.

Nationally, in 2006-07 the construction industry was the fifth largest Australian industry in current price terms, following property and business services, manufacturing, finance and insurance and mining. The dollar value of construction work done in 2006-07 was \$112,817.1 million, a 5.7 % increase from the previous year.¹⁶ Engineering construction was the largest component, with work valued at \$47,538.5 million or 42.1 % of total construction. In the same period, non-residential and residential construction contributed \$25,907.2 or 22.9 % and \$39,371.5 million or 34.9%. In sum, the industry contributed 6.7% to the Gross Domestic Product (GDP).

At the May 2007 quarter, it employed 9.0 % of the country's workforce, an increase of 16.9% in the three-year period from May 2004 to 2007. It employed 937,300 persons, with 30 % employed in General Construction and 66% employed in Construction Trade Services.¹⁷ In May 2007, construction workers worked, on average, four more hours than all other industry groups, and earned higher wages than the average for all industries. At the same time, the average weekly earnings (AWE) for all construction employees were 23.3% higher than the AWE for all industries, showing an increase of 25.5% between 2004 and 2007.¹⁸ In May 2007, 72.1% (676,000) of workers were classed as employees, compared to 88.3% for all industries. Twenty two percent (210,600) were classed as 'Own account' workers, in

¹⁴ New South Wales Government, *A perspective of the Construction Industry in NSW in 2005*; a discussion paper (New South Wales Government, 1997) at 8.

¹⁵ *ibid* at 12, 13.

¹⁶ Australian Bureau of Statistics 2008. *Feature article: a statistical overview of the construction industry*. (Australian Bureau of Statistics, 2008) [http://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/1350.0Feature%20Article1Aug%20008?opendocument&tabname=Summaryandprodno=1350.0andissue=Aug%202008andnum=andview\(2/2/2009\)](http://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/1350.0Feature%20Article1Aug%20008?opendocument&tabname=Summaryandprodno=1350.0andissue=Aug%202008andnum=andview(2/2/2009)) at 3.

¹⁷ *Ibid* at 5.

¹⁸ *Ibid* at 6.

other words, contractors or self-employed, compared with 8.8% for all industries. In general, the construction industry was only second to the Agriculture, Forestry and Fishing industry (37.4%) for ‘Own account’ workers.¹⁹ By 2009/2010, the number of workers in the industry rose to 938,000, representing 9% of the Australian workforce, with 71% classed as employees, representing a slight increase in the ‘non-employee’ classification.²⁰ This large number of contractors and self-employed persons makes the regulation of health and safety requirements on jobs difficult for all parties, including employers and involved unions.

Industry structure

The industry is obviously a vital and important component in the Australian economy, and its potential as a source of wealth for successful developers and entrepreneurs is significant.²¹ However, its financial contribution comes at the cost of its workers, who are killed or injured at a higher rate than most other industries worldwide.²² The reasons behind this unacceptable morbidity and mortality rate are numerous and are closely related to the structure of the industry. It is project based, meaning that worksites are ever changing; it engages many different trades and labourers; it relies heavily on contract and sub-contract work, usually on a short-term basis. Increasingly, large firms have relinquished employment of full time personnel, in favour of increased sub-contracting models. This ‘business model’ lends itself to increased risk of injury, illness and death.²³ Lingard and Rowling maintain that suitable organisational structures should be in place to deal with the changing and dynamic nature of a construction site. That is, an ‘organic’ management style is necessary to deal with the varying phases of the project, the day-to-day contingencies that may arise, and the need for quick, decentralised decision-making. The older style approach based on traditional craft practices ‘...engenders a free, independent spirit

¹⁹ Ibid at 7.

²⁰ Safe Work Australia *Construction Fact Sheet*
<http://www.safeworkaustralia.gov.au/sites/SWA/AboutSafeWorkAustralia/WhatWeDo/Publications/Pages/FS2010ConstructionInformationSheet.aspx> (21/7/2012)

²¹ The industry is dominated by a relatively few numbers of large firms, some of whom are multinationals, such as Lend Lease and Multiplex, with other large Australian based companies, for example Grocon. However, industry volatility means that even large firms have faced insolvency in recent times. (NSW Government, ‘Discussion and Issues Paper Inquiry into Construction Industry Insolvency in NSW’, October 2012).

²² See above, note 5 at 1.

²³ Ibid at 3.

in construction site personnel and has, traditionally, led to a disregard for authority and regulation...’ which on occasion has led to corruption and malpractice.²⁴

This industry structure makes it one of the most dangerous industries in Australia, contributing to the deaths of about 50 construction workers per annum, fatality rates that are three times the national workplace average. Moreover, the injury rates are 50% higher than those in other sectors, and building workers are 2.4 times more likely to be killed at work than in any other Australian industry. ‘Although these health and safety statistics are ‘comparable to the United States (US) and Europe’, they are ‘double that of the United Kingdom’.²⁵ In NSW, the industry had the third highest incidence of employment injuries and the second highest number of work related fatalities of all industries in 2003-2004.²⁶ The statistics are typical for the industry as will be seen in figures for fatalities and serious injury for the period 1998 to 2009 shown later in this chapter.

The primary causes implicated in workplace injury, disease and death in the construction industry include poorly maintained and unsafe sites, changing worksites and unsafe site conditions, continuously changing worksites with numerous work processes carried out, and often crowded or cramped working conditions. Other primary causes include under-capitalisation, which limits the firm’s ability to expand and withstand adverse economic events; low margins, which are disincentives for development and research into new technologies and new processes; a focus on short-term projects, short term planning and relationships and a ‘fragmented and aggressive approach to doing business’.²⁷ Secondary causes are associated with management systems, namely financial, time and budgetary pressures, ‘lack of commitment to safety, policy, standards, knowledge and information, restricted training and task selection, and poor quality-control systems.’²⁸

²⁴ Ibid.

²⁵ Charles M, Pillay J, Ryan R, *Guide to Best Practice for Safer Construction: Literature Review 'From concept to completion'*. Fleming T, Ryan N and Wakefield R (eds) Cooperative Research Centre for *Construction Innovation*, (Icon.Net Pty Ltd: 2007,) at 4. See also Hughes P. and Ferrett E. *Introduction to Health and Safety in Construction*. 3rd Edition (London: BH, 2008), The fatal injury rate for UK workers in 2004/5 was 3.4 per 100,000 workers as against the industrial average of 0.8.

²⁶ WorkCover NSW ‘Statistical Bulletin 2003-2004’ at 11-12.

²⁷ New South Wales Government White Paper *Construct New South Wales: seizing opportunities to build a better construction industry*, DPWS report NO. 98022 (New South Wales Government:1998)

²⁸ See above note 5 at 4.

A number of other cultural, social and behavioural traits are believed to be contributing elements to poor health and safety. These included an aging workforce, inexperienced workers, high labour turnover and work intensification.²⁹ A ‘between the lines’ reading of the court decisions in this thesis shows that both primary and secondary factors played a major part in the traumatic injury resulting in the death of workers. However, because of the way in which the prosecution was structured through the OHS Acts of both 1983 and 2000, there was only a limited number of elements, or specific sections of the Acts that the court could consider, and so fatal incidents could only be seen through a narrow lens. Chapters Five and Six provide a fuller discussion of this and related features.

The production processes in the industry are largely determined by its sub-contracting structure, in which businesses are typically small, family owned specialist trade enterprises. As many as twenty specialist sub-contractors may work on cottage/residential projects and up to 200 may be employed on a major construction site. Competitive pressures promote cost-cutting measures, such as neglect of basic health and safety policies and practices, poor equipment maintenance, use of illegal labour, non-payment of statutory obligations, such as workers compensation, non-payment of award rates and superannuation. Studies in Australia, Europe and North America have identified a clear link between high levels of subcontracting and elevated levels of injury and ill health. For example, Francois and Lievin found that temporary agency (labour hire) and fixed-term contract workers in 85 French enterprises experienced both a higher incidence and a greater severity of injury than did employees in permanent employment.³⁰

Richard Johnstone has observed

These organisational forms, particularly those which involve introducing third parties to work arrangements and creating multi-employer worksites, result in fractured, complex and disorganised work processes, weaker claims for responsibility and ‘buck-passing’ and a lack of specific job knowledge (including knowledge about OHS) among workers moving from job to job.

²⁹ Ibid.

³⁰ Francois and Lievin (1995) and Storrie (2002) cited in Underhill, E., ‘*Changing Work and OHS: The Challenge of Labour Hire Employment*’, 2002. www.actu.asn.au/public/ohs/reactivatecampaign/1064475108_26370.html.(14/4/2006)

They also make it more difficult for worker interests in OHS to be effectively represented.³¹

Worker consultation about health and safety problems can be problematic on a building site where sub-contractors come and go as work progresses, which makes adequate representation of specific work groups/trades on safety committees problematic. There are also high numbers of workers from non-English speaking countries who tend to be under represented on OHS committees. The implication for miscommunication due to language barriers is also important as particular trades/labouring groups tend to reflect high numbers different NESB workers, for example, Koreans in tiling³² and in NSW, South Pacific Islanders in demolition work, Cambodians in asbestos removal.³³

Large building sites usually employ dedicated safety officers and have a union presence, while the opposite is generally true for the small domestic sector.³⁴ Over time, financial and OHS risks have been outsourced to sub-contractors. Occupational health and safety has been compromised as ‘moral’ builders’ tenders are more costly due to health and safety considerations, and so, in a highly competitive market, less scrupulous tenderers win contracts. Sub-contracting also weakens health and safety through longer, more intensive and arduous working conditions, cutting corners, cost cutting, ignorance of, or ignoring OHS regulations and a growing culture of resistance to OHS regulators.³⁵

In summary, it can be seen that the construction industry is a large and important segment of the Australian economy. There are various factors that render it unsafe, namely the structure and economic characteristics of the industry that create disincentives to safety, and it is inherently dangerous through the scale and complexity of the construction labour process, where hazardous tasks are carried out in close proximity to other workers, thus increasing the overall risk.

³¹ Johnstone R, Quinlan M and Walters D, ‘Statutory OHS Workplace Arrangements for the Modern Labour Market’, Working Paper 22, National Research Centre of OHS Regulation, (Australian National University: 2004) at 2.

³² Andonakis N and Loosemore M ‘Barriers to Implementing Reforms – the Experiences of Small Subcontractors in the Australian Construction Industry, *International Journal of Project Management*, (2007) Vol.25, Issue 6 August, 579-588.

³³ Personal observation.

³⁴ Personal observation.

³⁵ Wadick P. ‘Safety Culture Among Subcontractors in the Domestic Housing Construction Industry’, *Structural Survey*, (2010) Vol.28, Issue 2.

Complexities of contracting

The ‘power hierarchy’ in multiple employer organisations also has an impact on site safety through the way in which organisations respond to safety and legal liability.³⁶ Examples from the construction industry are abundant, because of ubiquitous contractual arrangements in which lines of responsibility are blurred and there are power differentials amongst the parties. Small sub-contractors have the ability to react to legal liability by changing their name, changing the legal status of the company or increasing insurance, however size does not necessarily mean that positive strategies for health and safety overtake defensive strategies to limit liability. However, it does mean that larger organisations have the resources to employ effective defensive strategies when needed.³⁷

The complexities of contracting in the construction industry, which reflect the fragmentation and lack of consolidation referred to earlier, are illustrated by some examples drawn from the sample judgements in the following prosecutions for workplace fatalities. The defendants in the first of these operated small to medium companies employing 20 or less persons; in the second case, quite large corporations were involved.³⁸

In Case 27, three prosecutions were launched in relation to the death of a labourer engaged in concreting work in 2004. Three companies and three directors were charged and convicted with offences under *Occupational Health and Safety Act 2000* (OSHA 2000). These included the labour hire firm, Company A, who contracted with Company B, (who also had a state subsidiary, Company C, both B and C were companies employing less than five workers) to provide six labour hire workers. Company B employed three persons at the site, including the deceased. One sole trader also performed contract labour for Company A. The site was owned by a medium sized firm, Company D, who operated another smaller company, Company

³⁶ Haines F, ‘The Show Must Go On: the Response to Fatalities in Multiple Employer Workplaces’ *Social Problems*, (1993) Vol.40, No.4 November, 547-563.

³⁷ Ibid.

³⁸ For a comprehensive account of contractual arrangements in the construction industry see Underhill L, ‘The Australian construction industry: union control in a disorganised industry’ in Bosch G and Philips P, eds, *Building Chaos: an International Comparison of Deregulation in the Construction Industry* (London: Routledge, 2003).

E. All companies and directors were charged and found guilty of offences related to breaches of the duty of care provisions of the Act.³⁹

In another case, Case 17,⁴⁰ the self-employed defendant was charged in relation to the death of a worker drowned in a flooded pipeline. The defendant had been contracted as a project manager by Company A, a medium size enterprise. Company A was contracted by Company B, a large semi-government corporation that owned the reserve where work was carried out. Company C was a large subsidiary of Company B and it was contracted by Company A to carry out a range of works. In turn, Company C contracted Company D, a labour hire company to supply labour to the site. The deceased was an employee of Company C.

Some common problems emerging where layers of contracting arrangements exist include lack of appropriate OHS controls, poor OHS awareness and practices, time and financial pressures. The use of labour hire can obscure lines of responsibility, as workers can ‘fall between the cracks’ of management safety systems. This demonstrates the confusion between prime contractors and sub-contractors about who has responsibility on sites. The NSW government’s inquiry into death and serious injury recommended that WorkCover undertake regular unannounced site inspections to ensure that all parties were aware of and operating with due care, as well as requiring duty holders to furnish appropriate OHS management plans.⁴¹

Illicit practices – phoenix companies and sham contracting

The complex corporate structures and entities that are typical of the industry may mask financial dealings and obscure legal responsibilities.⁴² Corporations can organise themselves in different company groups and subsidiaries, taking on an independent existence within the larger corporate group structure. Corporations can

³⁹Inspector Sharpin v A Team Concrete (Aust) Pty Ltd and Ors [2004] NSWIRComm 182 ; Inspector Sharpin v Concrete Civil Pty Ltd and Inspector Sharpin v Daryl Smith [2004] NSWIRComm 173; Inspector John Sharpin v Boka Aluminium Windows Pty Limited and Anor [2005] NSWIRComm 447

⁴⁰ WorkCover Authority (Insp. Clark) v Raymond Jabboury (No.2) [2002] NSWIRComm 70; WorkCover Authority of New South Wales v Sydney Water Corporation Ltd [2001] NSWIRComm 240; WorkCover Authority of New South Wales v Ledonne Constructions Pty Ltd [2001] NSWIRComm 272.

⁴¹ New South Wales Legislative Council, General Purpose Standing Committee No.1 ‘*Serious injury and death in the workplace*’, Report 24, (New South Wales Government: 2004) at 32

⁴² Johnstone, R and Wilson, T. *Take Me to Your Employer: The Organisational Reach of Occupational Health and Safety Regulation*, National Research Centre for OHS Regulation, (Canberra: Australian National University, nd)

also outsource and build pyramids of supplier contractors, and in doing so are able to obscure lines of responsibility, which, in turn, makes the regulatory duties of investigation an onerous one.⁴³ In the construction industry, these structures also typify some small and medium sized enterprises, and these business arrangements could be more closely scrutinised during prosecutions for OHS breaches.

Companies, especially small operations, commonly go into liquidation following, or even preceding, a court sentence. In some cases, this is a legitimate business decision because of limited capital, or insolvency, but in others, it is a fraudulent activity to avoid paying penalties, as well as taxes and worker entitlements, by re-emerging as a 'phoenix' company. Essentially, directors engaging in 'phoenix' activities transfer assets of an indebted company into a new company of which they are directors. The indebted company is then placed into administration or liquidation but with no assets to pay creditors. The directors then continue to trade under the new company structure.

In the 1990s, the Australian Securities Commission estimated that annual losses due to this practice totalled \$1.3 billion or 0.28 per cent of Gross Domestic Product of the Australian economy. Eighteen per cent of small to medium companies had engaged in phoenix activities, and 45 per cent 'appeared to be in the building/construction industry'.⁴⁴ A report on phoenix companies by financial analysts Dun and Bradstreet showed that of the 10,200 companies in Australia that went into liquidation in 2009, 29 per cent involved companies whose directors had been previously involved in liquidation, compared to 10 per cent in 2004-2005. It also showed that the number of directors involved in multiple business failures had increased from 8 per cent in 2004-2005 to 20 per cent in 2010.⁴⁵ The CFMEU C and G Division had been monitoring illegal business practices for years, as well as being represented on government reviews and policy committees established to address the problem. The National Secretary made the point that phoenix activities went beyond problems of worker entitlements, creditors and the taxation office. It raised questions about the role of lawyers and insolvency advisors; asset less liquidation, and how companies

⁴³ Ibid.

⁴⁴ Martin A, *Directors' Duties and Phoenix Companies*, (Allens Arthur Robinson, 2007) <http://www.aar.com.au/pubs/pdf/insol/pap4apr07.pdf>.(11/10/2011).

⁴⁵ Ferguson A, 'A Free Rise From the Ashes of Others', *Sydney Morning Herald Weekend Business*, 11-12 December 2010 at 8.

use the practice to gain unfair business advantage through non-payment of debts at the completion of the building project.⁴⁶

The analysis of judgements in this thesis found several instances where companies had gone into liquidation after a fatality. In one instance, following the death of a worker in 1999, the company appointed an administrator soon after the incident.⁴⁷ The company was established in 1995, and by the end of the decade, its annual turnover was in excess of one and a half million dollars, but the company experienced cash flow problems from bad debts, and in June 2001, the company was liquidated.⁴⁸ In this case, the prosecution insisted on a penalty, regardless of the financial circumstances of the company. The judge commented that

The prosecutor expected the company to argue the futility of penalty imposition because there would be no claim by WorkCover. Notwithstanding this, the prosecutor argued ‘... the fact of a penalty is a matter that has relevance to the WorkCover Authority and its systems and statistics... in the circumstances that ... imposition of a fine on the corporation would not be a futility even if no fine was recoverable. An appropriately large fine would also have a general deterrence effect. There is no need in these circumstances to reduce the amount of the fine to reflect the incapacity to pay’.⁴⁹

The director of the company took a position with another firm, in which he was the sole shareholder, and his daughter the sole director, and that company took over contracts held by the liquidated firm. Despite these manoeuvres, the judge commented

...nothing has changed. His financial circumstances, it was submitted, are far from pallid. There is nothing in his circumstances which permits any claim of incapacity to pay. Specific deterrence is a matter which should be expressly considered in assessing an appropriate penalty to impose on Mr .[X].⁵⁰

A penalty of \$88,000 was imposed on the defendant company, and the director fined \$8,250.⁵¹ This example typifies the way in which companies or their directors attempt to evade penalty or seek penalty reduction, yet continue to operate in the industry under different guises. However, in this case, the court was aware of the reality of the defendant’s financial situation.

⁴⁶ Ibid at 9.

⁴⁷ Inspector Kenneth Vassel v Stokes Contractors Pty Ltd (in liquidation) and anor [2002] NSWIRComm 331.

⁴⁸ Ibid at 12.

⁴⁹ Ibid at 22.

⁵⁰ Ibid at 24.

⁵¹ Ibid 38-40.

Sham contracting is another growing form of illicit business practice in an industry that is ‘uniquely at risk of being exploited by sham operators’, according to the Office of the Australian Building and Construction Commissioner’s (ABCC) Sham Contracting Inquiry Report 2011.⁵² The report also noted that there were more independent contractors working in this industry than in any other, and that the proliferation of contractors makes it easier for unscrupulous employers to take advantage of the situation. There is no widely accepted definition of sham contracting, but in relation to the building and construction industry, the ABCC report suggested that ‘a sham arrangement or sham contract involves misrepresenting or disguising an employment relationship as one involving a principal and contractor under a contract for services’.⁵³ In other words, a worker is deemed to be a contractor when he or she is, in reality, an employee.

The disadvantages for the employee are that, as a ‘deemed’ contractor, they must supply and maintain their own tools and equipment, pay for compulsory taxes and insurances and carry a risk of loss. While these are standard elements in a contractual relationship, the problem arises when workers, who are legitimate employees, are persuaded, tricked, or in some cases, coerced, into entering into bogus contracting arrangements. The benefits to the employer are obvious, as they are exempted from considerable financial obligations and legal responsibilities that would arise in a proper employer/employee relationship. There are downsides for the government in loss of revenue; and honest employers are placed at a competitive disadvantage. For the industry generally, there is reduced health and safety performance and poorer workplace relations.⁵⁴

The CFMEU C and G Division had led the campaign against sham contracting arrangements, through direct intervention on worksites, negotiations with prime contractors and through publication of instances where workers have been disadvantaged by bogus employment relationships through its national and state journals, *Unity* and *Hard Hat*. However, because of general union opposition to the ABCC⁵⁵ (the reasons for which are described in Chapter Six), both the, Australian

⁵² Australian Government, *Sham Contracting Inquiry Report*, Office of the Australian Building and Construction Commissioner, (2011) www.abcc.gov.au 2011 (2/2/2012) at 11.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ The ABCC was a statutory authority established by the conservative federal government in 2005. It arose out of the Cole Royal Commission into the Building and Construction Industry in 2001. That

Council of Trade Unions (ACTU) and the primary building union, the CFMEU C and G Division, declined to take part in the Inquiry run by the ABCC. The construction union published its own report in 2011, where it concluded that between 26 to 46 per cent of all independent contractors were in sham arrangements,⁵⁶ a finding that the ABCC Report found was ‘unreliable’⁵⁷.

Sham contracting is not confined to Australia, as Lamare’s study of New York workers found. This research also highlighted a problem common to Australia, that is, the targeting of non-English speaking workers by unscrupulous employers.⁵⁸ Lamare describes the practice as ‘misclassification’ meaning the incorrect designation of employment status of workers when they are incorrectly ascribed the status of contractors. In the American context, this occurs especially with vulnerable workers, that is, those who are unaware of their rights, and in particular, migrant workers. Improper misclassification has a threefold cost. Firstly, to workers denied the legal entitlements and rights of full time employees; to other employers, who suffer from the undercutting unscrupulous firms can then engage in (and who then may be tempted to use the same tactics to retain a competitive edge); and, third to the public who lose the taxes which would otherwise have been collected.⁵⁹

In the US, the construction industry accounts for ‘tens of thousands’ of employees being improperly classified with loss of wages calculated at about US\$12 million, with further millions in workers compensation premiums lost as well.⁶⁰ The primary reason for employers misclassifying workers is to avoid paying compensation premiums,⁶¹ which is also a factor in the Australian context.

Commission found that unions were primarily responsible for lawlessness in the industry and the ABCC’s aim was to investigate and force compliance through prosecutions. It was abolished by the federal Labor government in May 2012, and was replaced with the new regulator Fair Work Building and Construction. During its operations before Labor came to power, most of its prosecutions were against unions. On the appointment of the new Commissioner by Labor, it turned its attention to the problems of sham contracting and began to investigate employer misdemeanours and offences. However, its powers and ability to fine and imprison offenders remained in place.

⁵⁶ CFMEU C and G Division, ‘Race to the Bottom: Sham Contracting in Australia’s Construction Industry’ (Lidcombe:CFMEU,2011) (in author’s possession).

⁵⁷ Ibid at 71.

⁵⁸ Lamare, J. ‘The misclassification of vulnerable workers in New York: prevalence and effects in construction and other industries’ in Conference Proceedings Hendon Campus Middlesex University *Health and Safety and Vulnerable Workers in a Changing World of Work* (Middlesex: 2010).

⁵⁹ Ibid.

⁶⁰ Ibid at 8.

⁶¹ Ibid at 9.

The ability or propensity of companies to go into administration and liquidation and their (sometime) re-appearance as ‘phoenix’ companies, and the prevalence of illegal employment relations, such as sham contracting, are testimony to the exceptional nature of the building industry. These forms of business operations have an obvious impact on health and safety. ‘Phoenix’ operations mean that companies with poor OHS practices are able to continue to harm workers; they escape the penalties which would otherwise be imposed, and the public exposure that those penalties may incur; they are able to present a ‘clean’ record’ when tendering for government or other large contracts which require disclosure on OHS performance. The use of sham contracting is particularly insidious, as it robs workers of all legal entitlements, of which, given the high-risk nature of the industry, workers compensation is one important aspect.

Injury, disease, fatality

The number, type and variety of jobs and tasks required in the construction industry contribute to its high-risk profile. While some former high-risk work practices have disappeared, others have taken their place, such as erection of concrete wall panes or curtain walls. Occupational groups include trades or semi-trades, such as bricklayers, tilers, floor layers, carpenters, electricians, plumbers and gas fitters, gyprockers, plasterers, renderers, painters, riggers, scaffolders, crane drivers, sheet metal workers, lift installers, air conditioning installers, labourers, amongst others.

The diversity of occupations exposes workers to numerous dangers. These include physical hazards, mechanical and manual handling hazards, chemical and biological exposures and psychological stressors. Toxic substance exposures include asbestos, synthetic mineral fibres (SMF), lead, crystalline silica, cement dust, formaldehyde, wood dusts, organic solvents, isocyanates, polychlorinated biphenyls, environmental contaminants, welding fumes, sealant chemicals, metals in solder and pipe paste flux, confined space gases, viruses and bacteria.^{62 63} Workers suffer from body stressing through manual handling and mechanical hazards, effects of noise and vibration, exposure to electrical and radiation hazards. Psychological stressors include poor

⁶² Hughes P. and Ferrett E, *Introduction to Health and Safety in Construction*. 3rd Edition, (BH, 2008) at 322-323.

⁶³ Methner M.M ‘Identification of potential hazards associated with new residential construction’, *Applied Occupational and Environmental Hygiene*, (2005) Vol.15, Issue 2, 189-192.

working conditions, exposures to the hazards already mentioned and organisational hazards, such as over work, inadequate management, workplace bullying and violence.

National fatality statistics

The industry is characterised by high levels of fatalities. In Australia, between 1989 and 1992, the National Occupational Health and Safety Commission (NOHSC) reported the deaths of 234 persons fatally injured in the construction industry, that is, 10 deaths per 100,000 workers, and double the death rate for all industries whose average rate was 5.5 deaths per 100,000 workers.⁶⁴ Numbers of deaths remain constant over time as shown below in Table 2.1. From 2000–01 to 2008–09, the number of compensated fatalities in the construction industry ranged between 49 and 55 for all fatalities, and between 21 and 35 for traumatic injury fatalities, at a national level.

Table 2.1. Number of compensated injury and disease fatalities by mechanism of injury/disease (Australia) – Construction, 2000-2010 (2009-10 are preliminary figures). (Source: Safe Work Australia data and Analysis Team)

	00-01	01-02	02-03	03-04	04-05	05-06	06-07	07-08	08-09	09-10p
Total traumatic injury fatalities	35	26	25	28	21	28	30	29	29	27
Being hit by moving objects	10	12	8	5	6	3	7	4	9	9
Biological factors				1						
Body stressing	1							2		
Chemicals and other substances	1	1	1						2	
Falls, trips and slips of a person	7	3	4	9	4	8	4	4	9	3
Heat, radiation and electricity	4	1	9	3	5	4	2	4	3	7
Hitting objects with a part of the body	2			1						1
Mental stress									1	
Other and unspecified mechanisms of injury	10	9	3	9	6	13	17	15	5	7
Total disease fatalities	14	21	23	25	27	17	25	13	10	14
Biological factors	1	1						1		1
Body stressing			1	1	1					
Chemicals and other substances	9	15	19	16	23	16	24	11	10	12
Falls, trips and slips of a person	1			1		1	1			
Heat, radiation and electricity					1					
Mental stress		1	1	3						
Other and unspecified mechanisms of injury	3	4	2	4	2			1		1
TOTAL FATALITIES	49	47	48	53	48	45	55	42	39	41

The preliminary national data for 2009–10 showed that there were 41 fatalities, which were the highest number of fatalities of all industries. This corresponds to a

⁶⁴ Worksafe Australia, Fast Fact Sheets: fatalities by industry (Sydney 1999).

fatality rate of 5.9 fatalities per 100 000 employees in 2009–10, which is almost three times the rate for all industries of 1.9. The most common causes of traumatic injury fatality were vehicle incidents, which accounted for 13% of fatalities, and falls from a height and contact with electricity, each accounted for 11% of fatalities.⁶⁵

NSW fatality statistics

Injury incidence rates for the construction industry in NSW are high at 22.4 per 1,000 compared to the state average of 14.0 per 1,000 for 2006/07.⁶⁶ Those occupational diseases reported in the NSW compensation statistics defined as resulting from repeated or long-term exposures are less easy to quantify, especially those that have long latency periods, and they may not be counted in compensation statistics. ‘Own account’ or self-employed construction workers are automatically excluded from NSW compensation statistics, and given the high numbers of persons working in this category, and the problems associated with sham contracting, the actual incidence of injury and disease is likely to be much higher. In the eleven-year period from 1997 to 2008, there were 267 deaths in the New South Wales construction industry alone. Averages calculated from the *WorkCover Statistical Bulletins* 1997/1998 to -2007/2008 showed an average incidence rate of 12.2 workers per 100,000 dying as opposed to the incidence rate for all other work related fatalities of 5.7 per 100,000. This places the construction industries among the four industries with the highest fatality and injury rate in the country.⁶⁷ Figure 2.1 shows numbers of fatalities in the construction industry compared to numbers of traumatic injury fatalities in all industries in NSW. As can be seen, while the numbers of deaths for all workers show a downward trend, the numbers of deaths among construction workers remain relatively stable.

⁶⁵ Safe Work Australia *Construction Fact Sheet*
<http://www.safeworkaustralia.gov.au/sites/SWA/AboutSafeWorkAustralia/WhatWeDo/Publications/Pages/FS2010ConstructionInformationSheet.aspx> (7/9/2011)

⁶⁶ New South Wales Government WorkCover New South Wales *Workers Compensation Statistical Bulletin 2006/07*, (WorkCover NSW:2008)

⁶⁷ Data aggregated from all WorkCover NSW *Statistical Bulletins* 1997/1998 to -2007/2008.

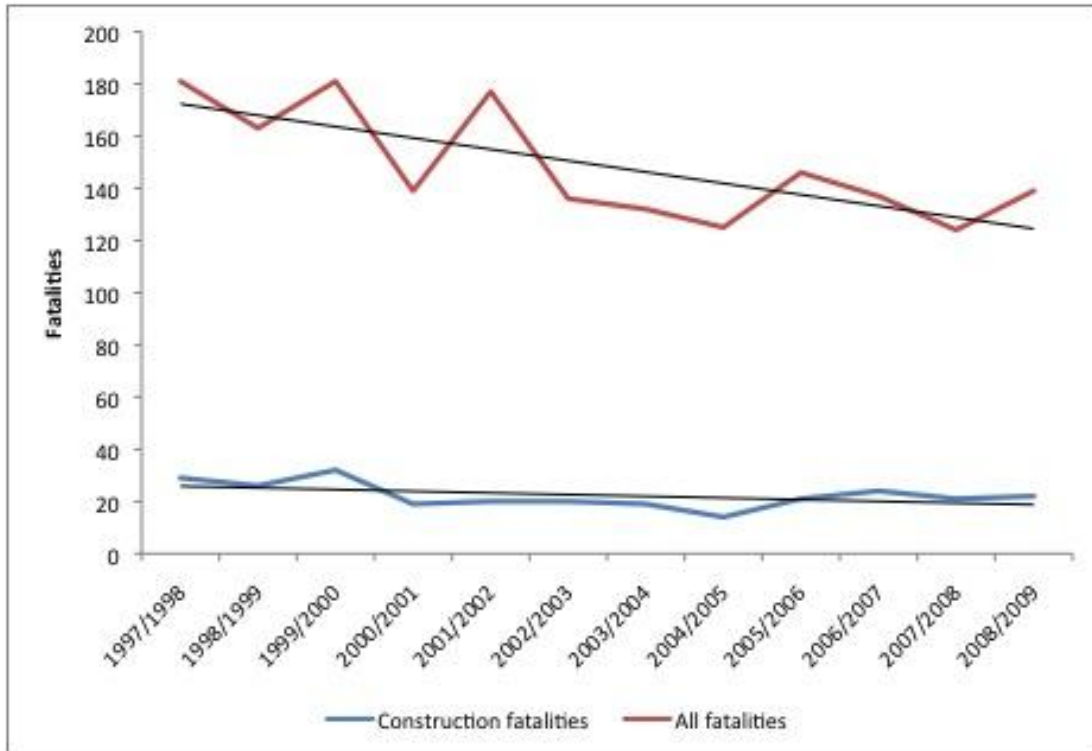


Figure 2.1. WorkCover NSW fatalities 1997/1998 to 2008/2009 (Source: New South Wales Government WorkCover New South Wales *Workers Compensation Statistical Bulletin 2006/07*, (WorkCover NSW:2008))

It is difficult to ascertain the true toll in workplace injury, disease and death due to differences in the data gathering protocols of Australia's state, territory and commonwealth regulators. Most information about workplace injuries, disease and fatalities are obtained from workers compensation claim data whose purpose is to measure compensation scheme performance and which has been acknowledged as underestimating by half the amount of workplace injury and fatalities in the workplace.⁶⁸ The data also does not account for those dying from occupational disease, estimated at four times that of persons dying from occupational accidents⁶⁹ The NSW data does not record incidents pertaining to the self-employed, to employers or to members of the public. It excludes data on deceased individuals where funeral claims were not made, even if the deceased was covered by workers compensation and in cases where the decedent had no dependants to whom the death benefit could be paid. The data makes no differentiation between those deaths occurring within the responsibility of an employer or outside of it. It also excludes Commonwealth employees, and those dying from dust diseases, excepting

⁶⁸ Industry Commission, *Work, Health and Safety*, (Canberra,1995) at 7-8.

⁶⁹ *Ibid.*

coalmines.⁷⁰ There are time lags in the data, an ongoing problem that was noted by Gunningham as far back as 1984.⁷¹ The paucity of data collection was criticised by the NSW General Purpose Standing Committee⁷², which recommended that WorkCover address inadequacies as a priority, and also recommended the establishment of a comprehensive national database. Although there are a numbers of agencies that collect data, ranging from the Australian Bureau of Statistics, the National Coronial Information System, university research centres and regulatory bodies⁷³ there has been little advance made in garnering information about occupational disease from medical practitioners and hospital recording systems. In the British context, Tombs and Whyte commented that reporting and data collection systems filter out an unknown amount of workplace injuries, diseases and deaths. This filter effect is increased if investigations are not made and if prosecutions are not initiated, thus many safety crimes go undetected, or if detected, are likely to be filtered out.⁷⁴

Regulatory framework, enforcement and prosecution

In 1983, New South Wales was the first Australian state to adopt a Robens approach to OHS with the introduction of the *Occupational Health and Safety Act 1983*. Although South Australia in 1972, Tasmania in 1977 and Victoria in 1981 had revised their acts along Robens principles, the NSW OHS Act of 1983 was much closer to the Robens model.⁷⁵ This meant that the former prescriptive legislation governing different aspects of industrial endeavour (shops, factories, construction and so on) gave way to a self regulatory, performance based approach with a general duty of care imposed on employers and to a lesser extent, on employees.

Six years after the promulgation of the OSHA 1983, the WorkCover Authority of New South Wales (WorkCover) was established in 1989 and was the first regulatory

⁷⁰ WorkCover Authority of New South Wales (a) *New South Wales Workers Compensation Statistical Bulletin 1997/98*, (WorkCover New South Wales, 1999) at 19.

⁷¹ Gunningham N, *Safeguarding the Worker* (The Law Book Company Limited:1984)

⁷² NSW Parliament Legislative Council General Purpose Standing Committee, *Serious injury and death in the workplace*, Report No.24, May (NSW Government: 2003), at 18-19.

⁷³ WorkCover Authority New South Wales, *The NSW Work Related Fatality Study 1997/98 to 2003/03: Summary Report* (NSW Government: 2004)

⁷⁴ Tombs S and Whyte D, *A crisis of enforcement: The decriminalisation of death and injury at work*, Centre for Crime and Justice Studies, Kings College, (London: 2008) www.crimeandjustice.org.uk (18/11/2011) at 5.

⁷⁵ Creighton B, *Understanding Occupational Health and Safety Law in Victoria* (CCH:1986) at 9.

authority in Australia to integrate its various roles as a provider of services to the community and government in the areas of occupational health and safety and workers compensation including rehabilitation and injury management. Specifically, its OHS functions consisted of promoting compliance with OHS legislation through providing education, information and advice, licensing hazardous equipment and activities and defined premises. Its inspectorial functions included workplace inspections, incident and complaint investigations, dispute mediation, issuing of penalty notices and prosecution.

The Robens approach was based on the belief that too much ‘paternalistic and punitive regulation’ had failed in its objectives, and had ‘...exerted a narcotic effect on employer activism in regard to the issue [of OHS]’⁷⁶). The presumptions behind self regulation were that the punitive approach had neither succeeded, nor could ever work; that apathy was the ‘single most important cause of industrial accidents’; workers and employers should bear the main responsibility for workplace safety, and that, unlike the industrial relations arena, workers and employers would have a more common interest in maintaining healthy and safe workplaces.⁷⁷

These are contested presumptions as it has been argued that there is little commonality of interests between workers and employers, since the latter’s attention are centred on ownership and control, capital accumulation and profit, conditions which run counter to workers’ interest, and which often contribute to poor health and safety outcomes.⁷⁸ Furthermore, as there has been no comprehensive evaluation of the Robens approach in this country, many of these assumptions are yet to be tested.

In the 1990s, the state Labor government moved to increase the WorkCover NSW inspectorate and to strengthen their powers. Consequently, inspectors could enter workplaces without prior notice, and at the same time, unions were extended this right, in that authorised union officials could enter workplaces to check on health and safety matters and take remedial action where appropriate. It targeted high-risk

⁷⁶ Quinlan M and Bohle P, *Managing Occupational Health and Safety: a Multidisciplinary Approach*, (Melbourne: MacMillan, 1991) at 201.

⁷⁷ *Ibid.*

⁷⁸ See Creighton, W ‘Statutory Safety Representatives and Safety Committees, Legal and Industrial Relations Implications,’ *The Journal of Industrial Relations* (1982) Vol. 24:337–364; See also D. Glennon, ‘Will consultative safety equal more industrial relations or less injuries?’ *Australian Safety News*, (1987) 31–36; Johnstone, R ‘Improving worker safety: reflections on the legal regulations of OHS in the 20th Century’, *Journal of Occupational Health and Safety – Aust NZ* (1999) Vol. 15:521–526; Biggins D, ‘The Politics of Occupational Health’, *Current Affairs Bulletin* 64 (1987), 27–31.

industries for particular attention, with construction one of the top five. It established the WorkCover Construction Industry Consultative Committee to develop codes of practice and guidance notes in eleven key construction areas. In appealing to employers, WorkCover pointed out that a more pro-active managerial approach could reduce costs and improve productivity, reducing overheads and making businesses more competitive. In terms of state projects, construction companies were obliged to enter into a mandatory management system requirement, the OHS and R Management Systems Guidelines for government capital works programs.

In 1996, the government established the Legislative Council Standing Committee on Law and Justice,⁷⁹ which enquired into a range of matters concerning health and safety, and particularly focused on death and injury at work. Its final report called for a review of the 1983 OHS Act, and recommended the consolidation of numerous existing regulations. The reviewed Act would also incorporate the *Construction Safety Act and Regulations* and the *Factories Shops and Industries Act and its Regulations*.⁸⁰ One of the government's amendments to the 1983 Act placed a greater responsibility on company directors who were obliged to demonstrate due diligence in preventing workplace health and safety incidents, and in February 1996, the maximum fines for workplace health and safety offences were increased, as well as increases for penalties related to provisional improvement notices and prohibition notices.⁸¹

OHS legislation is developed within the economic and political tensions and contradictions inherent in liberal capitalist democracies. On one hand, government intervention imposes financial costs on industry in an attempt to reduce harms and risks to public health and well being, thus reducing the profit margin, but on the other, if they do not act to protect the public (including workers) and the environment, the legitimacy of the system as a whole may be threatened.⁸² WorkCover NSW, as the state OHS regulator, faced these contradictions, as it tried

⁷⁹ Parliament of New South Wales Legislative Council Standing Committee on Law and Justice, *Final Report of the Inquiry into Workplace Safety*, Volume One, Report No.10, (1998).

⁸⁰ National Review into Model Occupational Health and Safety Laws, *NSW Government Submission, July 2008*, <http://www.nationalohsreview.gov.au/NR/rdonlyres/27BE7EB5-CC10-4F97-AD39-2AAE073F08E5/0/137NSWGovernment.pdf> (19/2/2012).

⁸¹ NSW Government Green Paper, *The Construction Industry in New South Wales: opportunities and challenges*, (NSW Government 1996) at 42-43.

⁸² Pearce, F and Tombs S (1996). 'Hegemony, risk and governance: 'social regulation' and the American chemical industry' *Economics and Society*, 1996, Vol 25, No.3:428-454 at 435.

to appease capitalist businesses, while attempting to reduce the rate of illness, injury and death. WorkCover NSW has a major role as the prosecutor in breaches of occupational health and safety legislation, through its Strategic Investigative Unit but its emphasis is on compliance with OHS legislation,⁸³ rather than deterrence, which is one of the aims of the *Crimes (Sentencing Procedure) Act 1999* (at s3A). However, its compliance efforts have not been translated into significant numbers of prosecutions, as evidenced in a numbers of studies from 1984 onwards, with Braithwaite and Grabosky⁸⁴ commenting on the low rate of prosecutions for workplace safety and health offences. Four years later, Maconachie

argued that from their inception, local inspectorates had adopted a culture of non-prosecution⁸⁵ a point made by Carson who observed that inspectors in the 19th century were dissuaded from bringing prosecutions because of the non-cooperative attitude of magistrates, resulting in inspectors adopting a more educative or persuasive stance in their dealing with employers.

Carson⁸⁶ was of the view that health and safety offences were so universal, and inspectors so overwhelmed that rather than try the impossible, they developed strategies that excused non-prosecution. In this scenario, only the most serious crimes were prosecuted, with the rest being seen as ‘customary’ and thus escaped prosecution. Consequently, a convention was established which, through a complex process,

...allowed for the development of elaborate notions of intent to distance causal connections, and so make enforcement less immediate...[with legislation seen as]...performing a symbolic role which not only headed off the growing challenge of organised labour and legitimated the separation of OHS from industrial relations, but also helped to build a myth that traditional concepts of criminal law were inappropriate for infringements of OHS legislation- a myth which became a foundation plank of the Robens Report.⁸⁷

Additional to these factors, organisational limitations played a part, including the finite numbers of available inspectors, increased workloads, and legal difficulties,

⁸³ WorkCover Authority of New South Wales *Compliance and Prosecution Guidelines* (2010) http://www.workcover.nsw.gov.au/formspublications/publications/Documents/compliance_policy_prosecution_guidelines_2010_4437.pdf. (4/11/2011)

⁸⁴ Cited in Quinlan and Bohle above, note 74.

⁸⁵ Ibid at 199.

⁸⁶ In Quinlan and Bohle, above note 74 at 231.

⁸⁷ Ibid at 56 and 231.

such as ‘...the refusal of courts to inflict severe penalties on employers violating statutory requirements’.⁸⁸

In the modern context, Johnson demonstrated the uncooperative nature of Victorian magistrates, reflecting their underlying ideological views of the ‘careless worker’, and commenting on the persistent notions about the non-criminality of workplace harms.⁸⁹ Although Robens believed that criminal sanctions were not the answer to improving working conditions, the point here is that the historical and ideological notions which informed his view have continued on into the present, and are demonstrated in WorkCover’s policies and practices, which emphasises the primary role of information advice and assistance as its preferred mode of action, in line with its compliance pyramid.⁹⁰

The tenor of its television and cinematic advertisements has emphasised these principles, with the most recent examples highlighting employee responsibilities to ‘come home safely’, exemplified in its ubiquitous slogan ‘Work Safe: Home Safe’, which places responsibilities for safe and healthy workplaces on employees. WorkCover now makes ‘quality control’ phone calls to employers who have been visited by its inspectors to ensure that they, the employers, have been treated well by inspectors.⁹¹ The extent that this policy may (or may not) undermine the authority of inspectors is unknown.

Anecdotal evidence from senior members of the judiciary, members of Parliament and union OHS officers, indicates that in 2006, WorkCover management was instructed by senior levels of the Labor government to ‘go easy’ on business, that is, to concentrate more on advising and educating business, rather than taking more stringent action. The numbers of prosecutions undertaken by the agency for incidents involving death and/or serious injury demonstrate that there was a marked decrease in prosecutions in the year following, as shown in Table 2.2. The IRC’s Annual Report 2008 noted that this decrease ‘remains to be explained’⁹² but it hoped that it

⁸⁸ Bartrip and Fenn in Quinlan and Bohle, above, note 82 at 231.

⁸⁹ Johnstone R. *Occupational Health and Safety, Courts and Crime*, (Sydney: The Federation Press, 2003).

⁹⁰ WorkCover Authority of New South Wales *Compliance and Prosecution Guidelines* (2010) accessed on 14/11/2011 from

http://www.workcover.nsw.gov.au/formspublications/publications/Documents/compliance_policy_prosecution_guidelines_2010_4437.pdf

⁹¹ Pers. comm. Senior Inspector, WorkCover Authority New South Wales, 4/11/2010.

⁹² Industrial Relations Commission of New South Wales *Annual Report 2008*, at 18-19.

was a consequence of successful programs initiated by all relevant parties. If this is the case, it appears that the improvements did not follow through for the years 2008 and 2009.

Table 2.2.⁹³ NSW IRC prosecutions for death and/or serious injury 2004 to 2009.

	2004	2005	2006	2007	2008	2009
IRC	186	174	193	93	185	131

Not only are the number of prosecutions scant when the totality of injury, illness and fatalities in NSW are considered annually,⁹⁴ but the average penalties imposed for workplace offences are low as this thesis demonstrates.

The social democratic view that a commonality of interest exists between employer and employee in their pursuit of safe workplaces, is questionable in current ideological and economic conditions. Tombs and Whyte⁹⁵ suggest that the Robens ‘advise and persuade’ technique (favoured by WorkCover NSW), fails to grasp ‘that nearly all incidents are the inevitable result of unsafe working systems which could themselves be made safe by the employers, by a combination of hazard analysis, planning, training and supervision’, and it must be added, their willingness to do so. The construction unions argue that the duty of employers in NSW to consult with workers on safety and health matters requires representation of workers through a trade union in order to obtain effective and meaningful consultation without fear of intimidation and/or retribution, particularly in the light of the precarious nature of many workers in the construction industry as a result of complex contracting arrangements.⁹⁶

Furthermore, the nature of work has undergone change since the Robens Report was drafted in the UK in 1972. In Britain and Australia, the stability of the workplace environment with a largely full time workforce, strong trade union participation and job security was thought to justify the Robens approach to OHS – an approach which sought to simplify the layers of prescriptive legislation, introducing consultative arrangements between employers and workers, thus placing responsibility firmly in their joint hands in a spirit of mutual cooperation.

⁹³ Industrial Relations Commission of New South Wales *Annual Report 2008*.

⁹⁴ There were 124 fatalities and 142,542 injuries in NSW in 2007-2008. WorkCover Authority New South Wales *Workers Compensation Statistical Bulletin 2007-2008*, (WorkCover NSW 2009).

⁹⁵ Tombs and Whyte, above, note 72.

⁹⁶ CFMEU C and G Division, Submission to the National Review into Model Occupational Health and Safety Laws. (CFMEU National Office Sydney, 2008) at 41.

[The Robens recommendations were] ... based upon unspoken assumptions that there would be a vigorous trade union movement covering almost half the workforce and that this union movement would play its role in the consultative process. Another assumption was that its machinery...would be funded amply by government.⁹⁷

By 1998, social and economic changes in Britain saw these assumptions evaporate. When the Robens approach was first mooted for NSW in the early 1980's, social and industrial conditions were similar to that of Britain in the 1970's, with 'a strong and vigorous trade union movement, a highly-regulated labour market, large-scale employment, full-time employment, and government with deeper pockets...'⁹⁸ McCallum's view was that by 1998, the decline in the conditions of workers in Britain, the underfunding of government departments, the increase in contingent work and the 'vertical disintegration' of the labour market in which large corporations outsource and contract out services, saw a rise in accident rates along with a decline in trade union membership.⁹⁹

Walters and James¹⁰⁰ argue that in the U.K, the *Safety and Health at Work Etc. Act 1974* and the preceding Robens report 'were based on a particular view of both the social relations of production and of the consequences for health and safety, influenced by a socio-political and economic situation whose characteristics have become increasingly less relevant to the 1990s.' In other words, social democratic principles had been supplanted by neo-liberal Thatcherite doctrines and the incoming New Labor government was in no mood to overturn all of its economic and political policies.

In NSW, the review of the 1983 *OHS Act* led to the promulgation of the *OHS Act 2000*, followed the next year by its accompanying *Regulation 2001*. The *OHS Act 2000* particularly emphasised employers' obligations to consult with their workforce on OHS matters and to require employers, manufacturers of plant and controllers of premises to undertake risk assessments, including identifying, assessing and controlling workplace hazards. It stipulated a requirement to appoint a principal contractor on construction work. It required persons leasing, hiring, registering,

⁹⁷ McCallum R. *Final Report of the Enquiry into Workplace Safety, Vol.1*. Parliament of New South Wales Legislative Council Standing Committee on Law and Justice, Report No.10 (1998) at 45.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Walters D and James P. 1998. *Robens Revisited – the case for a review of occupational health and safety regulation*, Institute of Employment Rights, (London, 1998) at 31.

designing, or selling plant to ensure that it was without risk for industrial and public safety.¹⁰¹ In addition, the new Act imposed higher penalties, effectively doubling the maximum fines for employers who failed in their various OHS duties. This meant that penalties at the time were the highest in Australia, with maximum penalties shown in Table 2.3 below. An amendment in 2006 (s.32A) introduced increased penalties for persons causing a workplace death due to reckless conduct, and included the provision for a five year term of imprisonment, but to date, no one has been charged under this section.

Table 2.3. Changes in penalty rates for breaches of the general duty of care provisions NSW *OHS Act* 1983 and NSW *OHS Act* 2000.¹⁰²

Year	Act	Section	Penalties
1983	NSW OHS Act 1983	15 and 16	\$50,000 corporation \$5000 individual
30 June 1987 Penalty units increased from \$100 to \$110	As above	As above	\$100,000 corporation \$10,000 individual.
1991 Amended 1 March	As above	As above	\$250,000 corporation \$25,000 individual
1996 Amended 1 February	As above	As above	\$500,000 corporation \$50,000 individual (Additional penalty for second and subsequent offences s51A of \$250,000 corporation and \$25,000 or 2 years imprisonment)
After 1 September 1997 (penalty unit increased from \$100 to \$110)	As above	As above	\$550,000 corporation \$55,000 individual (see s51 A increased to \$255,000)
2000 to present	NSW OHS Act 2000	ss8 and 9 (penalty see s12)	\$550,000 corporation \$55,000 individual Second and Sub offence \$825,000 corporation and \$82,500 or 2 years imprisonment
2006	NSW OHS Act 2000	Part 2A s32a introduced reckless conduct causing death	\$1,650,000 corporation \$165,000 or 5yrs imprisonment or both

In NSW, once the regulator decided to launch a prosecution in the case of a fatality, the matter was heard in the NSW IC. This Court had its genesis in the Industrial Relations Commission of New South Wales (IRCNSW), established by the *Industrial Arbitration Act* 1901. Its central function as a body exercising arbitration and conciliation functions remained essentially the same throughout the decades of

¹⁰¹ New South Wales *Occupational Health and Safety Act* 2000, Part Two: Duties relating to health safety and welfare at work.

¹⁰² Penalty amounts are expressed in penalty units. As at 1987, a penalty unit was \$100 and increased to \$110 after 1 September 1997.

the twentieth century. In 1908, the Industrial Court was established by the *Industrial Disputes Act* with a Supreme or District Court Judge appointed for a seven-year term, with jurisdiction to hear matters concerning industrial disputes and to arbitrate and prosecute in industrial matters.¹⁰³

By 2010, the major functions of the IRC NSW concerned conciliation and arbitration of industrial disputes, setting industrial awards, approving enterprise agreements and hearing unfair dismissal claims. The Commission was administered by the New South Wales Department of Justice and Attorney General and exercised both an administrative civil role as the Industrial Relations Commission (IRC) and a criminal role, through judicial responsibilities of the Industrial Court of New South Wales (NSW IC). In this form, the Court had status equivalent to the Supreme Court, making it a 'superior court of record'.¹⁰⁴ The unique nature of the NSW IC was in its specialist role. Judges became familiar with the features and dynamics of OHS offences, as well as other industrial cases because these were the regular matters being heard. However, it will be shown that judges were constrained by sentencing rules and legislation, but at the same time, failed to exercise more innovative sentencing options.

Less serious offences under the New South Wales *Occupational Health and Safety Act* (2000) which did not involve fatalities were usually heard at local levels in the Chief Industrial Magistrates Court (CIM), but in 2010, its functions in relation to the NSW *Industrial Relations Act* 1996 and the NSW *Occupational Health and Safety Act* 2000, were referred to the Industrial Court, thus relieving Industrial Magistrates and Local Courts of their duties in relation to this legislation. The Bill for this amendment¹⁰⁵ was introduced into the NSW parliament in 2009. The rationale for these changes was that the introduction of the Commonwealth *Workplace Relations Act* 1996 under the conservative Liberal-National Party (LNP) coalition federal government, had reduced the workload of the IRC, as the Commonwealth assumed the dominant role in industrial relations. This lesser load continued even after the

¹⁰³Industrial Relations Commission, *Our History*
http://www.lawlink.nsw.gov.au/lawlink/irc/ll_irc.nsf/pages/IRC_about_us_our_history (3/9/2010)

¹⁰⁴Industrial Relations Commission, *Purpose and Functions*
http://www.lawlink.nsw.gov.au/lawlink/irc/ll_irc.nsf/pages/IRC_about_us_IRCpurpose

¹⁰⁵Industrial Relations Amendment (Jurisdiction of Industrial Relations Commission) Bill 2009.

introduction of the *Fair Work Act 2009* by the federal Labor government.¹⁰⁶ In 2010, there were 10 members of the judiciary in the NSW IC, including the President, Vice President and three Deputy Presidents presiding over matters relating to OHS offences, and other industrially related cases. The NSW IC had the confidence of the Labor Government, and with the approaching state elections in March 2011, the then Opposition Coalition Shadow Attorney-General also stated his party's intention to maintain the status quo in respect of the IRC's and the IC's function. However, as Chapter Seven shows, after the election of the Coalition government in 2011, the status of the NSW IC as an independent court changed.

Industry associations

There are numbers of peak bodies representing the various trades and allied industries in the building and construction sector, only one of which, the Master Builders Association (MBA), is considered here because of its role in day-to-day operations. Its major responsibility is representing employers' interests in the construction sector. Its traditional role in industrial advice and dispute resolution was expanded during the 1990s and into the 2000s as the federal LNP government moved to more vigorous de-regulation of Australian industrial relations. Medium to large companies typically seek the MBA's advice where union work stoppages occur, including those concerned with OHS, and it usually represents employers where OHS disputes escalate to the industrial court (NSW IC). The association has a partnership agreement with NSW WorkCover for improving workplace safety and injury management across the construction industry. The aim of this collaboration with the MBA was '...to deliver practical, cost effective solutions...' with WorkCover being aware of '...the difficulties employers, particularly small businesses face in addressing safety and injury management issues.'¹⁰⁷ However, as the data show, the numbers of fatal incidents at building sites has not fallen significantly over time.

In such a dangerous industry, the assistance of the building unions in monitoring and inspection of site safety is both economically beneficial to the State and contributes to the health and safety of its members and other workers. However, the imperatives

¹⁰⁶ Legislative Review Committee 2009 *Legislative Review Digest, No.4 of 2009*, Parliament of New South Wales.

¹⁰⁷ WorkCover Authority of NSW. *WorkCover and Master Builders Association renew partnership agreement* [http://www.workcover.nsw.gov.au/aboutus/newsroom/Pages/WorkCoverandMasterBuildersAssociationrenewpartnershipagreement.aspx...NSW Government \(2/11/2011\).](http://www.workcover.nsw.gov.au/aboutus/newsroom/Pages/WorkCoverandMasterBuildersAssociationrenewpartnershipagreement.aspx...NSW Government (2/11/2011).)

of capital gain is the prime concern of employers, as pointed out by one of the main Australian employer associations the Australian Industry Group who have stated: ‘...(I)t is often suggested that OHS should be the top priority. While this is a worthy ideal every organisation should strive for, the reality is that making a profit will always be the highest priority of a business’.¹⁰⁸

Rearranging these priorities in the workplace is a necessary, though insufficient, condition to secure a safe and healthy workplace and an effective way of doing this is to have unionised work sites, with union appointed HSR’s.¹⁰⁹ A number of studies have examined the relationship between union presence at the workplace and safety outcomes, confirming that unionised workplaces are safer than the non-unionised.¹¹⁰ A study by the London School of Economics concluded that work injury rates were 24% lower in unionised sites.¹¹¹

Nichols et al¹¹² suggest that it is difficult to ‘disentangle’ the impact of union involvement at work because of two factors. Firstly, workplaces with a strong union presence are likely to have greater awareness of OHS issues, which may increase OHS incidence reporting. Secondly, ‘adverse conditions of work may bring trade unions into workplaces in the first place’.¹¹³ Studies by Reilly¹¹⁴ in 1995 and more recently by Nichols et al¹¹⁵ (2007) concluded that participative arrangements in conjunction with union involvement are effective and produce positive safety outcomes. Reilly’s study for example, found that:

¹⁰⁸ *Industry*, Autumn 2008 at 41

¹⁰⁹ Tombs S ‘Workplace harm and the illusion of law’ in *Criminal Obsessions: Why Harm Matters More Than Crime*, eds Dorling D, Gordon D, Hillyard P, Pantazis C, Pemberton S, Tombs S, 2nd ed Centre for Crime and Justice Studies, (Kings College London, 2008), www.crimeandjustice.org.uk (18/11/2011).

¹¹⁰ Frick K and Walters D, ‘Worker representation on health and safety in small enterprises: lessons from a Swedish approach’, *International Labour Review*, (1998) Vol.137, No.3.

Reilly B, Pad P and Holl P ‘Unions, Safety Committees and Workplace Injuries’, *British Journal of Industrial Relations* (1995) Vol.33, No.2: 275 – 288; Shearn P., ‘Workforce participation in the management of occupational health and safety, Report No. HSL/2005/09’, Health and Safety Executive (2004) <http://www.hsfor exampleov.uk/research> (5/2/2009); Braithwaite J, *To Punish or Persuade: enforcement of coal mine safety*. (State University of New York Press,1985).

¹¹¹ Litwin A, Trade unions and industrial injury in Great Britain’, LSE Discussion Paper DPO468, (London School of Economics, August 2000).

¹¹² Nichols T, Walters D and Tasiran A. ‘Trade unions, Institutional Mediation and Industrial Safety: Evidence from the UK’, *Journal of Industrial Relations* (2007) Vol.49, No.2: 211-225, at 212.

¹¹³ *Ibid* at 212.

¹¹⁴ Reilly B, Pad P and Holl P. (1995) ‘Unions, Safety Committees and Workplace Injuries’, *British Journal of Industrial Relations* Vol.33, No.2: 275 – 288.

¹¹⁵ Nichols et al above, note109.

[e]stablishments with joint consultative committees exclusively for health and safety — and with all employee representatives chosen by unions — have, on average, 5.7 fewer injuries per 1000 employees compared with establishments where management deals with health and safety matters without any form of worker consultation.¹¹⁶

Further support for the positive role of unions in the OHS process was confirmed in a 2002 Canadian study. The study, commissioned by the Ontario Workplace Health and Safety Agency, found that:

...78-79 per cent of unionised workplaces reported high compliance with health and safety legislation with only 54-61 per cent of non-unionised workplaces reporting such compliance.¹¹⁷

The beneficial role of unions in OHS consultation was also pointed out by Saksvik and Quinlan,¹¹⁸ who suggested that unions can vet OHS internal control systems/management systems in ways that inspectors may not be resourced to do. In addition to union support at the enterprise level, other elements in effective participation include the local statutory framework and support of the regulator, as well as management's recognition of HSRs participation. However, without active support of the union in health and safety improvements, high union density in itself is not enough to have a positive effect. Eaton and Nocerino¹¹⁹ suggest that it is not just high union density that improves the performance of employee participation programs 'but whether or not the union has taken an active role in that program'.

In the case of the NSW CFMEU C and G Division, there is a strong emphasis on health and safety, with the union running in-house training programs for its organisers and delegates, as well as providing information in a range of different languages to accommodate a multicultural workforce. Organisers also attend extensive training programs run by WorkCover NSW, and the union is active in seeking outside professional help and advice on building sites of concern.¹²⁰ However, in line with all other trade unions in Australia, there has been a

¹¹⁶ Reilly et al above, note 111 at 283.

¹¹⁷ O'Neill 2002 cited in Johnstone, R. Quinlan, M. and Walters, D., 2004, 'Statutory OHS Workplace Arrangements for the Modern Labour Market', Working Paper 22, National Research Centre for OHS Regulation, Australian National University, (2002) at 5.

¹¹⁸ Saksvik P.O. and Quinlan M 'Regulating Systematic Occupational Health and Safety Management, Comparing the Norwegian and Australian Experience', *Relations Industrielles*, (2003) Vol.58, No.1, cited in Mylett T. and Markey R.) 'Worker Participation in OHS in New South Wales (Australia) and New Zealand: Methods and Implications', *Employment Relations Record*, (2007) Vol.17, No.2 at 26.

¹¹⁹ Eaton, A.E. and Nocerino, T, The Effectiveness of Health and Safety Committees: Results of a Survey of Public-Sector Workplaces, *Industrial Relations*, (2000) Vol.39, No.2 at 26.

¹²⁰ Personal communication. CFMEU C and G State Secretary, 5/9/2008.

decrease in union membership over time and union density in the construction industry dropped from 34 per cent in 1994 to 17 per cent in 2008.¹²¹ Anecdotally, density appears to be higher in major construction projects and on those work sites where union enterprise bargains have been negotiated.

The ability for unions to attend worksites for health and safety reasons was enabled by the state Labor government through an amendment to the New South Wales *Occupational Health and Safety Act 1983* in 1995, allowing trade union authorised officers entry to workplaces ‘for the purposes of investigating any suspected breach of the occupational health and safety legislation’. These powers were similar to those granted union officials in the NSW *Industrial Relations Act 1996* allowing them to access to workplace to investigate suspected breaches of industrial conditions.¹²² In contrast, the federal LNP government opposed what it saw as the unfettered right of unions to enter work sites, and the right of entry was severely restricted under its *WorkChoices* industrial legislation promulgated in 2005.

There was a fall in industrial disputes in the construction industry from 371 in 2003-04 to 30 in 2006-7, representing a greater drop (91.9%) than for all other industries for the same period. A corresponding percentage drop of 92.2% was observed for working days lost to industrial dispute, again greater than for all other industries. The ratio of numbers of days lost per employee was also lower, with ratios of 1.15 days per employee in construction compared to 1.2 days in all other industries.¹²³ This period corresponds to the introduction of the LNP federal government’s *Australian Building and Construction Industry Improvement Act 2005* (ABCII) 2005, which targeted building unions, and made formerly lawful industrial action illegal.¹²⁴ This Act was to have negative consequences for health and safety in the industry, as union action around these issues was curtailed, and as union officials, delegates and

¹²¹ Percentage calculated from ABS series 6310.0 – Employee Earnings, Benefits and Trade Union Membership, Australia, 2011.

¹²² Officers could enter worksites only where members or potentially eligible members were present, and only with written permission from the Industrial Registrar of the Industrial Relations Commission. In effect, authorised union officers were *de facto* WorkCover inspectors. By 2008, there were approximately fifty CFMEU authorised officers, visiting hundreds of sites annually and following up safety breaches on a daily basis, assisting and supplementing the relatively few WorkCover NSW construction industry Inspectors. (CFMEU C and G Division, *Submission to the National Review into Model Occupational Health and Safety Laws*. CFMEU National Office Sydney, July 25, 2008).

¹²³ NSW Government Paper Green Paper 1998 above, note 6 at 8

¹²⁴ See Marr, J, *First the Verdict; the real story of the building industry royal commission*. (Pluto Press Australia; Pluto Press, 2003). See also Dabscheck, B. ‘Two and two make five: industrial relations and the gentle art of doublethink’. *Economic and Labour Relations Review* (2005) Vol.15 No. 2.

members were threatened with imprisonment and heavy financial penalties under the powers of its enforcing agency, the Australian Building and Construction Commission (ABCC).

Labour and capital – contested terrain

The building and construction industry is no stranger to contests between labour and capital that began some 160 years ago, when, in the 1840s, carpenters and joiners formed an industrial association. This action was immediately attacked by the press, with the *Sydney Gazette's* editorial declaring that workers' plans to form a union were 'mad', that workers were not of an 'honest and honourable character' and that they would bring suffering to their families. It continued '...it may not be generally known that the Law has wisely provided a very severe penalty for the punishment of the crime of Combination...for months they (workers) may be incarcerated within the walls of a prison'.¹²⁵ Building workers continued to press for their rights for an eight-hour day over a six-day week, and were eventually successful. Stonemasons won a 44-hour week in the 1870s, a campaign not too vigorously opposed by employers because of the comparatively young mortality rate among workers in this trade due to exposure to silica dust, usually about 35 years of age,¹²⁶ making employers conscious of the need to maintain the workforce as far as possible.

It was not until the 1920s that building workers won working hours commensurate with the stonemasons, with the *Sydney Morning Herald* giving prominence to the view of the employers association, the Master Builders, that the community would pay, later echoed by the *Daily Telegraph's* assertion that housewives would suffer and that the life or death of industries was at stake.¹²⁷ Years later, the *Sydney Morning Herald* attributed the 44-hour week as a 'grave factor in the depression' of the 1930's. In 1920, building workers in Melbourne ('apostles of laziness', as described by the *Argus*) agitated for a further reduction of working hours to 40 hours per week. Campaigns for a 38-35 hour week commenced in the late 1950s and although the result was still not fully achieved by 1980, the *Daily Telegraph* was moved to describe the renewed push for a 35 hour week as '...a policy of deliberate

¹²⁵ True P, Building Workers and the press: 160 years of anti-union propaganda. (Sydney: NSW Branch CFMEU C and G,1999) at 6.

¹²⁶ Ibid.

¹²⁷ Ibid at 8.

sabotage.’¹²⁸ Other union campaigns for holidays, long service leave, workers’ compensation, amenities, site allowances, picnic days, minimum wage, sickness benefits and Green Bans have been the subject of further newspaper criticism and condemnation.¹²⁹

During the 1970’s union militancy saw improvements in building workers’ wages and conditions during a period of low unemployment and high inflation, which encouraged wage demands, and provided high job security in an era of building boom. Large developers and multinational construction companies were increasing, and workers were abandoning their former loyalties to small scale and cottage industry employers. The proliferation of sub-contractors was also causing poorer industrial relations because of their dubious business practices, which reduced labourers’ job security, as they became more casualised.¹³⁰

While workers were becoming more unified, the opposite was happening in employer groups, with the Master Builders Association representing smaller and middle size builders, and larger companies choosing not to join. The Building Workers Industrial Union (BWIU)¹³¹ had traditionally represented the trades, but about this time, there was an increase in the numbers of labourers on site, due to technological changes in materials, their use and manufacture. Concrete was replacing brickwork, and more demolition, excavating and general construction work was required. However, some of the new building techniques enabled the union representing labourers, the Builders’ Labourers’ Federation (BLF) to use its powerful industrial tactics of placing bans on concrete pours to force concessions from builders. Tensions were high between the two unions, caused by different views around industrial organising and tactics and different ideological positions taken by the unions’ leadership. By the mid 1980’s, the federal Labor government had deregistered the BLF at a national and state level, and in 1992, the BWIU and the BLF merged.¹³²

¹²⁸ Ibid at 11.

¹²⁹ Ibid.

¹³⁰ Ibid at 17.

¹³¹ The Building Workers Industrial Union merged with other construction industry unions to form the Construction division of the CFMEU.

¹³² Burgmann, V and Burgmann, M, *Green Bans, Red Unions* (UNSW Press, 1998)

The rivalry between the two unions was pronounced.¹³³ Apart from the political and ideological differences, building unions approached industrial action from quite different standpoints, with the BLF adopting a more militant stance in opposition to the BWIU's united front approach. Union leaders had a definite, though limited, influence on industrial relations through their strategic and ideological attitudes and stances, however, the structure of the industry itself was of crucial importance. Even the then head of the Australian Federation of Construction Contractors was reported as saying

My view is that the biggest problem in the industry is that we expect people to get out of bed at 5.30 am in the morning, do a shit job for 11 hours a day in an unsafe environment for six days a week and whinge when they won't do it on Sunday and act surprised when they spend as much time in the shed playing cards as they can¹³⁴

The structure of the industry created low levels of employer loyalty, due to the nature of short term, sub-contract work, under capitalisation among many employers, and heavy work with high injury rates, which lent itself to union organising.¹³⁵

The Australian labour market went through a deregulation process in the 1990s, but the construction industry, unlike most other sectors was not so affected, with market driven enterprise bargaining principles, weakened arbitration and the control of union influence in industrial relations. Job instability, which affected other sectors was always a feature of the construction industry, which was able to 'ride' this deregulated effect more easily. However, it did not escape wage decline.¹³⁶ In Australia, the years of the LNP government from 1996 to 2007 saw neo-liberalism assume greater heights, with its sights set on the trade union movement, and in particular, those unions it deemed to be the most militant and hostile. These included the Maritime Union of Australia and the CFMEU C and G Division. Some of the industrial legislation that it passed was inherited by the incoming federal Labor government in 2007, which appeared reluctant to abandon some of the former conservative government's political and economic policies. The following chapters

¹³³ Mitchell G. *On Strong Foundations: the BWIU and industrial relations in the Australian construction industry*. (Sydney: Harcourt Brace, 1996). See also Boyd B, *Inside the BLF; a Union Self-Destructs*. (Ocean Press, 1991).

¹³⁴ *Ibid* above note 125.

¹³⁵ *Ibid* above note 127.

¹³⁶ Underhill L, 'The Australian construction industry: union control in a disorganised industry' in Bosch G and Philips P, eds, *Building Chaos: an International Comparison of Deregulation in the Construction Industry* (London: Routledge, 2003) at 134.

will demonstrate how some aspects of these policies were detrimental to workers' health and safety, partly because of the impacts made on the ability of unions to monitor safety at construction workplaces.

This chapter has shown that the construction industry is highly productive and valued by both State and private interests. Its importance to the economy of the nation is such that any threats to productivity, such as that allegedly posed by trade union activity, is harshly dealt with. It is characterised by precarious working conditions with high levels of sub-contracting and micro business arrangements, Its mode of production leaves the industry vulnerable to illegal or dubious employment practices, and these social relations of production contribute to poor health and safety outcomes. This is demonstrated by the fact that the industry is one of the country's most dangerous, with high levels of traumatic injury fatalities and serious injury.

The following chapter sets out the theoretical constructs that are used to understand and unravel the complex relationships shown, in the conceptual model in Figure 1. Among other things, it discusses theories of the State, the 'war of position' engaged through hegemonic and counter-hegemonic struggles. Social harm theory is also considered as a useful conceptual device to explain the many facets of harm experienced by those who are victims of workplace safety crimes.

CHAPTER THREE

Theoretical Perspectives and Literature Review

...any adequate understanding of the vast scale of harm that affects people from the cradle to the grave must be understood in terms of political imperatives and the economies of the neo-liberal paradigm. They cannot be explained by a focus on individual acts or omissions. The vast majority of harms are structurally determined...individuals are responsible at some point, but they act collectively following the dictates of the neo-liberal paradigm.¹

Introduction

There are many complexities underlying the problem of workplace deaths in the construction industry. These include consideration of causes; the regulation of work, health and safety; the leniency of penalties for workplace fatalities (as will be shown in chapter 4); the effectiveness of deterrent measures; and the perception of OHS crimes. In trying to appreciate these intricacies, this research draws on neo-Marxist theories, which in turn are informed by classical Marxism, one of the ‘grand theories’, characterised as a comprehensive and broad view of human society and behaviour.² This approach privileges the role of social relations, wherein the concepts of history and ideology are employed to gain a better understanding of the nature of inequality in human endeavours. The importance of an historical perspective is emphasised to show how social relations of production change over time, but in which class relations and associated ideological positions remain constant.

The model in chapter 1 identified the state and its instruments as interacting together to produce a particular regulatory, social and political context for the treatment of workplace harms. It displays the state as a mechanism of ideology and hegemony. This chapter explores the theoretical literature that has been used to develop this view of the state. It discusses the state as a hegemonic force that provides cohesion

¹ Tombs S and Hillyard P, ‘Towards a political economy of harm: states, corporations, and the production of inequality’, in *Beyond criminology: taking harm seriously*. (London: Pluto Press 2004) at 53.

² Jaccard J, and Jacoby, J, *Theory Construction and Model-Building Skills*, (New York: The Guilford Press, 2010)

among diverse and autonomous institutions. It then changes focus to examine the prevalence and influences of neo liberalism as an ideology to show how this ideology frames the treatment of OHS and injury, illness and death at work.

Its empirical analysis of court judgements for traumatic workplace fatalities is grounded in an examination of the State and its agencies. It assesses legislative, judicial and regulatory changes over a timeframe primarily reflective of the study period, that is from 1988 to 2008, and which have shaped the social, economic and political milieu that has implications for the health and safety of the workforce. Of central interest is the literature that directly or indirectly, relates to perceptions of OHS crimes. When offences against OHS legislation are considered equivocally, there are implications about the effectiveness of deterrent measures, and this thesis argues that perceptions such as these are ones fostered by an economic system that privileges capital. This approach differs from other research, because while questions about OHS, punishment and deterrence has been examined by regulatory theory, critical criminological and sociological perspectives, this thesis positions workplace fatalities as the microcosm through which we can gain a better understanding of the dominance and constancy of particular ideological positions, in this case, that of neo-liberalism.

The economic policies and ideological constructs of neo-liberalism gained ground in Australia during the 1980's and are still evident. This was also the time that saw the introduction of Robens style OHS legislation with its objectives of self-regulation and self-determination, concepts that sit comfortably with the neo-liberal paradigm. Australian Labor and conservative governments directed a range of economic reforms, which saw an upsurge in policies of privatisation of state owned resources and utilities, diminution of public sector services and financial de-regulation, and other 'reforms' designed to strengthen capitalism and weaken the strength of the labour movement.³ A fundamental contradiction of the capitalist State lies in its attempts to manipulate social tensions between the interests of capitalism and the excesses of capitalists, because it is in the interest of the State to maintain itself, to promote social harmony and to reproduce the means of production. Neo-Marxists

³ Scott J, *Sociology: the Key Concepts*, (ed) John Scott, (London: Routledge,2006) at 173-4: see also Walker and Walker, *Privatisation: Sell off or Sell Out? the Australian Experience* Sydney (ABC Books ,2000); Pusey M, *The Experience of Middle Australia: the Dark Side of Economic Reform* (Cambridge: Cambridge University Press, 2003); Bray M, Waring P, Cooper R, *Employment Relations: Theory and Practice* (Ryde: McGraw Hill 2009)

argued that the state needed to exercise relative autonomy from class based interests, in order to exercise these checks and balances.⁴

Following Gramsci, this thesis conceptualises the State as reflective of power relations in society,

...for it should be remarked that the general notion of state includes elements which need to be referred back to the notion of civil society (in the sense that one might say that state = political society + civil society, in other words, hegemony protected by the armour of coercion.⁵

Society is not a unitary static formation, but a complex structure with differing influences exerting pressure at one point or another, pressures that include ideological and cultural forces. This chapter explores some of these forces and pressures that exist in and between the elements of the model and identifies the concepts that are used in exploring the subject of this thesis.

The classic Marxist view of the State is that it is not an external power forced on society, but as Engels observes, it is instead

... a product of society at a certain stage of development; it is the admission that this society has become entangled in an insoluble contradiction with itself, that it has split into irreconcilable antagonisms which it is powerless to dispel. But in order that these antagonisms, these classes with conflicting economic interests, might not consume themselves and society in fruitless struggle, it became necessary to have a power, seemingly standing above society, that would alleviate the conflict and keep it within the bounds of 'order'; and this power, arisen out of society but placing itself above it, and alienating itself more and more from it, is the state⁶.

The state is both produced by, and expresses the conflict inherent in class differences. The state arises in response to these differences and in doing so, proves the irreconcilable nature of class antagonisms.⁶ Later neo-Marxist theorists sought to expand and refine this characterisation by defining the state as an instrument that reflects the dominant interests of capital, but also reflects the fact that there are different fractions of capital, and consequently the state retains a degree of autonomy from those fractions. There is a '...dialectic between state and society, not a

⁴See Miliband R, *The State in Capitalist Society*, (London:Weidenfeld and Nicolson,1969), but see in response Poulantzas' argument against Miliband's 'instrumentalism's being central to reformist social democracy' in Poulantzas N, 'The Capitalist State: a Reply to Miliband and Laclau', (1976) *New Left Review* 1/95.)

⁵ Gramsci A, *The Antonio Gramsci Reader: Selected Writings 1916-1935*, (ed.) D Forgacs, (New York: New York University Press 2000) at 235

⁶ Lenin V I, *The State and Revolution*,
<http://www.marxists.org/archive/lenin/works/1917/staterev/ch01.htm> (12/12 /11)

separation'.⁷ Moran maintains that Gramsci and Poulantzas saw the state as one wherein 'class struggle is reproduced within the state apparatus itself', with Gramsci viewing the state as a factor of class cohesion '... the capitalist class is not a unity outside the state' and the state maintains the 'cohesion and form' of the capitalist. The state operates as a 'collective capitalist' to represent the long-term interest of the capitalist class as a whole, under the hegemony of one of its fraction. This fraction today is monopoly capitalism. It is the structural characteristics of capitalism and not the class origins or powers of individuals therefore, that determines the class nature of the state.⁸

The state is central to the analysis here, as it is from the state that the mechanisms that ultimately affect human lives flow. At the very least the state can be seen as an agent of control, but the extent to which that control is exercised by different agencies, and explanations of what its functions are, are multifold.⁹ There is also debate about the institutions that constitute the state. While Weber saw the state as the bearer of legitimate force within its given territory, Marx theorised the state as the instrument of the ruling class; Gramsci emphasised the ideological control exercised by capitalists through the state, while Althusser discussed the roles of the state in terms of its repressive (armed forces, police etc) and ideological (religion, media, education etc) apparatus.¹⁰

For Gramsci ideology is the force that shapes a shared worldview. Ideology '...[has] a validity which is 'psychological'; it 'organises' human masses, [it forms] the terrain on which men move, acquire consciousness of their position, struggle, etc'.¹¹ Ideologies are part of the hegemonic process, which Gramsci conceived of in several ways. It applies not only to the question of leadership of the proletariat but also to the rule of other classes in other historical periods. It is that 'cultural, moral and

⁷ Head B and Bell S 'Understanding the Modern State: Explanatory Approaches' in *State, Economy and Public Policy in Australia* (eds) S Bell and B Head, (Melbourne: Oxford University Press,1994). See also. Moran J, 'Two Conceptions of State: Antonio Gramsci and Michael Mann, *Politics* (1998) Vol.18, No.3:159-164 at 160-161. See also Pitelis C 'On the Nature of the Capitalist State, *Review of Political Economy*, 6.1(1994) Vol 6, No.1:72-105 at 89.

⁸ Moran *ibid* at 89.

⁹ See for example, Meckstroth T, 'Marx and the Logic of Social Theory: the Capitalist State' *Science and Society*, (2000) Vol.64,No.1, Spring 55-86; Pitelis C 'On the Nature of the Capitalist State, *Review of Political Economy*, (1994) Vol 6, No.1:72-105, and a more recent review of debates about the state in the light of globalization see Cerny P, 'Restructuring the State in a Globalizing World: Capital Accumulation, Tangled Hierarchies and the Search for a Spatio-Temporal Fix', *Review of International Political Economy* (2006) Vol.13, No.4:679-695.

¹⁰ Scott J, *Sociology: the Key Concepts*, (ed) John Scott, (London:Routledge,2006) at 173-4.

¹¹

ideological leadership over allied and subordinate groups [that]...is identified with a new ideological 'terrain' with political, cultural and moral leadership and with consent'.¹² Gramsci links hegemony in '...a chain of associations and oppositions to 'civil society' as against 'political society', to consent as against coercion, to 'direction' as against 'domination'. The importance for Gramsci is that 'though hegemony is ethico-political, it must also be economic, must necessarily be based on the decisive function exercised by the leading group in the decisive nucleus of economic activity'. Hegemony is dynamic, in contrast to notions of a static dominant ideology thesis in which the actors are submissive recipients. Hegemony 'presupposes that account be taken of the interests and the tendencies of the groups over which [it] is exercised'¹³. So hegemony is created, achieved, and sustained through the state apparatus.

This emphasis on the role of ideas, of ideology and its influence on the outcomes for society, is one that Althusser grappled with some forty years ago. He saw, like Marx, that capital relies on the reproduction of labour power to sustain itself and wages are the means through which this occurs. However, skills are also necessary and are increasingly being provided outside the job in other institutions, where workers learn social rules, norms, mores- the rules of the dominant class. These rules result in workers submitting themselves to the rules of the hegemonic social order, and at the same time, the children of the ruling class acquaint themselves with the tools to '...manipulate the ruling ideology correctly for the agents of exploitation and repression'.¹⁴

In Marx's view, the dominant ideas in any society are those of the ruling class. Althusser, however, was interested in explaining the 'relative autonomy' of the superstructure and its reciprocal action on the economic base. He wanted to move from what he termed 'descriptive' Marxism to one that would understand the hidden determinants of social action, and ideology is central in this search. For Althusser, depending on the historical circumstances, another structure other than the economic

¹² Ibid.

¹³ Ibid at 423-424.

¹⁴ Althusser L, *Lenin and Philosophy and Other Essays* (1970)
<http://www.marxists.org/reference/archive/althusser/1970/ideology.htm> (19/2/2011)

base (the superstructure) could be dominant, but the economic base would always be the determinant of that domination.¹⁵

Although Marx believed that the bourgeois State was inherently repressive in its functioning, Althusser introduced the notion of the State Repressive Apparatus (RSA) and State Ideological Apparatus (ISA). These two sets of social sites condition the capitalist mode of production. The State Repressive Apparatus includes the government, administration, armed forces, police and courts. It ultimately functions through violence, though repression can also be expressed in non-physical forms.¹⁶ The idea that most attracted Althusser was how the Ideological State Apparatus played a parallel role in maintaining capitalist class structure (Wolff, n.d). ISA's are found in religious and educational institutions, mass communications, cultural institutions and artefacts, and trade unions. It is difficult for the ruling class to exercise complete control over these ISA's and there is therefore a continuing struggle for hegemony in this arena. The ISA's function primarily by ideology and secondarily through repression, and so there is a 'very subtle or tacit combination' in the interplay of the ISA's and RSA's.¹⁷

Michael Burawoy¹⁸ proposed a Sociological Marxism that privileges society concurrent with, but distinct from the state and economy. He maintains that the convergence of the ideas of Gramsci and Polanyi, following different Marxist traditions, independently contributed to the thesis of Sociological Marxism, which holds that '...the dynamism of 'society', primarily located between State and economy, is a key to the durability and transcendence of advanced capitalism...'.¹⁹ Gramsci was a critic of bourgeois sociology, objecting to crude positivism in sociology but also in Marxism, and his great contribution was to '...bring culture and ideology to the centre of political analysis.'²⁰ He argued that 'civil society' was the new terrain of struggle connecting the state to everyday life, through the media, mass education, political parties and voluntary associations, assisted by 'a more elaborated and more interventionist state.'²¹ The importance to Gramsci of political parties,

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Burawoy M, 'For a Sociological Marxism: the Complementary Convergence of Antonio Gramsci and Karl Polanyi' *Politics And Society*, (2003)Vol 31, No.2:193-261

¹⁹ Ibid at 194.

²⁰ Ibid at 200.

²¹ Ibid at 206.

ideology and the state were fuelled by the failure of revolution in the West and the rise of fascism in Italy. A new form of domination was on the rise, which he termed hegemony.

The ‘normal’ exercise of hegemony on the now classical terrain of the parliamentary regime is characterised by the combination of force and consent, which balance each other reciprocally, without force predominating excessively over consent. Indeed, the attempt is always made to ensure that force will appear to be based on the consent of the majority.²² Force is ever present, but in different guises, waiting in the wings ‘to be mobilized against individual deviants and in anticipation of moments of crisis’.²³

Pearce and Tombs²⁴ study of the companies in the American chemical industry is illustrative of these broader forces. The authors described the ‘passive revolution’ that the industry underwent to adapt itself to the globalised economy, particularly in the areas of production and regulation. Although it adjusted due to social pressures, it was only in ways that sustained its power, influence and interests.²⁵ It did so by forming a ‘hegemonic block’ or class coalition and as a class fraction was able to exert most power over the extraction of surplus value. As such, class fractions can convince other, allied forces to accept their moral and political leadership and contribute to their mode of governance and in doing so, expect that subordinate classes or fractions will fall in with the interests of the dominant ideology. Hegemony involves ‘the entire complex of practical and theoretical activities within which the ruling class not only justifies and maintains its dominance, but manages to win the active consent of those over whom it rules’.²⁶ Therefore, although a society may be composed of numbers of varying groups and interests, the ruling ideology is that which represents them all.

For Marxists, human minds, and the ideas which shape them are the ‘...products of historically developing social relations’. As Marx put it ‘[T]he human essence is no abstraction inherent in each single individual. In its reality, it is the ensemble of

²² Gramsci, in Burawoy, above, note 21 at 214.

²³ Ibid. Cf Althusser and the repressive state apparatus.

²⁴ Pearce, F, and Tomb, S ‘Hegemony, risk and governance: ‘social regulation’ and the American chemical industry’ *Economics and Society*, (1996) Vol 25, No.3:428-454.

²⁵ Ibid 429.

²⁶ Gramsci, in Pearce and Tombs, ibid at 430.

social relations'.²⁷ For Gramsci, ideology is '...a conception of the world that is implicitly manifest in art, in law, in economic activity and in all manifestations of individual and collective life'.²⁸ Not just concerned with ideas, ideology also works on the level of praxis – the inspiration of attitudes and the means to action. People must have some rules of conduct or orientation, and ideology therefore becomes 'the terrain on which men move, acquire consciousness of their position, struggle, etc'.²⁹

Gramsci argued that in order to undermine advanced capitalist societies, and lay the ground for socialism, a 'war of position' (an analogy to World War 1 trench warfare), must be undertaken, rather than the full frontal attack of a 'war of movement' such as that which occurred in the Russian revolution. However, hegemony is never 'complete' and there is always a shifting of terrain between the dominant and counter- hegemonic forces. While Gramsci saw two such forces – the dominant and the sub ordinate, Pearce and Tombs³⁰ argue that there may be a number of 'autonomous and counter hegemonic principle...and movements'.³¹ In examining the issues surrounding the social forces, movements and behaviours that have a bearing on court processes, including sentencing, and in thinking about the factors that have a bearing on the maintenance of workplace safety, counter hegemonic actions and principles are revealed. A 'war of position' occurs on the terrain of health and safety that demonstrates not only the gross struggles between dominant capital and sub-ordinate labour, but also the bearing that civil and political society brings to the arena.

The political debate in Australia is one where the dominant discourse is currently situated within a neo-classical economics, which is value laden and functions as a 'technology of power', which orders and re-orders social life.³² It produces a particular form of social order and social relations - 'a society constructed and animated in accordance with the logic, rules and values of the neo-classical narrative'.³³ The power of neo-classical economics lies in its ability to 'codify bodies

²⁷ Bhaskar, R (1983) Idealism in Bottomore, T (ed). *A Dictionary of Marxist Thought* (London: Blackwell References, 1983) at 218.

²⁸ Jorge Larrain 'Ideology', in Bottomore, T above, note 27 at 222.

²⁹ Ibid.

³⁰ Pearce and Tombs, above, note 24 at 43.

³¹ Ibid at 43.

³² Finlayson A, Lyson T, Pleasant A, Schafft K, Torres R, 'The "Invisible Hand": Neoclassical Economics and the Ordering of Society' *Critical Sociology*, (2005) Vol 31, No 4: 515-536 at 516.

³³ Ibid at 519.

of knowledge as true or false'; it maintains social order though privileging certain forms of conceptual and discursive possibilities and denying others, and thus structures our thoughts and actions. This occurs through a series of 'hegemonic moments', which, as Gramsci showed, allows a class alliance or bloc to obtain '...economic, ideological, political, and cultural control through a combination of consent and coercion'.³⁴

The ideological constructs of neo-classical economics and neo-liberalism were those that accompanied the changes in OHS and industrial relations legislation during 1988 to 2008. That is, the ideology and practices of neo-liberalism had become part of the Australian zeitgeist as the country adopted economic rationalist policies in the 1980's under a Labor federal government that had also embraced enterprise bargaining (single employer bargaining) and moves toward de-regulation.³⁵ This also provided a basis for the self regulatory policies of Robens style OHS legislation. These aims were further advanced when the conservative federal government of John Howard rationalised the introduction of regressive industrial relations legislation during his term of office 1996–2007, on the grounds that it allowed employees and employers a greater degree of choice and flexibility, a rhetoric which masked the inherent 'power and dependency in the employment relationship'.³⁶ In particular, the government was ideologically opposed to trade unionism, and moved to stamp out collective bargaining, as well as weaken the union movement in many respects.³⁷ These actions were supported by some business sectors and by different states and at various times.

The amount of de-regulation (which in fact, resulted in massive re-regulation and intervention), had a profound effect on workers as individuals and as a class and the introduction of very conservative industrial legislation was a major factor in the

³⁴ Ibid at 521.

³⁵ Fairbrother P, Svenson S, Teichner J, 'The Ascendency of Neo-liberalism in Australia', *Capital and Class* (1997) at 63; See also Pusey M, *Economic rationalism in Canberra: a nation building state changes its mind*. (Cambridge: Cambridge University Press, 1991)

³⁶ Westcott M, Baird M, Cooper R, 'Re-Working Work: Dependency and Choice in the Employment Relationship', *Labour and Industry*, (2006) Vol. 17, No.1, See generally Kitson M, Martin R, Wilkinson F, 'Labour Markets, Social Justice and Economic Efficiency', *Cambridge Journal of Economics*, (2000) Vol. 24:631-641

³⁷ Cooper R and Ellem B, 'The Neo-liberal State, Trade Unions and Collective Bargaining' in Riley J and Sarina T, 'Industrial Relations in 2005', *Journal of Industrial Relations* (2006) Vol 48, No.3:341-355; Fraser L, 'Significant Developments in Occupational Health and Safety in Australia's Construction Industry', *International Journal Occupational and Environmental Health*, (2007) Vol.13:12-20. Cooper R and Ellem B, 'The Neo-liberal State, Trade Unions and Collective Bargaining in Australia' *British Journal of Industrial Relations*, (2008) Vol.43, No.6:532-554.

decline in union membership from 31 per cent to 19 per cent from 1996 to 2007.³⁸ The effects of de-collectivisation, and the attacks on what conservatives termed ‘union monopoly’, saw particular emphasis placed on militant unions.³⁹ Those particularly targeted were the Maritime Union of Australia (MUA) and CFMEU C and G Division, with the latter coming under the scrutiny of the Royal Commission into the Australian Building and Construction Industry (the Cole Commission) and the subsequent introduction of the *Building and Construction Industry Improvement Act 2005* (BCII Act); which as shown in Chapter Six was equipped with exceptional powers of investigation and enforcement that were almost solely directed at the building trade unions and their members.

These government initiatives, couched in a rhetoric of reducing union power and a rhetoric of competitiveness, productivity and efficiency as ensured through the operation of the ‘market’ had OHS ramifications given the importance of a trade union presence in maintaining safe and healthy working conditions. The introduction of individual agreements designed to replace collective union bargaining, and a process of reducing conditions contained in industrial awards to a limited number of ‘allowable matters’ under the ‘award simplification’ of the *Workplace Relations Act 1996*, had a flow on effect for workplace health and safety. This was because the former award system had assisted workers to participate in the regulation of areas of work that affected health and safety, as until the mid 1990’s federal awards regulated working hours, rest breaks, safety facilities, consultative arrangements and OHS training.⁴⁰

The impact of the Workplace Relations Act affected the workforce generally, but particularly in non-unionised areas. Negative consequences included lower wages, less job security, work intensification, less disposable income for necessities, less representation at work and poorer health outcomes.⁴¹ Peetz argues that the government’s ‘WorkChoices’ industrial legislation (which amended the Workplace Relations Act in 2006) ‘...introduced a large number of restrictions on industrial

³⁸ Ibid.

³⁹ Ibid at 538.

⁴⁰ O’Neill S, ‘*Toward national workplace safety and workers compensation systems: a chronology*’ (Parliament of Australia, ongoing)
[http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/ChronOHS\(9/2/2012\)](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/ChronOHS(9/2/2012))

⁴¹ Ibid above, note 33 at 545.

action that make most forms of industrial action illegal [and that] the decline in industrial conflict is ...one manifestation of the lower level of power that employees have under WorkChoices'.⁴²

At the same time, the conservative government was also looking at OHS laws and workers compensation regulations, with the aim of moving them to the federal arena away from state control and reshaping them to suit its neoliberal ideology.⁴³ The implications of the anti-union stance of the government meant that workers' conditions became riskier, as matters to do with consultation about OHS hazards became less common, and advances made through union campaigns were diluted.⁴⁴

While neo-liberalism informed the direction of labour market regulation under both Labor but more so conservative federal government in Australia, its ideological position which emphasised the individual as opposed to the collective, placed great weight on workers responsibility for health and safety, shifting focus away from employers. This construct percolated into state policy with respect to health and safety.⁴⁵ Although the NSW OHS legislation of 1983 and 2000 set out defined responsibilities for employers, there was an increasing trend in the media campaigns by WorkCover NSW to emphasise the common partnerships of workers and employers in the health and safety enterprise.⁴⁶ These representations of health safety as a mutual responsibility reinforced the existing reluctance of some employers to

⁴² Peetz D, 'Brave New Work Choices: What is the Story So Far?' Paper presented at the 24th Conference of the Association of Industrial Relations Academics of Australia and New Zealand, (Auckland, NZ, 9 February 2007. See also Barnes A, 'Australian Unions in 2006', *Journal of Industrial Relations* (2007) Vol 49:380 for discussion of effects of both WorkChoices and the Building and Construction Industry Improvement Act 2005(BCII Act) on the extremely low numbers of industrial actions. See generally, Hall R, The First Year of Work Choices: 'Industrial relations in Australia in 2006', *Journal of Industrial Relations* (2007) Vol 49:307.

⁴³ Quinlan M and Johnstone R, 'The Implications of De-Collectivist Industrial Relations Laws and Associated Developments for Worker Health and Safety in Australia, 1996-2007' *Industrial Relations Journal* (2009) Vol 40, No. 5:426-443, at 427.

⁴⁴ See Walters D and Nichols T, 'Introduction: Representing Workers on Health and Safety in the Modern World of Work', in *Workplace Health and Safety :International Perspectives on Worker Representation*, eds. Walters D and Nichols T, (Palgrave MacMillan, 2010); See also Nichols T and Walters D, 'Worker Representation on Health and Safety in the UK –Problems With the Preferred Model and Beyond', in *Workplace Health and Safety :International Perspectives on Worker Representation*, eds. Walters D and Nichols T, (Palgrave MacMillan 2010).

⁴⁵ See Gray G, 'The Responsibilization Strategy of Health and Safety: Neo-liberalism and the Reconfiguration of Individual Responsibility for Risk', *British Journal of Criminology* (2009) Vol.49: 326-342

⁴⁶ For example, the 'Work Safe Home Safe' campaign which stresses workers responsibility for their own health and safety with no follow up message about employer obligations. There has also been a revival of behaviour based safety programs, which emphasise personal responsibility for OHS. (Personal observation).

accept statutory responsibilities, arguing that poor workplace safety outcomes lie at the feet of unsafe, disobedient and irresponsible workers.⁴⁷

The State determines social policy through a variety of means depending on its particular political formation. The policies will reflect the interests of the dominant class in that society and there will be opportunities for other classes to act upon it, to a greater or lesser extent. For example, in the UK, it is argued that the New Labour administration of Tony Blair presided over a ‘continuing, regressive redistribution of wealth, income and life chances for most groups of people’⁴⁸ as it embraced the neo-liberal platform established by previous conservative governments. One outcome was the criminalising of behaviours and practices previously seen as anti social, deviant or simply undesirable, and laws were instituted for the benefit of community safety.⁴⁹

At the same time, this allowed the focus to be shifted away from those individuals and organisations engaged in corporate crime.⁵⁰ The major events affecting most people in advanced capitalist societies are produced through an ‘increasingly complex state-corporate network’⁵¹ and harms need to be understood within the framework of public-private enterprise, characterised by adherence to free market policies and ‘small’ government. The state has always played a role in capitalist economies, of whatever form. The activities of states ‘are preconditions for the risk-taking of entrepreneurs’⁵² Furthermore, they

... help to constitute capital, commodity, commercial and residential property markets, produce different kinds of “human capital” and constitute labour markets, and regulate the employment contract. Further, the state plays a role in

⁴⁷ Reeve and McCallum 2011 found that prosecuted employers in NSW and Victoria expressed ‘dismay and outrage at being held accountable for accidents they see as resulting from the disobedience, recklessness or carelessness of their employees’, but that courts in both jurisdictions located ‘...the central cause of workplace risks in the broader social and organisational context of work rather than in the specific actions of individuals’. Reeve B and McCallum R ‘The Scope of Employers’ Responsibilities under Australian Occupational Health and Safety Legislation’, *Australian Journal of Labour Law* (2011) Vol.24 at 211.

⁴⁸ Tombs and Hillyard, above, note 1 at 30.

⁴⁹ For example, in Australia, building union ‘behaviour’ became a central focus of government intervention against them as the State, politicians, media and employer groups portrayed unionists as criminals and thugs.

⁵⁰ For example, the Building Industry taskforce and its successor, the ABCC established by the Cole Commission did little to investigate criminal activities of employers, but concentrated resources on surveillance and prosecution of FMEU officials and members

⁵¹ Tombs and Hillyard, above, note 48 at 32.

⁵² *Ibid* at 34.

constituting economic enterprises through specifying rules of liability and possibly specifying rules of incorporation.⁵³

Although seemingly to contradict the rhetoric of ‘free market’ ideology, the State therefore, is involved in all forms of market creation, development and coordination, and laws are crucial to these endeavours, not least of which is the regulation of health and safety. This in itself is a contested area, because the making of laws around OHS regulation is also subject to the dominant ideas of the time and not the least of these are social perceptions of the nature of OHS crimes and the ways in which OHS legislation is framed and then actioned by the state.

When is a crime not a crime? When it is an OHS offence

Kit Carson adopted the critical framework, which positions the State and politics as ‘the sites for absorbing and trying to deal with the contradictions and crisis tendencies that Marxism diagnoses in capitalism.’⁵⁴ The structural contradictions inherent in capitalism are reflected in the ambiguous response of regulators to white-collar crime, and are predicaments that appear in the economic, political and administrative arenas.⁵⁵ This ambiguity around perceptions of safety offences as criminal acts or regulatory infractions is evident in a Finnish study of police investigations into safety crimes.⁵⁶ The researchers⁵⁷ Alvesalo and Whyte, showed how safety crimes are marginalised by the media, policy makers and academic research on crime and criminal justice. Corporate crimes are viewed as outside the scope of criminal law or are subject to lesser sanction. Safety crimes are not perceived as ‘real’ crimes and a number of assumptions underscore this perception. In the first place, health and safety crimes are constructed as ‘accidents’, wherein the notions of unforeseeability, unpreventability and unknowability are pre-eminent.⁵⁸ Secondly, it is seldom senior management or directors of corporations who are targeted as perpetrators, but rather workers lower in the organisational structure, who

⁵³ Ibid.

⁵⁴ Haines F and Sutton A, ‘The importance of being ambiguous’ in *Governance and Regulation in Social Life: essays in honour of W.G Carson*, eds. Brannigan and Pavlich, (Routledge-Cavendish, 2007) at 32.

⁵⁵ Ibid.

⁵⁶ The Finnish police play a much more central role in incident investigations generally, than do Australian police.

⁵⁷ Alvesalo, A and Whyte, D, ‘Eyes wide shut: the police investigation of safety crimes. *Crime, Law and Social Change* (2007) Vol.48: 57-72

⁵⁸ WorkSafe NSW replaced the term ‘accident’ with the word ‘incident’ in its training materials in the late 1990’s.

may be blamed on account of their supposed incompetence or accident proneness. In the third place, safety crimes do not fit the picture of mainstream analyses of ‘violence’ and the result is ‘that the dominant conceptions of violence imply interpersonal as opposed to structural forms of violence, produced as a result of ongoing power relations’.⁵⁹ The final point is that these assumptions lead workers and/or their families to believe that they are not victims of crime and thus they ‘may not demand a criminal justice response to their victimisation’.⁶⁰

There are some structural and procedural differences, but also similarities between the Finnish system and that in NSW. Firstly, the construction of safety crimes as accidents has some resonance, particularly as seen in Johnstone’s study of Victorian magistrates’ courts and almost certainly in popular thought. This thesis shows that corporations and employers are targeted for prosecution, with fewer examples of lower level managers being actioned against. This is probably because in the construction industry there are fewer layers of management, especially in the SME structures. Perceptions that OHS crimes do not fit the ‘violent crime’ model are common in Australia. Finally, if NSW workers are aware of their rights under OHS law (and not all are) then they understand that they do have recourse under relevant legislation, but whether most would see that as a ‘criminal justice response’ is unknown. However, in the unionised sectors of the construction industry, there is a greater awareness of employer duties and acknowledgment that legal sanctions can apply. At a local community level, there was resistance to the ideas of OHS ‘non-crime’ through the formation of support groups in NSW and Victoria advocating for better state responses to workplace deaths and appropriate legal response to OHS crimes.⁶¹

The legal principles of the need to establish a guilty mind (*mens rea*) and an intention to harm (*actus reus*) are central tenets in criminal law, giving primacy to the idea of motive, which is difficult to apply when considering offences caused by organisations. Inability to explore motives in the context of safety crimes makes it hard to see how the crime might fit with the ‘broader goals or aims of the employing

⁵⁹ Tombs and Hillyard, above, note 53 at 59.

⁶⁰ Ibid.

⁶¹ Workplace Tragedy Support Group NSW (WTSG) and Industrial Deaths Support and Advocacy Inc Victoria (IDSA).

organisation that might be responsible for the crime'.⁶² Although cost and profit often feature as motives in safety offences, they remain in the ideological realm of non-crime, and are viewed consensually as 'accidents'.⁶³ The idea that financial pressures and profit maximisation are actually *discovered* as causes for industrial deaths in the New South Wales context is challenged in this thesis, as it is rarely, if ever, discussed in judgements of the industrial court.

Financial crimes that 'subvert' market function threaten capitalism more so than other economic or corporate crimes, and so are subject to harsher penalties, including imprisonment.⁶⁴ Alvesalo and Whyte believe safety crimes have fallen between the categories of violent crime and economic crime, despite the extensive social harms caused by them.⁶⁵ Work safety offences in Finnish law are constituted as distinct criminal offences and violations of the regulations are considered criminal offences. However, the law only allows for the prosecution of individuals, not corporations, because the legislative process was unable to construct corporate fault. However, even if the principle of *mens rea* does not apply to corporations, sanctions can be applied to them in the absence of individual offenders being found.

...if a safety crime is committed in the framework of a corporation... it is not possible to find the corporation guilty, but it is possible to impose a fine on it. This is an interesting and original formulation in the context of the ongoing preoccupation with the contradictions thrown up by concepts of corporate *mens rea* in many other jurisdictions.⁶⁶

Here, the letter of the law can be applied flexibly in terms of liability of corporations and individuals and in determining the criminality of workplace safety violations. While the designation of workplace crime is unequivocal in Finland, and involves direct police presence, the contradiction is that police were not comfortable in criminalising health and safety offenders. In NSW, the criminal nature of the OHS legislation is nullified by its association with the regulator, that is, it is seen more in terms of rule breaking, than law breaking. A recent study of OHS prosecutions in NSW and Victoria found that, for many employers

...prosecution was accompanied by disapproval and hostility at having their responsibility for the occurrence of a serious injury or death in their workplace

⁶² Alvesalo and Whyte above, note 57 at 59

⁶³ Ibid.

⁶⁴ Cf. NSW statistics Maurice Punch and Michael Levi in Alvesalo and Whyte, above, note 62 at 62.

⁶⁵ Ibid at 59.

⁶⁶ Ibid at 63.

deemed a criminal offence for which they were directly culpable. In NSW, in particular, many were incredulous about the responsibility imposed on employers by OHS legislation and resented the court proceedings, judgements and fines that they were required to accept.⁶⁷

These views were echoed more strongly by small employers who were ‘bewildered’ by being responsible for employees whom they thought of as negligent or incompetent, or that the incident was an act of fate.⁶⁸ Small and some large employers believed that prevailing legislation and consequences were unjust and that they were deemed guilty from the start.⁶⁹ Because they did not believe that their actions caused the incident, they rejected both responsibility and the ensuing criminality of the offences –how could they be criminals when there was no criminal intent on their part?⁷⁰ Some of these opinions were voiced in a broadsheet column written soon after the election of the NSW conservative government in 2011. Cheering its victory, the columnist declared that WorkCover must be ‘truncated’, and that it, ‘working in tandem’ with the NSW IC, had delivered ‘bastard justice in case after case of wretched precedent.’ The statistics were ‘disgraceful’, with NSW having five times more prosecutions and convictions than other states’ and in NSW there was ‘a formal presumption of guilt for employers’.⁷¹ The State is interested in seeing a stable capitalist economy. It is not in its interests to criminalise productive capitalists, nor does it wish the flow of capital to be impeded. On the other hand, it must be seen to be protecting its workforce. This contradictory position results in ambiguity about the nature of crime and its application in the health and safety context.

The classical theory of crime is one based on the notion of rationality and the rule of law. Crime is that which violates the law, and the rights of individuals. The focus of classical theory is on the criminal act, which is:

...primarily a matter of making the wrong choice, by violating the law...[i]ndividuals are held to be responsible for their actions...[thus] crime is in essence a matter of free choice. The source of criminality lies within the rational, reasoning individual. Crime is the result of individuals either making a

⁶⁷ Schofield T, Reeve B and Jamieson S, ‘Deterrence and OHS: Prosecuted Employers Responses’ *Journal of Occupational Health and Safety*, (2009) Vol.25, No.4:264-276, at 271.

⁶⁸ Ibid.

⁶⁹ Ibid at 272.

⁷⁰ Ibid. See also Jamieson S, Reeve B, Schofield T, McCallum R. ‘OHS Prosecutions: Do They Deter Other Companies From Offending?’ *Journal of Health, Safety and Environment*, (2010) Vol. 26, No.3: 213-231.

⁷¹ Sheehan P, ‘Crippling Blow to a Destructive Machine’ *Sydney Morning Herald*, May 30 2011 at 11).

calculated decision to do wrong (by weighing up the potential rewards and negative consequences) or engaging in what might be seen as irrational behaviour (by not using their reason adequately or properly).⁷²

This definition does not sit well with health and safety crimes, as it places weight on the acts of the individual, giving rise to the principles of *mens rea* and *actus reus*. Health and safety crimes are usually the result of a multiplicity of causes, not all of them rational decisions, though employers will make choices based on their economic imperatives.

Functionally, law may be seen as repressive, ideological and facilitative.⁷³ In this formulation the repressive function is directed at the working class; the facilitative function aids the exchange of commodities and the maintenance of profit, through ‘[F]ormal rationality, the contract and contractual freedoms...’ and capitalists are ‘...given a framework...to orient their conduct’.⁷⁴ Ideologically, there is an emphasis on freedom and equality for all, if the rule of law is to be obeyed,⁷⁵ a notion that is consistent with neo-liberal ideology. However, the bourgeois State cannot simply direct all its repressive power at the working class and in fact does act against capitalists through laws designed to protect capitalists’ interest, or more correctly, different fractions of capital. This seeming contradiction is seen in laws pertaining to the environment, anti-monopoly laws and health and safety, because within an economically competitive framework, they ensure a ‘level playing field’ for capitalism by weeding out undercutting firms, that is those entities that either drive down profit or threaten the ‘good character’ of capitalist activity.

The interest of traditional criminologists in attempting to explain the behaviours of the ‘lowest classes’ overlooked hegemonic interests. It took a challenge to colleagues by an influential American academic, Edwin Sutherland,⁷⁶ in 1939 to spark a focus on white-collar crime or corporate crime. Fifty years later, an American conflict theorist, William Chambliss,⁷⁷ focused on the problem of ‘state-organised crime’. Thus, for the United States, it was only relatively recently that attention was turned

⁷² White R and Haines F, *Crime and Criminology* (Melbourne: Oxford University Press 1996) at 28.

⁷³ Milanovic D, *An Introduction to the Sociology of Law*, (New York: Criminal Justice Press, 2003) at 104

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Sutherland EH, ‘White-Collar Criminality’ *American Sociological Review*, (1940) Vol. 5, No. 1:1-12.

⁷⁷ Chambliss WJ, ‘State Organized Crime’ *Criminology* (1989) Vol.27, No.2.

to crimes falling outside the province of the 'usual suspects', drawn mainly from the working class and the lumpenproletariat. Since then, other criminology theorists have contributed to the discussion. These included perspectives from radical, neo-Marxists, critical, left realists and feminist writers.⁷⁸

Whereas accepted forms of regulation and conventional criminological theory are informed by causal relationships between sanctions and resulting effects, critical criminology takes its epistemological stance from a number of different radical approaches. In defining crime, it focuses on 'structural forms of oppression', such as that engendered by race, gender, class. Its focus of analysis is on the state, ideology and political economy, and has demonstrated the harms caused by the powerful, such as white-collar and corporate crime. 'A consistent focus of this research has been to label these acts criminal, and to call for their inclusion as quintessentially criminal acts, to be dealt with accordingly'.⁷⁹ Are 'crimes' only those things which have been successfully prosecuted? If an offender is not found out, has the offence been committed, or is it just that a criminal has not been found and convicted? In 2004, Tombs noted that there were more than one million workplace injuries sustained annually by British workers and approximately 1,000 prosecutions successfully taken against offenders, a statistic that raises questions about the discourse surrounding 'crime' and 'criminality'. Did the other non-prosecuted injuries arise in the absence of any other agents or cause? Were there no criminal acts associated with the injuries? If the injuries were, for example, by incidents involving modes of transport, with a similar lack of prosecution, would they be seen as falling outside the realm of the criminal? The differences found in prosecution in the British workplace data, have conceptual, theoretical and political implications insofar as how such data can be conceptualised.⁸⁰

Another problem that arises in cases of health and safety crimes is the concept of the guilty mind (*mens rea*) in its importance as a test of criminal intent. It is usually, but not exclusively, applied to the individual. In some case, the failure to act is blameworthy and can be counted as a crime, however it is arguable that this and

⁷⁸ Freidrichs D, Schwartz M. 'Editors' introduction: on social harm and a twenty first century criminology'. *Crime, Law and Social Change* (2007) Vol.48, 1-7

⁷⁹ See especially Tombs S and Whyte D, *Safety Crimes*, (Willan Publishing, 2007).

⁸⁰ Hillyard and Tombs above, note 53 at 13.

other tests of criminality are an ‘artifice’.⁸¹ One cannot read another’s mind and therefore cannot judge their intent. Therefore, this occurs through proxy, where the person’s behaviour is examined and assumptions are made about the likely actions of an idealised person. The complexity of the law in terms of defining crime has an ‘individualising effect’ extending ‘beyond the notion of intent *per se*’. Citing examples of prosecutions for corporate manslaughter where intent is not at issue, Tombs and Hillyard argue that this individualising ethos has ‘militated against successful prosecutions’ and that manslaughter charges have then been raised against individuals involved in the incidents, but employed at a lower corporate level.⁸²

Reiman⁸³ draws a comparison between the motives and moral culpability of the intentional murderer and the ‘indirect harms’ inflicted by the ‘absentee killer’ whose acts of omission (failure to invest in safe equipment, for example) or commission (falsifying documents, illegal environmental acts and so on) result in fatal incidents. Most people who murder intentionally focus on one or more individuals, with no intention to harm others. The corporation and /or its representatives who murder in absentia and the individual who murders intentionally have different and distinct moral culpabilities. The corporate killer does not seek to harm particular persons, but knows that the consequences of their actions would/could be fatal to someone, who, once harmed, becomes someone in particular. ‘There is no moral basis for treating *one-on-one harms* as criminal and *indirect harm* as merely regulatory’.⁸⁴ By doing so, the corporate killer poses more of a generalised threat than the intentional murderer does and indifference can be seen as culpable as or more culpable than intention and should be treated as such by the criminal justice system. ‘Yet the greater moral culpability that is attached both legally and popularly to acts of intention can also allow those implicated in corporate crimes to rationalise away the consequences of their actions’.⁸⁵

⁸¹ Ibid at 12

⁸² Ibid at 14.

⁸³ In Tombs and Hillyard *ibid* at 14,15

⁸⁴ Reiman 1998, p.67-70, in Tombs and Hillyard *ibid* at 15.

⁸⁵ *Ibid*.

‘Harms’ rather than ‘crimes’?

It was within the frame of a revitalised critical criminology that calls for thinking about a broader approach to social harms were examined. Social harm theory had its genesis in UK theorists’ critique of the discipline of criminology and the approach that the majority of criminologists took in their writings. Specifically, social harm theorists argued that critical criminology, with its emphasis on a functionalist epistemology and questioning of socio-political agendas was past, and that the discipline had returned to ‘its old empiricist orientation as an applied science’ with agendas set by contemporary political imperatives and economics.⁸⁶ Orthodox criminology, the argument goes, is an intellectual discipline whose view is ‘distorted and distorting’, because it ignores so much of the damaging and destructive harms wrought on people by the state, by economies, religions and social structures and concentrates instead on what are trivial harms. It will remain a ‘suspect discipline’ while it concentrates on matters defined hegemonically by nation states, the organisations which cause the majority of social harms.⁸⁷

On the other hand, unlike criminology, ‘social harm... provides a theoretical framework for examining the effects of unintended harms...’⁸⁸ Furthermore, an analysis shaped by the theoretical frame of political economy could uncover the harms caused by neo-liberal globalisation that is characterised by concentrations of economic power, increasing de-regulation, and hegemonic control. Essentially, this approach took a broader view than ‘standard’ criminology, in that it scrutinised the social, political, economic and cultural landscapes in which ‘crime’ in its many guises, was situated. In this regard, the approach is not novel, being one that critical sociologists have long recognised, for example, Carson’s 1982 study of health and safety in the offshore oil industry was couched in a multi-disciplinary framework of sociology, safety science, corporate crime and regulatory analysis.⁸⁹

⁸⁶ van Swaaningen in Hillyard and Tombs, *ibid* at 10-11.

⁸⁷ Hillyard P, Pantazis C, Tombs S and Gordon, D. (eds.) *Beyond Criminology: taking harm seriously*. (London; Pluto Press, 2004) at 9.

⁸⁸ *Ibid* at 9; see generally Pemberton S ‘Social harm future(s): exploring the potential of the social harm approach’, *Crime, Law and Social Change* (2007) Vol.48: 27-41
Matthews R and Kauzlarich D. ‘State crimes and state harms: a tale of two definitional frameworks’, *Crime, Law and Social Change* Vol 48: 43-55); Freidrichs and Schwartz above, note 78, for debate on zemiology (praxis) as a social harm alternative the discipline of criminology.

⁸⁹ Woolfson C, ‘The Continuing Price of Britain’s Oil’, in *Governance and Regulation in Social Life: essays in honour of W.G Carson*, eds. Brannigan and Pavlich, (Routledge-Cavendish 2007)

Hillyard and Tombs⁹⁰ argue that many are harmed in differing ways throughout their life through local and State activities and through corporations (inadequate housing, food or health provision, poverty, human rights violations and victimisation). A social harm approach examines ‘deleterious’ actions towards differing social groups, or even differing geographic locations, and does not merely focus on the individual, a tendency in orthodox criminology. Social harm encompasses *physical* harm, (death or serious injury through numerous causes, including workplace deaths); financial harms (poverty fraud, misappropriation of funds and so on). Emotional and psychological harms are more difficult to quantify, but evidence exists to demonstrate that these harms, in particular contexts, are ‘significant’.⁹¹ This evidence is reinforced by recent Australian studies on families affected by workplace traumatic injury. Workplace deaths deprive family, friends and the wider social networks of a participant and social affiliate. Importantly, the deceased immediate family often suffer ongoing, intergenerational harm through psychological and economic privation. Psychological harm may also be experienced through the state’s inadequate handling of the case, as well as the resulting measures (prosecutions, penalties) being seen as less than delivering justice for the offence.⁹² A social harm approach can reveal aspects of cumulative damage and such a perspective is significant for this thesis, in that it can situate these impacts within a new framework for dealing with occupational fatalities.

Social harm theory can chart and compare social harms temporally, like crime, but unlike orthodox criminological studies, it can generate comparisons with other harmful events, such as that caused by adverse social policies.⁹³ ‘A comparative and broader picture would allow a more adequate understanding of the *relative* significance of the harms faced by different groups of individuals’.⁹⁴ Thus, if workplace fatalities and injuries were to be viewed in this light, focus can be turned

⁹⁰ Hillyard and Tombs 2004.

⁹¹ Ibid at 19-20.

⁹² See Tombs 2004; Matthews L, Bohle P, Quinlan M and Rawlings-Way, ‘*Traumatic Work-Related Death in the Construction Industry: Experiences of Victims’ Families*,’ Work and Health Research Team, Ageing, Work and Health Research Unit, (University of Sydney, 2010); Brookes D, ‘*Restorative Justice and Work-Related Death: consultation report*’, (St.Kilda: Creative Ministries Network, 2009).

⁹³ Dorling, D ‘Prime suspect: murder in Britain’, in Hillyard P, Pantazis C, Tombs S and Gordon D (eds.) *Beyond Criminology: taking harm seriously*. (London: Pluto Press, 2004).

This study of crime rates in Great Britain rejected the individualist approach to murder rates, and used an analysis that related the data to the underlying social and political context of the time.

⁹⁴ Hillyard and Tombs above, note at 21.

on persistent events, rather than isolated occurrences, which could throw light on endemic unsafe and illegal practices. A broader understanding of social phenomena could generate the production of more rational social and regulatory policies. Although such policies could be beneficial to states (as well as individuals), Hillyard and Tombs warn that they could also pose a potential threat to states, as their activities (or lack thereof) could be then seen as sources of harm.⁹⁵ A study of harm can also broaden the scope of investigations into what caused the harm, moving from ‘individualistic notions of responsibility or proxy measures of intent’ (*mens rea*) which are demanded by the process of criminal justice. Instead a focus on harms ‘... allows consideration of corporate and collective responsibility’⁹⁶ and can also turn attention to state responsibilities.

There is a disjuncture between the individualist approaches taken to offences by mainstream criminal justice systems and attempts to prosecute those cases where the individual is subsumed by the collective actions of a corporation or state. Thus,

...we have here attempts to squeeze into a discipline organised around individualistic notions of actions and intention harms – both chronic and acute-caused by routine practices, Standard Operating Procedures, lines of organisational responsibility and accountability, general *modus operandi*, cultures of fear, indifference and thoughtlessness and so on, on the part of bureaucratic entities which are not reducible to the actions, motive and intentions of the individual human agents who constitute them.⁹⁷

The effect, insofar as prosecutions for workplace health and safety offences are concerned, is that the harm caused by the company *per se* may go unpunished and better deterrent policies may remain unexamined and unexplored.

Proponents of social harm theory are well aware of the political cast of their view. They see the perspective as one that can move from the academic into the realm of praxis- ‘a field of study with clear humanistic concerns at its core’ which will be better able to ‘document and intervene within the harmful organization of capitalist society’, to ‘provide analyses and articulate challenges to the systemic harm produced by this mode of organisation’.⁹⁸ Whether or not criminology as a discipline stands or falls, is not the subject of inquiry here. Rather, it is argued that the concept

⁹⁵ Ibid.

⁹⁶ Ibid at 22.

⁹⁷ Ibid at 24.

⁹⁸ Pemberton S ‘Social harm future(s): exploring the potential of the social harm approach’, *Crime, Law and Social Change* (2007) Vol.48: 27-41 at 39.

of social harm couched as it is in the discourse of critical sociology, is considered to be a constructive way of considering the role of the state and its apparatus (law, courts, justice systems) in relation to its treatment of workplace death, punishments and deterrent effectiveness.

Does self-regulation really regulate?

The dominant ideology of neo-liberalism sat comfortably with the individualist tenets of self regulation and self determination inherent in Robens' approach to OHS introduced in Australia in the early 1980's and which underpinned the New South Wales *Occupational Health and Safety Acts* of 1983 and 2000. It was based on the premise that the main elements of protection against workplace harms are the responsibility of employers and employees, with the State playing a lesser role. As Tombs⁹⁹ points out, an 'enormous onus' is placed on the power relations between labour and capital at the level of both the workplace and in policy making. In the former, power principally resides in the presence and strength of trade unions, and in the latter, although policy is formulated through a tripartite structure (as it is in Australia), the inherent conservatism of the policy makers tends towards an employer centred approach. This was especially noticeable when the Australian federal Liberal-National Party government downgraded worker representation on its national health and safety body in 2005.¹⁰⁰

Self-regulation is also based on 'credible' enforcement techniques, which should employ sanctions on escalating severity where required, that is, a principle of deterrence should apply. However, credibility is the key point here; the state must maintain a minimum level of control and inspection to ensure that compliance is enforced and that faith in the system is maintained by those with most to lose, employees. In the UK, the Health and Safety Executive (HSE) increasingly called for movements 'away from external control' or intervention by the state authorities'.¹⁰¹ According to Tombs, the HSE was inconsistent in its application of enforcement, investigation and prosecution measures; there were substantial numbers of cases

⁹⁹ Tombs above, note 1.

¹⁰⁰ Fraser L, 'Significant Developments in Occupational Health and Safety in Australia's Construction Industry', *International Journal Occupational and Environmental Health* (2007) Vol. 13:12-20 at 19. See also Johnstone R, 'Harmonising Occupational Health and Safety Regulation in Australia: the first report of the national OHS review, <http://corrigan.austlii.edu.au/au/journals/JIAppLawP/2008/3.pdf>.

¹⁰¹ Tombs above, note 99 at 161.

which were not investigated; three quarters of ‘near misses’ were not investigated, a fact at odds with the HSE’s stated aim of preventing injury and disease. Moreover, financial restraints made the prioritisation of activities very difficult, for example, increased investigations led to decreased inspection rates that is, resources were shifted to investigation and away from inspection.¹⁰²

Pearce and Tombs¹⁰³ believe that companies are ineffective self-regulators in the occupational health and safety context. They argue that OHS regulators were established precisely because industry was incapable of self-regulation. Further, under conservative governments in both the US and UK, the incidence of occupational serious injury and death rose in both countries. This occurred in the context of wider deregulatory and neo-liberal policies and was a ‘key element in the shifting balance of power among capital, regulators and labour...’¹⁰⁴ Moreover these scholars noted:

Where pressures upon corporations ...to attend to occupational safety are weakened, performance...deteriorates. [Though] calls for greater self-regulation continue to be articulated [this] says less about the efficacy of self-regulation, more about the class and social power of corporate capital.¹⁰⁵

Does self-regulation deter offenders?

In considering whether self-regulation as perceived by Robens is effective, some mention of ‘classical’ deterrence theory is necessary. In 1985, Braithwaite¹⁰⁶ proposed a ‘compliance’ pyramid, as a means of enforcing regulatory controls. Most regulatory action aimed at persuasion formed the pyramid’s base. If persuasion failed, the non-complier was to be warned in writing. If compliance was still not forthcoming, a civil penalty would be applied. The next escalation was to criminal prosecution, then to shutdown of the operation or temporary suspension of a license to operate and finally permanent licence suspension. Braithwaite’s argument was that regulators would be less likely to resort to the most punitive sanctions. Although Pearce and Tombs¹⁰⁷ are essentially in agreement with a model of escalating punishment, they doubt that companies will self-regulate, arguing that lesser scrutiny

¹⁰² Ibid at 174.

¹⁰³ Pearce and Tombs above, note 24.

¹⁰⁴ Ibid at 88.

¹⁰⁵ Ibid.

¹⁰⁶ Braithwaite, V and Braithwaite, J. (n.d.) ‘An evolving compliance model for tax enforcement’.

<http://www.vab.anu.edu/pubs/1/anevolvingcompliance.pdf> (14/9/09).

¹⁰⁷ Pearce and Tombs above, note 103 at 97.

of organisations leads to lesser compliance. McQueen¹⁰⁸ is more scathing in his rejection of the ‘gentle pyramid of penalties’ as a means of giving employers the ‘space to exercise virtue’, as capitalists have had more than enough time to understand and observe their lawful (and indeed, social) obligations.

Furthermore, Braithwaite’s proposals that regulators should move to goal oriented rather than prescriptive legislation (as is the case in Australia) has not resulted in greater levels of compliance. Goal based regulation has two disadvantages. It enables individual corporations to argue for the lowest standards and secondly, it enables trade associations ‘to impose definitions of what constitutes feasible compliance’.¹⁰⁹ Once prescriptive legislation is removed, and replaced by goal-oriented requirements, such as those tied to notions of reasonable practicality, then it lays the field open to ‘direct contest by powerful corporate actors’.¹¹⁰

One rationale for a regime based on self-regulation is that it consumes minimal scarce State resources, it may appeal to the ‘better nature of people’, and self-regulation strategies provide incentives to industry to show ‘good faith’.¹¹¹ However, this tactic must be reinforced with realistic penalties, because minor infringement notices and low penalties are not likely to encourage compliance. Hopkins argues Braithwaite’s persuasion model is ‘class biased’, commenting ‘who ever heard of police trying to *persuade* conventional criminals to become law abiding citizens!’¹¹² It is not just the ‘class biased’ nature of Braithwaite’s analysis that is in question here. Hopkins argues that the ‘synergy’ between productivity and safety is finely balanced. If certain safety measures initially result in lower productivity, the firm might choose to increase profit by increasing labour. This in turn would mean that more workers are exposed to hazards, or there is more labour output from the existing labour force, thus rendering the workplace less safe. Employers can then be in a position where their decision ‘...places a morally acceptable limit on the extent to which safety should be allowed to interfere with productivity’.¹¹³ According to

¹⁰⁸ McQueen H, *Framework of Flesh: Builders’ Labourers Battle for Health and Safety*, (Port Adelaide; Ginninderra Press, 2009) at 256.

¹⁰⁹ *Ibid* Braithwaite and Braithwaite, n.d.

¹¹⁰ *Ibid*.

¹¹¹ Braithwaite J, *To Punish or Persuade: enforcement of coal mine safety*. (New York: State University of New York Press 1985) at 146.

¹¹² Hopkins A, ‘Book reviews: To Punish or Persuade: enforcement of coal mine safety. John Braithwaite, State University of New York Press’ *Journal of Sociology*, (1986) Vol.22 at 333.

¹¹³ *Ibid*.

Ellis, companies in Australia are increasingly outsourcing their OHS obligations, rather than maintaining in house OHS practitioners. Combined with decreases in unionisation, this is an ominous situation for workers, as the influence of the employer, is left unchecked.¹¹⁴ The ideological and economic environment in which health and safety is played out is not, and cannot be, one that provides equal outcomes for employers and employees.

The social, political and economic conditions relevant to the construction industry were discussed in the preceding chapter and this thesis shows that the numbers of workplace fatalities have remained relatively constant over time, with some recent increases in numbers of traumatic deaths, which raises questions about the effectiveness of deterrence in the construction industry. The activities that lead to occupational health and safety crimes are usually produced by the ongoing conditions of work and thus their detection and correction should be less arduous than policing one off crimes, for example street crimes. However, successful detection is reliant on sufficient resources and neo-liberalism is characterised by 'small government' policies. In practice, this is manifest by diminution of state resources for inspection and prosecuting OHS offences. Seen another way, self-regulation is less of a drain on state resources, therefore the regulatory agency require fewer of them.

In the UK, deterrence, both specific and general, has had a bearing on improvements to workplace health and safety.¹¹⁵ Pearce and Tombs noted that '...some corporations have urged the operationalisation of this principle as central to their demands for the equalisation of the conditions of competition'¹¹⁶ which is an especially important factor in the highly competitive environment of the Australian construction industry. Thus, they are not necessarily opposed to deterrence as long as it does not harm their competitive advantage. Corporations also acknowledge that regulation and deterrent measures are a necessity in enforcing compliance, as voluntary compliance would not be forthcoming. Corporations are economic rationalists, as well as being 'amoral calculators'¹¹⁷ and as such, are likely to comply with effective forms of deterrence, as these are part of their 'conditions of existence'.

¹¹⁴ Ellis N, 'Sick OHS Needs Health Reform' *OHS Professional*, June (2010), at 17.

¹¹⁵ Pearce and Tombs above, note 107 at 94.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid* at 95.

In other words, ‘the existence of a likelihood of detection and credible sanctions following successful prosecutions makes it possible for corporations to obey the law’.¹¹⁸

Deterrence can also assist those who work for safety within the corporation, giving them a voice that is frequently overlooked by senior management, and in this sense, it can be ‘facilitative and productive’¹¹⁹ rather than being perceived negatively. It is not, however, sufficient to rely solely on deterrent mechanisms. Companies may not act ‘rationally’ and other controls need to be in place. It is not so much the actions of individual capitalists that shape the nature of OHS regulation, but rather the projection by the State of a hegemonic ideology that confuses the place and status of OHS harms that prevails. This in turn has implications for the way in which the activities or behaviours that produce them are dealt with. This thesis shows that deterrence, both specific and general, has not appeared to be effective in reducing workplace traumatic mortality in the NSW construction industry, because the physical mechanisms of death remain as ongoing causative factors.

The argument of criminal deterrence theorists rests on the idea that punishment should fit the crime such that it satisfies community values about justice, fairness and due process. Crime will be reduced if there is a high probability of conviction and if the severity of the punishment is seen to be adequate, with the certainty of punishment being more important than severity.

As Kennedy¹²⁰ puts it, the implicit promise of deterrence is that a crime-free society will be attained ‘provided that the right combination of law enforcement techniques and tools are employed’. The ‘economic model of the rational actor’ stems from Jeremy Bentham’s beliefs about the conscious rational decisions made by the actor/individual. Putting a cost-benefit analysis in place would allow the actor to decide whether or not the action would be undertaken, that is, would the risk be worth it, in effect. In reality, this is precisely what occurs in modern OHS risk assessment, where the risk of harm is weighed against the cost of control measures.

As noted above, adherents to the criminal deterrence model of utility maximisation are of the view that crime decreases in inverse proportion to the probability of

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Kennedy K. ‘A critical appraisal of criminal deterrence theory’, *Dickinson Law Review* (1983) Vol.88, No.1: 1-13 at 1.

conviction or severity of punishment, with probability being seen as more important than severity. '[S]everity only has a deterrent impact when the certainty level is high enough to make severity salient'.¹²¹ Certainty of punishment is a better deterrent than severity of punishment.

The question remains, however, whether *objective* certainty is critical to deterrence, or whether *subjective* certainty suffices. Researchers agree that the effectiveness of deterrence depends more on the perception of certainty than on the objective reality of certainty. Some, however, contend that no punishment can deter unless the punishment is perceived as being severe. But again, the perception of risk more than the actual risk seems to be important, and the subjective probability of punishment is a greater deterrent than its subjective unpleasantness.¹²²

In addition to the notions of certainty and severity, deterrent effectiveness also requires that the threat is credible and capable of being communicated. In other words the potential offenders need to believe that punishment will be forthcoming, and the message must be clearly conveyed. 'Personal experience and police presence apparently have the greatest impact on perception of credibility'.¹²³ The 'objective probability of apprehension' is enhanced by the numbers of enforcers present, as well as increasing the 'perceived credibility' of threat in those who have personally experienced arrest.¹²⁴ However, if the offender believes that punishment will not be forthcoming because of the inability or unwillingness of the legal system to impose the sanction, then it will neither act as a deterrent or will minimise the potency of the threat. This result '...is even more probable if short or otherwise lenient sentences frequently are imposed on offenders...'¹²⁵ Proponents of deterrence believe that it is effective where the credibility of the regulator is high and where a sound basis for the punishment is given.

Deterrence might fail if social conditions are such that the transmission or reception of the message is undermined. Personal experience may undermine the intention of the message if it is in opposition to one's own experience, for example, where publicity campaigns are not followed through with the publicised punishments. In

¹²¹ Antunes and Hunt, in Kennedy. *ibid* at 5.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid* at 6.

these cases, ‘...Publicity without substance may decrease the general credibility of law enforcement threats’¹²⁶

... deterrence is based on the psychological assumption that the subjective certainty and unpleasantness of punishment discourages the community from engaging in criminal behaviour. The social stigma attached to a conviction is part of the punishment and, in some instances, may have a greater deterrent effect than the term of imprisonment itself.¹²⁷

Nonetheless, critics argue that the ‘rational actor’ economic model on which it is based is unrealistic, in that it supposes that actors always behave rationally.¹²⁸ While some crimes might be impulsively committed (and therefore deemed irrational), others may still be committed but with careful planning and forethought (thus making them rational, as with some corporate crimes for example. Ponzi schemes). In this sense, strong commitment to the commission of the illegal act is not likely to be deterred by threats of punishment.

Kennedy¹²⁹ argues that, at least for the early 1980’s, deterrence theory has not been proved to be successful, yet continues to be promoted. Then, as now, the increased numbers of prisoners in the general prison system testifies to the theory’s impotence. Another obstacle to the effectiveness of deterrence is its lack of a ‘sound moral foundation’. By this, Kennedy¹³⁰ means the ‘social legitimacy of the criminal justice system’. In researching the effects of deterrence, the empiricist instrumental methodology used by deterrence theorists does not account for the effects of the broader socio-political environment on actors, nor does it employ a moral dimension. In this way deterrence theory can be associated with excessive punishment regimes, such as mandatory sentencing for relatively minor offences and capital punishment, and it must also be based on a ‘deliberate threat of harm’.¹³¹ The model is paradoxical in that the deterrent effect is removed once the crime is committed. That is, the threat of punishment has failed to deter the commission of the offence, the crime cannot be undone by punishment and therefore ‘judges may be inclined to

¹²⁶ Zimring, in Kennedy *ibid.*

¹²⁷ *Ibid* at 7.

¹²⁸ See Freiberg A, *The Tools of Regulation*, (Sydney: Federation Press, 2010) at 211-214.

¹²⁹ *Ibid* note 128 at 7.

¹³⁰ *Ibid* at 8.

¹³¹ *Ibid.*

impose less punishment than the legislatively authorized maximum because the benefit to society ‘...appears to have diminished’.¹³²

This has been demonstrated in sentencing practices for OHS breaches¹³³ and although judges in the NSW IC subscribed to the principle of general and specific deterrence and specifically addressed penalties to those principles, penalties remained low. The paradoxical nature of deterrence is shown in that persons who are the least deterred are the ones who most need deterring, and vice versa.¹³⁴ The chances of discovery of illegal actions are as important as the offender’s reactions to discovery. Compliance is a doubtful outcome if offenders are not remorseful and if they displace responsibility by blaming others for the incident.¹³⁵ Deterrence is ‘...based on a narrow theory of motivation.’¹³⁶ The offender is punished through ‘manipulating’ his/her environment, through ‘gains and losses’, but this ignores the person’s internal values, which differ from self-interest.¹³⁷

Do people obey the law because of the perceived respect and legitimacy of the social order? If this is so, theorists could concentrate more on methods to strengthen this perspective in those inclined to criminal behaviour. ‘[E]xperience suggests that perhaps most members of society are law abiding because they recognise the benefit of social order and not because they fear apprehension and punishment for the violations of the criminal law’.¹³⁸ It is arguable that in the case of workplace health and safety offences, there is rarely an actual intent to do harm. For the construction industry, fatalities occur in the context of an extremely complex economic, social and political environment that determines health and safety outcomes for the workforce. The thesis returns to matters of deterrence in the following Chapters, where Court considerations of general and specific deterrence are discussed, and questions raised about the effectiveness of sanctions imposed under them.

This discussion has emphasised the contradictions faced by the State and the State ideological apparatus of the OHS regulator, the courts and judiciary, in its attempts to

¹³² Ibid at 9.

¹³³ Lenard C. ‘Doing time for corporate crime’, B.A Honours thesis, (Department of Industrial Relations, University of Sydney, 2000)

¹³⁴ Freiberg, above, note 128.

¹³⁵ Ibid; see also Schofield T, Reeve B and Jamieson S, ‘Deterrence and OHS: Prosecuted Employers Responses’ (2009) *Journal of Occupational Health and Safety*, ANZ Vol.25, No.4:264-276.

¹³⁶ Freiberg above note 135 at 214.

¹³⁷ Ibid.

¹³⁸ Kennedy above, note 121 at 12-13.

balance the opposing interests of labour and capital. This is not a straightforward process and sometimes alliances are formed between different fractions of capital and labour, for example, the construction union may move against corporate capital to protect the interest of small sub-contractors; small business may group together against the State and big capital, and so on. The existence of different fractions in the State make it hard to conceptualise, because of the independence of these fractions. However, in the last analysis, the State and its institutions still reflects the interests and ideas of the dominant ideology and in this case, it is the ideology of neo-liberalism.

Based on neo-classical economics, the ideological positions of neo-liberalism saw movements toward de-regulation, which assisted in weakening the strength of organised labour, and, in turn, reduced unions' ability to protect workers' rights, including OHS protections. Although there was an historical resistance to seeing OHS crime as criminal conduct, business associations and sections of the media became more vocal in condemning OHS laws in NSW as too onerous and unfair. The incapacity of classical criminology to capture the essence of white-collar crime, and perhaps particularly OHS crime, caused contradictions in its regulation. That is, what is criminal conduct is regulated through laws administered not by the police, but by a statutory authority. The disjuncture between mainstream legal approaches to acts of individuals ('standard' criminal action) and to those of corporate entities makes for an uneasy fit, and contributes to the notions of OHS offences as not criminal. It is possible that these underlying ideas were partly responsible for the imposition of low penalties and no penal sentences for OHS crimes heard in the NSW IC that are revealed in Chapter Four. Researchers have proposed alternative models for thinking about crime and deterrence and social harm theory is one that is very appropriate in considering OHS crime, as it encompasses the broad range of harms caused by workplace fatalities. An understanding and acknowledgment of the physical, psychological and economic harms caused by these incidents would enable a broader research perspective than is currently the case in mainstream regulatory theory and that recognises the essential inequalities in capitalist societies.

The regulation of health and safety in NSW since 1983 has played a part in de-regulatory and self-regulatory environments. The State has mediated the demands of capital and labour, with both sides gaining advantages when either Labor or

conservative governments have been in power. That is, each side has made some gains, for example by increasing penalties or removing the absolute care provisions on employers, but there has no change to the essential regime where the ambiguous criminal nature of workplace injury remains fixed.

However, neither side has completely captured the agenda, and the State has ensured that what it sees as the economic imperative of the moment is satisfied. That is ‘class struggle is reproduced within the state apparatus itself’. The State is a factor of class cohesion and the state maintains the ‘cohesion and form’ of the capitalist class.¹³⁹ Accordingly, the state cannot be an instrument of one particular class. Rather, it operates to represent the long-term interest of the capitalist class as a whole, under the hegemony of one of its fraction, which is monopoly capitalism.

The elements that make up the model in Chapter One shows the dynamic movement within and between the institutions of worker organisations, the legislature, the regulator, and the judiciary which were mediated through ideology, and its central driver, the capitalist economy. It does so to show how behaviours that contributed to death at work were contested, and to demonstrate the ‘war of position’ that occurred among different political and civil elements of the State over workers’ rights to safe and healthy workplaces.

The literature on crime reviewed here suggests that activities and behaviours are examined in terms of commissions rather than omissions. Health and safety offences are caused by omissions – failure to act in specific and defined ways to ensure the health, safety and welfare of persons at a workplace. By concentrating attention on those specifics, the broader causes of workplace deaths in the construction industry are ‘silenced’. The circumstances are individualised rather than contextualised. This thesis argues that the decontextualisation of events surrounding workplace traumatic deaths at the point of prosecution is driven by the perception that OHS offences are regulatory rather than criminal. Other factors are due to the ways in which the events are ‘pulverised’ during the court proceedings and the system of regulatory and judicial rules governing prosecutions. These features result in the imposition of low penalties and judgements are unable to explicate the wider social harms that these offences cause.

¹³⁹ Pitelis on Gramsci in Pitelis C ‘On the Nature of the Capitalist State, *Review of Political Economy*, (1994)Vol. 6, No.1:72-105 at 89.

The deterrence literature suggests that predictability of prosecution is more important than severity from offenders' perspectives. This thesis argues that that employer actions (or inactions) related to workplace fatalities in the construction industry are not particularly influenced by predictability of punishment (because offenders do not see themselves as possessing a guilty mind), nor of its severity (because of the low penalties imposed, or in a few cases, the non-imposition of penalty). This in itself reflects the ambiguous treatment of activities that lead to injury and illness at work.

This chapter sets out the conceptual basis for the State as represented in the model seen in Chapter 1. The dominant or current ideology that provides some unity in state action has been described as neo-liberalism, which influences, but does not determine the shape and nature of state activity. The way that OHS has been framed in this ideological context shapes the approach adopted by particular institutions, that is the judiciary, regulator, legislature, industrial organisations, and impacts on actual regulation that constrains their activities. The following chapters take up the actual outcomes by examining particular institutions, that is, the judiciary and regulator in Chapters Four, Five and Six and returns to re-address the industrial context in Chapters Six and Seven.

CHAPTER FOUR

Empirical Findings and Judicial Sentencing

The end of punishment, therefore, is no other, than to prevent the criminal from doing further injury to society, and to prevent others from committing the like offence. Such punishments, therefore, and such a mode of inflicting them, ought to be chosen, as will make the strongest and most lasting impression on the minds of others, with the least torment to the body of the criminal.¹

Part 1 of this chapter presents the analysis of the empirical data collection relating to 127 decisions of the NSW IC from 1988 to 2008 in relation to the industrial deaths of 76 building workers. It confirms conclusions drawn from previous studies that show penalties imposed by courts for workplace deaths are low in comparison to maximum available penalties. Part 2 begins to identify reasons for these lenient penalties by describing the social rules and social norms which affect and influence judges and their decisions in the general courts, particularly the District and Supreme Courts, but which can be extrapolated to the NSW IC. This discussion is further advanced in Chapter Five, where the argument is situated at the level of State structures and State apparatus.

Existing studies of penalties

Studies have shown that the average penalties imposed by courts in cases where a breach of legal obligation has been found to have led to workplace fatalities or injuries, are well below the maximum allowable. This thesis shows that the same conclusion can be drawn in regard to prosecution penalty outcomes for traumatic injury fatalities in the NSW construction industry. Richard Johnstone's extensive historical work examining OHS prosecutions for injury and death in Victoria² demonstrated that, between 1900-1919, the fines imposed for all prosecutions in the magistrates' courts averaged 25 per cent of the maximum fine and in the following

¹ Cesare Beccaria (1767) quoted in White R and Haines F, *Crime and Criminology* (Melbourne: Oxford University Press, 1996) at 30.

² Johnstone, R *Safety, courts and crime*, Working Paper 6, National Research Centre for OHS Regulation ANU (2002)

six decades, averaged between 10 and 15 per cent of the maxima. The average fine imposed by the Victorian magistrates' courts for all offences during the 1980s and 1990s was just over 21 per cent of the maximum available fine. The data in the following section demonstrates that penalties for workplace fatalities in the NSW construction industry from 1988 to 2008 were less than those for all offences in the Victorian context.

Fooks, Bergman and Rigby³ considered intervention and sentencing strategies used by some international state bodies to ensure compliance with health and safety laws.⁴ Using statistics on fines for industrial fatalities compiled by the NSW Judicial Commission, the report found that penalties under *OSHA* 1983 were consistent with those found in the other jurisdictions studied, and, as Table 4.1 below shows, the majority of penalties were markedly below the maxima possible.

Table 4.1. Percentage of penalty amounts in fatality decisions, NSW OSHA 1983.⁵

Per cent of decisions	Per cent of maximum penalty
23 per cent	5 per cent or less
48 per cent	10 per cent or less
75 per cent	20 per cent or less
9 per cent	50 per cent or more
No cases	80 per cent or more

Fooks et al. report that the average amount of fines for workplace death in NSW during 1996-2005 was \$16,934. They believe this 'under-sentencing' can be explained by courts' reluctance to 'radically' increase penalties on appeal, and WorkCover NSW 'lack of urgency' to extend opportunities to victims' families to make victim impact statements.⁶

In a 2004 advisory report to WorkCover NSW, McCallum et al⁷ analysed 225 court decisions for workplace fatalities, from 1983 to 2003, and reported that, in most cases, the penalties for all NSW workplace fatalities ranged from 10 per cent to 20

³ Fooks, G, Bergman D, and Rigby B, International comparison of (a) techniques used by state bodies to obtain compliance with health and safety law and accountability for administrative and criminal offences and (b) sentences for criminal offences, Report to the UK Health and Safety Executive, Centre for Corporate Accountability, (London: HSE Books, 2007).

⁴ Jurisdictions observed for the study were the USA; Canada: Australia; the Netherlands: Germany: Italy: Sweden (only some jurisdictions were observed for the first three countries).

⁵ Fooks above, note 3 at 369.

⁶ Ibid.

⁷ McCallum R, Hall P, Hatcher A and Searle A. *Advice in relation to workplace death, occupational health and safety legislation and other matters*, Report to WorkCover Authority of NSW (WorkCover Authority of New South Wales, 2004) at 7.

per cent of the maximum allowable. They also found that actual penalties had not increased proportionally to the statutory increases, and it was ‘apparent’ that WorkCover NSW and the community were concerned about a ‘pattern of lenient sentencing’.⁸ The Report of the 2006 Statutory Review of the *Occupational Health and Safety Act 2000* (the Stein Report)⁹ found that, in 2005, the average fine for offences against the general duty of care provision (s8) was \$25,000 and that between 1999 and 2004, 79% of cases incurred penalties of 20 per cent or less than the maximum. Notwithstanding the significant increase in maximum penalties in 2006, the proportion of penalties that were less than 20 per cent and 50 per cent of the maximum actually increased.¹⁰ McCallum et al noted that ‘...even in cases where all or nearly all of the most serious objective factors are present, the penalties awarded are still nowhere near the maximum’.¹¹

In 2006 when penalties in the *OHS Act 2000* were increased, the President of the NSW IC said that the intention of the enabling legislation was to ensure that courts would ‘sharply’ increase sentencing patterns, however, the Court of Criminal Appeal later said that increases in maximum penalties would not ‘...automatically mean that all penalties to be imposed ...should increase by the same proportion as the increase in the maximum.’¹² In its deliberations on an environmental matter, the Court said, in part

It remains necessary to address the facts of the particular case, with due regard to the current maximum penalty and the seriousness of the offence and to the need for deterrence thereby indicated together with all other relevant matters.¹³

McCallum et al argue that though each case should be judged on its merits, it remains the fact that the maximum penalties for OHS offences have increased fourfold since 1983, and that the intent of the legislation must be that penalties should ‘very significantly increase’.¹⁴ The authors point out that the ‘essential purpose’ of penalties for OHS offences is that of general deterrence. For workplace deaths, the authors doubt that this has been achieved, and state that for the decade

⁸ Ibid.

⁹ WorkCover Authority of New South Wales, ‘Report of the 2006 Statutory Review of the NSW Occupational Health and Safety Act 2000’, (WorkCover NSW Publication No.5625) at 16.

¹⁰ McCallum et al above, note 7 at 8.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid at 9.

¹⁴ Ibid.

prior to the issuing of their report in 2004, convictions for workplace deaths have remained reasonably constant. Thus, it can be said that general deterrence is failing.

Given that offences under the occupational health and safety legislation are generally a result of individual negligence or systemic dysfunction (or a combination of both), then deterrence ought to be much more effective in this area than in the area of deliberate criminal behaviour.¹⁵

The pattern of sentencing for OHS matters ‘...is indicative of the inherent difficulty associated with assessing the appropriate penalty for a strict liability offence, where conviction is not the result of individual criminal liability in the normally-understood sense.’¹⁶ The Report recommended that members of the IRC in Court Session receive more statutory guidance in sentencing procedures when considering OHS offences.¹⁷ Other advice considered the merits of instituting a new offence pertaining to workplace deaths; which were the appropriate courts to hear OHS offence matters and appeals; and, if the law relating to the duties of directors and managers should be enhanced.¹⁸

Following the Report, in 2006, amendments to the *OHS Act 2000* saw the introduction of s32A, dealing with offences concerning workplace deaths. Under this provision, a corporation or manager of a corporation was guilty if their conduct caused the death of a person at work for whom they owe a duty of care, and who was reckless as to the danger of death or serious injury to that person. No person was ever convicted under this provision, and the new set of health and safety laws introduced nationally in 2012 did not include a similar provision. There are no special provisions for workplace deaths in the new national legislation, but rather

...a graduated enforcement of duties ...exposing corporations or their officers to the severest penalties where their non-compliance with the duty in question involves high culpability (such as recklessness) and where there is a serious risk of harm (such as death). *This approach effectively removes the need for a separate workplace deaths offence in OHS law.*¹⁹ (emphasis added).

Given that the proportion of penalty amounts has not risen in line with penalty increases, there is no guarantee that the even higher penalties proposed under the new national legislation will act as a deterrent.

¹⁵ Ibid.

¹⁶ Ibid at 10.

¹⁷ Ibid.

¹⁸ Ibid at 3.

¹⁹ NSW Law Reform Commission Report 122 *Workplace deaths* (July 2009) at ix.

Fatalities in the NSW construction industry 1998-2008 – background

As Chapter One indicated, one phase of data collection was to quantify information related to the identified fatality cases. The following section presents empirical data related to the cause of death of the deceased and their age and occupations. It is followed by an analysis of the numbers of prosecutions launched in the NSW IC and the relevant sections of both *OHS Acts* (1983 and 2000) which were cited in the prosecutions. It describes the amount of penalty imposed for these breaches and the category of defendant, that is, a corporation or an individual. It shows particulars about the type of business conducted by offenders, and particulars about judges presiding over OHS prosecutions in the NSW IC, with a description of the amount of penalty and discounts allowed by each judge.

Cause of death

As shown in Table 4.2 below, most fatalities were caused by crush injuries, sustained through collapse of walls or trenches, collapse of plant such as cranes or being caught between objects. Death resulting from falls from heights and workers being struck by moving objects (usually vehicles or plant) were the next most frequent, with other fatal incidents caused by electrocution, burn injuries and drowning. These causes of death and the magnitude of the rates are typical of the national and state workplace fatality statistics as discussed in Chapter Two.

For example, in 1998, the National Occupational Health and Safety Commission (NOHSC) reported²⁰ that the main mechanisms of fatal incidents were firstly, those involving vehicles; secondly, being hit by moving objects (mainly falling objects and pedestrian incidents; followed by falls, electrocution and drowning. In this sample, the mechanism of injury categorised as ‘crush injury’ included those where workers were fatally injured by collapsing walls or trenches, or were trapped between or under objects. Fooks et al²¹ noted that falls from height in the construction industry were predominant in the UK; and Safe Work Australia’s Notified Fatalities Statistical Reports consistently specify falls from heights as a principal mechanism of injury.

²⁰ National Occupational Health and Safety Commission, *Work-Related Traumatic Fatalities in Australia, 1989 to 1992 Summary Report*, (Commonwealth of Australia, 1998) at 14.

²¹ Above, note 3 at 2.

Table 4.2. Cause of death (n=76)

Cause of Death	Number of fatalities
Burns	1
Drowning	2
Electrocution	11
Struck by moving object	14
Falls from height	16
Crush injuries	30
Unknown	2

Ages and occupations

Ages of the deceased ranged from 16–69 years and their occupations included electrician, plumber, carpenter, rigger, dogman, demolition worker, labourer, plant operator, concreter, plasterer, linesman, traffic controller, fitter, bricklayer, scaffolder, painter and apprentice.

Fatalities in the NSW construction industry 1998-2008 – penalties

Prosecutions under the NSW Occupational Health and Safety Act 1983 and NSW Occupational Health and Safety Act 2000

From 1988 to 2008, OHS prosecutions in cases of fatality in the NSW construction industry have been brought under the general duty of care for the health, safety and welfare of persons at work section in the relevant legislation. Figure 4.1 below shows that, for cases breaching sections of the 1983 *OSHA*, most cases (n=29) attracted charges under s15 of the NSW *OHS Act* 1983. Fifteen defendants were prosecuted for breaches of s16, which required employers and the self-employed to ensure the health safety and welfare of persons other than their direct employees. In these cases, the deceased workers were sub-contractors. In seven cases, charges were laid against the employer for breaches of both s15 and s16. Three charges were laid under s17, which required persons in control of workplaces, plant and substances used by non-employees to ensure health and safety. Section 50 relates to offences by corporations, s49 refers to time for instituting proceedings against the offence, and s51 refers to persons aiding and abetting in the commission of an offence.

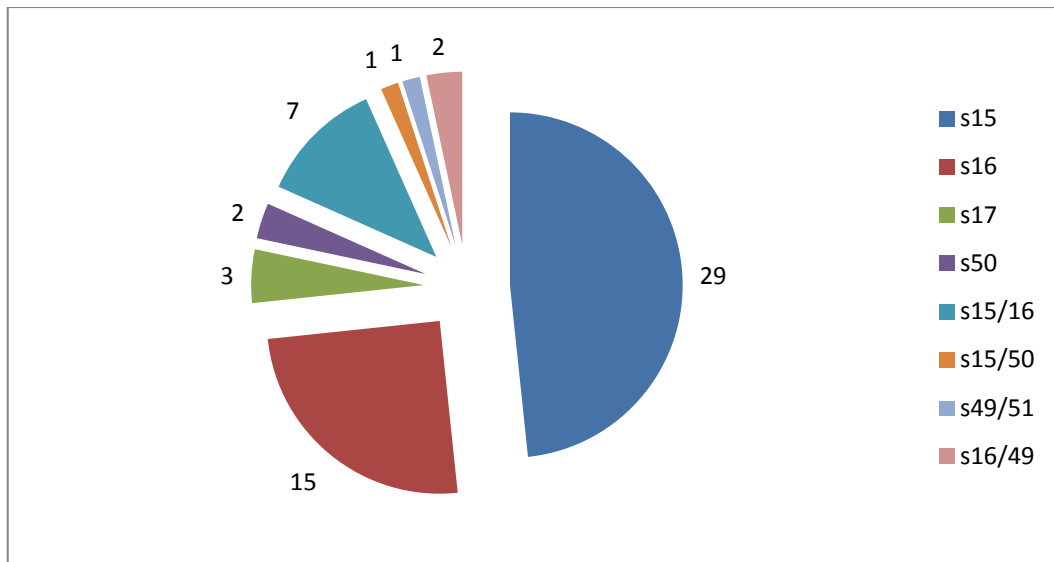


Figure 4.1. Prosecutions for offences under the NSW Occupational Health and Safety Act 1983 (n=60)

Similarly, Figure 4.2 below shows that in prosecutions for cases brought under the NSW *OHS*A 2000, the majority (39) were for breaches of s8, that is, the general duty of care provision. Eleven prosecutions were laid under s10, which penalises the controllers of work premises, or of plant or substances, for failing to provide safe premises or places of work, and failing to provide safe plant or equipment. Three prosecutions were laid under section 9 which refers to the duties of self-employed persons; one under s20 referring to the duties of employees, and eight under s26 that refers to offences committed by corporations.

In summary, more than two thirds of all cases found employers guilty of failing in their general duty of ensuring that premises under their control were safe, that plant and substances, systems of work and the work environment were safe and for failing to provide appropriate information, training, supervision and facilities to employees. Section 8(1) of the *OHS*A 2000 and s16 of the *OHS*A 1983 also require the employer to ensure the health, safety and welfare of others at the place of work, for example contractors or visitors.

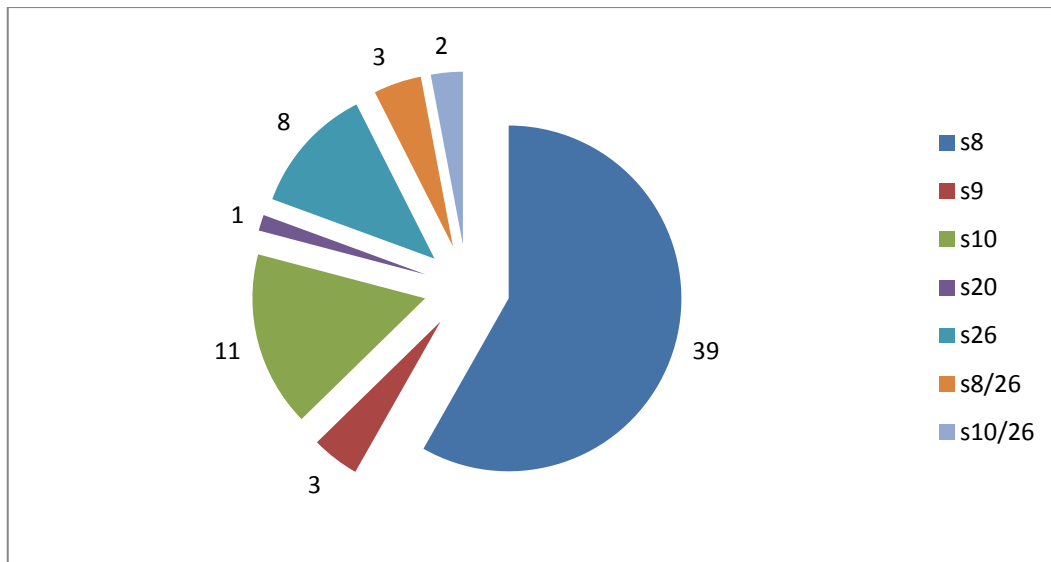


Figure 4.2. Prosecutions for offences under the NSW Occupational Health and Safety Act 2000 (n=67)

An analysis of the prosecutions and the sentences imposed shows that the average penalty was \$79,242, which represents an average of 17.96 per cent of the maximum penalty applicable. The courts allowed an average of 15.2% discount on penalties, ranging from 5 per cent to 35 per cent. Where repeat offenders were concerned, the court had discretion to impose terms of imprisonment, but offenders have never served a penal sentence in NSW since the inception of Robens legislation in 1983. One defendant was sentenced to two years imprisonment but the sentence was suspended and a two-year good behaviour bond imposed.²² In another instance, the offence was proved but no conviction recorded and the matter was dismissed,²³ and in a third case, the matter was dismissed because of the judge's view that WorkCover NSW's risk assessment procedures in relation to granting of demolition permits was in error.²⁴

Particulars about the type of business conducted by offenders

Table 4.5 shows that 51 medium to large corporations were prosecuted, with 58 prosecutions initiated against micro and small businesses, including nine prosecutions in the cottage sector. Generally, the literature suggests that workers in

²² Inspector Batty v David Smith t-as David Smith Roofing and Guttering [2009] NSWIRComm 203.

²³ Inspector Vierow v LBJ Crane and Rigging Pty Ltd [2003] NSWIRComm 358.

²⁴ Inspector Michael Dall v Brambles Australia Ltd [2006] NSWIRComm 213.

smaller businesses are at higher risk of injury or death,²⁵ while this data shows a lesser disparity. Micro businesses in this sample comprised a one or two person operation, often a sole trader and spouse responsible for administration tasks.

Table 4.5. Business size by numbers of employees.

Micro <5	Small 5-19	Medium 20-99	Large 100+
37	21	8	43

Judges and the penalties and discounts they impose

Table 4.6 below shows the number of cases heard by individual judges, and their affiliations with either labour or non-labour law chambers.²⁶ Of the seventeen judges who presided over the prosecutions, eleven had a background associated with labour law, and the remaining six had no labour association.²⁷ The table also shows the total averages of all monetary penalties each judge imposed on corporations and on individual directors, and the percentage amount of the prescribed penalty that this represented. It also shows the average percentage of the discount that the judge allowed for mitigation purposes on corporations and on individual directors. Fines are expressed as a percentage of the statutory maximum fine.

As can be seen, judges from labour law firms imposed lower actual penalties on corporations than non-labour judges (\$98,282 compared to \$118,300), but higher penalties on individuals than non-labour judges (\$10,028 compared to \$7,734). They granted lower mitigation discounts for corporations (14.5% compared to 17.5%) but greater mitigation discounts for individuals (17.5% compared to 12.8%). Thus, while labour law judges were more lenient to companies, they allowed lesser discount units. Reversing the trend for individuals, they allowed greater discount units, as against higher actual penalties. Non-labour law judges imposed higher penalties on corporations and lesser penalties for individuals. They allowed greater mitigation discounts to corporations than to individuals. However, the overall percentage of the prescribed monetary penalty was less for individuals at 15 per cent than corporations at 19 per cent.

²⁵ See Centre for Corporate Accountability, *Small isn't Beautiful: Construction Worker Deaths 2007/8: Employer Size and Circumstances*, (London: nd)

²⁶ In NSW, chambers have historically developed along ideological lines, such that those barristers with either labour or business affiliations tend to congregate accordingly.

Table 4.6. Judge affiliations and penalties imposed.

No. of decisions	Judge	Labour/Non-Labour	Company penalties			Individual penalties		
			Av. actual penalty (\$)	% prescribed penalty	% av. mitigation discount	Av. actual penalty (\$)	% prescribed penalty	% av. mitigation discount
6	H	L	21,667	16.17	0	-	-	-
3	G	L	16,667	6.67	0	-	-	-
3	J	L	55,833	37.33	0	-	-	-
9	C	L	45,313	7.83	10.6	8,250	15	25
16	D	L	59,545	11.6	14.55	7,800	14.18	24
3	F	L	81,667	16.21	10	-	-	-
8	I	L	113,327	17.72	25.6	-	-	-
20	K	L	143,500	22.06	18.46	5,333	9.7	14.17
10	M	L	135,714	22.08	17.1	8,950	21.97	31.7
8	P	L	154,100	25.98	18	21,817	39.67	0
7	Q	L	178,667	27.55	21.67	18,000	32.73	25
TOTAL 93			98,282	18.44	14.52	10,028	19.09	17.50
11	A	NL	97,083	18.76	10	10,668	19.4	18.6
1	B	NL	-	-	-	0	0	0
6	E	NL	63,750	11.93	21.3	2,500	4.64	17.5
3	L	NL	171,667	20.81	13.3	-	-	-
10	N	NL	138,389	23.31	24.7	16,000	32	0
4	O	NL	119,833	16.85	21.7	3,000	12	0
TOTAL 35			118,300	19.32	18.90	7,734	15.03	12.80

The results from this sample indicate there is no strong suggestion that judges show particular political and/or ideological affiliations when coming to a decision. Johnson maintains that Victorian magistrates were influenced by the ‘...dominant and individualistic ideologies of OHS’ in so far as they had internalised ideas about worker carelessness, employer worthiness and the inevitability of ‘accidents’.²⁸ But analysis of the judgements texts for this research indicate that judges, on the whole were less influenced by the ‘careless worker’ thesis and the inevitability of incidents, but did give attention to pleas concerning good corporate citizenship.

The practice of sentencing – why lenient penalties?

The theoretical model described in Chapter One assists in understanding some of the structures which influence the judicial system in a capitalist economy. The model addresses the influences of state regulatory legislation; regulatory principles and guidelines; judicial principles, and pulverisation techniques within the broader

²⁸ Johnstone R, Occupational Health and Safety, Courts and Crime, (The Federation Press, 2003).

framework of the existing political economy. The agency and discretion of judges is bounded by the institutional structures of the state. These structures frame what activities of judges and consequently have a bearing on discretionary outcomes and provide options for sentence reduction. That is, the way in which sentencing laws and regulatory investigative and prosecutorial procedures are structured, can, in themselves, provide fertile ground for the de-contextualisation and pulverisation of events in cases relating to death and injury at the workplace.

State OHS legislation

The State as the promulgator of legislation, specifies those purposes for which a court may impose a sentence on an offender, and these are set out in Section 3A, Part 3A of the NSW *Crimes (Sentencing Procedure) Act 1999*. The purposes are to (a) ensure that the offender is adequately *punished* for the offence (note that this sentencing principle does not specifically refer to ‘just deserts’ or retribution); (b) to prevent crime by *detering* the offender or other persons from committing similar offences; (c) to *protect* the community from the offender; (d) to promote the *rehabilitation* of the offender; (e) to make the offender *accountable* for his or her actions; (f) to *denounce* the conduct of the offender; and (g) to *recognise* the harm done to the victim of the crime and the community (emphasis added).²⁹ In summary, the purposes of sentencing are punishment, deterrence, community protection, public recognition of harms perpetrated, and denunciation of these harms. Under these guidelines, offenders should be made accountable for their actions, but there is also an element of rehabilitation included in the objectives.

When determining sentences, the court considers aggravating and mitigating factors.³⁰ Mitigating factors relevant to OHS offences are consideration of the offender’s measures at restitution, good citizenship, the absence of prior convictions and the likelihood or otherwise of the offender to re-offend. Aggravating factors include the existence of prior convictions, significant injury, loss or damage to a person, the committal of offences regardless of public safety, offences involving grave risk of death to another person, and the abuse of positions of trust or authority in relation to the victim.³¹ The only subsection of the *Crimes (Sentencing*

²⁹ NSW *Crimes (Sentencing Procedure) Act 1999*, Section 3A, Parts 3A (a) to (g).

³⁰ NSW *Crimes (Sentencing Procedure) Act 1999* ss21-23.

³¹ *Ibid* s21A(2)

Procedure) Act 1999 to which the OHS court decisions was specifically referred was that relating to prior convictions and it is not known why judges did not reference other aggravating factors. This is not to say that they might not play a part in the judge's own mind when considering sentence, as in the 'instinctive synthesis' model (see below). It also highlights the fact that these are aspects, which the prosecution appears not to consider in fatality or serious injury proceedings.

The two Acts referenced in this discussion are the NSW *OHS Act* 1983 (*OSHA* 1983) and the NSW *OHS Act* 2000 (*OSHA* 2000). The 1983 legislation, based on the Robens philosophy of self-regulation, was innovative in that it removed many prescriptive and detailed elements, typical of former laws governing workplace health. It imposed an absolute duty of care on the employer, with a defence being that it was not reasonably practicable for a person to comply, or that commission of the offence was due to causes beyond the control of the duty holder and against which it was impracticable for the duty holder to make provision.³² This Act was reviewed and replaced by the *OSHA* 2000 and the multiplicities of regulations associated with the 1983 Act were replaced with a single *OHS Regulation* 2001. According to the Stein report '(c)riminal sanctions were still to be ones of last resort but seen as 'necessary teeth' to back up consultation, inspectoral warnings, improvement notices and prohibition notices'.³³

In both Acts, the primary duty of care of the employer was outlined in some detail, requiring them to ensure the health safety and welfare at work of all persons in their employ. The duties were to ensure the safety and freedom from risk, of premises controlled by the employer; that plant and/or substances in use at the workplace be safe and without risk to employees; to ensure that systems of work and the working environment are similarly risk free and safe; that employees be provided with information, instruction, training and supervision to ensure their health and safety, and that adequate facilities be provided.

These provisions, set out in s8 of the *OSHA* 2000 were similar to those of the earlier Act, except that they placed more emphasis on risk assessment and worker consultation, than did the 1983 Act, which was slightly more prescriptive.³⁴ While

³² Stein Report, above, note 9 at 18-19; see also s.53 NSW *Occupational Health and Safety Act* 1983.

³³ Ibid at 21.

³⁴ See s15 NSW *Occupational Health and Safety Act* 1983.

the detail of these provisions is not in dispute, it will be seen that they necessarily, but narrowly guided the court's deliberations. That is, prosecution charges had to be specified according to the exact sections of the relevant parts of the Act (almost all being directed to the general duty of care of the employer). Thus, the prosecution and the judges were necessarily denied the opportunity to reflect on the broader conditions of work, or workplace relations which might have had more bearing on the matter.

WorkCover NSW – compliance policy and prosecution guidelines

The emphasis of WorkCover NSW's compliance policy³⁵ is on the achievement of successful OHS outcomes without the use of enforcement. Compliance is achieved through a range of strategies involving 'information advice, persuasion, co-operation, inspection, verification and compulsion through to deterrence activities.' The policy also seeks to ensure that there will be 'fair and swift consequences for non-compliers'.³⁶ Responsive regulation is the means whereby the regulator attempts to achieve compliance 'appropriately' and 'effectively', and its strategies are based firmly on the compliance pyramid.³⁷

When considering prosecution the regulator applies the guidelines of the Office of the Director of Public Prosecution (ODPP),³⁸ which encompass three criteria. These are the existence of a prima facie case; a reasonable prospect of conviction, and the public interest, which considers, among other things, the seriousness of the offence, mitigating and aggravating circumstances, need for general and specific deterrence and whether the alleged offence is of considerable public interest.³⁹ In cases of prosecutions for workplace death (s32A of the *OSHA* 2000), the prosecution considers whether there is sufficient evidence to establish if the conduct of the alleged offender caused the death; that is, if the duty holder engages in recklessness

³⁵ WorkCover NSW *Compliance Policy and Prosecution Guidelines*, (NSW Government, 2010 at 10.)

³⁶ Ibid. Given that there is an approximate time lag of anywhere between 2 to 8 years before matters come to judgement in the NSW IC, the swiftness referred to must be reserved for cases of lesser magnitude, such as those attracting provisional improvement notices and prohibition notices.

³⁷ Based on Braithwaite's model in Braithwaite J, *To Punish or Persuade: enforcement of coal mine safety*. (New York: State University of New York Press, 1985).

³⁸ Office of the Director of Public Prosecutions *Prosecution Guidelines*, http://www.odpp.nsw.gov.au/guidelines/DPP%20Guidelines_whole_document_current%20to%2031_dec_2010.pdf (2/12/2011). See generally Maxwell, C, 'Prosecution Ethics and a Commentary on the Guidelines of the New South Wales Director of Public Prosecutions', Paper presented to University of Wollongong, 2 April 2011.

³⁹ Ibid at 15.

causing death or serious injury. The prosecutor will also consider the nature of any defence available to the defendant.⁴⁰ Prosecutions under this provision could only proceed with the written consent of the relevant government Minister or by an inspector and in fact, no prosecutions were laid in NSW under this provision.

While the court is not directly concerned with how WorkCover NSW applies its policy in the normal course of inspectorial work, the regulator's decision to, and reasons for prosecution, should have a bearing on judges' decisions. That is, the decision to prosecute corporations and directors or managers occurs 'when it is in the public interest to do so... and particular regard [is] paid to the steps taken by such persons to ensure compliance by the corporation...'⁴¹ The 'core concepts' applying to the concept of due diligence by corporations or persons in respect of health and safety include '*...ensuring that the corporation has safe work systems to address risks to workplace safety and ensuring compliance with and regular review of the safe work measures*'.⁴² (emphasis added). Safe work systems are part of a broader and more encompassing safety management system that is not addressed in the policy, so an opportunity to at least consider some structural elements governing healthy and safe workplaces is not attended to, and the narrow focus is reflective of the particularities of the general duty of care sections in NSW OHS legislation as noted above. As Ingleby and Johnstone comment, the '...focus is produced by a number of reasons, including the convenience of the defence and prosecution confining themselves to specific occurrences, and the court procedural requirements.'⁴³ Ultimately, these reasons produce narrowly presented cases and pulverised verdicts.

When sentencing, the judge must consider not only aggravating and mitigating factors, but also the objective and subjective factors relevant to the charge. Primary consideration is given to the objective seriousness of the offence, or what is expressed in OHS prosecutions as 'the nature and quality of the offence', a principle derived from case law in the NSW IC (*Lawrence Diecasting (1999) 90 IR 464*), wherein '(A) particular offence is assessed in terms of its relative seriousness in

⁴⁰ WorkCover NSW *Compliance Policy and Prosecution Guidelines*, (NSW Government 2010) at28.

⁴¹ Ibid at 31.

⁴² Ibid.

⁴³ Ingleby R and Johnstone R, 'Invocation and the Enforcement of Legal Rules' in Hunter R, Ingleby R, Johnstone R eds. *Thinking About Law: Perspectives on the History, Philosophy and Sociology of Law*, (Allen andUnwin,1995) at 171.

relation to the worst offence for which the maximum penalty is provided'.⁴⁴ Other decisions have established further principles, for example in regard to mitigation for guilty pleas, cooperation with WorkCover NSW by the defendant, and safety remediation measures performed by the defendant. Good 'industrial citizenship', the absence of prior convictions and the 'propensity of the offender to reoffend' are all to be considered when the final decision is handed down.⁴⁵

The prosecutor's role is laid down in NSW Barrister's Rules, with Rule 71 stating that the prosecutor must not try to persuade the court to '...impose a vindictive sentence or a sentence of a particular magnitude', but can (amongst other things) '...submit that a custodial or non- custodial sentence is appropriate and ...inform the court of an appropriate range of severity of penalty, including a period of imprisonment, by reference to relevant appellate authority'.⁴⁶

If it is invited, WorkCover NSW may make a submission about sentencing within the confines of the principles of sentencing. This may include submissions about the range of seriousness of the offence (upper or lower range), but it cannot depart from sentencing principles in general.⁴⁷ When commencing a prosecution, WorkCover NSW aims to '...change the behaviour of the offender and deter future offenders'.⁴⁸ It believes that appropriate prosecution will alert the community to the fact that offenders will be punished. Its policy is to prosecute 'significant breaches, such as fatalities and serious incidents. In doing so, WorkCover NSW takes account of several factors. Of these, 'the general public interest is the paramount concern to be taken into account ...'⁴⁹ The sentencing judicial officer considers these elements, as well as the facts of the case; the circumstances of the offence; subjective factors about the defendant, and sentencing laws.

Maximum sentences or penalties are designed for a 'worst case' scenario, and there are no mandatory penalties for health and safety crimes, except for those 'on the spot' fines which can be imposed on employers by inspectors. There does not appear to be a definition of 'worst case scenario' in policies or legislation, nor in any of the judgements studied for this thesis. Presumably, it might be reserved for cases of

⁴⁴ Above, note 41 at 35.

⁴⁵ Ibid at 36.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid at 27.

⁴⁹ Ibid.

recklessness causing serious injury or death, but this category was dealt with in 2006 with the insertion of s 32A in the *OSHA* 2000. Whatever the case, none of the decisions came close to imposing the maximum sentence, therefore none were judged to represent a ‘worst case scenario’.

Chapter Three referred to the paradox of OHS harms – they are not perceived as real crimes. One of the reasons for this lies in the difficulty of proving intent, *mens rea*, on the part of corporations and in cases of strict liability such as OHS offences, the prosecution needs to only prove the commission of the criminal act (*actus reus*). In other words, both elements are not required, as they would be in a criminal trial.⁵⁰ Another factor lies in the involvement of administrative agencies, such as the OHS regulator, WorkCover NSW, that operates across different portfolios (advising, inspecting, enforcing etc).

While factory offences have been statutorily described as crime and proscribed by law, they have been frequently committed and substantially tolerated in practice. Factory offences have been dealt with by administrative agencies ... far removed from the normal machinery of criminal justice,’ which lends itself to the perception that these offences are not true crimes.⁵¹

The Judiciary- sentencing, knowledge, attitudes, beliefs

Until recently, ‘white-collar’ crimes were also viewed as not ‘real’ crimes. Although that perception has changed and corporate crime is now more regularly acted against, with almost 130 Australian corporate directors and managers serving anything up to 10 years imprisonment from 1996 to 2005⁵², the punishment regimes of those responsible for workplace death are insignificant. Occupational health and safety legislation is grounded in criminal law, so OHS crimes remain invisible within the structures in which OHS laws are situated. At best, OHS legislation sits uneasily on the shoulders of criminal law.

Sentencing practices

The ineluctable core of the sentencing task is a process of balancing overlapping, contradictory and incommensurable objectives. The requirements of deterrence, rehabilitation, denunciation, punishment and restorative justice do not generally point in the same direction. Specifically, the requirements of

⁵⁰ Above, note 44 at 162.

⁵¹ Ibid at 164.

⁵² Sarre R, ‘*Sentencing Those Convicted of Industrial Manslaughter*’, in National Judicial College of Australia, Sentencing Conference 2010 Canberra, 6-7 February, 2010 <http://www.austlii.com/au/journals/ALRS/2010/1.html> (12/7/2011)

justice, in the sense of just deserts, and of mercy often conflict. Yet we live in a society which values both justice and mercy.⁵³

In the late 1990's, the NSW Court of Criminal Appeal prepared to institute guideline judgements for particular offence categories, with the main objective being to ensure consistency in sentencing between courts and judges. This approach was seen as preferable to that of mandatory sentencing or 'grid' sentencing, which are a 'complex framework of sentencing protocols designed to ensure consistency in sentencing.'⁵⁴ The idea was not meant to restrict judges, but to allow them discretion to 'move within' the guidelines, or to move away from them, in which case it was expected that judges would explain that departure in sentencing remarks. 'Sentencing in guideline judgements are indicators, just as prescribed maximum penalties are indicators of a different kind'.⁵⁵ Elsewhere, guidelines set sentencing ranges for particular offences and to address relevant aggravating and mitigating circumstances. Jurists have commented on the dangers of producing sentences that are either too onerous or too lenient, if judges adopt a 'mechanistic approach' to the guidelines, pointing out that, in themselves, they are no more or less, guidelines.⁵⁶

In 1998, the NSW Chief Justice moved to formulate these judgements in particular cases, as noted above. In identifying a starting point, the Court settled on the offence of dangerous driving causing death or serious injury because of the history of Crown appeals against sentences, indicating a degree of inconsistency among sentencing judges. The former Director of Public Prosecution (DPP), Nicholas Cowdery, pointed out that there was also intense media interest about these cases and subsequent growing political interest.⁵⁷ The impact of the guideline judgement that emerged from a Crown appeal⁵⁸ was reported as producing greater sentencing consistency and penalty increases, with a drop in the number of Crown appeals.⁵⁹

⁵³ Chief Justice Spigelman cited in Nicholas Cowdery *Guidelines judgements: it seemed like a good idea at the time*, The International Society for the Reform of Criminal Law. 20th International Conference. 2-6 July 2006, Brisbane. <http://www.odpp.nsw.gov.au/speeches/speeches.html> (6/6/2011) at 1.

⁵⁴ Findley M, *Criminal Law: Problems in Context* (Melbourne: Cambridge University Press, 2006) at 199.

⁵⁵ Cowdery N, *Guidelines judgements: it seemed like a good idea at the time*, The International Society for the Reform of Criminal Law. 20th International Conference. 2-6 July 2006 Brisbane. <http://www.odpp.nsw.gov.au/speeches/speeches.html> (6/6/2011) at 3.

⁵⁶ *Ibid.*

⁵⁷ *Ibid* at 5.

⁵⁸ *R v Jurisic* (1998) 45 NSWLR 209:101 A Crim R 250.

⁵⁹ Above note 57 .

A guideline judgement was also sought for the offence of armed robbery, and in that case, sentencing ranges were established, as opposed to a defined starting point. In another instance, a guideline judgement was established in relation to the sentencing of children, and in that case, the Court said that they were intended to ‘...provide benchmarks for particular kinds of offence, by way of guidance, while preserving the application of proper sentencing principles which is of general application.’⁶⁰ Another guideline judgement, this time a quantitative one, set out some parameters for determining the amount of discount applying to pleas of guilty. The *Crimes (Sentencing Procedures) Act 1999*, allows the Court to ‘impose a lesser penalty than it would otherwise have imposed’⁶¹, and said that in general, it should be assessed in the range of 20-25% sentence discount. The main consideration here is the timing of the plea, because clearly its utilitarian value would depend on how far proceedings had commenced, had the party initially pleaded not guilty. Cowdery noted that this guideline provided an ‘extremely fertile ground for appeals’.⁶²

As DPP, Cowdery took a strong stance in maintaining the ‘separation of powers’ that is, upholding the independence of the judiciary from the executive arm of government. To him, the positive aspect of guideline judgements was in:

forestalling unreasonable sentencing legislation by the Parliament, directing it into avenues that the courts have been able to interpret and manage consistently with continuing judicial independence’; providing consistency in sentencing for particular offences; providing acceptable guidance to judges; and, increasing sentence penalties in some case.⁶³

The negative consequences, including those pertinent to OHS crimes, have been warned against by a range of commentators. That is ‘the prescriptive nature of guidelines and the risk of uncritical adherence by judges [and] the fetters they may impose on judicial discretion in individual cases...’⁶⁴ However, Zdenkowski believes that guidelines will become part of the ‘sentencing landscape’ because of their development from appellate sentencing practices and attempts to improve sentencing consistency.⁶⁵ Nonetheless, he also warns that courts face challenges to appropriately

⁶⁰ Ibid at 7.

⁶¹ Ibid at 10.

⁶² Ibid.

⁶³ Ibid at 19.

⁶⁴ Ibid.

⁶⁵ Zdenkowski G, ‘Limiting Sentencing Discretion: Has there been a paradigm shift? *Current Issues in Criminal Justice*, (2000) Vol.12 No.1 at 72.

take account of public opinion; explain guideline decisions in an easily understood way, and to resist ‘the temptation to conflate consistency and severity’.⁶⁶

Sentencing: ‘Two-tiered’ and ‘Instinctive Synthesis’

Guideline judgements are often cited in OHS cases and are considered here in the light of discussion about two differing sentencing styles, that is ‘two-tiered’ (sometimes referred to as ‘two-staged’) sentencing and the style known as ‘instinctive synthesis’. Cowdery observes that guideline judgement ‘regimes’ may lend themselves to the more formulaic or mechanical style of two stage sentencing’.⁶⁷ In tier one, the judge considers the seriousness of the crime by looking at the objective facts of the offence and in tier two, the subjective elements are considered before the sentence is pronounced. In another version, the judge specifies a sentence quantum that is proportional to the crime and then by reference to other facts, specifies some variable to that amount.⁶⁸

A typical example of this occurs when the court states that it is reducing the sentence it would otherwise impose by a specified percentage because of an offender’s guilty plea, or by reference to an offender’s assistance to authorities or both. ‘This procedure is more overtly mathematical (particularly if a discount in the form of a percentage is specified)...and, may...be defined as the narrow meaning of two-tiered sentencing’.⁶⁹ In effect, the sentence outcome is arrived at through a staged process where weight is first given to some variable and that weighting is then altered according to consideration of other variables.⁷⁰ Although there is no clear definition for two-tiered’ sentencing, its mathematical approach is exemplified by granting specific discounts beginning with a ‘starting point based on the objective gravity of the offence’ and then adjusting penalty amounts according to other factors.⁷¹

Whatever else it may mean it does seem to involve the decision-maker arriving at one value or type of sentence first and then, either incrementally or in one further step, deriving the final sentence that is imposed. A process of sequential

⁶⁶ Ibid.

⁶⁷ Above note 64 at 19.

⁶⁸ Traynor, S and Potas, I, ‘*Sentencing methodology: Two-tiered or Instinctive synthesis*’ *Sentencing Trends and Issues*, (2002) 25 <http://www.judcom.nsw.gov.au/publications/st/st25/index.htm> (19/8/2011)

⁶⁹ Ibid at 2.

⁷⁰ Ibid.

⁷¹ Ibid at 3.

reasoning sometime criticised as being synthetic or artificial, seems to be an integral part of this approach.⁷²

In OHS Judgements, the events have already been presented in their isolated parts; they are considered against mitigating and aggravating factors, which are, in turn considered in the light of subjective and objective factors, which are then taken into account.

Instinctive synthesis

The instinctive synthesis approach allows judges to arrive at a sentence

...by looking at all the relevant factors and sentencing principles, and determining their relative weights by reference to all the circumstances of the case. The balancing of all the relevant considerations takes place in a single step or synthesis, not sequentially.⁷³

Thus, the sentencing judge ‘instinctively’ synthesizes all the various factors involved in a particular case and arrives at a sentence.

In her study of 31 judges in the Supreme and District Courts of Queensland⁷⁴ Mackenzie notes that judges typically report that the ‘art’ of sentencing, or the intuitive nature of sentencing, lies in their discretionary practices, and these are derived mainly from experience, rather than being taught. The view that sentencing is an art form or an intuitive skill has attracted criticism, and Mackenzie questions,

...whether something as complex and with such serious ramifications as sentencing can be left to intuition. Even if [it] is based on experience, statutory guidelines and precedent, it arguably remains an almost arbitrary process, reliant on the intuitive skills and experience of an individual judge. Although the system of appellate review provides the necessary checks and balances, “sentencing as an art” raises issues of consistency and fairness.⁷⁵

What guarantees there are that judges will exercise objectivity, consistency and fairness in their deliberations is something the former High Court Judge Michael Kirby contemplates arguing that ‘...[i]ntuition may itself be the product of unrecognised psychological forces, cultural assumptions and social attitudes’.⁷⁶

Mackenzie found that judges preferred an instinctive or intuitive sentencing approach because ‘consciously or unconsciously, it allows the judge to have maximum

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Geraldine Mackenzie, *How Judges Sentence*, (Sydney: The Federation Press 2005).

⁷⁵ Ibid at 17.

⁷⁶ Kirby J in Mackenzie *ibid* at 19.

discretion in sentencing'. They saw sentencing in pragmatic terms, rather than through the lens of theory or justification for offending, a position in accord with findings from a study of Victorian judges.⁷⁷ This pragmatism resulted in judges adopting a procedural approach to sentencing, involving their response to sets of facts. Thus, judges commented that sentencing was the outcome of investigations; that it was a means of determining penalties reflecting the 'criminality of the offender'; and that it was the provision of fair procedures.⁷⁸

It has been suggested that, by looking at objective and subjective factors separately, judges may be helped when there are numerous factors to consider when determining sentence. Traynor and Potas suggest that there may be reasons to adopt a two-tier or sequential sentencing approach, combining it with comparison from other decisions.

They argue that '(t)his process of sentencing by analogy is common practice' and is accepted by judges who support either one of the two approaches⁷⁹

In 2002, a majority of High Court judges found that the two-tier approach should not be adopted as it was wrong in principle.⁸⁰ Instinctive synthesis sentencing could be modified slightly to permit discounts for certain mitigation factors, such as early guilty pleas and assistance given to authorities, a process not favoured by the High Court. Traynor and Potas argue that some cases lend themselves more to sequential reasoning than others, and this may well apply to OHS cases, where a multiplicity of factors are normal. What is important is that decisions are transparent, and while two-stage sentencing appears mechanistic, it does allow for reasons for the sentence to be given and provides accountability from the Court, while for Traynor and Potas intuitive or instinctive synthesis is 'more mysterious, idiosyncratic and less open to analysis'.⁸¹ Judges in the NSW IC use both styles of sentencing, and in the following case, both elements of instinctive synthesis and two-stage sentencing appear to be in operation. The judge in Case 2⁸² was guided by the High Court's decision in *Markarian v R* (2005) 15 ALR 213, a guideline judgement that figures frequently in NSW IC sentencing hearings. In this case, the judge remarked

⁷⁷ Ibid at 20.

⁷⁸ Ibid at 21.

⁷⁹ Ibid at 19

⁸⁰ Ibid 18.

⁸¹ Ibid 20.

⁸² *Inspector Robert Mayall v D J Gleeson Pty Ltd* [2006] NSWComm 217 .

The court, using the “instinctive synthesis” approach, would include an assessment of the objective and individual subjective factors, with the appropriate weight given to each factor, and could (but not should) give a degree of deduction in penalty to some element in the consideration, in such circumstances as where it better serves the interests of transparency, which element should be narrowly confined (for example, the utilitarian value of the plea).⁸³ Their Honours recognised the “instinctive synthesis” approach to sentencing gives rise to an inevitable tension between the need for transparency and adequate reasoning on the one hand, and the need to avoid a mathematical approach pursuant to which the sentencing court engages in a “staged sentencing process” starting at the maximum penalty and then making deductions from it without adequately assessing (even in a provisional way) the sentence called for by the objective facts (see *Markarian* at [32]).⁸⁴

In a consideration of penalty, the court must consider the objective seriousness of the offence or, as has been said, the nature and quality of the offence. The Full Bench commented in *Lawrenson Diecasting Pty Limited v WorkCover NSW Authority of New South Wales (Inspector James Swee Ch'ng)* (1999) 90 IR 464 ad idem with the view expressed in *Markarian* (at 474):

. . . in our view, it is important to reiterate that the primary factor to be considered when a judicial officer is determining the appropriate sentence to impose is the objective seriousness of the offence charged. In case of prosecutions under the OHS Act, this proposition has often been expressed by saying that the "true measure of penalty lies in the nature and quality of the offence" . . .⁸⁵

The High Court also stipulated that sentencers should pay particular attention to the maximum penalties stipulated,; they invite comparison between the case before them and the worst case, and so they provide a yardstick, balanced on all other relevant factors. The High Court found that the Court of Appeal in *Markarian* was in error because it did not start at the maximum penalty but at another maximum, which it used as a starting point.⁸⁶ It appears from the judgements analysed in this thesis that judges did not always specifically address the maximum penalty, though it may have been in their minds. Others had a starting point of a discounted penalty, which was then further discounted for objective and subjective factors, as well as other mitigating circumstances. The High Court also pointed out that when maximum penalties were raised, then higher penalties should be imposed, because the courts are expected to recognise the intentions of the legislation⁸⁷, but this was not evident

⁸³ Ibid at 8

⁸⁴ Ibid at 9.

⁸⁵ Ibid at 12.

⁸⁶ New South Wales Judicial Commission, *Sentencing Bench Book, Sentencing procedures generally, Objective Factors* <http://www.judcom.nsw.gov.au/benchbks/sentencing/objective-factors.html>.(31/9/2009)

⁸⁷ Ibid.

in the thesis analysis. To take but two examples, in Case 61,⁸⁸ a corporation was fined \$50,000 of the maximum of \$550,000 and the individual party fined \$10,000 of maximum of \$55,000. In Case 40,⁸⁹ the defending corporation was fined \$97,500 of the maximum of \$550,000. In both cases, the defending corporations were large companies and the penalties give no indication of the shift to higher penalty rates that had occurred in 2000.

This approach to sentencing in OHS cases gave rise to community disquiet about justice, as the disparity between the maximum sentence legislated for and the actual penalty imposed was considerable. However, while the more ‘usual’ crimes against persons or property are relatively straightforward to prosecute, those relating to OHS offences are laid against the relevant section of the Act that is, in almost all cases reviewed here, failure to undertake a duty of care. The following remarks made in considering the penalty in Case 2 demonstrate the point.

While the fact of the death of Mr (B) is not the focus of this inquiry, as Hill J pointed out in *Tyler v Sydney Electricity* (1993) 47 IR 1 (at 5):

The gravity of the damage or injury actually resulting from breach does not, of itself, dictate the amount of penalty. However, the gravity or otherwise of the potential risk flowing from breach and its foreseeability are clearly relevant as are the measure of gravity of the breach itself and the measure of culpability and as Wright J, President said in *WorkCover NSW Authority of New South Wales (Insp Page) v Walco Hoist Rentals Pty Limited and Anor (No 2)* 99 IR 163 at [22]:

...The gravity of the consequences of an accident, such as the damage or injury, does not, of itself, dictate the seriousness of the offence or the amount of penalty. However, a breach where there was every prospect of serious consequences might be assessed on a different basis to a breach unlikely to have such consequences. The occurrence of death or serious injury may manifest the degree of seriousness of the relevant detriment to safety.⁹⁰

This example of the sentencing approaches in the NSW IC demonstrates the difference in approach to that of murder/manslaughter, where the amount of damage or injury has a direct bearing on the final penalty.⁹¹ It is also difficult for the victims’ families, or the community, to come to terms with the legal position that the gravity occasioned by a death determines neither the seriousness of, nor the penalty for, the consequence.

⁸⁸ *Inspector Denis Macready v Mission Services Pty Ltd and Anor* [2007] NSWIRComm 279

⁸⁹ *Inspector Robert Mayell v New South Wales Land and Housing Corporation* [2006] NSWIRComm 92

⁹⁰ *Inspector Robert Mayell v D J Gleeson Pty Ltd* [2006] NSWIRComm 217 at 21.

⁹¹ NSW Crimes (Sentencing Procedures) Act 1999.

The perception and experience of judges

There is little research about the judicial sentencing process from judges' perspectives, for a number of reasons, not least of which is the difficulty in obtaining access to judges, and the '...perceived or actual reluctance ...of the potential judicial subjects to reflect on their perceptions and experience, let alone participate in the debate'.⁹² Some insights into NSW judges' perceptions of their role is gained through a series of broadsheet articles written in 2010 and based on interviews with 22 judges and magistrates of the Local, District and Supreme Courts of NSW.⁹³ A similar series had appeared in the same broadsheet some 25 years before, but at that time, judges would only speak off the record. The series did not include the judges and magistrates of the Industrial Court and the Chief Industrial Magistrates Court, that is, that part of the judiciary responsible for workplace injuries and fatalities, despite the potential for these incidents to be either summary or criminal statutory breaches. It could be argued that this omission lends weight to the perception that OHS harms are not perceived as true criminal events.

In relation to sentencing, judges' main concerns related to increased workloads, and worries that their decisions would be overturned on appeal. They noted that the bench was becoming less monocultural, with an expanded base of members from divergent socio-economic, cultural and gender backgrounds. As one judge put it 'less formal, less hierarchical, less Anglican and less school tie',⁹⁴ This may account for the lack of sentencing differentiation seen in the decisions of labour law and non-labour law judges in the NSW Industrial Commission. Political pressures from 'law and order' proponents had increased workloads in all jurisdictions, and particularly at Local Court level.⁹⁵ Judges rejected the idea that politicians directly influenced them, but were irked by the 'more subtle pressures-the willingness of politicians to climb aboard populist law and order campaigns regardless of the impact on the standing of the courts and the state's prison population'.⁹⁶ Judges also thought that they had lost the support of the state's Attorney-General (AG).⁹⁷ In New South Wales, there had

⁹² Mackenzie G, *How Judges Sentence*, (Sydney:The Federation Press,2005) at 3.

⁹³ Snow D, 'The secret life of judges', *The Sydney Morning Herald News Review*, October 16-17 2010.

⁹⁴ Ibid 7

⁹⁵ Ibid.

⁹⁶ Ibid 8.

⁹⁷ At the time, the DPP had been at loggerheads with the A.G over perceived undue interference by the Executive arm of government and the influence of the media on politicians, See generally

been an uneasy relationship between the DPP and its AG's Department in the state Labor government,⁹⁸ which was accelerated by the actions of the incoming NLP government in 2011, discussed in more detail in Chapter Seven.

The influence of political pressure on the judiciary was exemplified in the criticism made of a NSW Supreme Court judge by a former NSW Premier over his perception of her leniency in a rape case. While the judge agreed that the sentence was light, she argued that it 'followed the prevailing range of rape sentences – as judges must, 'because that's equal justice'.⁹⁹ In response to public criticisms of judges' decisions, suggestions had been made by the judiciary to make judgements more accessible and intelligible to the layperson. These included ways to make decisions, more transparent provision of information, sessions explaining the criminal justice system and workshops for judges to help them communicate with laypersons.¹⁰⁰ In the face of the level of confusion, misunderstanding and family trauma that can arise in regard to workplace fatality cases, the adoption of policies like these would be welcome.¹⁰¹

The 'art' of sentencing

The essence of sentencing is the balance of interests within the framework of the law... (these are)... the community, the accused, the accused's family, the victim and the victim's family. The balance is...constrained by the framework of the law – this is the public misconception of the process...¹⁰²

Judges find sentencing difficult because of the conflictual nature of the adversarial system, the need to adapt to, and be competent in applying rapidly changing laws and in applying the law to diverse situations, and the emotional and physical drain they experienced. The imperative to balance conflicting interests demanded consideration of prior case law, the requirements laid down in sentencing legislation, and the

Nicholas Cowdery, *The Law of the Ruler*, Keynote address to ANZ Critical Criminology Conference University of Sydney July 2010.

⁹⁸ Ibid.

⁹⁹ Ibid above, note 93.

¹⁰⁰ Ibid.

¹⁰¹ Brookes D, 'Restorative Justice and Work-Related Death: consultation report', (St. Kilda: Creative Ministries Network, 2009); Workplace Tragedy Support Group at www.workplacetragedy.com; Matthews L et al. *Traumatic Work-Related Death in the Construction Industry: Experiences of Victims Families*. Work and Health Research Team, Aging, Work and Health Research Unit (University of Sydney, 2010).

¹⁰² Above, note 92 at 13.

interests of all key parties. However, in actual terms, the interests of the parties are often irreconcilable, and thus achieving a balanced reconciliation is impossible.¹⁰³

...many of the judges said that personally they did not support deterrence as a sentencing objective, they tended to use it routinely in their sentencing remarks. The fact that...judges tend to see sentencing in fairly practical terms as a response to a set of facts in front of them supports the conclusion...*that sentencing philosophy and the theories of punishment do not form a large part of a judge's deliberations on the choice of sentence.*¹⁰⁴ (emphasis added)

That sentencing is seen so instrumentally means that the community (in this case, the families of the deceased) may not be able to gauge whether or not justice has been served as far as fairness and consistency is concerned. The Australian Law Reform Commission's report into sentencing in 1988 concluded that 'judicial education in sentencing was necessary [due to] the complexity of the sentencing task, the need for consistency and ... that... most judicial officers learnt about sentencing once on the bench...'¹⁰⁵ Insofar as specialisation is concerned, increasing worry about correct judicial practice and accountability necessitate a 're-examination' of the role of specialisation, which is already occurring '...in areas such as planning and environment law. There are valid arguments why criminal law ... in particular is a specialist and difficult jurisdiction, and may merit distinct specialisation in the courts.'¹⁰⁶ The changes brought by the state LNP government in 2011 in removing serious OHS matters from the NSW IC (to be discussed in Chapter Seven) was a move away from specialisation and the outcomes are yet to be identified.

Despite criticisms about inconsistency in sentencing due to the discretion allowed judges, they believed judicial discretion to be a necessary part of the sentencing process because of their experience and knowledge, and they also believed that there was no 'undue disparity' in sentencing,¹⁰⁷ a view that supports the consistency in judgements shown in this thesis. The concept of judicial discretion has been challenged in the last decade, largely because of the populist notion that sentencing should be harsher and political agendas of government to be seen as 'tough on crime'. Sentencing regimes have seen the introduction of mandatory sentencing,

¹⁰³ Ibid at 14.

¹⁰⁴ Above, note 103 at 21-22.

¹⁰⁵ Ibid at 36-37.

¹⁰⁶ Ibid at 37.

¹⁰⁷ Ibid at 44.

judicial sentencing guidelines and the use of sentencing grids¹⁰⁸ There have been calls for sentences to be mandatory for OHS crime¹⁰⁹, but Zdenkowski shows that ‘... although there is considerable doubt as to the efficacy of the mandatory sentencing regime, there is no unequivocal evidence either way to date, but there is significant evidence elsewhere that mandatory penalties do not have the hoped for effect of crime reduction’¹¹⁰

Range of sentencing options

Judges in Mackenzie’s study believed that imprisonment was neither a satisfactory option in many instances, nor an effective deterrent. For example, they believed that the offence of dangerous driving did not warranted a prison sentence, but felt that public pressure demanded it. In NSW, there is no apparent community or media pressure to have repeat OHS offenders imprisoned, and it is doubtful if the public are even aware of the provision.

Judges reported that they found sentencing a difficult task. They also believed that some members of the public, radio hosts and politicians tended to be critical of perceived lenient sentencing, and that the deterrent effect of sentencing was reduced if people believed that judges were more lenient in sentencing than they actually were. This view is in contrast to that of employers, who, as seen in Chapter 3, believed that frequency of prosecution was more likely to be effective than severity of penalties.

A Chief Justice commented that ‘[T]he media would enhance the deterrent effect if they reported it more fully or more accurately’.¹¹¹ The Chief Justice of the NSW Supreme Court said that judges make inevitable errors due to the complexity of sentencing, which has occurred due to ‘...past law and order election campaigns. There are unnecessary complexities in it. The Court of Criminal Appeal...frequently just has to allow appeals because some technical relationship in some structured

¹⁰⁸ Zdenkowski, G. ‘Sentencing Trends: Past, Present and Prospective’ in Chappell D and Wilson (eds) *Crime and the Criminal Justice System in Australia: 2000 and beyond*, (Butterworths, 2000) at 175-180.

¹⁰⁹ See CFMEU submission to harmonisation review CFMEU C and G Division, *Submission to the National Review into Model Occupational Health and Safety Laws*. CFMEU National Office Sydney, July25. (2008)

¹¹⁰ Above, note at 175.

¹¹¹ Geesche, Jacobsen et al *Putting the truth into sentencing* Sydney Morning Herald 20/10/2010 at 9

sentencing exercise was overlooked.’¹¹² A retired Supreme Court judge said that the sentencing rules were not the problem, but rather the drafting of the legislation, and the inexperience of some judges in applying it.

In NSW, Supreme Court sentences tend to be the highest and sentencing options are quite straightforward. District Court sentencing provides more options to the judge, for example, a prison term might be replaced with some other option. Judges rely on guideline judgements, test cases and appeal outcomes, as well as the sentencing legislation to determine their sentences. There are inconsistencies in discounting for guilty pleas, where judges might give large discounts for pleas lodged at the beginning of a trial, whereas to take advantage of mitigatory circumstances, guilty plea should have been lodged at a much earlier stage.¹¹³ The judgement analysis here shows that, on occasion, judges discounted for guilty pleas even where the plea was lodged later in the proceedings.

This discussion has attempted, in part, to explore some of the social, political and cultural undercurrents in which the judiciary arrive at sentencing decisions. The legislative, policy and judicial rule requirements are part of this environment. That is, judges are bound by both social rules (sentencing legislation, guideline) and social norms (community expectations, professional expectations, customs, attitudes and beliefs). Judges may be overworked and feel pressured by political campaigns and opportunisms, and criticism. Judges were seen to be influenced in their sentencing styles by case law established in the appeals process. Though theoretically able to take advantage of wide sentencing options, they tended to a conservative approach, staying within the boundaries of established penalty ranges. Except in rare cases, the judges in the NSW IC did not avail themselves of penalty options other than monetary ones, thus more creative and possibly more effective means of deterrence were not explored.

There is a tension here between structure and agency, that is, the tension that exists between the judiciary as discretionary social actors and the institutional structures that are imposed on them. The relative constancy in the low penalties given to OHS offenders suggests that, despite the talk of discretion, judges (intentionally perhaps) take a conservative view because of the requirements of sentencing and the concern

¹¹² Ibid

¹¹³ Above, note 111.

about having their decisions appealed. The case where penalties are increased through legislative changes, but with no ‘real’ effect seems to illustrate this internal regulation by the judiciary; that is, the importance of judicial norms in reinforcing certain judicial behaviours.

Overall, there are no surprises in observing the conservatism of the judiciary, as the law is essentially a conservative institution. It is claimed that society has two fears about judicial decision-making. On the one hand, if judges acted completely independently they would threaten democracy because it is the parliament’s right to make legislation, and on the other, the rule of law demands predictability.¹¹⁴ These precepts in themselves contribute to a conventional stance. Furthermore, the ambiguity of OHS crime and its situation in the administrative arm of government (WorkCover NSW) may also contribute to the continuation of conservative and unrealistic sentencing in OHS matters.¹¹⁵

The following chapter examines extracts from the judgement focusing particularly on how events are decontextualised. It is contended that this focus on the events surrounding fatal incidents serves to depoliticise the contributing circumstances because it fails to capture complex interactions leading to the incident. What is interesting is to see if this conservatism, interacting with other social institutions, produces punishments for industrial deaths that are both ineffective as deterrents and unjust to victims and families. This discussion follows on from that presented here because it looks at how judges have articulated and rationalised their decisions, that is, how they justified their judicial discretion and how they were influenced by social rules, in the form of judicial guidelines.

¹¹⁴Ingleby R and Johnstone R, ‘Judicial decision making’ in Hunter R, Ingleby R, Johnstone R eds. *Thinking About Law: Perspectives on the History, Philosophy and Sociology of Law*, (Allen and Unwin, 1995) at 162.

¹¹⁵ See Steve Tombs and David Whyte. *A Crisis of Enforcement: the decriminalisation of death and injury at work*. Briefing 6, Centre for Crime and Justice Studies (Kings College, London, June 2008).

CHAPTER FIVE

Decisions of the New South Wales Industrial Court 1988 to 2008

Legal decisions do not inscribe a class bias in the law; rather, those legacies are the coagulations from the centuries of conflict. Because class struggle keeps one class dominant, not omnipotent, the relative autonomy of the law is understood best as an unstable consequence of the relative strengths of contending classes...OHS laws resulted from the growing power of labour. In extracting internal coherence, the courts crafted a rationality of their own, which... is not always logical.¹

In coming to a decision on punishment for cases where a workplace fatality has occurred, judges are confronted either consciously or unconsciously with a complex array of facts, opinions, case law, judicial rules and peer expectations, state legislation and regulatory policies. These elements contribute to the construction of formulaic judgments, which ‘silence’ the economic, social and political relations of production that play a large part in influencing workplace health and safety outcomes, policies and practices. Chapter One presented a model to demonstrate the dialectical relationship between the state and civil society. In this chapter and the next, the emphasis is on the judiciary (Industrial Court) and the regulatory body (WorkCover NSW). The question then, is do the formal requirements of NSW state legislation² and regulatory requirements,³ together with informal judicial mores or modes of sentencing, and influenced by the de-contextualised or ‘pulverised’ version of events presented in court, result in decisions that are ineffective in addressing and redressing the structural causes of workplace fatalities?

If it is beneficial to hide the circumstances surrounding an event, then it ‘becomes important for the representatives of the activity to pulverize the relationships which people begin to see.’⁴ An effective method of pulverizing revealing relationships is to

¹ McQueen H, *Framework of Flesh: Builders’ Labourers Battle for Health and Safety*, (Port Adelaide; Ginninderra Press, 2009) at 263.

² NSW Crimes (Sentencing Procedure) Act 1999, S3A, Part 3A

³ WorkCover Authority New South Wales Compliance Policy and Prosecution Guidelines.

⁴ Johnstone R. *Occupational Health and Safety, Courts and Crime*, (Sydney: The Federation Press, 2003) at 11-12.

isolate the event which was the point of departure from the rest of the activity of which the event is part ‘...so that the sentencing process plays a similar role in OHS prosecutions.’⁵ This series of rhetorical and process driven mechanisms or devices together help to de contextualise behaviour, which as Chapter One explains, Thomas Mathiesen (2004) calls pulverisation. While the notion that these are intentional devices is a contentious one, the elements identified by Mathiesen are useful in analysing judgements.

‘Pulverisation’ is a useful set of categories that assists in deconstructing the sentencing process in courts. It uncovers the contradiction inherent in state regulation of OHS, that is, the necessity to reproduce and protect the workforce versus the necessity to produce commodities. These contradictions are a manifestation of the dominant ideology and pulverisation is a way to interpret complex social behaviour.

This Chapter considers the institutional processes that decontextualise decisions through the process of ‘splintering’ the events that occurred at the workplace, thus isolating the events from their context and obscuring the true nature of labour relationships and overall risks to health and safety.⁶ This chapter makes use of the elements proposed by Mathiesen (later adapted by Johnstone⁷) to explore one aspect of the prosecution process as revealed in the judges’ summation of the cases.⁸ Chapter Six extends this examination by considering the penalties in the light of the formal requirements of the state and informal socio/cultural influences on the judiciary.

The discussion that follows shows how the prosecution, defence and judges themselves use the different pulverising techniques, wittingly or unwittingly. That is, the actual process of presenting evidence, considering evidence and sentencing is embedded in the structures imposed by other forces, a combination of legislation, judicial policy and rules and regulatory strictures. In turn, these have been produced

⁵ Ibid.

⁶Ibid at 209.

⁷ Ibid.

⁸After the texts of the judgements were coded using NVivo, relevant sections were examined and this Chapter draws out illustrative examples. The prosecution process is defined here as the summation of the arguments of the defence and the prosecution, leading to the court’s decisions or judgements. Pulverisation occurs throughout the prosecution process, which affects the judgement and penalty. Although these processes are procedurally separate, that is the hearing and normally, at a later date, the judgement, the decontextualisation of the evidence has a direct bearing on the outcomes.

through complex interactions between the elements of the model seen in Chapter One. Table 5.1 below sets out the different pulverising techniques used in case prosecution and the number of cases in which each technique was used. It should be noted that most cases combine different elements of the pulverisation typology and the table picks up on multiple strands which might run through the same case.

Table 5.1. Pulverising techniques and number of cases in which they were applied

Pulverising technique	Number of cases
Anthropomorphising the defendant	8
Blaming the worker	12
Blaming others	22
Good corporate citizenship	17
Individualising the event	14
Isolating in the present	7
Isolating present from the future	5
Normalising the event	7
Relegating the event to the past	21

Elements of pulverisation

Temporal isolation: the past, the present and the future

When attempting to understand the totality of circumstances leading to a particular occurrence, it is necessary to understand the past and present history surrounding it and to speculate about the possible future consequences. Conversely, isolating and separating events from the past effectively prevents the development of a thorough understanding of causes.⁹ There is some overlap in the cases between these temporal elements, especially in relation to post incident rectifications.

Relegating the event to the past

An event can be isolated from its context ‘...by relegating it to a more or less outdated past.’¹⁰ While this technique is similar to that of isolating the event in the present, in which the defendant’s positive response in rectifying matters post the incident is emphasised, it places greater weight on showing how the past was of little concern or consequence to the defendant’s ‘...current or likely future behaviour, and

⁹ Mathiesen T, *Silently Silenced: Essays on the Creation of Acquiescence in Modern Society* (Winchester: Waterside Press, 2004).

¹⁰ *Ibid* 42.

untransferable to other parts of the work process'.¹¹ Judges in the NSW IC considered what available measures there were prior to the incident occurring as an indication of the foreseeability of the incident, but also took into account improvements made post the offence, which might operate in mitigation of the penalty. Improvements most typically involved recruitment of safety personnel or engagement of safety management systems experts or auditors¹², improvements that, in case 41 concerning the deaths of two men through a wall collapse, led the judge to remark

I believe the Company now has in place the necessary expert personnel, safety systems, procedures (and implementation) and on-going monitoring to ensure *that there is never a repeat of the safety failures that lead to the tragic deaths of [D]and [M] in December 1997.*¹³ (emphasis added)

Isolating the present from the outdated past was a method used in 21 prosecutions by the defence in the NSW IC, which sometimes appeared to sway a judge toward the defendant's case. For example, in the Case 40¹⁴, concerning the death of an electrician, one company '... adopted a new procedure for an electrician to attend a property first to isolate and knock out the power...[it] also purchased testing wands for testing whether electrical wiring contains live power'. Another company involved in the same incident '...held a toolbox meeting after the incident and informed its sub-contractors to make sure all bare wires are made safe by an electrician immediately and not to presume that power to sites has been switched off.' The judge commented 'I am ... satisfied that both defendants have taken steps to address the risk that arose at this site in order to ensure that it would not again occur at their workplace.'

Further examples are seen in Case 2¹⁵ where the company director re-trained himself to meet modern safety requirements and standards. In Case 5¹⁶ the decision contained a lengthy documentation of the defendant's efforts after the incident, to demonstrate the improvements to its system including the introduction of comprehensive safety management systems that encompassed managerial responsibilities, increased

¹¹ Johnstone above, note 4 at 233.

¹² See for example Case 41. Inspector Sharpin v Bovis McLachlan Pty Ltd [2002] NSWIRComm210

¹³ Case 75. WorkCover Authority of New South Wales (Inspector Carmody) v Consolidated Constructions Pty Ltd [2001] NSWIRComm263 at 38.

¹⁴ Case 40. Inspector Robert Mayell v William McLean and ors [2006] NSWIRComm93 at 66,67.

¹⁵ Case 2. Inspector Robert Mayell v D J Gleeson Pty Ltd [2006] NSWIRComm217 at 25

¹⁶ Case 5. WorkCover Authority of New South Wales) v State of New South Wales (Department of Services, Technology and Administration [2009] NSWIRComm202 at 21-33.

regional supervisory personnel, enhanced training, improved information and communications, and ‘upskilling’ of contractors. The judge’s view was that

...having regard to the length of time it has been directly involved in the construction industry, the Department's record is to be considered a good record notwithstanding the seriousness of this breach. It had significant safety systems in operation prior to this accident *but almost inexplicably*, they were not enforced in relation to this project. The Department then undertook a thorough review of this type of work and generally its safety systems and made a large number of alterations to those systems, both in direct recognition of avoiding a recurrence of this type of accident as well as making better provision in the future for safety. *There is, however, merit in the prosecutor's submissions that the revised contractual provisions may not necessarily be as effective as the Department believes and there is good reason, in light of these comments, for those matters to be revisited to ensure their effectiveness.*¹⁷ (emphasis added)

This demonstrates several isolation factors. The judge exonerated the defendant by alluding to behaviour that is so out of character as to be ‘inexplicable’. Despite the ‘seriousness’ of the breach, the defendant had a ‘good record’, implying that the incident is out of character, and is an individual, ‘one off’ occurrence. However, the judge was not entirely convinced by the defence’s argument, and agreed with the prosecution that the improvements undertaken may need reviewing, but by who is not made explicit.

Other cases employed the tactic of relegating unsafe practices to the outmoded past, referring to descriptions of new methods to be employed ‘from now on’,¹⁸ or the fact that the offending company had now appointed a new safety manager and had learned lessons from the fatal incident.¹⁹ The offending company in Case 12²⁰ ‘fast tracked’ the installation of reversing cameras on its vehicles, and encouraged its sub-contractors to do the same, and here the prosecution reinforced the defence’s submission about its redress of prior ‘shortcomings’. The judge conceded that ‘the extensive measures put in place by both defendants after the incident indicate that there is less likelihood of either defendant re-offending under occupational health and safety legislation’, and safety measures implemented post incident ‘will be taken into account in their favour in mitigation of penalty.’²¹ All defendants in the sample cases submitted details about improvements to their systems in some form or

¹⁷ Ibid at 21-34.

¹⁸ Case 6. Inspector McColl v Waterway Constructions Pty Limited [2003] NSWIRComm441.

¹⁹ Case 9. Inspector Richard Mulder v Baseline Constructions Pty Ltd. Prosecution under s 8(2) of the Occupational Health and Safety Act 2000 [2008] NSWIRComm136.

²⁰ Case 12. Inspector Robert Mayell v Bilfinger Berger Services - Roads Pty Limited (formerly known as Abi Road Maintenance Pty Limited) and Another [2009] NSWIRComm10 at 20.

²¹ Ibid at 23.

another, some being very extensive and others quite limited, for example, the purchasing of small items of safety equipment, and implementation of information sessions.²²

In Case 9²³, the company employed an OHS manager six weeks after the accident, who conducted extensive reviews, made improvements to the risk management system and brought in external experts to assist. This medium size company had been brought up to ‘a ‘tier one standard’, that is, a standard expected of a major construction company’.²⁴ In another prosecution²⁵ concerned with the same fatality, the company employed a full-time engineer to ensure that design plans were in accordance with the applicable standards, and provided re-training for senior personnel and sub-contractors. In Case 12, the Court found that another company’s ‘post-incident safety measures...attest to its acceptance of responsibility for its actions as well as its acknowledgement of the fatal injury caused to Mr [C]’.²⁶

In Case 2,²⁷ the defence was successful in convincing the judge that

the defendant has not manifested, by its commission of this offence, a continuing attitude of disobedience to the law or a likelihood that any offence of like kind will be committed in the future. The defendant is a first offender who has now in place proper safety practice and procedures which ensure there should be no risk of re-occurrence.

Here, the focus, and indeed, the faith of the Court was on the immediate events, the rectifications undertaken by the defendant, and the strategy of concentrating attention on the positive and pro-active present, succeeded in de-contextualising the incident, relegating the events surrounding it to the past. Generally, in most cases the safety measures undertaken by the defendants were directed at universal systems, but a few were limited to specifics of machine/plant operation,²⁸ and where judges relied on these measures in mitigation, their attitudes were reflective of magistrates in

²² See for example Case 40. Inspector Robert Mayell v William McLean and ors [2006] NSWIRComm93; WorkCover Authority (Insp. Clark) v Raymond Jabboury (No.2) [2002] NSWIRComm70

²³ Case 9. Inspector Richard Mulder v Baseline Constructions Pty Ltd. [2008] NSWIRComm136 at 15,16.

²⁴ Ibid at 16.

²⁵ Case 9. Ins Richard Mulder v Girotto Precast Pty Ltd. Ins Richard Mulder v Giuseppe Girotto at 49.

²⁶ Case 12. WorkCover Authority of NSW -V- Cidan Pty Ltd [1994] NSWIRComm189;[1994] NSWIRC 58 at 32.

²⁷ Case 2. Inspector Robert Mayell v D J Gleeson Pty Ltd [2006] NSWIRComm217 at 35.

²⁸ Case 8. Inspector Stephen Cooper v Rail Infrastructure Corporation [2008] NSWIRComm92 at 55.

Johnson's study,²⁹ where the focus was on technical issues, rather than overarching management systems. Judges' beliefs that risks were minimised or negated given improved safety systems is likely unfounded, given the continued recurrence of fatalities from common identified causes, such as falls from height, for example.

Judges are obliged to consider any mitigating circumstances and the defence is right in introducing them. However, many of these improvements to safety systems were those that should have been in place prior to the incident if the defendant had complied with basic risk identification procedures as specified in the OHS legislation. The following extract shows that at least the prosecutor in Case 43 had raised the point in the Court

A number of steps had been taken by the defendant after the accident to improve workplace safety. There had been a review of all occupational health and safety procedures at all of the defendant's sites...[The] prosecutor accepted that the defendant was entitled to some credit for these efforts but that the steps themselves revealed that they were capable of being taken before the accident had a more pro-active approach been adopted by the defendant.³⁰

This was not an issue that was further pursued by the judge nor mentioned in the concluding sentencing remarks, and while judges often made much of the 'seriousness' of fatal incidents, the issue of foreseeability was not particularly highlighted, (despite the fact that foreseeability was an important aspect of sentence decision making. In this case, the judge's conclusion shows that by relegating events to the outmoded past, the offender's actions are excusable, despite the 'seriousness' of the offence

I am satisfied that, on a consideration of all of the evidence, this is a serious breach of the Act committed by the defendant. As the Court has noted before, it is not infrequent that otherwise diligent employers with quite specific systems of safety nevertheless overlook simple and straightforward methods to ensure the safety of workers.³¹

After applying discounts of 35 percent, the medium size company was fined \$78,000 of a maximum penalty of \$550,000 in the traumatic fatal injury of one worker.³²

²⁹ Johnson above note 11.

³⁰ Case 43 McGrath. Inspector Peter Newman v Mainland Civil Pty Ltd [2003] NSWIRComm 288 at 24.

³¹ Above, note 27, at 34.

³² Ibid at 37.

Isolating in the present

This technique was employed in seven prosecutions, is closely related to the previous one, and consists of ‘...maximum emphasis [being] placed on the human or humanitarian aspects of the case in the present.’³³ This method has common characteristics with that of anthropomorphising the offending company by emphasising the good character of the defending person. In placing mitigating factors before the court, the emphasis by the defence is on the redeeming actions of the defendant in relation to the incident. That is, it emphasises the rectifications the defendant has undertaken, the assistance offered to the victim’s family, the absence of prior convictions and can be closely linked to that of the good corporate citizen plea, wherein the defendant’s excellence is emphasised. Attention is focused on the defendant’s reputation and good attitude, and is largely predicated on form rather than substance.³⁴

In Case 5³⁵ wide-ranging defence submissions were made about the extensive OHS improvements undertaken by the defendant, a large government department. In Case 6³⁶ numerous affidavit submissions described in minute detail the company’s financial arrangements, its corporate history and activities, including its buy out of a former government owned enterprise; in which it invited employees to buy shares. It described its large client base and its subsequent expansion into an enterprise with a 22.5 million dollar annual turnover and a staff of 55. The strategy was to impress the Court with the company’s corporate responsibility and success. With mitigation for pleading guilty, it was fined \$71,500 from a maximum of \$550,000, arguably a small penalty for such a successful enterprise. In this case, the defence had broadly hinted that the deceased worker’s actions might have contributed to his death. In Case 17³⁷ the defendant ‘rehabilitated’ his work methods and practices. He was now ‘extremely careful’ about issuing instructions, and ‘is aware that he should immediately voice his concerns over any suggested activity that may give rise to occupational health

³³ Mathiesen above, note 9, at43.

³⁴ Johnstone above, note 29, at 210.

³⁵ Case 5. Inspector Childs (WorkCover Authority of New South Wales) v State of New South Wales (Department of Services, Technology and Administration [2009] NSWIRComm202 at 29.

³⁶ Case 6.: Inspector McColl v Waterway Constructions Pty Limited [2003] NSWIRComm44

³⁷ Case 17. WorkCover Authority (Insp. Clark) v Raymond Jabboury (No.2) [2002] NSWIRComm70 at 12.

and safety risks.’ He has also ‘acknowledged the need’ to undertake risk assessments for all tasks.

In Case 18, a teenaged worker on his third day at work was killed after falling through faulty roof safety mesh. He had received no induction, training or safety equipment.³⁸ The company concerned reviewed and rectified its safe working practices, enrolled personnel in OHS courses, and assisted other companies in complying with rules regarding safety mesh installation. The Court was not convinced by this defence submission and commented

On the evidence, it is apparent the implementation of such steps prior to the accident would have avoided the tragic consequences that arose when [J.E] lost his balance and fell from the metal purlin.³⁹

Another defendant⁴⁰ in the same case was a large construction company that had contracted the company mentioned above. After the incident, it ‘extensively reviewed its safety management systems and policies especially in relation to working on roofs.’ It dismissed the subcontractor directly involved in the incident. It engaged consulting engineers to inspect the safety mesh on site, and advised that senior personnel would henceforth inspect and supervise the installation of safety mesh. It had implemented a new management system including a policy on the appointment and monitoring of contractors, including policies dealing with young people and apprentices on site, requiring strict supervision of these employees and suitable training. In this case, the judge observed that

It is relevant to the objective seriousness of an offence to consider if there were readily and easily available remediation steps which could have been undertaken by the defendant before the accident to prevent injury occurring.⁴¹

And further remarked

The steps taken by the defendant to review all aspects of its occupational health and safety system ... following Mr [E] death is (sic) commendable. *In many respects, they were steps able to be implemented prior to [his] fatal fall.* As is so often the case, Mr [E] death highlights the critical importance of workplace

³⁸ Case 18. WorkCover Authority of New South Wales (Inspector Dubois) v James Nicholas Denson, JB Metal Roofing Pty Limited and Garry James Denson [2007] NSWIRComm119 at 69,70,71.

³⁹ Ibid at 72.

⁴⁰ WorkCover Authority of New South Wales (Inspector Dubois) v Australand Holdings Limited [2007] NSWIRComm156 at 50,51,52

⁴¹ Ibid at 47.

safety and the need for employers to be constantly vigilant in ensuring safety standards are consistently reviewed and enforced.⁴² (emphasis added).

Here, the judge acknowledged that present remediation should not be obscured by the fact that there were ‘readily and easily available ‘steps which could have prevented the fall. However, this and the fact that he considered that the offence to be ‘objectively serious’ and that penalty would be assessed on that basis, did not significantly alter the final penalty outcome of \$178,500 of a maximum of \$550,000⁴³.

The de-contextualising of events is a powerful force in pulverising sentences, as seen in Case 25⁴⁴ in which a trainee rigger was killed while operating a boom lift on a construction site. Three companies were prosecuted, one being the direct employer of the rigger which had been contracted by another firm, who had, in turn, been contracted by a third entity. The judge found that all three parties were culpable, commenting that companies cannot sub contract out their responsibilities. The penalty incurred by the director of the employing company was \$18,000 (from a maximum of \$50,000) and his company then went into administration. The other two companies were fined \$180,000 each, from a maximum of \$550,000. All received a 25 per cent discount for early pleas of guilty.

In relation to mitigating circumstances, the judge took into account the measures Company A had developed and implemented following the commission of the offence. These included conducting annual external audits; hiring OHS personnel; development of an OHS management system; random checks and visits to its sites; weekly tool box meetings; preparation of job safety analyses, plant inspections and licence checks; monthly OHS Committee meetings; OHS consultation training for senior managers; enforcement and updating of its policies and procedures.⁴⁵ The judge also listed the many improvements made by one of the other companies since the incident that were similar to those for Company A, which ‘...operates in mitigation of penalty’.⁴⁶

⁴² Ibid at 55.

⁴³ As at 31 December 2011, Australand had a market capitalisation of approximately \$1.38 billion [http://www.australand.com.au/About-Australand/Company-Information/Company-Information\(13/1/2012\)](http://www.australand.com.au/About-Australand/Company-Information/Company-Information(13/1/2012))

⁴⁴ Case 25. Inspector Melissa Chaston v Sacco Builders Pty Ltd and Others [2008] NSWIRComm152.

⁴⁵ Ibid at 56.

⁴⁶ Ibid at 58.

The cataloguing of these ‘improvements’ in fact demonstrated the lack of a safety management system on the part of the company, as well as how poor the company’s OHS performance was at the time of the fatality; as all the upgrades detailed to the court should be part of the required safety operating policies and practices of a building and construction enterprise. This view was put by the state secretary of the C and G Division of the CFMEU, in a letter to Unions NSW, the state’s peak union body, requesting advice from WorkCover NSW on conducting an appeal against the low penalty imposed. The letter stated that despite the Court finding that the rigger had been poorly trained, that there had been no safe work risk assessment undertaken and that the Court believed that a serious breach had occurred, the objective seriousness of the incident was mitigated by reference to the safety systems that the defence claimed the companies had in place at the time of the hearing. The CFMEU concluded that ‘[G]iven the findings made about the manifest failure to provide a safe system of work and the consequences of the failure, such a conclusion is difficult to understand’.⁴⁷ WorkCover NSW did not allow an appeal, but ironically, in the circumstances, the defendants appealed on several grounds, including whether the judge imposed sentences which were ‘manifestly excessive’.⁴⁸

Isolating present from the future

When the future consequences of an event are not considered, the technique of isolating the incident in its immediate present is achieved, and the consequences are put off ‘for a more or less indefinite future’.⁴⁹ This was a strategy used by the defence in five instances. For Johnstone, the rules and guidelines of sentencing in Victorian courts meant that past and present factors were the focus of examination and the ‘logical future consequences not challenged’.⁵⁰ However, in NSW, the requirement to consider general and specific deterrence is an opportunity for the Court to be quite definite about its expectations of the defendant’s future behaviour. The following case⁵¹ shows how the defence submission clearly isolated the incident from the future by focusing on the immediate event without consideration of future

⁴⁷ Letter from Andrew Ferguson, Secretary, NSW Branch Construction and General Division CFMEU 21/8/2008, in author’s possession.

⁴⁸ *Sacco Builders Pty Ltd v Inspector Chaston* [2009] NSWIRComm153 at 3.

⁴⁹ *Johnstone* above note 34 at 229.

⁵⁰ *Ibid.*

⁵¹ Case 11. *WorkCover Authority of NSW (Inspector Hopkins) v Profab Industries Pty Ltd* [1999] NSWIRComm289

consequences. The prosecution also contributed to isolating the event by focusing on one causal aspect.

(T)his was not a series of little risks adding up to a big risk. We would ... ask your Honour to note the significance of bringing to the court a charge of maintenance [safe system of work] only. In this case, we submit that was a very appropriate course for the prosecution to adopt. It involved the prosecutor making no concession beyond that it was clearly established in the investigation and that is, there was a system... the prosecutor [is] properly determining it was just a maintenance matter. In the scheme of matters coming to this court that puts it in a small category. Where charges under s15 are brought in this court the most usual in terms of system is a combination, a failure to provide or maintain, *not just a failure to maintain [a safe system of work] and in that sense it puts this case in a particular category which is right down in the lowest end of seriousness, the lowest end of categories of cases your Honour would see.* at 47. (emphasis added)

The judge found the offence proven, but in a rare instance in fatality cases, discharged the defendant without conviction under s556A of the *Crimes Act* 1900, with the prosecutor's costs to be paid by the company. Later, WorkCover NSW lodged a successful appeal against this decision and the defendant was fined the sum of \$50,000.⁵²

The faith of the Court in the future good conduct of the offender is demonstrated in Case 12⁵³ involving the death of a worker run down by a reversing truck. One of the two defendants, both large companies, subsequently fitted its vehicles and plant with reversing cameras, and 'encouraged' its subcontractors to do the same, although there was an acknowledgment that this particular procedure was already known to be 'a potential risk' or a 'potential hazard'.⁵⁴ The prosecution conceded in relation to both defendants in this case that 'extensive steps to address shortcomings in its occupational health and safety systems' had been taken'.⁵⁵ The judge commented

the Court considers that the extensive measures put in place by both defendants after the incident indicate that there is less likelihood of either defendant re-offending under occupational health and safety legislation.⁵⁶

While there is an element of future considerations about health and safety in these comments the focus on the minutiae highlights the way in which events are

⁵² WorkCover Authority of New South Wales (Inspector Hopkins) v Profab Industries Pty Ltd [2000] NSWIRComm

⁵³ Case 12. Inspector Robert Mayell v Bilfinger Berger Services - Roads Pty Limited (formerly known as Abi Road Maintenance Pty Limited) and Another [2009] NSWIRComm10

⁵⁴ Ibid at 21.

⁵⁵ Ibid at 20.

⁵⁶ Ibid.

decontextualised and the court is presented with ‘a fragmented, sanitised and simplified present’.⁵⁷

Anthropomorphising the defendant

Another way to de-contextualise events in prosecutions for construction fatalities is to graft the qualities of the individual onto the company, such that it appears as a worthy entity, one deserving of the Court’s compassion. There are also overlaps with the ‘good corporate citizen defence’ in these submissions, and together these strategies were used in 25 cases. In one instance⁵⁸ the defendant was depicted as exemplifying the successful small businessman, building up the company over many years from age 20, after starting his apprenticeship at 15, and was a person with a ‘fine industrial history’.⁵⁹ The judge considered his financial situation, which she accepted as being under strain, but that he was ‘not a person of no means.’⁶⁰ With these elements as mitigating factors, along with his age and good citizenship, she fined him \$30,000 of a maximum of \$550,000. WorkCover NSW successfully appealed this low penalty, which was then increased to \$70,000.⁶¹

In Case 5, the defending government department expressed its ‘sincere sympathy’ to relatives of its two deceased workers, wrote letters of condolence to the families of the injured and erected a memorial on the site of the fatality; they later met with families during the Coronial Inquest. It was left to the C and G Division of the CFMEU to suggest that the defendant pay outstanding wages and accrued entitlements totalling more than \$40,000 to families of the deceased and to the injured, which was duly done.⁶² A further, extreme, example of anthropomorphising is seen in Case 9⁶³, where the defence called witnesses to establish the contrition of the defendant and his close personal friendship with the deceased. The company was a ‘good corporate and industrial citizen with a clear record that had not only complied with safety standards in the industry, but had been involved in improving

⁵⁷ Johnstone above note at 229.

⁵⁸ Case 2. Inspector Robert Mayell v D J Gleeson Pty Ltd [2006] NSWIRComm.

⁵⁹ Ibid at 30.

⁶⁰ Ibid at 29.

⁶¹ Case 2. Bates WorkCover Authority of New South Wales (Inspector Robert Mayell) v D J Gleeson Pty Ltd.

⁶² Case 5. Inspector Childs (WorkCover Authority of New South Wales) v State of New South Wales (Department of Services, Technology and Administration) [2009] NSWIRComm202 at 33.

⁶³ Case 9. Inspector Richard Mulder v Baseline Constructions Pty Ltd. [2008] NSWIRComm136 at 7,9,10

safety standards in this industry'. The company had learned from the incident and was overhauling its safety procedures. The sole director of the company had a brother who was in a senior management position. The director had a degree in civil engineering and was a member of a number of professional bodies in which he was active. He and his staff had been 'heavily involved in promoting the need for and then drafting' a national Code of Practice, for which he had been 'specifically acknowledged'. His company was involved with an international federation, he had arranged for experts to speak to staff and other invitees, at his company's expense.' The company employed 70 persons, all of whom were known to the director, who encouraged them in further skill development. He 'worked closely with the WorkCover NSW and with the industry union, and had good working relationships with those bodies'.

In Case 40⁶⁴, the defendant pointed out that his son was friendly with the deceased, that he himself was upset by the death and that his company '...always tried to have good personal relationships with the company's contractors'. His company organised counselling for employees and attended the deceased's funeral. References attested to his good character, the close working relationships he had with employees, his company's charitable work and acts of kindness. The defence in Case 2⁶⁵ also employed the tactic of emphasising the good qualities of the firm, pointing out its longstanding service in the construction industry, providing employment for over 50 years. He had been active in community affairs and the company sponsored a football team, an expense that was not tax deductible, and therefore of no financial benefit to himself.

In Case 11⁶⁶ previously discussed where the emphasis was on isolating the circumstances of the fatality from the future, the judge felt the determination of penalty was difficult, given that

The defendant's history of no prior convictions, its generally meticulous approach to safety, for a reasonably small employer in a relatively dangerous industry, its co-operation with authorities, its care and concern for employees who were emotionally affected by the accident, its grant of time off for those employees together with counselling, all militate in the defendant's favour. The defendant's performance has in general been an exemplar of the sort of the

⁶⁴ Case 40. Inspector Robert Mayell v William McLean and ors [2006] NSWIRComm93 at 28,57.

⁶⁵ Case 2. Inspector Robert Mayell v D J Gleeson Pty Ltd [2006] NSWIRComm217 at 23, 24.

⁶⁶ Case 11. WorkCover Authority of NSW (Inspector Hopkins v Profab Industries Pty Ltd [1999] NSWIRComm289.

approach that employers, particularly in the building industry, should take to employee safety.⁶⁷

The defence in Case 9⁶⁸, attributed many human qualities to the firm. It had provided ‘a great deal of support’ to the deceased’s wife and family; it contributed to wakes and paid all funeral costs. The director supported a number of charities; the company had donated monies to an ANZAC memorial; the director was described as an ‘extraordinary manager of people,’ a ‘rare leader’ and was ‘admired by all with whom he came in contact.’ His company factories were described as being showpieces of order, pride and ‘workplace conviviality.’⁶⁹

The company had a prior record, but considering its length of time in the industry ‘where the risks of injury are an everyday reality’ the size of its workforce including ‘considerable number of sub-contractors’ meant, to the Court, that the corporate defendant had ‘a good industrial record.’ The judge commented ‘[T]he company had significant safety processes and systems ...but regrettably, in this instance, those systems were not adequately enforced to ensure the safety of workers.’ Nonetheless, ‘[T]he good industrial citizenship of the corporate defendant is further demonstrated by [the defendant’s] evidence about its support for a number of charities. All of these matters will be taken into account in mitigation of the penalty.’⁷⁰ The company was fined \$215,000 of a maximum of \$825,000 because of a prior offence, and the defendant director was discharged and placed on a two-year good behaviour bond and ordered to pay the prosecutor’s costs.⁷¹ The pulverising technique of normalising events was also used in this case as it was put to the Court that ‘the risks of injury are an everyday reality’ and reference made in the prosecution of the second defendant to the inherent dangers of the industry.⁷²

Shifting blame

The attribution of responsibility to another party is the hall mark of blame shifting, and is based on ‘individualistic notions of causation’, which stem from the way in

⁶⁷ WorkCover Authority of NSW (Inspector Hopkins v Profab Industries Pty Ltd [1999] NSWIRComm289 no para.numbers supplied.

⁶⁸ Case 9. Inspector Richard Mulder V Giroto Precast Pty Ltd [2008] NSWIRComm94; Inspector Richard Mulder v Giuseppe Giroto [2008] NSWIRComm94

⁶⁹ Ibid at 50.

⁷⁰ Ibid at 53

⁷¹ Ibid at 73.

⁷² Case 9.Inspector Richard Mulder v Baseline Constructions Pty Ltd. [2008] NSWIRComm 136

which prosecutions focus on the ‘minute details’⁷³ of the event and away from the broader structural causes of injury and fatality. This technique was used in 13 prosecutions, however, in the NSW IC, this defence is not always as successful as the following cases demonstrate. Case 5⁷⁴ shows how the defence attempted to distract the Court’s attention from the culpability of the defendant by attempting to shift blame onto others. Thus the defendant alleged the sub-contractor had more control over the day to day operations of its work than it had, and claimed that it had no responsibility for the ‘creation, provision or maintenance of the system of work including the labour, training and provision of equipment’ and was ‘unaware of inappropriate modifications made to the scaffolding by BGA and had no involvement in that process’.⁷⁵ Nevertheless, the Court was not persuaded by the argument and said

it is difficult to understand why the Department's project manager did not take some steps to address the state of the scaffolding which seemed to breach the most elementary requirements for stability and safety. As to foreseeability, the project manager appears not to have demanded evidence of the certification of the structural soundness of the scaffolding as required under the guidelines. That failure, together with the obvious inadequacies of the scaffold on site, should have raised concerns at an early stage and the failure to respond to those concerns indicates the foreseeability of the risk of failure of the scaffolding and the serious injury that might follow from such an event.⁷⁶

Another example arose in the prosecution of Case 70⁷⁷, which concerned the collapse of a brick wall, causing fatal injuries to two labourers on site. The defence attempted to minimise the culpability of the defendant by attributing the wall collapse to the failure of others at the work site.⁷⁸ The judge disagreed, observing that

Notwithstanding the contributing factors set out above, the Company, as Principal Contractor, had overall responsibility for the safety of the Site. It did not, as it should have, identify the hazard posed by the free-standing wall and take immediate steps to neutralise that hazard.⁷⁹

⁷³ Johnstone above note 57 at 211.

⁷⁴ Case 5 Inspector Childs (WorkCover Authority of New South Wales) v State of New South Wales (Department of Services, Technology and Administration [2009] NSWIRComm 202

⁷⁵ Ibid at 48.

⁷⁶ Ibid.

⁷⁷ Case 70. WorkCover Authority of New South Wales (Inspector Carmody) v Consolidated Constructions Pty Ltd [2001] NSWIRComm 263)

⁷⁸ Ibid at 22.

⁷⁹ Ibid at 65.

On another occasion, (Case 2),⁸⁰ the Court disallowed the defence's attempt to absolve its client of responsibility by claiming that the worker had had a heart attack, with the judge commenting

I am not satisfied Mr [B] had a heart attack but more importantly the identified detriment to safety was a risk of falling (for whatever reason) without any secondary restraint available for a man working two metres (approximately) above the ground.⁸¹

In the same case, the defence submitted that there was no obligation on the defendant to supply scaffolding if the working height was less than two metres. The judge responded that that proposition did not address the defendant's obligations to provide a safe work environment, and that safe alternatives were available. Despite the fact that the judge appeared to disregard the defence, such a light penalty on the defendant company was imposed (\$30,000 of a maximum of \$550,000), that WorkCover NSW successfully appealed, and the Full Bench imposed an increased penalty of \$70,000.⁸² In Case 13, the defence claimed that drawings supplied to the defendant company by the builder were inadequate, and that the roof collapse which caused the fatality was due to the builder and not the defendant. Once again, the Court did not accept this defence stating that the defendant was expert in steel construction, should have realised the deficiencies, and had them corrected.⁸³

Several types of blame shifting were evident in Case 17, where the defendant attempted to shift responsibility to both the project manager and its own workers. The fatality occurred when a worker drowned in a flooded pipeline during building works, in which the defendant was the principal contractor, and where four other building companies were also working. In mitigation, the company submitted that it had relied on its contracted project manager and the 'skill and experience of the defendant's employees to ensure that safety was maintained.'⁸⁴

In a separate hearing, the project manager, who was also charged, blamed the principal contractor. His defence conceded that the objective nature and quality of

⁸⁰ Case 2. Inspector Robert Mayell v D J Gleeson Pty Ltd [2006] NSWIRComm 217 at 16.

⁸¹ Ibid at 16

⁸² WorkCover Authority of New South Wales (Inspector Robert Mayell) v D J Gleeson Pty Ltd [2006] NSWIRComm363

⁸³ Case 13. WorkCover Authority of NSW -V- Cidan Pty Ltd [1994] NSWIRComm189;[1994] NSWIRC 58

⁸⁴ Case 17. WorkCover Authority of New South Wales (Inspector Thomas Clark) v Ledonne Constructions Pty Limited [2001] NSWIRComm272 at 16.

the offence was in the moderate to serious range, but that the Court should consider the defendant's belief that he

‘had no idea that the occupational health and safety requirements under the Act were part and parcel of my responsibilities as a project manager’ and believed that they were the responsibility of [the principal contractor].⁸⁵ (emphasis added)

The judge did not accept this defence, and observed that ‘(B)eing a civil engineer with ten years' experience, it should have been obvious to [the defendant], as the person in charge of the project, that the responsibility for occupational health and safety lay with him.’⁸⁶

In Case 22, a company director was charged when a concreter received fatal injuries due to the collapse of a concrete boom. The defendant blamed the concrete pump provider, and the design of the pump boom.⁸⁷ The evidence showed that the company's director was relatively inexperienced in operating this type of plant, and relied on others to help him. Blame was also apportioned to the industry and the regulator, with the defence's submission stating that little had been done to ‘police the industry’ apart from a Code of Practice released by WorkCover NSW in 1994, and an advisory document put out by the industry association 7 years previously. The defence submitted that ‘[t] here is no strict programme in place, even now in this industry, where such machinery has to be inspected by a licensed mechanic and registered every year.’⁸⁸ The defence also attempted to cast doubt about the cause of the concrete pump defects, implying that they might have been caused when the plant was idle in an ‘unsecured yard’. The defence then turned attention to the worker, pointing out that had he been wearing his hard hat, serious injury or death might have been prevented. The state came in for criticism as well –‘[W]hile there is an absolute duty placed upon the defendant, that absolute duty can at times be a little unfair, and that is one of those occasions.’⁸⁹

Although the defence in Case 75 identified ‘apparent contributing causes by persons other than the defendant’, the judge responded that ‘that that does not necessarily exculpate any liability of the defendant’. Even if that were the case, the judge

⁸⁵ WorkCover Authority (Insp. Clark) v Raymond Jabboury (No.2) [2002] NSWIRComm 70 at 14.

⁸⁶ Ibid at 16.

⁸⁷ Case 22. WorkCover Authority of NSW -V- Celea, Charles Sam [1996] NSWIRComm144

⁸⁸ Ibid.(No para. number supplied)

⁸⁹ Ibid. no para number supplied.

reasoned, the defendant failed in their duty of care and did not identify the dangerous environment that led to the fatality.⁹⁰ The defendant company claimed that there were ‘large numbers of contributing causes to the accident,’⁹¹, but this was not accepted by the Court, with the judge commenting that the defence:

overstated the position and in such a way as to invite error in the sentencing process. There can be no doubt, in my view, that in determining the culpability of a defendant the role played by other parties is necessary to be considered as part of a review of the total circumstances of the case.⁹²

Blaming the worker

There were specific attempts by the defence to blame workers, and this pulverising technique was employed in 12 cases. In Case 15, the defendant acknowledged that he had not supervised the work, but he believed it had been done correctly and ‘he thought the workmen performing the work knew how to do their job properly as they had previously performed this task.’⁹³ The deceased in Case 11 was an experienced worker who had performed a very familiar task in a risky manner according to the defence. The defendant, painted by the defence as an ‘exemplary company’ was found guilty of the offence but discharged without conviction.⁹⁴

The defence had attempted to show that the deceased in Case 71 was negligent by failing to wear his seat belt. However, the judge disagreed, pointing out that the seat belt policy was very loosely applied by trainers and workers, and that it was a ‘persistent, industry-wide problem.’ Appropriate risk assessments had not been undertaken, the defendant had control; of the operation, which had ‘obvious risks’ attached, and that risk management consisting of training alone was inadequate.⁹⁵

The judge said

As the authorities have long observed, employers must also ensure the safety of careless or negligent employees. Merely training employees as to the existence of safety risks and in how they may be avoided will not necessarily put an employer in the position where it has met its obligation to ensure safety. Here,

⁹⁰ WorkCover Authority of New South Wales (Inspector Carmody) v Consolidated Constructions Pty Ltd [2001] NSWIRComm263 at 19.

⁹¹ Ibid at 83.

⁹² Ibid at 46.

⁹³ Case 15. Inspector Batty v David Smith t-as David Smith Roofing and Guttering [2009] NSWIRComm203 at 13.

⁹⁴ Case 11. Inspector Hopkins v Profab Industries Pty Ltd [1999] NSWIRComm289 .

⁹⁵ Case 71. Inspector Kenneth Vassell v Boral Construction Materials Limited [2004] NSWIRComm29 at 124,125.

the defendant's failure to enforce its seat belt policy, also confirmed that the defence was not made out.⁹⁶

The Industrial Court has built up an extensive array of case law relating to health and safety. In Case 29, when deliberating questions of employer responsibility and culpability, the Court referred to previous decisions in considering 'common risks on building sites where numerous contractors are engaged in various capacities,'⁹⁷ observing that:

where an operator continues to operate in circumstances that present an obvious and known risk to persons working at the site and which constitutes an offence under the Act, the culpability of the operator will not be removed by the fact that other persons may also have responsibilities in relation to the safety of the site generally, or related responsibilities as to a particular operation at that workplace.

And also that

The duty to be proactive falls equally upon each and every employer or self-employed person on a particular site, subject, of course, to a consideration of whether the risk emanated from the relevant 'undertaking' and 'place of work'. However, when determining an appropriate penalty in circumstances where more than one individual or legal entity can be said to have contributed to the relevant risk, it is important to view the nature and seriousness of the defendant's offence by reference to the contribution of the defendant to the relevant risk.⁹⁸

Here, the advantage of a specialist court becomes apparent, as it allows judges to familiarise themselves with the particular characteristics of different industries. In this case, the complexities of contractual arrangements in construction work were readily identified and considered in court decisions.

A final example of the defence strategy of blaming the worker is seen in the following extract and needs no further comment:

Mr Bonnici (defence) submitted that the way the wall fell on the deceased was not clear. His client was in business in a modest way. The company had ceased demolition work. It had been doing "extremely well", employing the deceased and four casual employees. The deceased had been hired as a bobcat operator. Perhaps he had pulled the wall over on himself.⁹⁹

⁹⁶ Ibid at 126.

⁹⁷ Case 29. Inspector David Waterhouse v Innovative Property Developments Pty Ltd and Others [2006] NSWIRComm97 at 48.

⁹⁸ Ibid.

⁹⁹ Pritchard WorkCover Authority of NSW -V- Delfos Pty Ltd (Fleck Rubbish Removals) [1996] NSWIRComm 156 (29 August 1996 at 14.

Individualising the event

Individualising an event isolates it from its context, and creates it as something ‘unique...incomparable...special, individual and atypical’.¹⁰⁰ The event is so exceptional that no lessons can be drawn from it, no ‘far reaching conclusions concerning any change of course’.¹⁰¹ This strategy was part of the defence in 14 cases, and is exemplified in the way the defence presented its submissions in Case 5, an incident that killed two men and injured three others. The circumstances were presented as an isolated and individualised occurrence, especially in the light of the multitude of comprehensive safety systems that the defendant had in place. Part of the defence’s case relied on two affidavits, the first of which ran to sixty-seven pages, with a second clarifying supplement of seven pages. They contained the personal and work history of the Acting Director General (A/DG) of this state government department, and his many accomplishments. They detailed the department’s exemplary efforts in managing workplace health and safety and its involvement in the state government’s construction consultation committee. The A/DG was very active in all aspects of construction safety, being personally briefed on all safety incidents and following up on further improvements. He made quarterly visits to all sites where the department was involved in work. At the time of the incident, the Department had a comprehensive system of contractor management.¹⁰² These very detailed submissions assisted in obscuring the fact that the defending corporation had failed in its supervisory responsibilities to the extent that a preventable fatal incident ensued.

In cases involving middle to large size companies, it is usual for the defence to emphasise the extent of companies’ safety systems. Thus, for example in Case 9, detailed submissions were made about safety management systems, policy manuals, training and inductions, reviews, audits, surveys relating to safety culture, fostering of safety culture, annual re-induction programs for sub contractors and employees. The Court was informed about the firm’s comprehensive local and national communication systems, tool box talks, board reporting mechanisms, annual training needs analysis and implementation, the employment of full time health and safety

¹⁰⁰ Mathiesen above note 33 at 38.

¹⁰¹ Ibid.

¹⁰² Case 5. Inspector Childs (WorkCover Authority of New South Wales) v State of New South Wales (Department of Services, Technology and Administration [2009] NSWIRComm202 at 5,6,11.

staff, the safety responsibilities expected by all staff, ongoing OHS personnel needs analyses, dismissal policies for safety breaches. If this was insufficient, defence also supplied a ‘great deal of background information’ about how the company became involved in the project. This ran to ten paragraphs of the judgement transcript and one thousand eight hundred and twenty eight words (paragraphs 23–32.). The events surrounding this fatal incident were unique according to the defence, as the company ‘had not experienced a failure of the type that occurred in this accident.’¹⁰³

The ‘one off’, individual factor for the defence in Case 13 was evidence to show that before the collapse of a building the engineering drawings showed that ‘there was nothing in the structural steel drawings provided to the Defendant to indicate that the structural steelwork needed to be erected in any particular sequence or using any particular procedure.’¹⁰⁴ The defendant in Case 40 testified that ‘it was the first time in his work history that he had ever seen a main electricity switchboard that had been tampered with like the one at Dobu Place.’¹⁰⁵ This defendant also blamed his prime contractor for failing to disconnect power at the dwelling where an electrical fatality occurred. In his experience ‘the Corporation cut off the power: that was not his obligation.’¹⁰⁶

Case 20 demonstrates the judge’s views of the behaviour of the defendant’s Site Safety Coordinator (SSO) as an apparent aberration, not typical of his usual practice. He accepted that the SSO performed his job ‘thoroughly and conscientiously’ and that his failure to properly check the installation of the safety mesh (which failed, causing the death of a young worker) ‘as an oversight in what was an otherwise robust workplace safety system at the defendant’s worksite.’¹⁰⁷ The judge detailed the checks and balances the defendant had in place, attesting again to the uniqueness of this event. Indeed, prior to the incident, the defendant had been commended by WorkCover NSW Authority for its occupational health and safety system as being ‘mature, robust, well implemented, [with a] continuous improvement culture

¹⁰³ *Ins Richard Milder v Grotto Precast Pty Ltd. Prosecution under s 8(2) of the OHS Act 2000 and Ins Richard Milder v Giuseppe Grotto* at 19-32.

¹⁰⁴ *Case 13. WorkCover Authority of NSW -V- Cadman Pty Ltd* [1994] NSWIRComm189; [1994] NSWIRC 58 (2 June 1994) at 14.

¹⁰⁵ *Case 40. Inspector Robert Mayell v William McLean and ors* [2006] NSWIRComm 93 at 52.

¹⁰⁶ *Ibid* at 56.

¹⁰⁷ *Case 20. WorkCover Authority of New South Wales (Inspector Dubois) v Australand Holdings Limited* [2007] NSWIRComm156 at 42.

evident'.¹⁰⁸ Furthermore, its Western Australian and Victorian divisions had been highly praised for their efforts in safety.¹⁰⁹ These remarks were not challenged by the prosecution, who might well have pointed out that the defendant's practices in other states were irrelevant to the incident in hand, and that whatever the company's alleged merits might be, the result proved fatal for a young worker.

Normalising the event

The other face of individualising events is the technique of making something seem normal rather than abnormal; of transforming it into something 'repetitive rather than incomparable, something general and ...typical, rather than ...special and atypical'.¹¹⁰ In the Victorian magistrates' courts, 'normalisation [occurred] through analogies', which likened health and safety events to normal daily phenomena. 'Normalisation involves emphasising the similarity of features of the event with other events in the common experience of the magistracy'.¹¹¹ The analysis of cases in this thesis did not demonstrate that this was a technique used by the defence. This may be because it is doubtful that judges would accept that defective health and safety systems were 'normal', as it appeared to be in the Victorian examples, where one magistrate commented '[T]he hazards for man are not peculiar to the industrial field'¹¹²

However, there were nine instances where judges in the NSW IC commented on what might be called the 'structural normalcy' of the construction industry as a hazardous occupation. For example '...[T]he defendant operates in an important and inherently dangerous industry';¹¹³ '...the respondent was a large enterprise in one of the State's more dangerous industries...';¹¹⁴ '... as the accident had occurred in a notoriously dangerous industry (the construction industry) and 'fall' accidents continued to feature in OHS prosecutions...';¹¹⁵ 'Demolition work is notoriously dangerous and when conducted with no effective supervision avoidable risks of

¹⁰⁸ Ibid.at 73.

¹⁰⁹ Ibid at 74.

¹¹⁰ Mathiesen above note 100 at 39

¹¹¹ Johnstone above note 73 at 226.

¹¹² Ibid.

¹¹³ Case 43 Inspector Peter Newman v Mainland Civil Pty Ltd [2003] NSWIRComm 288 (10 September 2003) at 38

¹¹⁴ Case 63 At 2 Inspector Howard v Boulderstone Hornibrook Pty Ltd [2009] NSWIRComm 92

¹¹⁵ Ibid at 192

serious injury or death can readily occur'.¹¹⁶ Although these remarks were made in the context of reprimanding the defendant, it is likely that in acknowledging the inherent industrial risks, Courts might be more inclined to give less weight to the issue of foreseeability. The Court has occasionally seen the dangerous nature of the industry as a reason for lessening the penalty where the large scale of a particular corporation and the numbers of employees is seen in mitigation of the offence¹¹⁷.

Good corporate citizenship

The defence of good corporate citizen is generally considered in relation to the subjective factors that the Court considers. Claims made to establish good corporate citizenry include: the defendants' length of time in the industry, the absence of prior convictions, contribution to employment, involvement in the community, involvement with the industry, contributions to charity, to women's employment initiatives, indigenous employment, health promotions, employee assistance programs, study leave for employees, awards for excellence.¹¹⁸ The popularity of this defence strategy is evident in the 17 instances in which it was used. For example in Case 5, the defendant was a state government department, therefore parts of its 'good citizenship' were directly attributable to its obligations under state public service legislation or policies, such as equal employment, provision of varieties of leave including study leave, and employee assistance plans.¹¹⁹

Other examples of company 'virtues' tendered in mitigation were the provision of counselling services after fatal incidents and establishment of trust funds for a relative of the deceased. In Case 6, when considering the question of general and specific deterrence, the good citizenship submission meant that the judge considered that there were:

...significant aspects of the case which limit the need to be heavy-handed in [respect to specific deterrence]... its creation of the trust for the deceased employee's granddaughter, which will act as a constant reiteration to the

¹¹⁶ Case 52. WorkCover Authority of NSW -V- Delfos Pty Ltd (Fleck Rubbish Removals) [1996] NSWIRComm 156 (29 August 1996) at 14.

¹¹⁷ See cases n110 and 111.

¹¹⁸ See especially Inspector Childs (WorkCover Authority of New South Wales) v State of New South Wales (Department of Services, Technology and Administration [2009] NSWIRComm202 at 28-31.

¹¹⁹ Inspector Childs (WorkCover Authority of New South Wales) v State of New South Wales (Department of Services, Technology and Administration [2009] NSWIRComm202 at 28-31.

defendant of its failing in the present matter and thus its need to be diligent in the interests of workplace safety.’¹²⁰

Therefore, in the Court’s view, general deterrence was more significant. Notwithstanding, the defendant, who had pleaded guilty under s15 of the NSW *OHS* 1983, was granted a 35 per cent discount and fined \$71,000 of a maximum \$550,000.¹²¹

In a more unusual good citizenship plea, the defendant in Case 9 spoke about his close relationship with the deceased and that as he had been a practising Catholic, the defendant called a priest to bless the site after the incident and at each anniversary thereafter. The local council had approved the re-naming of a street after the deceased. The company had sponsored a junior rugby league club to keep ‘Aboriginal children out of trouble’. It had held a golf day and had raised \$60,000 for a children’s hospital. The Court commented that ‘in a variety of ways these documents spoke of [the company’s] involvement in the community, its charitable works and its involvement in safety and the good reputation it generally enjoyed in the construction industry and in the community’¹²²

In Case 12, the fact that management attended the site after the incident and commenced investigations was put forward in mitigation, although this would have been a legal obligation and expected behaviour. The company organised a wake for the deceased, paid for his funeral in New Zealand, and for his family to attend. One of the defendants supported community initiatives and various charities.¹²³ These qualities were ‘conceded’ by the prosecutor as attesting to the good corporate citizenship of the companies.

Discussion

This case analysis has dealt with the issue of prosecution, sentencing and penalty outcomes through a textual analysis of judgements in the NSW IC, a superior court that has considerable expertise in hearing industrial and serious OHS cases. Thus, its institutional machinery differs from that of the Victorian magistrates courts, and

¹²⁰ Case 6. *Inspector McColl v Waterway Constructions Pty Limited* [2003] NSWIRComm441 at 23,26, 29.

¹²¹ *Ibid.*

¹²² Case 9. *Inspector Richard Mulder v Baseline Constructions Pty Ltd.* [2008] NSWIRComm136

¹²³ *Inspector Robert Mayell v Bilfinger Berger Services - Roads Pty Limited (formerly known as Abi Road Maintenance Pty Limited) and Another* [2009] NSWIRComm10 at 33.

consequently some attempts by the defence, or inadvertently by the prosecution, to decontextualise issues are not as successful as in the Victorian cases. For example, the ‘careless worker’ defence did not sway most judges, and blame shifting was also not so successful. The paradoxical issue is that, though judges’ frequently commented on the gravity of the offences,¹²⁴ their ultimate decisions were reflected in pulverised penalties.

The technique of isolation was a common defence strategy in the judgements under consideration. While judgements, in some cases, reiterated the actual specificities leading to the event, the future consequences of the defendant’s behaviour was not considered, other than giving regard to specific and/or general deterrence. Given that an aim of WorkCover NSW guidelines is to change behaviour and to protect the public interest, it is curious that the ability of the court to impose court orders under ss112 -117 of the NSW *OHS Act 2000* which, among other things, can require the offender to make restitution, or to carry out appropriate rectification projects, are rarely implemented.¹²⁵ This is an issue explored further in the following chapter. In addition, the sentencing guidelines refer to future outcomes, for example, they refer to rehabilitation and deterrence, elements that could be factored into improved sentencing outcomes through court orders.

The effort (or otherwise) of the defendant in improving safety on the job is, for the court, an important ingredient to consider during the judgement phase. The cases show that these endeavours have considerable weight when leniency is being considered. Because of the time lapse between the incident and the hearing, between 3-4 years on average, the judge focuses on any improvements made by the defendant during that period. That is, the isolation technique of ignoring future consequences is not so evident in the NSW judgements, and the defence is able to capitalise on putting the events surrounding the fatality into an outmoded and distant past, which has a positive bearing on the decision of the court, and the judgement does not focus

¹²⁴ See for example, *Inspector Peter Newman v Mainland Civil Pty Ltd* [2003] NSWIRComm 288 (10 September 2003) at 34 where the judge remarked that ‘...this is a serious breach of the Act committed by the defendant.’; See also *Nathan WorkCover Authority of NSW (Insp Dubois) v Transfield Pty Ltd* [2000] NSWIRComm 204 (8 November 2000) where the judge said ‘The court, as to the defendant company’s industrial record notes a number of convictions for minor breaches of the Act, leading to the two serious convictions and this most dreadful of fatalities.’ at 23.

¹²⁵ A fuller discussion about the implementation of court orders is seen in Chapter Six.

on what should have happened prior to, or at the time of the incident but on what has happened since.

The next chapter extends this discussion and proposes that the silencing of events are a product not only of pulverisation techniques but are also due to the influence and requirements of the formalities of NSW state legislation and regulatory constraints, and the more informal customs and practices associated with case law. It is argued that it is the synthesis of these elements and their antecedents which contribute to the production of consistently low penalties for workplace deaths. That is, decontextualisation is a process based in the institutions of the state and not just in the agency of the actors, the judges, prosecutors and defence.

CHAPTER SIX

Silencing OHS crime

It is often suggested that OHS should be the top priority. While this is a worthy ideal every organisation should strive for, the reality is that making a profit will always be the highest priority of a business.¹

Chapter Five demonstrated the ways in which decisions in the IC could be categorised using the Mathiesen typology. It showed the formulaic nature of judgements, as they were guided by the inescapable rules of sentencing, as outlined in Chapter Four. To reiterate, the NSW *Crimes (Sentencing Procedure) Act* 1999 not only set out the purposes of sentencing, that is punishment, deterrence, community protection, public recognition of harms perpetrated, and denunciation of these harms, it established those factors that the court must take into consideration when considering a sentence. These mitigating and aggravating factors are those that steer the outcomes – pulverised sentences. In NSW it is not so much the strategy or artifice of the defence, or, as was the case in Victoria, the ‘world view’ of the magistracy which contributes to decontextualised verdicts, but the spirit of the state legislation itself, that is, ‘the blunt nature of legal rules [which] invariably decontextualise complex social phenomena such as OHS’.²

The interaction of state legislation, regulatory policies and judicial imperatives are important features in the production of lenient penalties. However, factors outside of these phenomena influence the ways in which firstly, health and safety in principle, and, secondly, the harms caused by health and safety crimes, are seen by regulators, law and policy makers and the community in general. That is, other methods of silencing health and safety harms, either explicitly, as in attempts to remove collective protections around OHS harms, or implicitly, as in absencing OHS as part of the overall legal framework, are discussed. Ideology guides the way that OHS is viewed by those parts of the state involved in the enforcement processes. In this

¹ Australian Industry Group (*Industry*, Autumn 2008) at 41.

² Johnstone R. *Occupational Health and Safety, Courts and Crime*, (Sydney: The Federation Press, 2003) at 238.

confused and contradictory process, the structural location of the court and its process of judicial reasoning reflects the acceptance that OHS breaches are not crimes and that the legal framework finds it difficult to accommodate the collective aspects of work regulations.

First, we consider IC decisions to reveal some of the contradictions intrinsic to their reasoning. An essential principle that runs through all OHS prosecutions for fatality is evident in the following extract, which concerns the death of a 29-year-old labourer, crushed by a concreting machine.

...the crucial consideration is that the true measure of penalty lies in the nature and quality of the offence and although due allowance has to be made for subjective considerations, *it is essential that the Court ensure that the allowance for those factors does not produce a sentence which fails to take account of the objective gravity of the offence.* In assessing penalty, *the maximum penalty available for the offence reflects the public expression by parliament of the seriousness of the offence with a large penalty indicating the gravity of the offence as perceived by the community.* In those circumstances, the task of this Court is to assess the relative seriousness of the particular offence in relation to the worst case in which the maximum penalty is provided, having been increased to \$500,000 shortly before the incident. The approach that courts should take in relation to that circumstance is well settled in that *it requires the existing sentencing pattern "to move in a sharply upward manner".* The gravity of the consequences of an accident, such as the damage or injury, does not, of itself, dictate the seriousness of the offence or the amount of the penalty. However, a breach where there was every prospect of serious consequences might be assessed on a different basis to a breach unlikely to have such consequences. *The occurrence of death or serious injury may manifest the degree of seriousness of the relevant detriment to safety.* (emphasis added).³

This statement typifies the approach taken in the judgements reviewed in this thesis, and is not contested, as it reflects the principles set out in the sentencing rules, and higher court authority, by which judges are bound. However, if the maximum penalty amount is to reflect ‘the public expression by parliament of the seriousness of the offence’ then it is questionable as to why the courts consistently provide sentences representing 18 per cent of the maximum allowable, especially in the light of the requirement to ‘sharply increase’ sentencing patterns. Are penalties in this range consistent with one of the principles noted in the extract, that is, indicative of public expectations that a large penalty should indicate the gravity of the offence as perceived by the community? Indeed, what are the expectation of the community regarding workplace death and disability? There has been minimal research in this

³ Case 49. WorkCover Authority of New South Wales (Inspector Tyler) v Abigroup Contractors Pty Ltd [2000] NSWIRComm 40 at 21.

area, although as noted previously, several recent studies have canvassed the views of persons associated with workplace fatalities, that is, employers and families.⁴ The expectations of families are that offenders will be punished for the death of their family members, as for example, a criminal law case might prosecute for murder or manslaughter, but the reality is that offenders are seen to be punished for a breach of regulatory law, one administered by the regulator and not the police. The common precept referenced in all cases states that

...the true measure of the penalty lies in the nature and quality of the offence and not merely the result. The gravity of the injury actually resulting from the breach does not of itself dictate the amount of penalty, nevertheless, the occurrence of death or serious injury manifests a degree of seriousness of the relevant detriment to safety⁵.

Of necessity, charges laid by the prosecution have to be specified according to the precise sections of the relevant parts of the NSW *OHS Act* 1983 and NSW *OHS Act* 2000, which, in this sample, were mainly directed to the general duty of care of the employer; that is, to ensure the health, safety and welfare at work of employees by providing safe premises, equipment, substances; by providing training, supervision facilities, and providing safe systems of work. Offenders might be prosecuted for some or all of these provisions, but because of the compartmentalisation of the offences, there was no real opportunity for either the prosecution or the judges to reflect more holistically on the organisation of work, and the social relations of production that characterise the construction industry.

For example, although the WorkCover NSW *Compliance Policy and Prosecution Guidelines* June 2010 stated that one of its 'core concepts' was to ensure that corporations or other duty holders complied with the provision to provide safe work systems and reviewed compliance with this provision,⁶ it appears from the judgements that the Court did not have these concepts in the forefront of its reasoning, and so an opportunity to reflect on the overall management of health and safety was not availed upon. This is typified in Case 27 where the judge stated

⁴ Schofield T, Reeve B and Jamieson S, 'Deterrence and OHS: Prosecuted Employers Responses' *Journal of Occupational Health and Safety*, (2009) Vol.25, No.4:264-276; Brookes D, 'Restorative Justice and Work-Related Death: consultation report', (St. Kilda: Creative Ministries Network, 2009).

⁵ Case 41:Inspector Sharpin v Bovis McLachlan Pty Ltd [2002] NSWIRComm 210 at 8.

⁶ WorkCover NSW *Compliance Policy and Prosecution Guidelines*, June 2010, NSW Government at 28.

Such a proposition [measures to ensure safe operation of equipment] from the prosecution might well be drawn to the industry's attention. However, it is not the role of this Court to design a system of work. The basic failure, in the facts as presented, was the failure to ensure the maintenance on the boom pump had been properly carried out on this machine to ensure safety of all persons at the defendant's worksite.⁷

Here, the emphasis on technical failures overshadows the bigger picture. Obviously, the mere provision of safe work systems does not address the totality of the procedures required to ensure a safe and healthy workplace, as more overarching measures, which begin at the planning stages of a construction project, must be considered.

The approach adopted in this case is one that also typifies the remarks of the sentencing judge of the Industrial Court, who regularly refer to an important guideline judgement of the NSW IC Full Bench.⁸ This decision sets out the rules implicit in the *Crimes (Sentencing) Act*, and reiterates the method of determining a sentence which, in a legal sense, must accurately and objectively reflect the gravity of the particular offence; that the penalty must reflect the nature and quality of the particular offence; that the level of penalty must be such as to compel attention to occupational health and safety risks so that persons are not exposed to workplace risks.⁹

In Case 27, and again, typifying other cases, the judge commented that objectively the matter warranted a 'substantial penalty', mentioned that the maximum penalty reflected the 'public expression' by Parliament of the seriousness of the offence; that it was the Court's task to assess the relative seriousness of the offender's particular

⁷ Case No 27. Inspector John Sharpin v Boka Aluminium Windows Pty Limited and Anor [2005] NSWIRComm 447 at 24.

⁸ Full Bench of the Industrial Relations Commission of New South Wales in Court Session in Warman International Limited v The WorkCover Authority of New South Wales (1998) 80 IR 326 at 339-340

⁹ The relevant principles as to penalty are those expounded by the authorities, and include that penalties 'must compel attention to occupational health and safety' (see Fisher v Samaras Industries Pty Limited (1998) 82 IR 384; Capral Aluminium Limited v WorkCover Authority (2000) 49 NSWLR 610); that 'The primary factor to be considered in determining an appropriate penalty is the objective seriousness of the offence' (see Lawrenson Diecasting Pty Limited v WorkCover Authority (1999) 91 IR 464 at 474; Fletcher Constructions Aust v WorkCover Authority (1999) 91 IR 66 at 77-81), and that 'The seriousness of an injury does not dictate the size of any penalty but it does demonstrate the seriousness of the detriment to safety occasioned by the offence' (see Inspector Tyler v Sydney Electricity (1993) 47 IR 1 at 5) referenced in Bojanic Case No 7 Inspector Maurice Vierow v Rail Infrastructure Corporation [2002] NSWIRComm 273 at 3

offence in relation to a worst case scenario.¹⁰ The judge gave ‘significant weight’ to general deterrence, and commented that

‘a small or nominal fine will not satisfy the element of general deterrence, let alone the requirement for punishment. The imposition of a small or nominal fine, in respect of a serious breach of the Occupational Health and Safety Act, 1983 has little or no effect as a deterrent to other possible offenders.’¹¹

Although the judge accepted the stated contrition of the company, he noted that there appeared to be no ‘evidence of any specific tangible acts confirming that contrition which are often found in cases such as the present.’¹² In terms of general deterrence, he remarked on the need ‘to compel the attention of large operators (including the defendant) in the construction industry to the need to ensure that their operations are conducted with the greatest regard to safety, as is required by the terms of the Act’.¹³ After considering all these factors, the penalty imposed on a very large national construction company that failed to provide appropriate safe working methods and to insure their implementation was \$125,000, which represented 25 percent of the maximum fine.¹⁴ It is questionable whether penalties in this range are sufficient to act as general deterrents. It is also difficult to comprehend how a penalty that is one quarter of the maximum allowable can be seen as satisfying community expectations that punishment in the case of death at the workplace is sufficient and just. The discount in penalty reflecting contrition and an early guilty plea in this case, appear to be arbitrary, given the judge’s statements, but not unusual when compared with other judgements reviewed for this thesis. That is, as Chapter Five demonstrated, there was a considerable gap between the Court’s pronouncements and the actual outcome.

Prosecutors cannot seek to sway the Court towards particular magnitudes of sentence, but can suggest ranges and severity of custodial or non-custodial sentences, with reference to appellate authority. Prosecutors may also suggest ranges of discount in relation to mitigation. For example, in Case 41 the prosecutor suggested a

¹⁰ Ibid note 6 at 3 ‘Sentencing procedures’.

¹¹ Ibid at 4.

¹² Ibid at 29.

¹³ Ibid at 30.

¹⁴ Nichols Case 49. WorkCover Authority of New South Wales (Inspector Tyler) v Abigroup Contractors Pty Ltd [2000] NSWIRComm 40.

discount between 10 and 25 percent for an early guilty plea¹⁵ and in Case 2, the prosecutor's support for an early plea resulted in a discount of 25 percent.¹⁶

Judgement transcripts showed that prosecutors did not recommend custodial sentences, and few suggested a penalty in the upper range. On the other hand, some were prepared to propose mitigation factors, normally a defence duty. As prosecutors have to rely on appellate authority in suggesting sentencing ranges, it is not surprising that more severe penalties were not requested, given that there had been no precedent set for the imposition of these penalties. However, it is not completely clear why other measures allowed by the OHS legislation were not suggested to the court. In *addition* to any other penalty, the court could impose a range of orders in connection with an offence under the NSW *OSHA* 2000 Part 7 Division 2 s.112 to 117.¹⁷ These were restorative orders,¹⁸ where the offender could be ordered to remedy any matters caused by the offence that is within their power to do so; repay to WorkCover expenses in relation to the investigation of the incident¹⁹ and required to publicise²⁰ the court outcomes, including the nature of the offence, its consequences, penalty imposed and any other related matter.

The court may make these orders in relation to specific persons or classes of persons, for example, to publish in relevant trade or industry journals, newspapers, annual reports or shareholder information sources. If the offender fails to comply, the prosecutor may take action to carry out the order, noting, as well as the required information as above, the fact of the offender's on-compliance. Any costs incurred in this case, are recoverable from the offender. The court can also order that offenders undertake specified projects relating to general improvements in health and safety.²¹ Penalties²² apply for failure to comply with these orders. The repealed NSW *OSHA* 1983 had a provision at s 47A²³ that allowed the court to impose, in addition, to the prescribed penalty, orders to remedy matters that were within the convicted person's ability to do so and in a specified period.

¹⁵ Marcelja Case 41:Inspector Sharpin v Bovis McLachlan Pty Ltd [2002] NSWIRComm 210 at 3.

¹⁶ Bates Case No 2 Inspector Robert Mayell v D J Gleeson Pty Ltd [2006] NSWIRComm 217 at 1 'Submissions'.

¹⁷ NSW *OHS Act* 2000 Part 7 Division 2 s.112.

¹⁸ Ibid s.113.

¹⁹ Ibid s.114.

²⁰ Ibid s.115.

²¹ Ibid s.116.

²² Ibid s.117.

²³ New South Wales Occupational Health and Safety Act 1983.

However, the IC has made little use of these provisions, though it appears they have been used more in the lower court. For example, one case heard in the IC²⁴ involved a large construction company that was ordered to publicise its conviction, and in 2004, five cases were heard in the NSW Chief Industrial Magistrates Court (CIMC) where publicity orders were made under s115 that required offenders to publicise their offences to their employees.²⁵ In another case in the CIMC²⁶, the magistrate ordered the company to undertake an OHS project.

The uncommon use of these provisions was highlighted by a WorkCover news bulletin that reported the ‘unusual step’ taken by a NSW IC judge to order an offender convicted of the serious injury of an apprentice worker to advertise the details of the case in the print media.²⁷ The offending company was obliged to advertise in at least one major metropolitan newspaper and two trade journals, in addition to a fine of \$65,000 plus costs to WorkCover. The apprentice carpenter suffered major injuries after a fall from height, a very common cause of death and injury in the construction sector. The presiding judge said:

An illustration of what can go wrong by reference to an actual incident is much more effective in compelling attention to a particular matter than the mere recitation or incanting of a set of rules or basic principles, most of which people in the construction industry will have heard before. Mere repetition does not attract attention.²⁸

Why court orders were not more widely used is debatable, even though judicious application would seem to be in step with the aims of sentencing legislation. A senior prosecuting barrister suggested that court orders were seen as

...unusual or out of the mainstream or things that really are not what the system is about ...it should be about punishment and [orders] are not seen as punishment ... I’ve never had instructions from anyone I’ve done prosecutions for to seek those orders.²⁹

Prosecutors would not ‘presume’ to tell a judge what to do, although they could suggest penalty and discount ranges.³⁰ It was doubtful that WorkCover had the

²⁴ Inspector Howard v Baulderstone Hornibrook Pty Ltd [2009] NSWIRComm 92.

²⁵ Michael Tooma at 203-205 2004.

²⁶ Inspector Cherie McGrath v Anglican Retirement Villages Diocese of Sydney [2005] NSWCIMC 40.

²⁷ New South Wales Government ‘*Judge orders crane company to advertise breach*’ WorkCover Authority of NSW 9/9/2010.

²⁸ Ibid.

²⁹ Personal communication 24/2/2011.

³⁰ Personal communication Senior WorkCover official 3/3/2011.

administrative resources to monitor procedures associated with court orders. The courts and prosecutors attention was on compliance with specific sections of the OHS Acts and their more usual punishments, rather than on more inventive ways of seeking redress for harms.

The judiciary have taken the view that it's a matter for them, to determine what orders they impose, but generally they have not taken a position of imposing orders ... they are a rarity. We have had a difficult relationship in that regards in that some member of the judiciary have taken the position that it's not for us to make representation around orders, but others have done the opposite...there is not a lot of informed thinking or experience around these issues. But anecdotally... the courts and defendant have probably taken the position that it's imposing a penalty times two, so it hasn't had a lot of application...[T]he courts haven't really had an informed position in terms of the scope and application of project orders, and neither has Work Cover.³¹

A judge in the NSW IC stated that he would not object to the prosecution suggesting penalty options such as court orders, but that as they are not a legal alternative to the more usual financial penalties, the courts and the regulator would be are reluctant to impose additional cost burdens.³² This penalty conservatism is consistent with the formulaic nature of the decisions that are influenced by the mode of sentencing, that is, 'two-tiered' or 'instinctive synthesis'.

Chapter Four showed that both regimes have their critics, with the former DPP observing that two-tiered sentencing may lead to a mechanistic approach, and presumably, a mechanistic outcome. Where 'instinctive synthesis' is employed, the various case elements and sentencing principles are weighed up in reference to all the case circumstances. Mackenzie reported that judges in her study preferred the instinctive or intuitive sentencing option, because they believed it allowed them maximum discretion. However, decisions for workplace death heard in the IC showed that judges applied instinctive synthesis in only eight cases, and of these cases, the same judge figured in six instances. While the judges in the sample of cases examined appeared to prefer two tier sentencing, they often made reference to the principal authority, that is the landmark case of *Markarian v The Queen [2005] HCA 25: 18 May 2005*, where by a majority of the High Court (Kirby J dissenting), generally disavowed the sequential or two tiered approach to sentencing. However, this case did not entirely reject the proposition that, in some circumstances, 'an arithmetical process' would be appropriate. The Court continued

³¹ Personal communication, Senior WorkCover Inspector, 3/3/2011.

³² Personal communication, NSW IC judge, 25/2/2011.

... in a simple case, indulgence in arithmetical deduction by the sentencing judges should be absolutely forbidden. The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public. There may be occasions when some indulgence in an arithmetical process will better serve these ends.³³

This gave judges a rationale for adopting the two-tier approach, which was apparent in their discounting methods for penalty pronouncement. Discounts applied for early guilty pleas are purely of economic benefit to the state, as the following extract shows.

So, the quantification of the discount commonly applied for an early plea of guilty or assistance to authorities is offered *as an incentive for specific outcomes in the administration of criminal justice* and is not related to sentencing purposes. (emphasis added).³⁴

In Case 27, a discount was allowed for an early guilty plea, even though the judge observed that had the proceedings been contested, a finding of guilt was virtually inevitable. The economic considerations of awarding discounts were also evident in this case.

By virtue of Section 439 of the Crimes Act, 1900 (as Amended), the Sentencing Court is specifically required to take the plea of guilty into account in the Defendant's favour in assessing the appropriate penalty to be imposed. Where appropriate, a plea of guilty should attract a discount for utilitarian considerations, sufficient to encourage Defendants to enter pleas of guilty. In determining the degree of discount which should apply in a particular case, regard must be given to the following factors:

- (a) The strength of the Crown's case;
- (b) Time at which the plea is entered; and
- (c) The savings to the State of Court's time and the saving to the State of the costs of a trial.

3. In addition, a plea of guilty may attract a greater degree of leniency where, in addition to the factors set out above, it reflects contrition on the part of the Defendant.³⁵

Discounts for early guilty pleas are common in many criminal trials, but in some of the judgments considered here, the plea was changed at the last minute, in what might be assumed to be an attempt to gain penalty reduction. In these cases, despite the late change, the judge still awarded a discount for a guilty plea. Both the state and the offender benefit from discounting, but deterrence may lose out. The focus of

³³ Case 20. WorkCover Authority of New South Wales (Inspector Dubois) v Australand Holdings Limited [2007] NSWIRComm 156 at 25; see also Hunt Case No 34. WorkCover Authority of New South Wales (Inspector Mayell) v Claude Van Den Bruggen t-as Dolphin Antenna Service [2007] NSWIRComm 193 at 19.

³⁴ Hunt Case No 34. WorkCover Authority of New South Wales (Inspector Mayell) v Claude Van Den Bruggen t-as Dolphin Antenna Service [2007] NSWIRComm 193 at 20.

³⁵ Ibid note 6 at 2, 'Orders'.

regulatory agencies is on inspection and compliance, with financial penalties applicable when action is taken by them, which are often so lenient that companies can ignore the law because it is cheaper than providing required workplace conditions.³⁶

Chapter Two described the concern of business about what it saw as the onerous provisions of NSW's OHS laws.³⁷ There were suspicions that the state Labor government had advised the regulator to take a moderate approach when dealing with business,³⁸ and to focus particularly on the bottom end of the enforcement pyramid, that is strategies to encourage and assist duty holders to comply with the regulator, based on the provision of information, guidance, education and advice. This was to be the preferred approach before moving to the next more directive levels of issuing on the spot fines, improvement and prohibition notices, and only moving to the final level, prosecution, as a last resort.

Johnstone³⁹ argues that Robens style 'advise and persuade' approach in OHS enforcement '...has become the entrenched regulatory response in Australia to contraventions of OHS statutes... it is a historically contingent approach that has been taken for granted and until recently in Australia been left largely unexamined'. Tombs and Whyte⁴⁰ maintain that the Robens philosophical approach of mutual interest between workers and employers does not recognise that employers exercise ultimate power in the workplace.

Beginning with the industrial revolution, the British inspectorates favoured persuasion over punishment as the first deterrence measure, and only resorted to prosecution if employers remained non-compliant. Now, inspectors are more likely to prosecute in the case of serious violations leading to harm but it is claimed that this occurs more to satisfy public desire for retribution rather than for deterrent purposes.⁴¹ Regulatory agencies cite lack of resources and instances where

³⁶ White R and Habibis D, *Crime and Society* (Melbourne: Oxford University Press, 2005) at 123.

³⁷ See also Fraser L, 'Significant Developments in Occupational Health and Safety in Australia's Construction Industry, *International Journal Occupational and Environmental Health*, 2007; 13:12-20.

³⁸ Ibid at 13.

³⁹ Johnstone, R., *From Fiction to Fact – Rethinking OHS Enforcement*, National Research Centre for OHS Regulation, Australian National University, Canberra, (2003), at 8-9.

⁴⁰ Tombs, S and Whyte, D, 'A Crisis of Enforcement: The Decriminalisation of Death and Injury at Work,' (London: Centre for Crime and Justice Studies, 2007).

⁴¹ Hopkins A (c) *New strategies for safety regulators: beyond compliance monitoring*, Working Paper No.32. National Research Centre for OHS Regulation, (Australian National University, 2005).

compliance is impossible or impracticable, to argue in favour of the persuasive approach. Although prescriptive safety regulations were promulgated to protect employees, the regulator's conciliatory approach has led critics to the view that laws designed for those possessing power in the workplace are enforced less rigorously than those designed to control other offenders such as traffic violators or petty criminals. This conciliatory position has been described as regulatory capture.⁴² That is, where regulatory agencies tended to be less punitive if they had a close relationship with small numbers of companies or industries, or when confronting big business. To be effective, regulators should implement more punitive responses.⁴³

This discussion has centred on the effect of state and regulatory policies and legislation that contribute to the pulverisation process. It has examined the mechanisms by which the state regulatory agency brings cases before the court; the court's processes in enforcement through its punitive recommendations and the contradictions inherent in judicial rationalising of particular penalties.

We now turn to a broader look at some of the structural reasons behind the 'silencing' of workplace safety crimes. When the prosecution of OHS breaches finally reach the courts, their causes are not only situated in the immediate workplace, but are also a product of the prevailing ideas about health and safety. If these ideas are ones that reflect the dominant ideology that OHS crimes are not real crimes, then the ultimate penalties metered out will be affected by the prevailing attitudes.

Silencing OHS crime: absencing OHS crimes from the 'collective conscious'

There is an absence in mainstream judicial and criminological discourse about health and safety crime. For example, the Australian Institute of Criminology (AIC) has no OHS material on its web site, concerning itself only with environmental and economic crime, including crimes against business, fraud and corporate crime and identity fraud.⁴⁴ The NSW Bureau of Crime Statistics and Research provides similar information, drawing its data from matters heard in the criminal courts at Local,

⁴² Hutter, B (1997), in Hopkins *ibid*.

⁴³ *Ibid* at 6.

⁴⁴ Australian Institute of Criminology, 'Crime Types' http://www.aic.gov.au/crime_types.aspx (9/9/2011).

District and Supreme Court level, and providing detailed information about various crime categories, including information about victims and offenders, reported by locality and state level.⁴⁵ Neither agency collects data on occupational health and safety crime, nor does the Judicial Commission of NSW.⁴⁶ The state government website which provides information about court structures and systems does not mention the Industrial Court, stating that ‘the NSW criminal justice system consists of the Lower Courts (Local, Children’s) and the Higher Courts (District, Supreme Court (including Court of Appeal), despite the fact that the Industrial Court is, a superior Court.⁴⁷

Most Australian jurisdictions have either specific legislation relating to victims of crime or agencies that assist the victims. In NSW, the relevant legislation is the *Victims Rights Act 1996*, and Lawlink New South Wales provides the Victims of Crime Advice and Information website⁴⁸, which offers guidance on a range of pertinent subjects. These include advice to victims of sexual assault; crimes against the person; domestic violence; road trauma and homicide. There is no mention of support for victims of criminal harms caused by negligence under the NSW OHS Act or Regulation, and it is left to the OHS regulator to provide support to those involved in workplace fatalities.

Generally speaking, most law teaching texts do not specifically address OHS crime, though there is a large literature on white-collar crime.⁴⁹ Although persons are more likely to sustain an occupational injury than to be victims of conventional violence, they remain invisible in either popular discourse or in statutory or institutional reportage.⁵⁰ The difficulty of defining white collar crime has given rise to various definitions, with some commentators suggesting that the term occupational crime be used for those employees committing offences for personal gain, with the term

⁴⁵ NSW Government Lawlink Attorney General’s and Justice, http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_court_stats. This would be a useful model for WorkCover NSW to adopt). (17/8/2011).

⁴⁶ Judicial Commission of New South Wales ‘*Sentencing Trends and Issues*’ No.37 <http://www.judcom.nsw.gov.au/publications/st/sentencing-trends-and-issues-no-37/st37.pdf> (5/7/2010)

⁴⁷ Lawlink NSW http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_cjs_structure (21/6/2010)

⁴⁸ Available at <http://www.lawlink.nsw.gov.au/voc>

⁴⁹ See, for example, Findley M, *Criminal Law: Problems in Context* (Melbourne Cambridge University Press, 2006; Henry S and Lanier M, *What Is Crime: Controversies over the Nature of Crime and What To Do About It* (Lanham: Rowman and Littlefield, 2001)

⁵⁰ Tombs S, ‘Violence, Safety Crimes and Criminology’, *British Journal of Criminology* 2007 47 531-550.

corporate crime being reserved for offences by the firm toward ‘members of the public, the environment, creditors, investors, or corporate competitors’.⁵¹ Occupational health and safety offences are dealt with under the heading of ‘Offences against employees’ (which also includes industrial relations violations (economic offences) and discriminatory practices).⁵² As discussed in Chapter 3, the difficulties of prosecuting corporations for criminal offences stems from the concept of *mens rea*, the guilty mind, which applies to individuals rather to legal entities.

The power of language and ideology to silence ‘inconvenient truths’ is now a given. Offences against health and safety legislation are rarely viewed as criminal, and have been dubbed ‘social welfare’ type regulatory offences.⁵³ So, is a regulatory offence a criminal act? Are those who contravene regulatory laws criminals? Definitions of crime are plentiful, ranging from the narrow to the broad. If too narrow, harms such as those caused by corporations can be excluded, and if too broad, then most deviations can be labelled criminal⁵⁴. If OHS harms are designated criminal, the state can be called upon to deem them as such and deal with them accordingly.⁵⁵ Haines⁵⁶ notes the shift in the literature that first recognised that crimes committed by low status persons were labelled criminal, while those committed by corporations were treated as regulatory offences, to calls for the imposition of manslaughter charges to be laid for workplace deaths and the ‘recriminalisation’ of OHS laws. Other scholars⁵⁷ have argued that corporations are ‘sensitive’ to criminal charges, and that these measures directed at high status organisations would be effective deterrents.

Chapter Three discussed the marginalisation of safety crimes in Finland⁵⁸ and the resultant perception of the non-criminality of OHS offences. More recently

⁵¹ White R and Habibis D, *Crime and Society* (Melbourne: Oxford University Press, 2005) at 123.

⁵² *Ibid* at 127.

⁵³ WorkCover Authority of New South Wales, ‘*Report of the 2006 Statutory Review of the NSW Occupational Health and Safety Act 2000*’, (WorkCover NSW Publication No.5625) a t31.

⁵⁴ Lanier M and Henry S, ‘Crime in Context: the scope of the problem’ in Henry S and Lanier M, *What Is Crime: Controversies over the Nature of Crime and What To Do About It* (Lanham: Rowman and Littlefield, 2001) at 1: See also White R and Haines F, *Crime and Criminology* (Melbourne: Oxford University Press 1996) at 28.

⁵⁵ Milanovic D, *An Introduction to the Sociology of Law*, (New York: Criminal Justice Press, 2003) at 203; also see especially Tombs S and Whyte D, *Safety Crimes*, (Willan Publishing, 2007)

⁵⁶ Haines F, *Corporate Regulation: Beyond ‘Punish or Persuade’* (Oxford: Clarendon Press, 1997) at 3,4

⁵⁷ Pearce F and Tomb S (1990). ‘Ideology, hegemony, and empiricism’ *British Journal of Criminology*, Vol.30, No.4, Autumn.

⁵⁸ Alvesalo, A and Whyte, D, (2007) Eyes wide shut: the police investigation of safety crimes. *Crime, Law and Social Change* Vol.48, 57-72

Australian researchers⁵⁹ found that prosecution had an impact on specific deterrence, in that employers took specific remedial action, where incidents of serious injury and death had occurred, but significantly, they were reluctant to accept responsibility and would not necessarily institute broader, long lasting preventative measures. Moreover, employers, whether from large or small companies, ‘strenuously objected to the criminalisation of OHS offences’, with employers in denial about their legal responsibilities in the workplace. The authors concluded that routine prosecution is essential in demonstrating to employers their central role in OHS. ‘To confine the role of prosecution to a measure of last resort...[is] likely to send the “wrong message” to employers about how the problem of serious OHS offences is understood by regulatory authorities and in civil society more broadly’.⁶⁰

Sinclair and Haines⁶¹ studied workplace fatalities in multiple employer workplaces, that is, those in which the company had multiple contractual relationships with others on the project (much like typical construction work). The research showed that companies adopted a multiplicity of defence strategies to minimise their responsibility and to lessen their trauma. The strategies were very similar to those described as pulverising techniques, that is, denial, blaming others, blaming workers, blaming equipment, normalising and splintering the event. These defensive strategies resulted in companies taking less than a pro-active stance towards improvements in their safety management systems, and were typical of employer responses nearly 20 years later.⁶²

Employers ‘misdemeanours’? Unions ‘criminal acts’?

The previous sections and material from foregoing chapters, shows that certain activities at work that lead to injury and illness are designated by the state as ‘criminal’. Except in the regulations, the Robens approach fails to identify specifically these activities, leaving it up to the parties and the regulator to do so. Interestingly, the specific activities that are ‘wrong’ as set out in the regulation attract a lower penalty than the more ambiguous duties set out in the legislation. It is

⁵⁹ Schofield T, Reeve B and Jamieson S, ‘Deterrence and OHS: Prosecuted Employers Responses’ (2009) *Journal of Occupational Health and Safety ANZ* 25(4):264-276.

⁶⁰ Ibid at 275.

⁶¹ Sinclair A and Haines F, ‘Deaths in the Workplace and the Dynamics of Response, (1993) *Journal of Contingencies and Crisis Management*, Vol 1, No.3 September at 134

⁶² Ibid n55.

therefore more and more up to the courts (based on the prosecutions brought by the enforcement agency, the regulator) to decide what activities are criminal, and as noted in Chapter Five, a designation of ‘criminality’ is rarely used in the court setting. This thesis has shown the processes that the NSW IC has used to both find these activities as wrong but not as criminal; they have generally been downgraded to administrative infractions. This is evident that in some cases for multiple fatalities and previous convictions, the penalties were never exacted at the highest level nor was the legislated provision for imprisonment employed.

The rest of this chapter examines the treatment by the State of unions in the construction industry, as a counter point to the dilution of OHS crime. The last decade has seen activities of the construction industry unions, many of which are instrumental to ensuring compliance with OHS duties, designated as crimes. While the chapter does not look at the judicial processes (as is the case with OHS), it highlights how the state has legislated to capture particular activities (that were formerly legitimate and remain legitimate in other industries) as criminal. This redefinition of behaviour is consistent with the notions of ideology guiding particular policy developments and is consistent with a broad neo liberal philosophy. It also highlights the ‘contradictions’ related to the designation by the State of behaviours that can be designated as criminal in one sphere but not in another, and how the legitimacy of activities can be altered over time.

In NSW, the adoption of the national model of OHS laws in 2011 (*NSW Workplace Health and Safety Act 2011*), under a federal government agenda of harmonisation, saw the state LNP government oppose unions’ rights to prosecute for OHS crimes and remove OHS hearings from the NSW IC. The harmonised laws also contained more stringent provisions regarding unions’ rights to enter workplaces,⁶³ a move that directly affected unions’ ability to protect their members. Unions had a legal right to ensure that working conditions and arrangements such as changes to shift patterns, rosters, staff reductions, contractual arrangements and casualisation were not detrimental to workers’ health and safety. In unionised enterprises, officials had a role in negotiating appropriate agreements, an important role in sustaining optimal

⁶³ These events are more fully discussed in the following chapter.

OHS arrangements.⁶⁴ Some large construction companies were willing to cooperate with unions in negotiating changes affecting workers' conditions, including health and safety interests. However, some were also not averse to taking legal action against unions who imposed work bans or work stoppages because of health and safety concerns.⁶⁵

As Chapter Two pointed out, unions were significant agents in improving health and safety in workplaces, and in NSW had an inspectorial role as state authorised officers, as well as a right to initiate OHS prosecutions. In the construction industry, the regulator provided training to CFMEU C and G Division organisers in risk identification and inspection and the union saw itself as central to maintaining good OHS conditions on worksites.⁶⁶ However, this role was one of the catalysts for anti-union sentiment and action by building companies and the NSW LNP government and will be more closely examined in Chapter Seven.

Union action against poor health and safety on construction sites was one of the drivers of two Royal Commissions into the construction industry. The first was ordered by the NSW LNP Coalition government in 1990 and known as the Royal Commission into Productivity in the Building and Construction Industry or the Gyles Commission, as it was headed by Roger Gyles, Q.C. The terms of reference for the Gyles Commission were solely about productivity and efficiency with no reference to health and safety.⁶⁷ Just over 10 years later, in 2001, a national Royal Commission into the Building and Construction Industry Commission led by Terence Cole QC was instituted by the federal LNP Coalition government, (Cole Commission). Like its state predecessor, its formation was announced just before the federal government called an election. Again, like the Gyles Commission, there was no need for the inquiry and building and construction industry performance had been

⁶⁴ See generally Mayhew C, Quinlan M and Ferris R, 'The Effects of Subcontracting/Outsourcing on Occupational Health and Safety: Survey Evidence from Four Australian Industries' *Safety Science*, (1997) Vol 25, No 1-3 pp 163-178)

⁶⁵ Fraser L, 'Significant Developments in Occupational Health and Safety in Australia's Construction Industry', *International Journal Occupational and Environmental Health*, 2007; 13:12-20.

⁶⁶ Ibid.

⁶⁷ Royal Commission into Productivity in the Building and Construction Industry, *Final Report* 1992 at 3.

highly rated when compared to other countries, with Australian productivity and cost ranked overall second out of 14 countries.⁶⁸

The government's popularity was flagging; it needed to regain political momentum. 'Not for the first time, a conservative government opted for a Royal Commission focussing on union conduct, to provide some much needed political capital'.⁶⁹ The justification for the Commission was based on a short report from anonymous sources about the bad 'behaviour' of building unions, including criminal activities.⁷⁰

While the earlier, state, Gyles Commission found that the BWIU was innocent of charges of corruption and intimidation,⁷¹ employers did not fare so well, with the Commission finding widespread corruption and collusive activities and serious omissions in respect of OHS and industrial awards. Nevertheless, the Report concluded that some of this behaviour was 'explained by the behaviour of the BWIU'.⁷² Gyles was also of the view that the BWIU's attitude to the rule of law and disputation around agreements was such as to recommend its deregistration at state and federal level.⁷³ He also concluded that industrial relations were best decided through criminal and civil sanctions, rather than arbitration and conciliation, which was, in the view of Nyland and Svenson⁷⁴ a 'giant leap backward' to the nineteenth century systems of work relations'.

In its Final Report, the later, federal, Cole Commission found 85 instances of 'inappropriate conduct' by the construction unions, and only three by employers.⁷⁵ The findings of 'unlawful' behaviour on the part of the unions were in the nature of breaches of dispute settlement procedures in awards or agreements. The Commission did not examine employer breaches of awards/agreements or make specific findings about such breaches⁷⁶ and found only two OHS breaches by employers across Australia. There was no evidence of endemic corruption or criminality on the part of

⁶⁸ Australian States Joint Submission to Senate Employment, Workplace Relations and Education References Committee, Building and Construction Industry Inquiry Submission No: 26, 11/12/03. Retrieved on 19/8/08 from http://www.justice.qld.gov.au/__data/assets/pdf_file/0008/9467/ir-jointgovtosenate.pdf.

⁶⁹ Roberts, 2003, at 3.

⁷⁰ Hamberger 2001

⁷¹ Above note 66 Final Report, Appendix G.

⁷² Ibid at 134.

⁷³ Ibid at 24.

⁷⁴ Nyland C and Svenson S, 1995. 'The Battle of Bombo – besetting laws and the Right to Picket in New South Wales' *Australian Journal of Labour Law* Vol.8 at .177.

⁷⁵ Roberts *op.cit* at .4

⁷⁶ Roberts, *op.cit*.at .2

unions, nor were unions found to engage in illegal OHS stoppages. Lawyers representing unions accused the Commissioner of political bias in calling selective witnesses and restricting normal cross-examinations.⁷⁷

Nevertheless, acting on recommendations made by the Cole Commission, the federal government established the Building Industry Taskforce (BIT) in 2002 to deal with alleged widespread disregard for the law. The front cover of its first report 'Upholding the Law: Findings of the Building Industry Taskforce' September 2005, unlike more usual official government documents, consisted of a bright red collage of anti-union headlines taken from tabloid media headlines. At the close of the Royal Commission, the BIT was given 52 referrals of 'serious incidents', mainly relating to unions, and of these 47 were later discontinued.⁷⁸ The BIT also had the power to investigate business conduct, but it limited that to occasions where companies and the union had agreements for particular matters. For example, in one large enterprise, there was a standard procedure for a management-union committee to audit death sites, with workers paid while the audit and agreed work was undertaken, however the BIT considered this as an illegal industrial action and proceeded to investigate the company.⁷⁹

The Taskforce operated until the establishment of the Australian Building and Construction Commissioner (ABCC) on 1 October 2005, under its enabling legislation the *Building and Construction Industry Improvement Act (Cwth) 2005* (BCII Act).⁸⁰ In the government's words, the Act 'redefines unlawful industrial action, strengthens coercion provisions and substantially increases penalties to reflect the seriousness of the offences'.⁸¹ It had wide investigatory and prosecutorial powers, operationalised through the ABCC. The Act's provisions allowed the ABCC to oblige persons to provide information relevant to an investigation or to attend and answer questions relevant to an investigation. (s52 BCII Act). The Act carried criminal provisions under which a person was liable to six months imprisonment for

⁷⁷ Williams, G, 2008. The Australian Building and Construction Commission: an appropriate use of public power? Forum on Industrial Laws Applying in the Australian Construction Industry. National Press Club, Canberra, 25 August (2008); See also Roberts T, An Analysis of the Cole Commission into the Building and Construction Industry, (Sydney: CFMEU, 2003); McQueen H, Framework of Flesh: Builders' Labourers Battle for Health and Safety, (Port Adelaide; Ginninderra Press, 2009).

⁷⁸ CFMEU BIT Backgrounder, n.d.

⁷⁹ *Workers Online*, Issue 226 25 June 2004 http://workers.labor.net.au/226/news1_hadgkiss.html

⁸⁰ Australian Building and Construction Commission n.d.

⁸¹ Ibid.

failing to give required information; produce required documents; attend the Commission to answer questions; take an oath or affirmation; or answer relevant questions. There was no provision for a civil financial penalty option. Financial penalties include fines of up to \$22,000 for a person, and \$110,000 for an organisation. The prominent constitutional lawyer George Williams commented

It is bad enough to ever give such unchecked powers to a government minister, it is even worse to confer them on an unelected body that is not answerable in parliament. This represents a concentration of executive power of the worst kind...⁸²

Federal Labor government retains the ABCC

The ABCC had wide jurisdiction with powers to also investigate breaches of the *Workplace Relations Act 1996 (Cwth)*, the *Independent Contractors Act 2006 (Cwth)* and Commonwealth workplace agreements and awards, as well as any building code issued by the Minister.⁸³ Unions had campaigned before the 2007 federal election for the abolition of the ABCC and *BCII Act* and continued to do so after the Federal Labor Party took office. One contentious issue was that the Act and the Commission was directed only at the construction industry, and the union movement in general accused the government of retaining a discriminatory body. The National Secretary of the C and G Division of the CFMEU found it ‘amazing’ that the new Labor Prime Minister should ‘care so little’ about workers rights, given that his government came to power in 2007 on a promise of restoring ‘Australian’s rights at work’.⁸⁴ The Labor Party was committed to retaining the ABCC until 2010 after which it would be subsumed into an office of the industrial regulator, Fair Work Australia. This was not without wider criticism from within its own ranks, and in response the government established an inquiry into how the new arrangements would be exercised.⁸⁵ However, it recommended little significant change, including retention of the ABCC’s most repressive powers.

The then federal Industrial Relations Minister and Deputy Prime Minister (later Prime Minister) refused to concede that that the Commission’s powers were too

⁸² Williams above, note 76.

⁸³ Williams G and McGarrity N ‘The Investigatory Powers of the Australian Building and Construction Commission’ *Australian Journal of Labour Law* (2008) Vol. 21: 244-279.

⁸⁴ *Rights on Sites* Media Release, 25th August 2008.

⁸⁵ Wilcox Inquiry into the Creation of Building a Construction Industry Specialist Division within the Inspectorate of Fair Work Australia, 2008.

capacious nor, she said, would they be curbed. The government found itself being praised by employers and condemned by unions, 'in what has become an early test of relations with its caucus and its union base'.⁸⁶ The Labor government was in tune with the Cole Commission's (unproven) assumptions that union bullies overran the industry; and that unions were the main cause of loss of productivity. In the lead up to the federal elections of 2007, the Coalition government ran television advertisements depicting building workers as burley thugs intimidating cowering citizens, and adopting the same rhetoric after Labor's election, the Deputy PM announced that her government would not tolerate union thuggery.⁸⁷

Since its inception in 2005, the ABCC annual reports show that building unions have been overrepresented in mentions and prosecutions. Some of these were for industrial actions related to health and safety, but were framed as illegal industrial actions. For example, three unions engaged in building and construction work were fined a total of \$75,000 in breach of s38 of the BCII Act for 'industrial actions' in 2007-2008, in what were essentially stop works over poor OHS conditions.⁸⁸ Union organisers were banned from entering worksites for long periods of time, due to findings of their making 'blatantly unacceptable statements'⁸⁹ and for 'bad behaviour'⁹⁰, that is, for swearing, not an unusual occurrence in a robust masculine work culture. In that case, a NSW union official was forced to leave his employment, as he was unable to obtain a right of entry permit (ROE) because of his 'criminal' actions. Two union members were charged for failing to provide information to the ABCC when required to do so, and faced a penalty of six months imprisonment. Ultimately, both cases collapsed.⁹¹ The fact that the ABCC applied a criminal

⁸⁶ Gratten M 2008 'Gillard rejects union case on watchdog. *The Age*, August 26, 2008

⁸⁷ McQueen H, *Framework of Flesh: Builders' Labourers Battle for Health and Safety*, (Port Adelaide; Ginninderra Press, 2009) at 256.

⁸⁸ ABCC actions on Maryvale Pulp Mill *Workforce Express* 2/9/09

⁸⁹ ABCC E-Alert 17 May 2011 'ROE suspended for two NSW CFMEU officials', Update 7 ABCCupdate7@deewr.gov.au

⁹⁰ ABCC E-Alert 16 August 2011 'CFMEU official loses permit in NSW' Update 8 ABCCupdate8@deewr.gov.au

⁹¹ Noel Washington, a CFMEU C and G official refused to give evidence about matters arising during a worker meeting in 2007. Charges were dropped a year later. Mossman S, 'Building workers demand end of watchdog' *Sydney Morning Herald*, December 2, 2008. Retrieved on 4/3/2009 from <http://news.smh.com.au/national/building-workers-demand-end-of-watchdog-20081202-6ozw.htm> (4/3/2009); in 2008 a rigger, Ark Tribe, was charged with failing to attend a meeting with ABCC officials. The presiding magistrate found that the ABCC had improperly used its powers. See also Kappelle L. 'Abolish ABCC, say unions and Greens'. *Sydney Morning Herald*, November 24, 2010 <http://news.smh.com.au/breaking-news-national/abolish-abcc-say-unions-and-greens-20101124-1864r.html> (6/7/2011).

investigatory model in a non-criminal, industrial context stands in contrast to the reluctance of the State to apply such a model to health and safety crimes in a context that is both criminal and industrial. While governments have seemed reluctant to enforce OHS obligations through criminal mechanisms, in this case there is evidence of the industrial being treated as criminal. It is pulverisation in reverse where particular behavioural acts (for example. swearing) are taken out of context and prosecuted.

There are no empirical studies examining the effects on the construction industry as a whole, of ABCC activities under the former Coalition government and the present Labor government. However, it is likely that the targeting of union officials by the BIT and its successor the ABCC had consequences for union operations and safety in the industry. Anecdotal reports indicate that workers were less likely to speak up about safety issues, and that not all industry sectors were pleased with ABCC intervention. Many employers were disgruntled about the time and money expended on what they considered unnecessary and overly bureaucratic interference in their work.⁹²

The previous section of this Chapter showed the ambiguities and contradictions surrounding perceptions of OHS crimes and State and judicial practices accompanying its regulation. In effect, OHS breaches are seen more as administrative infractions, rather than as serious criminal harms, as in the case of workplace fatalities. However, in a reversal of this, the State, through its federal parliamentary system, has been willing to treat industrial matters, normally dealt with through various commissions and tribunals, as criminal events. While the labour movement and its supporters opposed diminution of the protections of IR and OHS legislation, employers were urging governments to take a more aggressive stance against organised labour, and there was, in this post-Robens environment, less cooperation and more conflict around OHS, particularly in the construction sector.

In Britain and Australia, the stability of the workplace environment with a largely full time workforce, strong trade union participation and job security was thought to justify the Robens approach to OHS – an approach which sought to simplify the layers of prescriptive legislation, introducing consultative arrangements between

⁹² Personal communication, construction site managers.

employers and workers, thus placing responsibility firmly in their joint hands in a spirit of mutual cooperation. The Robens' philosophical approach lay in the belief of a commonality of interest and mutual responsibility for OHS 'based upon unspoken assumptions that there would be a vigorous trade union movement covering almost half the workforce and that this union movement would play its role in the consultative process.'⁹³

The philosophy that endorsed a legitimate role for unions has no place in the ideological position fostered by Australian federal governments since 1996, because in the construction industry, union action was portrayed as criminal. A consequence of the *BCII* Act and the activities of the ABCC were to silence union officials and workplace delegates that in turn, silenced their activities around health and safety. It also silenced other illegal and corrupt activities by employers, identified in both Royal Commissions and not the least of which were the ongoing practices of sham contracting, phoenix operations and the use of illegal migrant labour. The ABCC's focus on union behaviour allowed attention to these practices to go unchallenged. Although federal Labor successfully sought to retain the essential elements of the *BCII* Act, uneasiness among its parliamentary ranks and union pressure saw the LNP government's appointed head of the ABCC replaced by a Labor appointee, whose first actions were to announce that it would investigate these illegal business practices.⁹⁴

This discussion has centred on the way in which the State adopted a neo-liberal rhetoric and ideological position in its stance toward representatives of the working class. It harnessed the powers of governments of both sides of politics and instituted repressive forces to silence its opposition. It also demonstrates how certain lawful behaviours (unions' engagement in stopping works over sub standard health and safety conditions, investigations of illegal industrial practices and so on) were criminalised, while criminal behaviour, of an industrial and health and safety nature on the part of employers, went unnoticed.

⁹³ McCallum R, 1998. 'Final Report of the Enquiry into Workplace Safety, Vol.1. Parliament of New South Wales Legislative Council Standing Committee on Law and Justice, Report No.10 at 45.

⁹⁴ Office of the Australian Building and Construction Commissioner, *Sham Arrangements and the use of Labour Hire in the Building and Construction Industry*, Discussion Paper (Australian Government, 2010)

Chapter Two showed how workplace traumatic death in the construction industry has remained reasonably constant over time but with a small rise in 2005-2008, the period in which the BCII's provisions came into play. If other standard health and safety measures are not delivering a reduction in these figures, it makes sense to suggest that curbing union's actions in affecting better outcomes is not helpful. That is, while the deterrent effect of low penalties remains in question, then other means of deterrence should be encouraged. The next Chapter discusses in more detail the recent changes to health and safety laws in Australia that will have implications for workers in NSW. Whether these are beneficial or detrimental changes and whether or not the result will be reductions in workplace traumatic fatalities, remains to be seen.

CHAPTER SEVEN

Recent Developments – Further Bricks in the Wall?

This thesis has argued that the State, while not monolithic, has reflected a hegemonic ideology that pervades institutions and practices in different and distinct institutions. The name attached to the dominant ideology reflected in Australian state is neo liberalism. This ideology becomes most apparent when considering the very recent changes to the state regulation of OHS in NSW. This whole agenda for change has been underpinned by a search for reduced costs or better efficiencies, rather than a concern with safety or lack of effectiveness in existing practices or institutions.

This study has examined how workplace traumatic injury resulting in death, is treated under a particular State system, and in a particular period of time, that is from 1988 to 2008. It has explored some of the intricate hegemonic relationships that contribute to contradictory positions among State agencies and State apparatus. The outcomes at the level of law and justice for the punishment of OHS crimes has been less than satisfactory for workers, and indeed for sections of the construction industry, in their striving for ‘level playing fields’. It is necessary to give some consideration to recent institutional and legal changes that began in the later part of the study period and which have, and will continue to have, direct effects on these problems.

The previous chapters have described how the State and its judicial, regulatory and parliamentary instruments produce varied health and safety outcomes for workers, depending on which political force gained ground in the ‘war of position’ between capital and labour. That is, on occasion the state Labor government supported more progressive health and safety legislation but ultimately, it did not opt to frustrate business interests, as exemplified in the regulator’s approach to compliance. The courts’ rhetoric about the seriousness of OHS offences that led to fatalities in workplaces did not lead to substantial penalties or other forms of deterrence.

At the federal level, regressive industrial legislation¹ that weakened unions' ability to protect workers from health and safety harms was endorsed by both sides of politics. While progressive individuals and unions struggled to maintain parity, in the end, legislation and practices that privileged business were implemented. The corollary of the form that this policy agenda has taken has been a weakening of the collective voice of workers in OHS machinery in NSW. Employees and their unions have a limited number of legitimate avenues to exert influence or enforce employer obligations, and where they have attempted to do so, have been limited by legislation that attaches criminality to union activities.

This Chapter considers the changes to OHS legislation, arguing that they did little, if anything, to re-position serious health and safety offences as essentially criminal in nature, and for NSW, there were some tangible losses. It is likely that significant changes to the state judiciary will also have a bearing on how courts, other than the NSW IC, frame OHS offences. Their interpretation and future judgements on OHS offences will also ultimately have a bearing on the deterrence of workplace harms.

The federal Labor government elected in 2007 softened, but did not entirely reject aspects of the conservative WorkChoices industrial legislation which had severely restricted the traditional rights of unions including their rights of entry to workplace provisions² and as shown in the previous chapter Federal Labor retained the onerous provisions of the ABCC. In NSW, the Labor government lost the 2011 election to the conservative LNP coalition that quickly moved amendments to the *OHS Act 2000* and introduced the harmonised legislation before its expected commencement in 2012.

The federal arena: moving to national harmonisation of health and safety laws

The incremental move toward common OHS standards at a national level has been framed by a rhetoric of efficiency rather than safety. The initiatives for uniformity have come from government concerns over the compliance costs of different regulatory regimes rather than any disquiet over the inadequate protection of worker

¹ See Forsyth A and Sutherland C, 'From 'Unchartered Seas' to the 'Stormy Waters': How Will Trade Unions Fare Under the WorkChoices Legislation?' *Economic and Labour Relations Review* (2006) Vol 16, No. 2, <http://www.austlii.edu.au/au/journals/ELRRev/2006/10.html>

² Ibid.

health and safety. The federal Labor government elected in 2007 followed through on a long-standing policy of national OHS harmonisation, one that had begun under a former federal Labor government. Following its creation in the mid 1980s, Australian states endeavoured to develop some consistency in the treatment of particular workplace hazards by adopting the standards promulgated by the tripartite national OHS body, (formerly called the National Occupational Health and Safety Commission (NOHSC), now known as Safe Work Australia (SWA)). In 1991, the NOHSC developed a strategy to harmonise OHS standards across Australia³, and this policy of national uniformity was implemented with the development and eventual promulgation by the state jurisdictions of OHS standards for six priority hazards. The take up was slow due to extensive consultation and other impact assessment requirements of the individual states.

In 1995, an Industry Commission noted the probability of increased OHS compliance costs to business because of competing state jurisdictions because of increased interstate business operations. It recommended a course of cooperative federalism whereby all jurisdictions would adopt core health and safety legislation.⁴ In 2004, its successor, the Productivity Commission made further inquiries into OHS in Australia, with a view to investigate, once again, the possibility of a more harmonised framework. Its recommended approach was to strengthen the 'national institutional structure based on NOHSC and the Workplace Relations Ministers Council (WRMC)...[and] progressively open up access to the existing Australian Government OHS regime, giving businesses the choice of a single set of national OHS rules.'⁵ In 2007, the Commonwealth *Occupational Health and Safety Act 1991* (*Cwth*) was amended to allow licensed self-insurer employers to be regulated by it, instead of by the state jurisdictional regulators. This raised questions about the suitability of using OHS legislation primarily designed for public service workplaces, in more dangerous environments⁶ It also had a significant effect for those construction workers in NSW working for companies shifting to the Commonwealth

³ Gunningham N and Johnstone R, *Regulating Workplace Safety: Systems and Sanctions* (Oxford: Oxford University Press, 1999)

⁴ Industry Commission, 1995. *Work, Health and Safety*, Canberra; see also Industry Commission *Annual Report 1995-96* (Canberra: AGPS, 1996).

⁵ Productivity Commission *Annual Report 2004-5* (Canberra: 2005)
http://www.pc.gov.au/_data/assets/pdf_file/0011/8687/annualreport0405.pdf. 10/8/2011)

⁶ Quinlan M, 'Response to report on rethinking regulation' *CCH Australian OHS Alert Newsletter*, 20 September 2006. Retrieved on 15/10/2009 from <http://intelliconnect.wkasiapacific.com>.

scheme, because unlike the NSW OHS Act 2000 there were no formal consultative requirements in the Commonwealth Act, nor did industrial organisations have the ability to prosecute employers. Some companies also argued that state union officials could not enter their worksites, as they no longer had jurisdictions.

The LNP government replaced the NOHSC with the Australian Safety and Compensation Commission (ASCC) in response to the Productivity Commission report. Its role remained much the same, but it was expanded to include workers compensation policy.⁷ Its emphasis was on perceived industry cost burdens and it eliminated the former statutory inclusion of three worker representatives on the Commission.⁸ In 2005, the National Regulatory Taskforce was set up to investigate the causes of compliance costs to industry, and recommended *inter alia* that the Council of Australian Governments (COAG) implement nationally consistent OHS standards as a business advantage.⁹ The harmonisation process was incorporated into the COAG agenda for a ‘seamless national economy’. Of all regulatory concerns, it found that work, health and safety were the most pressing for business. Of the 27 priority areas of regulation assessed by the COAG Business Regulation and Compensation Working Group, health and safety was ‘the number one issue’,¹⁰ in terms of economic considerations to business. A report of the Productivity Commission noted the burden on business due to lack of consistency in jurisdictions’ OHS legislations and regulation combined with the amount and complexity of differing jurisdictional OHS requirements.¹¹ While all Australian OHS legislation mirrored the Robens model, there were differences between the states and territories in relation to the obligations of duty holders, defence provisions and compliance requirements. Differences also existed in unions’ ability to launch prosecutions and in OHS representatives’ ability to issue immediate ‘cease or improve’ work notices on employers.

In 2007, the newly elected federal Labor government continued with the former government’s policy position of harmonisation and initiated consultation with

⁷ Ibid n 5.

⁸ Fraser L, ‘Significant Developments in Occupational Health and Safety in Australia’s Construction Industry’, *International Journal Occupational and Environmental Health*, 2007; 13:12-20.

⁹ Commonwealth of Australia (2006) *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, Canberra.

¹⁰ Ibid at 14.

¹¹ Productivity Commission Research Report ‘Performance Benchmarking of Australian Business Regulation: Occupational Health and Safety’, (Commonwealth of Australia 2010)

industry, unions, states and territories about introducing national workplace health and safety legislation. The following year all states and territories signed the *Intergovernmental Agreement for Regulatory and Operational Reform in OHS (IGA)*¹² which committed the parties to a number of initiatives including the establishment of a new body to replace the ASCC, which would also play a role in workers compensation matters.¹³ This new body, called Safe Work Australia, (SWA) was established in July 2009, and it was charged with developing a model Work Health and Safety Act, which was to commence in 2012.

Over the course of the decade and a half, the contested agenda for national standards around priority safety areas had been replaced by an agenda, largely accepted by state governments, for national OHS legislation. A model Work Health and Safety Bill developed under the auspices of SWA was released in late 2009. The federal government argued that this harmonised law would enhance the transfer of training and licensing requirements across state and territory borders, which would relieve intra state businesses of perceived cost imposts. This shift was to be more beneficial to large business rather than small firms operating within state boundaries.¹⁴ Even so, a peak employer body the Australian Council for Commerce and Industry (ACCI) was concerned about the compliance burden to intra-state industries and whether harmonisation would deliver productivity gains to business.¹⁵

Other areas of concern to big business were matters contained in the new model that ‘are peripheral to the achievement of better safety outcomes but rather are linked to other agendas’.¹⁶ These were to do with ‘issues resolution, union right of entry and the power of health and safety representatives to direct employees to cease work....’¹⁷

In ACCI’s view ‘...OHS laws should never be used as a vehicle to drive other agendas’,¹⁸ a statement that reflected prevailing ideas that unions used health and safety as an excuse to push other industrial agendas. ACCI was also disturbed about

¹² Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety <http://www.safeworkaustralia.gov.au/Legislation/Pages/ModelWHSLegislation.aspx> (18/6/2011)

¹³ Ibid.

¹⁴ Productivity Commission Research Report, Performance Benchmarking of Australian Business Regulation: Occupational Health and Safety, Research Report, Canberra (2010) at 331.

¹⁵ ACCI Opinion Piece OHS Harmonisation – ACCI’s Perspective 5 August 2009

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid at 2.

the ‘massive’ increase in fines for corporations under the primary duty of care that would increase to \$3,000,000, as compared to the lowest existing penalties of \$150,000 in Tasmania and the highest of \$1,650,000 in NSW. However, this last amount was reserved for the offence of reckless corporate conduct occasioning death, and on present record, a punishment unlikely to be used as the existing provision of s32A in the NSW *OHS Act* 2000, for the same type of offence, has never been employed.

Business interests were the main drivers for regulatory reform, evidenced in that the OHS harmonisation process was grounded in the report of a taskforce established by the Coalition of Australian Governments (COAG) to investigate the regulatory burden on business.¹⁹ A Regulatory Impact Statement (RIS) carried out by Access Economics²⁰ for the harmonisation process noted that ‘the actual costs of OHS compliance in Australia are not known’, nor are costs caused by jurisdictional differences.²¹ It was ‘generally accepted’ for most OHS laws that ‘there should be at least offsetting safety benefits’.²² The ‘largely financial’ benefits for employers would accrue through reduced workers compensation payouts, higher productivity and lower staff turnover, with improved safety being the only benefit for workers.²³

The report observed that costs to governments would not be significant, as they were in a continual process of review of the legislature and associated policies, and had allocated budgets to deal with training and education costs. ‘None indicated that they would require funding above their normal budget allocation’.²⁴ The report concluded that ‘the costs and benefits of the model Act are not readily quantifiable...the model Act is expected to bring medium sized benefits for business...partially offset...by adjustment costs...’ with workers experiencing ‘...some small safety benefits’. Overall, ‘...the model Act will confer an overall marginal to small net benefit.’²⁵ However, the Western Australian Government was reluctant to implement the model laws arguing that it had not had sufficient time to consider the changes, though

¹⁹ Australian Government, *Rethinking regulation, report of the taskforce on reducing regulatory burdens on business* (Commonwealth of Australia 2006) www.regulationtaskforcefor.exampleov.au/__data/assets/pdf_file/0007/69721/regulation-taskforce.pdf (4/5/2011)

²⁰ Safe Work Australia *Consultation RIS for a model OHS Act* Access Economics 25 September 2009

²¹ *Ibid* at ii.

²² *Ibid*.

²³ *Ibid*.

²⁴ *Ibid* iv.

²⁵ *Ibid*.

unions believed that the government did not want to introduce new provisions superior to the current WA OHS legislation.²⁶ The Victorian Government also announced that it would not adopt the harmonised law, as it ‘...offers little benefit for Victoria to offset the \$3.4 billion of estimated costs, the majority of which falls on small business.’²⁷ The previous NSW Labor government had said that it would not adopt the harmonised Act in its entirety, as it removed both unions’ right to prosecute, and the ‘reverse onus’ of proof, whereby employers were required to demonstrate that they had exercised due care when defending a workplace safety prosecution.

The harmonisation process would principally benefit those businesses operating across state boundaries, typically multinationals or multi-state businesses, which comprised less than 1 per cent of businesses, but employed 29 per cent of the workforce.²⁸ According to employer representative submissions made to Safe Work Australia by the Australian Industries Group (AiG), ACCI and the NSW Business Chamber, concerns were that the draft model Work, Health and Safety Regulations and Codes of Practice might impose a regulatory burden that was not offset by national consistency, and that supporting guidance material may not be ‘user friendly’. However, the NSW Business Chamber and AiG also believed that the changes would be positive for the ‘OHS landscape’ in New South Wales.²⁹

In what was a reflection of a dominant neo liberal ideology, which privileges market forces as the best allocator of resources, the rationale for harmonisation was to reduce business costs as part of the COAG National Reform Agenda. Its aim was to ‘... deliver more consistent regulation across jurisdictions and address unnecessary or poorly designed regulation, to reduce excessive compliance costs on business, restrictions on competition and distortions in the allocation of resources in the

²⁶ Alert Force, ‘*WA Refusing To Accept National OHS Harmonisation Laws*’, November 16, 2011. <http://alertforce.com.au/occupational-health-and-safety/wa-refusing-to-accept-national-ohs-harmonisation-laws/> 18/2/2012)

²⁷ *Victorian Budget 2012-13 Treasurer’s Speech*, Budget Paper No. 1 (Presented by Kim Wells MP, Treasurer of the State of Victoria), p 13. <http://www.landors.com.au/Publications/Workplacereationsandsafety/Publicationdetail/tabid/334/ArticleID/473/Default.aspx#>)30/5/2012)

²⁸ Above, note 20 at 16.

²⁹ Workplace Info ‘*Employers express concerns and some support for OHS harmonisation*’ 13 April 2011. <http://www.workplaceinfo.com.au/legislation/ohs/employers-express-concerns-and-some-support-for-ohs-harmonisation> (9/3/2012)

economy'.³⁰ COAG also believed that its outcomes would create a seamless national economy, enhance the country's longer-term growth, and improve labour participation rates and labour mobility.³¹

That harmonisation of workplace health and safety legislation was principally driven by economic considerations was further evidenced by the remarks of the Review team in its first report to the Workplace Relations Ministers Council (WRMC). They noted that: '(h)armonising OHS laws in this way will cut red tape, boost business efficiency and provide greater certainty and protections for all workplace parties'.³² It was adopted by most states and territories, with the exception of the Western Australian and Victorian governments. With the change in government in NSW in 2011, the objections to the model legislation held by the previous Labor government dissolved, and the new government adopted the model Act, with its own amendments, as discussed below.

Effects of harmonisation

The national harmonisation initiative was not without controversy that resonated between different fractions of capital, and industrial organisations. In particular, unions in New South Wales were concerned about the removal of the reverse onus of proof and the rights of unions to prosecute offenders that existed under the *OHS Act* 2000. After the draft harmonised legislation was circulated nationally in 2009, the ACTU began a public campaign against what it saw as the diminution of OHS protections for workers in favour of business drivers for productivity, as exemplified in ACCI's statement that '[T]he real objective of OHS...is to provide a safe place of work while maintaining a productive and sustainable business.'³³ The ACTU had actively participated in the national consultations and initiated the campaign after some of its extensive recommendations failed to persuade the national harmonisation consultative Review Panel. One of the main concerns for the ACTU was what it saw as a lessening of the rights, powers and protections for health and safety

³⁰ .National Partnership Agreement to Deliver a Seamless National Economy
http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/seamless_national_economy_np.rtf (17/10/2011)

³¹ Ibid.

³² Australian Government, National Review into Model OHS Laws, First Report to Workplace Relations Ministers Council, October 2008 at ii.

³³ ACCI, 'Opinion Piece OHS Harmonisation' *ACCI's Perspective* 5 August 2009 at 3.

representatives, which would make their job harder in the future.³⁴ ACCI maintained the position that the unions' campaign was designed to implement pro-union and punitive OHS rules, and its CEO stated

Behind the emotive message of this union campaign is a push for laws that would give union officials ...more rights for shop stewards elected as OHS representatives to stop work in a business.³⁵

The ACTU's submission³⁶ to the exposure drafts for the Model Act and regulations set out other concerns, including objections to the complicated and bureaucratic requirements for unions' rights of entry provisions that limited their timely access to workplaces thus increasing risks, especially in dangerous industries. The ACTU noted that genuine consultation between employers and workers was one that depended on valid representation without bureaucratic constraints. Its position was that to be consistent with the model legislation and to comply with ILO Convention 155, the objects of the Model Act should state that union and employer *involvement* rather than mere *encouragement* in overseeing health and safety was a preferred approach.³⁷

Harmonisation in NSW

When the NSW Labor government lost the election in 2011, within two months the incoming LNP coalition introduced the *Work Health Safety Bill (WHS) 2011* and the *Occupational Health and Safety Amendment Bill 2011*.³⁸ The *WHS* Bill enacted the model national work health safety legislation that was due to be implemented nationally in January 2012. The state government wished to implement immediately what it saw as three key reforms so that they might have take effect without delay.

³⁴ ACTU 'Time is running out for stronger health and safety laws: workers rally for change' 28 October 2009

³⁵ ACCI media release *Unions pushing wrong OHS issues* 14 September 2009 MR 109/09).

³⁶ Model Occupational Health and Safety Legislation Exposure drafts for the Model Act and Key Administrative Regulations, Submission of Australian Council of Trade Unions November 2009 ACTU D No. 20/2009 at 3.

³⁷ Object 3(1)(c) states '...encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting persons conducting business or undertakings and workers to achieve a healthier and safer working environment...' ILO Convention 1981, Convention 155 at Article 4 and Article 15 requires that the government and '...most representative organisations of employers and workers formulate, implement and periodically review a coherent policy on occupational safety, occupational health and the working environment'. It is worthwhile noting that the national model legislation and the NSW *WHS* Act mention deterrence as an objective.

³⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 May 2011,223, Andrew Stoner, Deputy Premier. (*Work Health and Safety Bill 2011* and *Occupational Health and Safety Amendment Bill 2011*).

These were the removal of the reverse onus of proof whereby the defendant was required to prove that they had complied with their duty of care; the removal of an absolute duty of care to one of due diligence and the removal of unions' rights to prosecution contained in the OHS Act 2000.³⁹ The Labor opposition condemned the haste with which the Bills were introduced, and the matters they addressed.⁴⁰

The ACTU argued that the reverse onus of proof provisions of the former NSW OHS legislation was consistent with that of anti-discrimination law and the *Fair Work Act* general protections, in which it was acknowledged that the operator of a business has better access to information about the operational needs of the business.⁴¹ This was a position consistent with a 2007 WorkCover review (the Stein report) which found that it was appropriate that the evidentiary burden falls on employers/defendant.

Quite frequently, the onus of proving defences peculiarly *within the knowledge of the defendant* is placed upon that party on the civil standard of proof – the balance of probabilities. There is nothing unique or unusual about this. Modern examples abound in consumer protection and environmental law.⁴²

This Report also found that the principle was compatible with the European Convention of Human Rights.⁴³ The Labor opposition highlighted the contradictory position of the government

....it supports the business lobby argument that unions should not have the right to prosecute employers responsible for the death or injury of a worker when at the same time this lobby supports draconian legislation in the construction industry. The existing occupational health and safety legislation allows employers to defend themselves in court, yet the Australian Building and Construction Commission (ABCC) gives workers no rights to silence, no right against self-incrimination and automatic jail sentences and heavy fines for workers who do not comply.⁴⁴

³⁹ Ibid.

⁴⁰ Parliament of New South Wales *Work Health and Safety Bill Occupational Health and Safety Amendment Bill* 2011. Second Reading Speaker Hon Luke Foley Legislative Council 25 May 2011, at 966

⁴¹ Submission of Australian Council of Trade Unions, November 2009 ACTU D No. 20/2009 to the Model Occupational Health and Safety Legislation Exposure Drafts for the Model Act and Key Administrative Regulations at 3.

⁴² WorkCover NSW 2007 Report of the 2006 Statutory Review of the *Occupational Health and Safety Act* 2000 WorkCover Publication 5625, at 31. Emphasis added.

⁴³ Above note 42 at 31 and 33.

⁴⁴ Parliament of New South Wales *Work Health and Safety Bill Occupational Health and Safety Amendment Bill* 2011. Second Reading Speaker Hon Peter Primrose Legislative Council 26 May 2011.

The ACCI was in favour of removing unions' rights of prosecution in OHS matters, as well as the reverse onus of proof provisions, these being aspects of the NSW OHS Act, which it opined 'undermine fundamental legal principles and processes'.⁴⁵

The haste with which both pieces of legislation were introduced caught many by surprise, including officers of WorkCover itself. Certainly, most inspectors had no idea that the state would move so quickly on introducing the new *WHS* provisions, and were concerned about the organisation's ability to implement the changes with their existing staffing levels.⁴⁶ The Parliamentary debate that ensued around these changes was intense. The government was at pains to point out the benefits of the new Bill and highlight the long-held criticisms of particular elements of the *OHS* 2000, criticisms that mainly came from employers and their associations.⁴⁷

Under the NSW OHS Act 2000, union officials had a right to enter a workplace during working hours if it contained members of that union and if they held relevant permits. More recently, union officials were also required to hold a permit under the federal Labor government's *Fair Work Act 2009 (Cwth)* which had retained the tightened union entry provisions introduced by the WorkChoices legislation in 2006 (see below).⁴⁸ Employers were advised to determine if an entry request in relation to OHS matters was 'genuine' and 'legitimate' by asking officials to give advance details about the OHS matter they intended inspecting⁴⁹ a move which would be likely to defeat the purpose of hazard detection and legitimate safety inspection.

The NSW *WSHA* 2011 allowed union officials a limited right of entry to workplaces to investigate possible breaches of the Act, if they were trained, 'fit and proper persons'. However, the restrictions placed on unions' entry into workplaces for the purposes of inspecting health and safety conditions are quite onerous under the federal legislation. This is demonstrated by the 34 sections of Part 7 of the *WHS* provisions for 'Workplace entry by *WHS* entry permit holders', a number greater

⁴⁵(ACCI Opinion Piece OHS Harmonisation – ACCI's Perspective 5 August 2009 at 1.

⁴⁶ Personal communication from four WorkCover inspectors. A senior inspector commented that of the 300 inspectors in the state, only about 150 were active at any one time.

⁴⁷ Parliament of New South Wales Work Health and Safety Bill Occupational Health and Safety Amendment Bill 2011. Speakers, G. Provest; Lulich, N; Patterson, C; Rowell, J; Lee, G; Hartcher, C; Deputy-Speaker, George, T, at 7922.

⁴⁸ *OHS Alert* 26 August 2009

⁴⁹ *Ibid.*

than for those relating to ‘Health and safety duties’ of those controlling businesses, and for sections related to ‘Enforcement measures’.⁵⁰

Presently, in NSW, the permit allowing entry to a workplace is issued by the Industrial Registrar under Part 7 of Chapter 5 of the NSW *Industrial Relations Act 1996*. Persons requesting right of entry must give at least 24 hours notice if they wish to inspect relevant documents related to suspected contraventions of the *WHS Act*, or to enter the workplace to consult and advise workers.⁵¹ Entry permit holders must also hold an entry permit under the federal *Fair Work Act* or relevant state/territory act.⁵² They may only enter a premise where they ‘reasonably suspect’ a contravention of the Act that could relate to or affect a worker.⁵³ There were a number of other restrictions associated with right of entry, including the requirement to show the permit and photo identification to anyone who so required it,⁵⁴ the right to only be exercised during usual working hours,⁵⁵ restrictions on the area to be inspected to work areas that may be directly affected by OHS risks.⁵⁶ The maximum penalty for breaches of these sections is \$10,000.

Union officials can apply to the IRC for permits if they have completed a training course and hold an entry permit under the *Fair Work Act* or relevant state/territory legislation.⁵⁷ When considering applications for entry permits, FWA must determine if the union official is a fit and proper person. In doing so it considers ‘whether the official, or any other person, has ever been ordered to pay a penalty under this Act or any other industrial law in relation to action taken by the official’ and /or ‘whether the official has ever been convicted of an offence against an industrial law’.⁵⁸ As mentioned in the last chapter, this had particular significance for officials of the CFMEU, as most actions taken by the ABCC had been against the union, its officials and delegates, effectively barring experienced organisers and worker representatives from gaining entry permits and consequently accessing sites.

⁵⁰ Model *Work Health and Safety Act* revised draft 23 June 2011

⁵¹ *Ibid* above n12 ss117-121.

⁵² *Ibid* s124.

⁵³ *Ibid* s117

⁵⁴ *Ibid* s125.

⁵⁵ *Ibid* s126.

⁵⁶ *Ibid* s127.

⁵⁷ *Ibid* s131.

⁵⁸ *Fair Work Act* 2009 s513.

The new OHS legislation had mixed signals for NSW. The removal of an absolute duty of care weakens the previous legislation that required an absolute duty on the employer. The removal of the reverse onus of proof means that the regulator might choose to take fewer prosecutions, because of financial and resource constraints. During parliamentary debate on the three ‘reforms’, a successful amendment meant that unions’ right to prosecute was reinstated in a limited way, that is, if the regulator failed to act then unions could launch an action themselves. On the other hand, penalties for OHS offences were substantially increased. However, as has been demonstrated throughout this thesis, increasing penalty sanction in legislation has not had significant flow-on to actual penalties imposed. It remains to be seen if the changes in penalty amount coupled with the changes in judicial jurisdiction, will alter the lenient financial penalties amounts seen for workplace fatalities.

Downgrading the NSW IRC jurisdiction

Another controversial action by the newly elected NSW LNP government in May 2011 moved OHS jurisdiction from the Industrial Court to mainstream criminal courts for the most serious offences. Category 1 offences relating to serious injury or death, such as those cases examined in this thesis would be heard in the Supreme Court, while other offences would be handled summarily in the District or Local courts. The President of the Industrial Court, Justice Boland, was taken unawares by this announcement in relation to the changes of jurisdiction for OHS offences and its immediate introduction of elements of the national model Act. For him, the ‘biggest surprise...was the government’s intention to remove occupational health and safety from the Industrial Court’s jurisdiction’,⁵⁹ as the government, when in opposition had assured him that the Industrial Court would retain jurisdiction over all but the most serious Category 1 offence of recklessly causing death or serious injury to a person. In these cases, the offence would be an indictable one and tried before a jury. The president remarked at a public meeting

I have been criticised for having the temerity to express my concern to the relevant ministers at not being advised about a change that will have a profound effect on the Industrial Court’s jurisdiction. I remain puzzled though as to why it was necessary to keep the matter secret until the bills were tabled in the Parliament on 5 May...[I]t is now proposed that the jurisdiction will go to the so-called mainstream courts that have no background, body of law or expertise

⁵⁹ Boland J, *Jeff Shaw Memorial Lecture*, Unions NSW, 26 May 2010.

in occupational health and safety...[O]ne may debate the role of specialist courts, but it cannot be denied OHS law is a special area of law, one which is complex and, as many cases have demonstrated, replete with legal issues peculiar to the jurisdiction, including sentencing and remediation.⁶⁰

In support, the President cited the findings of the Stein review into OHS, in which Stein *J* of the Supreme Court addressed this specific question

The expertise of twenty years in the Industrial Court dealing with occupational health and safety proceedings outweighs the general expertise in mainstream criminal law of the District and Supreme Courts. Occupational health and safety law is very specialised and the generalist courts do not have that experience and expertise. I recommend that the jurisdiction for serious occupational health and safety proceedings remain with the Industrial Court of New South Wales⁶¹

Given that WorkCover has two years to file a prosecution in the Industrial Court, or two years after a coronial inquiry, it is unlikely that prosecutions under the new Act will be filed in the IC. If the provisions of the *WHS Act* which came into effect from 1 January 2012 are to have effect, then the IC would have no jurisdiction regarding OHS. There would be questions as to whether prosecutions in 2013 would be dealt with under the (amended) *OHS Act* 2011, given the two-year period.⁶² This would be an untenable situation if the object of the whole exercise was to harmonise OHS legislation. The incoming government's haste in introducing these new pieces of legislation, with no consultation by the Minister with the IC, and without a reasoned basis for the transfer of jurisdictions, as Boland *J* maintains,⁶³ appears to be an ideological, rather than a pragmatic decision.

Conclusion

OHS enforcement has been switched from a specialist court to general courts. The rationale for these changes was driven by the conservative government's ideological agenda⁶⁴ and political alliance with big business interest, rather than concern about the ineffectiveness of IC in enforcing safety. In the light of the evidence from the previous chapters, it may be surmised that these changes may not see a change in the

⁶⁰ Ibid.

⁶¹ WorkCover NSW, 2007. *Report of the 2006 statutory review of the OHS Act* (Stein Report) http://www.workcover.nsw.gov.au/formspublications/publications/Documents/stein_inquiry_report_5625.pdf Page number at 145. (29/2/2008).

⁶² Roger Boland (2011) *Recent legislative amendments and their impact on the NSWIRC* Address to Australian Labour Law Association (ALLA) State Chapter Seminar, Sydney.

⁶³ Ibid.

⁶⁴ At the same time as it made this shift, it also removed from the NSW IC its arbitration role in setting public service wages and conditions. The government saw the NSW IC as an instrument of the trade unions and therefore was determined to see its demise.

courts view of the causes of workplace harms as criminal actions. The NSW state government's reasoning was that it would ensure better 'integration' with general criminal law. It is yet to be seen if this 'integration' with criminal law is to be realised. If it were to cement the perception that OHS harms were legitimate criminal matters, rather than regulatory misdemeanours and if those harms were punished accordingly, then the deterrent component of the sentencing process might become more effective. It should be noted again that only the most 'serious' offences will be heard in the Supreme or District Court, that is for category 2 and 3 offences. All other offences will be heard in district or Local Courts, and Johnstone's evidence for provides little optimism for better deterrence in these jurisdictions.

The District Court is already a very busy jurisdiction hearing criminal and civil cases. It appears that it has not been allocated any extra resources to carry out its new function, so there is a real concern that because of this, OHS prosecutions may not be given priority. There is also an issue about the change in judicial personnel hearing cases. While moving the jurisdiction over OHS prosecution to the general courts results in a loss of specialist tribunal/judicial members who have industrial expertise, it may be the case that judges of the District and Supreme Courts might be more willing to apply higher fines available under the new legislation as they see the damage that can be wrought as a result of OHS incidents through their civil case load.⁶⁵ Alternatively, these courts are just as likely to fall back on the individualised and decontextualised analysis of actions that lead to fatalities, which is to overlook systemic causes. If the IC, which has relevant industrial experience, has problems grappling with broad safe management systems of work, the question must be asked, would a mainstream court be any more effective?

This chapter shows the developments in the regulation of OHS in NSW and how these developments have arguable reflected a broad neo-liberal ideology privileging market relations. Through IR and OHS legislative changes, the ability of workers' representatives to protect and monitor worksite conditions was weakened. However, the competing interests and conflicts of State institutions between and among themselves meant that dominant hegemonic interests were unable to reframe completely OHS laws in terms of their business 'efficiency'. The left wing of the

⁶⁵ Personal communication. President and former senior legal officer CFMEU C and G Division, 2/2/2012.

federal and state branches of the Labor Party were more vocal in their condemnation of various aspects of the OHS legislation and other regressive IR legislation, as well as speaking out about the continuation of the ABCC. Not only were there irreconcilable class antagonisms, there were irreconcilable fractional difference within class divisions. As described by Gramsci, the state acts as a cohering force for dominant class interests, because there is no unity among the capitalist class, and the state assumes the form of a 'collective capitalist' representing 'long term interests of the class as a whole, under the hegemony of one of its fraction...monopoly capitalism.'⁶⁶ That such hegemony exists is evident in the actions of the State discussed here and in Chapter Six.

While the State exerts hegemonic control through ideological and repressive actions, the future for workers' health and safety cannot be optimal. The rhetoric of 'equal responsibility' and 'mutual interest' at the level of the worksite, is plainly false, because of the inherent inequality of power and structural antagonisms within the capitalist labour process. The dismantling of previous OHS legislation in NSW, the removal of employers' absolute duty of care and the probability that the regulator will be more reluctant to launch prosecutions because of the removal of the reverse onus of proof, may see workplaces become less safe. For the construction industry, this is a major concern, given its dangerous nature.

⁶⁶ Pitelis C 'On the Nature of the Capitalist State, *Review of Political Economy*, (1994) 6.1:72-105 at 89.

CHAPTER EIGHT

Conclusion

Corporate and safety crimes can be produced by an organisation's structure, its culture its unquestioned assumptions, its very modus operandi, and so on. Thus to understand such phenomena must not obscure human agency, but does require a shift from abstracted, atomised individuals to account for agency in the context of structures.¹

The problem re-visited

Chapter two of this thesis revealed that the number of workers killed through traumatic workplace fatality in NSW has not diminished, with latest figures showing that the state had the highest numbers of deaths from traumatic workplace incidents in the first quarter of 2012²; the majority occurred in the construction industry. Chapter Four showed that when offenders were prosecuted, the monetary penalties imposed were less than one fifth of the maximum allowable.

In seeking to explain this phenomenon, the thesis has sought to situate it within the relations of production that exist within the building and construction industry and the wider social relations (civil society, the State, the judiciary) that ultimately affect the lives of workers. This was done by developing a framework in Chapter One, which demonstrated the interactions and interrelationships between the different institutions of the State in the spheres of IR and OHS. This model was predicated on the notion of a hegemonic State within which institutions acted with autonomy. Together, these interactions legitimate structures and define activities that set the boundaries for workplace activities with its consequent impact on workers' health.

¹ Tombs S and Whyte D *Safety Crimes* (UK: Willan Publishing, 2007) at 3.

² Safe Work Australia, , March 2012

<http://www.safeworkaustralia.gov.au/sites/SWA/AboutSafeWorkAustralia/WhatWeDo/Publications/Pages/NotifiedFatalitiesMonthlyReport.aspx>. The number of all deaths notified to work health and safety authorities in 2010–11 showed a % increase on 2009–10. Given that the construction industry ranks among the three top causes of workplace death, it may be expected that fatalities in the industry will not diminish. Overall, the industry accounted for 278 deaths in NSW from 2003–04 to 2009–10 9 (Safe Work Australia, *Work-Related Traumatic Injury Fatalities, Australia 2009–10*, March 2012, <http://www.safeworkaustralia.gov.au/AboutSafeWorkAustralia/WhatWeDo/Publications/Pages/Traumatic-Injury-Fatalities-2009-10.aspp> (6/5/2010)

These processes are often in conflict, sometimes in concert, but operate to sustain the broad conditions for capitalist accumulation. These structural conditions must be considered when thinking about the apparent lack of measures to counteract workplace harms. By divorcing the conditions that produce ‘dangerous behaviours’ from the behaviours themselves (by decontextualizing, individualising) consideration of OHS obligations become disconnected from the economic environment in which they are embedded. For example, McQueen³ has shown that fluctuations in construction cycles, as well as investment risks on borrowed capital dictate the speed of work vital to profit maximisation. Sub-contractors work on a bonus or penalty system for early or late completion of work and economic risks are transferred to workers in the form of physical harms.⁴

Given that the numbers of deaths in the construction industry in Australia and NSW have not significantly declined, the question of the deterrent value of current levels of punishment was one issue considered in this thesis. It also suggested that the ways in which the state’s regulation of health and safety management and of judicial regulation through sentencing and criminal laws, contributed to judges’ operating in a ‘confined space’. That is, sentencing rules directed them toward pulverised penalties, through the mandatory use of mitigation discounting. Various legislative changes were mapped temporally from 1988 to 2008 to show, on one hand, changes to industrial relations legislation and other social and political actions, and, on the other, the legislative changes that were occurring in the sphere of workplace health and safety.

The thesis looked at approaches to sentencing OHS offenders by using empirical methods to examine a wide range of elements or factors relating to the circumstances of the fatalities, and their subsequent prosecution. Data analysis confirmed the conclusions from others’ research which demonstrated the leniency of OHS penalties, and by applying Mathiesen’s typologies to the judgements, the thesis showed how judgements were narrowly constructed, thus limiting judges’ ability to address broader and inherent safety problems in the industry. However, although the ‘silencing’ techniques applied in the courtroom, such as anthropomorphism, temporal relegation of events and so on, mirrored Johnstone’s Victorian research, this study

³ McQueen H, *Framework of Flesh: Builders’ Labourers Battle for Health and Safety*, (Port Adelaide; Ginninderra Press, 2009) at 263.

⁴ *Ibid.*

also showed that structural differences in court procedures and practices, and adherence to sentencing rules also had a bearing on judges' decisions.

Chapter One introduced the model and approaches, as well as stating the research problem and method. The underlying theoretical approach was drawn from Gramscian theory about the role of the State and the tensions inherent in hegemonic struggles over the contested terrain of industrial relations and health and safety. These were explicated in subsequent chapters, especially Chapters Five, Six and Seven.

In Chapter Two, the role played by the construction industry in the Australian economy was described, along with the particular characteristics of its work organisation. The relations of production in the industry contribute to elevated incidence of injury disease and death⁵. Practices such as work intensification, dubious or illegal contracting arrangements and the lack of integrated safety management systems were identified as contributing factors in poor workplace OHS outcomes. While the CFMEU C and G Division had endeavoured to alleviate this toll on the workforce, it was seen that successive governments, lobbied by powerful industry interests, moved to lessen union strength, because of its perceived interference in capital production and accumulation.

The theoretical perspective informing the thesis was established more fully in Chapter Three. Gramscian theory was used as a framework for the research, because of its ability to analyse civil society in terms of State functions and to take account of the shifts in groups seeking hegemonic control. For example, the struggle of labour to maintain at least some control over working conditions, and the response of the State to that endeavour. This thesis showed how the State wielded its ideological and repressive forces against trade unions, as exemplified by the passing of the *Australian Building and Construction Industry Improvement Act 2005* and the establishment of the Building Industry Taskforce, and subsequent Australian Building and Construction Commission.

The ambiguous response of regulators to white-collar crime, combined with perceptions of safety offences as regulatory infractions rather than criminal acts was

⁵ See McQueen, above, note 3; True P, 1999. *Building Workers and the press: 160 years of anti-union propaganda*. (Sydney: NSW Branch CFMEU C and G Division, 1999); Peacock M, *Killer Company: James Hardy Exposed*. (Sydney: Harper Collins, 2009); Sheldon P 'Job Control for Workers' Health: The 1908 Sydney Rockchoppers' Strike' (1988) *Labour History* No. 55.

seen as an important factor in the marginalisation of safety crimes, and a factor in the imposition of lenient sentences.⁶ This was further compounded by views that safety crimes were accidental and even isolated events; workplace harms were more the fault of operators, rather than management, and they fell outside mainstream ideas about ‘violence’. Health and safety crimes are anomalous; though technically criminal, they have been dealt with in courts that deal with regulatory offences, rather than the more usual criminal jurisdictions.⁷

Social harm theory allowed health and safety crimes to be considered through the spectrum of emotional, psychological, social and economic harms, as well as through the broad social construction of harms, and was a valuable tool when considering the complex mechanisms which contribute to workplace fatalities. This was particularly so when reflecting on the harms done to families of those killed at work and their perceptions about unjust penalties. The chapter considered some of the contradictions inherent in self-regulatory systems in a neo-liberal framework and the implications this had for effective deterrence measures.

Chapters Four and Five focused on the empirical results, which found that penalties for traumatic workplace fatalities caused by breaches of the 1983 and 2000 OHS legislation were less than one fifth of the maximum penalties allowable. This figure accords with previous research and government investigative reports. All prosecutions involved breaches of the general duties of care under both OHS Acts, that is, the failure of the employer to ensure the health, safety and welfare of all employees, sub-contractors and other persons, such as visitors, at the place of work. The majority of prosecutions were laid against corporations, and most offences were caused by medium to large companies, that is, those employing 20 or more persons.

No particular trends were seen in judges’ sentencing patterns as far as their affiliations to labour law or non-labour law chambers were concerned. Labour law judges imposed lesser penalties on corporations, but also allowed lesser discounts, while non-labour law judges penalised corporations at a higher level, but allowed

⁶ See Johnstone R. *Occupational Health and Safety, Courts and Crime*, (Sydney: The Federation Press, 2003); see also Tombs S and Whyte D, *A crisis of enforcement: The decriminalisation of death and injury at work*, Centre for Crime and Justice Studies (Kings College, London, 2008).

⁷ See Levin for discussion about initial development of OHS legislation as essentially criminal, to its ‘hybrid form’ as essentially civil in name, and, (in America), also in fact. Levin M ‘Crimes Against Employees: Substantive Criminal Sanctions under the Occupational Health and Safety Act’, (1976) *American Criminal Law Review*, Vol.14:717.

greater discounts. In speculating about the reasons for lenient penalties and discounting practices, the thesis considered the effects of the regulator's prosecution policies and the state's sentencing legislation and guidelines. In addition to these formulas, the use of guideline judgements and sentencing styles, (that is 'two-tiered' or 'instinctive synthesis') contributed to formulaic sentencing patterns, and a reluctance to apply more innovative sentencing options, such as court orders.

Mackenzie's study of the Queensland judiciary and media interviews of NSW judges shed light on the attitudes and beliefs of judges on sentencing issues, showing that some judges felt constrained by social rules (around sentencing) and by social norms (community expectations, professional expectations, customs, attitudes and beliefs). Judges in the NSW IC rarely took the opportunity to impose punishments other than financial ones, and overall, were tied to guideline judgements. In other words, the inherent conservatism of the law showed in the somewhat standard judgement statements. There is also the unexplored issue of whether judges perceive breaches of OHS duties as 'actual' crimes, or, even if they do, if the sentencing result is softened by more general perceptions of OHS offences as regulatory matters. These perceptions may also contribute to the continuation of seemingly lenient sentencing in OHS matters in cases of workplace fatalities.⁸

Chapter Five continued the theme of investigating the 'pulverisation' of OHS harms through applying the elements or techniques of 'silencing' events surrounding incidents, as proposed by Mathiesen. This textual analysis of decisions from the NSW IC confirmed Johnson's findings for the Victorian magistrates' courts, but with some exceptions. These were that judges had a less biased view of workers as being 'at fault' than did Victorian magistrates; judges were accustomed to hearing only OHS and industrially related matters, thus had built up a body of expertise over twenty years, and showed that they had more of a contextualised understanding of work related harms. Defendants were prosecuted under specific sections of the performance based OHS Acts, rather than the more prescriptive regulations, which presumably would provide an opportunity for judges to consider the broader aspects of OHS management. However, the thesis showed that this opportunity was not explored to any real advantage.

⁸ Tombs S and Whyte D, *A Crisis of Enforcement: the decriminalisation of death and injury at work*. (London: Centre for Crime and Justice Studies, 2008).

Chapter Six explored other dimensions contributing to the pulverisation process, specifically, the effect of state and regulatory policies and legislation. It also looked more broadly at some of the structural reasons behind the ‘silencing’ of workplace safety crimes, and the absence in general discourse that would position OHS harms as essentially criminal incidents. Health and safety offences are legally criminal, but are diluted through the structure of the (regulatory) OHS legislation and the way that it is enforced. That is, penalties are minimised through pulverisation and the silencing of other important dimensions associated with the social relations of production. The thesis showed that while judges made pronouncements about the seriousness of the defendant’s omissions, one aspect of deterrence, that is the financial penalty, was ameliorated by the sentence outcome. If OHS breaches are not recognised as an important problem, then industrial policing, in the form of union action, is an important factor for the welfare of workers. However, this action was seen as a threat by governments and capital, which at times, combined to minimise industrial strength. For building trade unions, this was attempted though the use of ideological and repressive forces, represented by Royal Commissions and oppressive legislation.

Chapter Seven reintroduced the role of the State in recent developments that led to national harmonisation of health and safety legislation, which, at the local level saw a downgrade of some previous OHS conditions with the implementation of the NSW *Work Health and Safety Act 2011*. The chapter highlighted the tensions and manoeuvres between capital and labour as each strove to push a particular agenda in these debates.

Empirical and theoretical considerations

The thesis makes a theoretical contribution by looking at the interactions between different elements of the State in a broader context as a hegemonic force, rather than as a set of complimentary institutions that are usually considered separately. It considers the hegemonic ideologies that inform thought and action around the regulation of health and safety and asks what effect they have on penalty outcomes, deterrence, legislative effectiveness and delivery of justice. It makes a more specific empirical contribution through the study of penalties and judgements delivered in a specialist court, the NSW IC, for OHS crimes committed in one specific industry,

that of building and construction. The thesis explains the empirical phenomenon of the penalty quanta by considering social norms and State rules about judicial sentencing, arguing that the de-contextualising of workplace crime in both a wider social context and in the court process acted to dilute punishment. It also argued that industrial relations laws pertaining to the construction industry had a bearing on workplace health and safety. The conceptual model used in the thesis has avoided a determinist and one-dimensional view of the State and its agents. By using a radical criminological approach, the sociological elements in question are better explicated. That is, it has been able to extend the focus onto social agency to see how those working for their agencies see their roles, duties and obligations. In turn, this sheds light on the tensions and contradictions inhabiting institutional structures; how the 'war of position' is contested over the hegemonic landscape.

The thesis makes a number of empirical, conceptual and methodological contributions to the field of workplace health and safety. It further informs the literature about health and safety concerns in a specific industry, that of building and construction. It raises the connections between health and safety literature that is concerned with regulation and deterrence, with that of industrial relations. It has not been content with looking at OHS harms and their punishment through the lens of standard criminological theory of causality, but has considered the wider social, political, and economic issues, which ultimately affect the everyday lives of workers. To do this, it has considered the role of the labour movement in protecting those workers, through the actions of building and construction unions. This in turn has led to consideration of the historical and continuing conflict between capital and labour, mediated by the ideological and repressive apparatus of the State.

The thesis has reaffirmed the usefulness of Mathiesen's typology in identifying underlying themes surrounding traumatic events. In terms of the judgements selected for analysis, it showed how silencing techniques were used to pulverise the details surrounding fatal incidents, such that the broader structural relations of production were left unexamined. However, this thesis has also considered other factors such as State sanctioned rules and regulations that governed judges' ability to hand down sentences truly reflective of the gravity of the offence. This in turn touched briefly on the issue of State interference in judicial matters, which exercised the NSW Director of Public Prosecution in defending the independence of the courts. The thesis also

considered the structural problem of the silencing of OHS crimes through non-reportage in official documents and statistical outlets.

Implications for policy/ practice

The thesis questioned if the level of penalty evidenced in the NSW IC was capable of delivering the deterrent effect desired by WorkCover NSW under the self-regulatory environment of OHS legislation. Presumably, its success relies on effective surveillance, as well as sanctions. However, this requires sufficient resources, and in a neo-liberal environment that is wedded to ‘small government’, the contradiction arises that by reducing regulatory resources, there is a reduction in inspections and other formal regulatory mechanisms. If self-regulation, as espoused by Robens legislation, is ineffective in reducing workplace traumatic fatalities in construction, what forms of deterrence are available?

Jamieson et al⁹ observed that classical deterrence theory operationalised through prosecutions is a necessary, but insufficient condition to prevent death and serious injury. Other regulatory analysts such as Neil Foster, Andrew Hopkins, Neil Gunningham and Richard Johnstone¹⁰ have observed that senior managers may be best encouraged to care for workers when their personal liberty and liability is at stake. The Victorian governments’ review into OHS, conducted by Chris Maxwell QC¹¹ (the Maxwell Report) found that ‘...the threats of prosecution, and the size of the potential penalties, are significant factors in promoting compliance’. As Chapter Seven noted, WorkCover NSW senior inspector was also of the view that company directors saw criminal convictions as the best deterrent for OHS offences. However, Chapter Two suggested that WorkCover NSW has reduced the numbers of prosecutions in NSW over the past few years, allegedly as a means of placating business interests who have expressed concern about penalty increases since 2006. Furthermore, while companies in the NSW construction industry are able to avoid

⁹ Jamieson S, Reeve B, Schofield T, McCallum R. ‘OHS Prosecutions: Do They Deter Other Companies From Offending?’ *Journal of Health, Safety and Environment* (2010) Vol. 26No.3: 213-231.

¹⁰ Neil Foster, Personal Corporate Liability under the Model Work Health and Safety Bill, Working Paper 73 National Research Centre for OHS Regulation, March 2010 p5; Hopkins, A, *Safety, Culture and Risk: the organisational causes of disasters* (Australia: CCH, 2005); Gunningham N and Johnstone R, *Regulating Workplace Safety: Systems and Sanctions* (Oxford: Oxford University Press, 1999); Johnstone R, ‘Improving worker safety, reflections on the legal regulations of OHS in the 20th Century’, (1999), *Journal of Occupational Health and Safety – Aust NZ* Vol.15: 521–526.

¹¹ Maxwell C, *Occupational Health and Safety Act Review*, (State of Victoria, March 2000) at 14.

their responsibilities through absorption of low penalties, bankruptcy proceedings or other administrative means, neither higher monetary penalties or enforceable undertakings, as envisioned under the NSW *WSH Act* (see below) are likely to have much impact on preventing construction fatalities.

Contrary to popular opinion, Maxwell was of the view that large companies were less concerned about OHS than small business, because ‘...larger businesses felt much less apprehensive about OHS compliance than did small business’,¹² with the main reason being that large corporations had more managers to look after health and safety compliance. Owners of small businesses were concerned about understanding and then implementing compliance requirements. The performance-based model of self-regulation is geared more to large corporations, rather than small business, whose owners are less able to identify and control hazards.¹³ For business generally, cost was a major factor for duty holders and the inspectorate in deciding on risk mitigation procedures.¹⁴

However,

Once an accident happens...the reluctance to spend money disappears. The future possibility has, all of a sudden, become a present reality. When a duty holder is prosecuted in respect of OHS breaches associated with the accident, the relevant safety measure – which did not exist at the time – will almost invariably have been implemented by the time the matter comes on for trial.¹⁵

Maxwell was unsure if improvements were made with an eye to penalty reduction or because of moral responsibility.

Anecdotal and personal observation suggests that administrative enforcement, such as the use of provisional improvement notices and prohibition notices by the inspectorate were a better deterrent than ‘advise and persuade’ approaches in the day-to-day management of safety in the construction industry. Both forms of notification require immediate action on the employer’s part in order to avoid financial penalties imposed by the regulator and by the client, because of job ‘over runs’. Employers were also quick to act where a union has taken stop work action over health and safety matters, for the same financial reasons, though occasionally larger companies purport to act for what could be described as ‘virtuous’ reasons.

¹² Ibid at 81.

¹³ Ibid at 238.

¹⁴ Ibid at 121.

¹⁵ Ibid.

However, these measures were generally only directed at specific OHS problems arising at a particular time and place, and did not address broader issues, such as attention to, and implementation of, whole of site safety management.

Accepted forms of regulation and conventional criminological theory are informed by causal relationships between sanctions and resulting effects. This thesis has shown that there are other contributing factors that have to be considered when thinking about deterrence. These include confronting the contradictions inherent in work health and safety legislation, which continue to remain unaddressed, one aspect of which is the tension between civil and criminal liability and between regulatory and criminal law.

In this respect, it is useful to re-consider the purposes of sentencing as described in the NSW *Crimes (Sentencing Procedure) Act* 1999 s 3A. These are, in order, to punish, deter, provide community protection, rehabilitate offenders, make offenders accountable for their acts, denounce offenders and recognise the harm done to victims and the community. Deterrence, as an objective, does not figure in the ‘Objects’ of the NSW *OHS Act* 1983¹⁶, NSW *OHS Act* 2000¹⁷ or *WHS Act* 2011¹⁸. The main objective of OHS legislation is to prevent workplace harms, so deterring employers from doing so is presumably the major goal when prosecuting under its auspices. The judgements considered in this thesis show that the court mainly concerned itself with aspects of deterrence (both specific and general), and implicitly, an element of community (that is, worker) protection. However, apart from the issue of deterrence and punishment, the other elements of the *Crimes (Sentencing Procedure) Act* 1999 s3A were not given particular attention, possibly because they are seen as more applicable to ‘conventional crimes’. If courts addressed each of these elements within the context of the sentencing process, it might assist in highlighting the essential criminal nature of OHS breaches and might provide some redress to the families of victims. Alternatively, other sentencing procedures could be developed which are more specific to OHS harms.

WorkCover NSW has concentrated its deterrence effort at the bottom end of the regulatory pyramid, emphasising the need to advise and educate employers. Its media

¹⁶ ‘Objects’ s5(1)

¹⁷ ‘Objects’ s3.

¹⁸ ‘Objects’ s3.

campaigns have emphasised mutual responsibility for safe workplaces and of late, that has turned more to placing responsibility on individual workers themselves. With the advent of the new harmonised OHS legislation, the regulator could take an approach that informs industry that breaches to the WHS Act and regulations resulting in serious injury and death are, in fact, criminal matters, not just regulatory misdemeanours. The courts take their lead from governments and regulators, and in a cycle of reinforcement do not treat practices that lead to injury and death at work as crimes. This is evident by looking at how they are prosecuted and sentenced. So if they are not seen as crimes is there a better way forward to try and change these practices within this prevailing view of non-crime? Would enforceable orders be useful in this respect?.

Consideration of alternatives

Enforceable orders

Enforceable undertakings (EUs) have been in use by federal and state agencies since 1983, and appear in the OHS legislation of the Australian Capital Territory, Queensland, Victoria and Tasmania.¹⁹ As the first part of this discussion shows, enforceable undertakings are attempts by regulators to address some of the aims of sentencing, that is redressing wrongs, making reparation to the victims and community, ensuring that offenders recognises harms caused by them and so on. They can also be viewed from the perspective of the restorative justice model (discussed below). However, their value as a deterrence measures remains largely unexplored.

EUs are ‘...an agreement between the individual or firm and the regulator, in which the former undertake to do or refrain from doing certain activities...[they are] a substitute for, or augmentation of, other regulatory enforcement methods...’²⁰ They are designed ‘...to secure quick and effective remedies for contraventions of regulatory provisions without the need for court proceedings...’²¹ They circumvent the narrow options available to courts through prosecution, which is also adversarial,

¹⁹ Johnstone R and Parker C, ‘*Enforceable Undertakings in Action: Report of a Roundtable Discussion With Australian Regulators*’ Working Paper 71 National Research Centre for OHS Regulation (Australian National University February 2010).

²⁰ Ibid at 5.

²¹ Ibid.

costly and ‘...precludes the kind of ‘cooperative’ negotiation that best achieves the desired organisational cultural change required’.²² As the term suggests, they are an agreement enforceable by the court. For proponents, their value lies as an alternative to ‘traditional coercive, regulatory enforcement action’.²³ They should not be used to the exclusion of other enforcement measures and Parker maintains that they are most successful in a business environment, as one of a number of other options and in an environment where the regulator is known as a strict enforcer of the law.²⁴ Critics of the use of EUs suggest that they are an example of regulators being ‘soft’ on corporate crime, as businesses are allowed the option of voluntary compliance, instead of punishing them proportionally to their the amount of harm caused by them.²⁵

NSW had no option of EUs under its former OHS legislation; instead, court orders could be imposed, as noted previously, but this thesis showed that they were rarely seen as an option by the NSW IC for reasons that appeared less than satisfactory. Court orders in NSW were to be used in addition to any other penalty that the court imposed, rather than an alternative penalty in themselves, as with EUs.. Enforceable undertakings are an alternative to standard deterrence options under the national harmonised WHS legislations and were adopted by NSW in its *WHS Act 2011*.²⁶ In general, for less serious offences, that is, those in Category 3,²⁷ EUs might be effective in ensuring that appropriate reparation is made, fulfilling the aim of recognising the harm done to individuals and the community as set out in sentencing legislation.

Economic imperatives are apparent in the NSW regulator’s reasoning for the introduction of enforceable orders. A 2008 WorkCover NSW publication noted that EUs would ‘... allow WorkCover more flexibility to support businesses with occupational health and safety, while rigorously enforcing the legislation where

²² Ibid at 6.

²³ Parker C ‘Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission’s Use of Enforceable Undertakings’ *Modern Law Review*, (2004) Vol.67, No.2:209-246.

²⁴ Ibid.

²⁵ Ibid.

²⁶ WHS Act 2011 Part 11.

²⁷ NSW *Work Health and Safety Act* s33 ‘Failure to comply with health and safety duty’

necessary.’²⁸ It also observed that public submissions during the 2006 review of the NSW *OHS Act 2000* ‘...highlighted the time taken for an occupational health and safety investigation and for a matter to proceed through the courts, and the associated cost and effort for employers and for WorkCover in these matters.’²⁹

WorkCover NSW described the enforceable undertakings as ‘an additional compliance measure’ that could replace prosecution, except for matters dealt with under s32A of the NSW *OHS Act 2000*. that is, reckless conduct occasioning serious injury or death. These binding commitments would allow the offender to take ‘...preventative or pro-active steps to correct or prevent breaches of occupational health and safety legislation to the benefit of the workplace and industry...’³⁰. EUs would be voluntary, could be suggested by WorkCover NSW or the ‘other party’ that is the offender, would be registered and monitored, with a mandatory compliance provision built in. They are not an admission of guilt by the person giving the undertaking.

The national harmonised health and safety legislation introduced the concept and use of ‘enforceable undertakings’ (EU) and they were subsequently adopted in the NSW *WHS Act 2011*.³¹ They may not be used when the prosecution is for a Category 1 offence where a person who engages in ‘reckless conduct’ and who has a health and safety duty ‘...and without reasonable excuse, engages in conduct that exposes individuals to whom that duty is owed to a risk of death or serious injury or illness, and the person is reckless as to the risk to an individual of death or serious injury or illness.’³² However, given that the most severe penalties under the now repealed *OHS Act 2000* of a 5 year term of imprisonment (for offences under s32A of the NSW *OHS Act 2000*), and of 2 years imprisonment available for repeat offenders, for breaches of ss9 and 10 were never exacted, it is unlikely that there will be many, if any, prosecutions taken under Category 1 offences.

It is disturbing to find that EUs are an option for Category 2 offenders, that is those persons who fail to comply with their health and safety duties and by doing so,

²⁸ WorkSafe New South Wales *OHS Act Review 2006 Fact Sheet Enforceable Undertakings*.
http://www.workcover.nsw.gov.au/formspublications/publications/Documents/enforceable_undertakings_fact_sheet_ohs_act_review_2006_4842.pdf (19/9/2008)

²⁹ Ibid.

³⁰ Ibid.

³¹ NSW *Work Health Safety Act 2011* Part 11 s216-222.

³² Ibid at s31 1(a), 1(b), 1(c).

expose individuals to a risk of death, serious injury or illness.³³ If offenders are allowed to nominate a mutually agreed EU for a Category 2 offence in the case of a fatality, it might be conjectured that even less deterrence will be achieved, and the criminality of OHS harms further diluted. The implementation of EUs as an alternative to prosecution for OHS crimes as set out in Category 1 and 2 offences will be a seriously retrograde step. The other issue is that they are still awarded in the current decontextualised prosecution process. As this focuses on specific events, it is unlikely that any EU would be granted that addressed the broader economic factors that led to a particular event, for example, the cost cutting associated with contracting that encourages companies to neglect safety.

Administrative enforcement such as the use of EUs and penalty notices are part of a reactive strategy that stops short of actual prosecution. The literature has shown that in some cases, employers are resentful when the next step in the regulatory pyramid is employed, that is, when they are prosecuted. It has been shown that prosecution has some deterrent effect, but how long that effect lasts is another matter. The construction industry is very fluid; even if the prosecuted corporation is a large one that has a good chance of survival, to what extent its corporate memory continues to be cognizant of its punishment is unknown. If increased penalties under *WHS Act 2011* are imposed more realistically, then positive OHS changes might result in decreased fatalities. However, as Schofield³⁴ points out, evidence for the deterrent effect of prosecution and criminal conviction is inconclusive and further research needs to be based on rigorous theoretical, as well as empirical study. So here there is a conundrum - if the penalties imposed are so low, then making any conclusions about their deterrent effect is flawed. Penalty rates would have to be increased to gauge their deterrent impact, so, in the current circumstance, it is difficult, or even impossible to tell if high financial penalties are a deterrent.

³³ Ibid at 32(a), (b), (c).

³⁴ Schofield T 'Deterring workplace deaths and injuries: legal sanctions and outcomes or institutional process?' Unpublished paper, (Faculty of Health Sciences, University of Sydney, n.d)

Restorative justice

Johnstone and Parker see EU's as contributing to the '...goals of rehabilitation and restorative justice.'³⁵ Restorative justice is a process where all affected stakeholders have an opportunity to discuss how they have been affected and to decide on a plan of reparation. Where criminality is concerned, its operating principle is that as crime hurts, so justice should heal.³⁶ Braithwaite's restorative regulatory theory argues that restorative justice should be at the base of a regulatory pyramid. He argues that these 'responsive justice pyramids' cover the weaknesses of one strategy with the strengths of other strategies higher up the pyramid.³⁷

Strang and Sherman, 2003³⁸ argue that the interests of victims have been abandoned by the 'jurisprudence of retribution'; restorative justice focuses on repairing and preventing the harms of crime, rather than concentrating on retribution. Empirical evidence³⁹ demonstrates that victims' sense of justice is affirmed through the restorative justice process, and Strang and Sherman ask if a new justice system could be developed that allowed for more 'procedural and distributive fairness... without harming offenders' rights or public safety?'⁴⁰ The historic shift from victim compensation to compensating the Crown resulted in the latter form being regarded as the natural form of justice, while the victim is institutionally excluded from the process.⁴¹ In recent times, some minor changes have occurred in the NSW judicial system to take account of victims' needs, such as allowing Victim Impact Statements to be read in court hearings and trials. Nonetheless, families of those killed at work remain unhappy about the justice system; dissatisfied with procedural practices, such as exclusion about progression of the case, no recognition of the emotional harms caused to them and a lack of respect and fairness in the justice system.

³⁵ Johnstone R and Parker C, *Enforceable Undertakings in Action: Report of a Roundtable Discussion With Australian Regulators*, Working Paper 71, National Research Centre for OHS Regulation (Australian National University February 2010) at 6

³⁶ Braithwaite, J. 'Restorative justice and de-professionalization' (2004) *The Good Society*, Vol.13, No.1 at 28.

³⁷ Braithwaite, J. 'Encourage restorative justice' *Criminal and Public Policy*, (2007). Vol.6, No.4,; 689-696 at 694.

³⁸ Strang H and Sherman L W. (2003). 'Repairing the harm: victims and restorative justice' (2003) *Utah Law Review* Vol.3, pp. 15-42

³⁹ Ibid

⁴⁰ Ibid at 15.

⁴¹ Ibid at 16.

Empirical evidence shows that about two thirds of victims of crime in general, in the UK were willing to engage in some form of reparative activity with the offender⁴² and that emotional healing took precedence over seeking material gain⁴³. While restorative justice is found to be successful most of the time for juvenile offenders and in cases of assault, robbery and so on,⁴⁴ Braithewaite⁴⁵ observes that, firstly, it is not effective in all cases and secondly, for corporate crime it is only as effective as the willingness of executives to take responsibility for their harmful actions. Research shows that some executives are simply uncaring, disinterested or unwilling to accept responsibility.⁴⁶ In this case, restorative justice must be over-ruled by strategies of deterrence. Moreover, it is questionable whether it would be effective where there are strong economic imperatives to establish systems of work that are cost effective, that is, where financial risk management, rather than hazard management renders workplaces unsafe (as in the construction sector). In these cases, individual choice is diluted as systemic risk is accepted.

The regulatory pyramid model provides for ‘integration of restorative, deterrent and incapacitative justice’, where restorative justice sits on the bottom tier, engaging the ‘virtuous actor’, followed by deterrence, which applies to the ‘rational actor’ and finally to ‘incapacitation’ at the apex of the pyramid which is employed to deal with the ‘incompetent or irrational actor’.⁴⁷ However, safety crimes are less likely to be committed by ‘irrational’ persons, (though a case might be argued for their incompetence). A virtuous response is one where repetition of the event is unlikely, and where the offending organization made significant changes to its OHS practices and policies following the fatality.⁴⁸ In the judgements examined for this thesis, the only assessment of ‘virtue’ was gleaned through the court transcripts and, as rectification of OHS practices and policies were a major mitigating factor in their defence, their ‘real’ virtue was hard to assess, and 17 defendants companies were re-offenders in any case.

⁴² Above, note 43 at 18.

⁴³ Above, note 38.

⁴⁴ See also Sherman L and Strang H (1997). ‘*Restorative justice and deterring crime*’ RISE Working Papers (Australian National University, Canberra, No. 4 April 1997).
http://www.aic.gov.au/en/criminal_justice_system/rjustice/rise/working/risepap4.aspx (29/9/2009).

⁴⁵ Above, note 38

⁴⁶ Schofield T, Reeve B and Jamieson S, ‘Deterrence and OHS: Prosecuted Employers Responses’ *Journal of Occupational Health and Safety* (2009) Vol.25, No.4:264-276.

⁴⁷ Ibid, above, note 39.

⁴⁸ Haines F, *Corporate Regulation: Beyond ‘Punish or Persuade’* (Oxford: Clarendon Press, 1997).

Braithwaite⁴⁹ has suggested applying the restorative justice model to offenders under the occupational health and safety regulations. In his view, the ability of trade unions to prosecute would enable the state, unions and employers ‘to take credible enforcement action against each other [so that] each will display an enforcement pyramid to the others that will motivate all to sit together in the restorative justice circle...’.⁵⁰ The advent of Australia’s national OHS laws has not seen trade union inclusion in the prosecution role, although NSW was allowed limited access to this avenue in its *WHS Act 2011*.

The Restorative Justice and Work-Related Death project⁵¹ explored the possibility of offering a restorative justice (RJ) approach in the case of workplace traumatic deaths, as a means of providing ‘better healing’ to the bereaved’. While RJ programs exist for other crimes, for example, youthful offenders, it is not used in Australia in the context of workplace fatality. If RJ were to be an option in the case of workplace fatality, as in the case of Category 2 offences, it should be used in addition to any other penalties and after careful research, consultation and evaluation with families (and always with their agreement) and other key stakeholders, such as trade unions.

Specific recommendations

Of course, administrative and criminal enforcements are not the only methods of improving workplace conditions. Construction health and safety performance can be enhanced through a number of externalities, such as improvements in communications, coordination of projects, better integration of supply chains, and better overall safety management.⁵² These initiatives should also include recognition of the underlying economic realities of the industry as discussed in Chapter Two and ensure that tenders contain mandated and realistic OHS budgets, assessed by competent persons who would be held responsible for allowing dubious documents to be approved.

⁴⁹ Braithwaite, J. *Thinking laterally: restorative and responsive regulation of OHS* (2003) Working Paper 13, National Research Centre for OHS Regulation, ANU

⁵⁰ *Ibid* at 8.

⁵¹ Brookes D, *Restorative Justice and Work-Related Death: consultation report*, (St.Kilda: Creative Ministries Network, 2009)

⁵² Charles M, Pillay J, Ryan R. ‘Guide to Best Practice for Safer Construction: Literature review ‘From concept to completion’ in *Guide to Best Practice for Safer Construction* (eds.) T Fleming, N Ryan, R Wakefield, Cooperative Research Centre for *Construction Innovation*, (Brisbane: Icon.Net Pty Ltd, 2007), at 4.

Chapter Two commented on the ways companies could avoid penalties for workplace OHS crimes through deregistration, liquidation and ‘phoenixing’. As a preventive measure, the CFMEU⁵³ suggested that legislative amendments to all OHS legislation could require the Australian Securities and Investments Commission (ASIC) to refer changes in companies’ status to Safe Work Australia. In cases of serious injury, disease or fatality, corporate changes, which might nullify the potential liability of individual company officers or the corporation, should be disallowed without an order of the relevant court approving such change. In order to pierce the ‘corporate veil’, reports on businesses’ financial status should be provided to an appropriate panel of experts to provide meaningful information on company liabilities and assets.⁵⁴ The judgements examined in this thesis showed that thorough scrutiny of company financial records was not required by the court and therefore sentencing decisions were occasionally made in the absence of clear information. Where it is likely that a defendant will plead insolvency, it would be advantageous for the prosecution to obtain all relevant details.

To allow for more consistent jurisdictional penalties, a national register of decided cases could be established, thus allowing a transparent comparison of national company performance and a comparison of the judicial performance of the states. Further, each OHS jurisdiction should keep records and details of all prosecutions, and these should be readily available to the public. At present, there are many impediments for policy and research analysts in obtaining relevant and accurate data.

Further research

The problem of ‘decriminalisation’ of OHS offences and the ‘generalised denial’ of employers toward their legal responsibilities for workplace health and safety, remains a serious obstacle in bringing attention to workplace harms and the most suitable way of dealing with them.⁵⁵ Criminal law has the potential to deter corporate

⁵³ CFMEU C and G Division, Submission to the National Review into Model Occupational Health and Safety Laws. CFMEU National Office Sydney, July 25. (2008)

⁵⁴ Ibid.

⁵⁵ Tombs S and Whyte D (2008), *A crisis of enforcement: The decriminalisation of death and injury at work*, Centre for Crime and Justice Studies, (Kings College, London, 2008): see also Schofield T, Reeve B and Jamieson S, ‘Deterrence and OHS: Prosecuted Employers Responses’ *Journal of Occupational Health and Safety*, (2009) Vol.25 No.4:264-276: see also Jamieson S, Reeve B, Schofield T, McCallum R. ‘OHS Prosecutions: Do They Deter Other Companies From Offending?’ *Journal of Health, Safety and Environment*, (2010), Vol. 26 No.3: 213-231.

offenders, as it is ‘...aimed at organisations that claim rationality for themselves and operate on the basis of calculability, as well as being managed by individuals with careers, prestige and status to protect’.⁵⁶ It is able to signal symbolically unacceptable behaviours, important in a context where many do not believe that corporate crimes are ‘real’. Finally, criminal law is that which is used by victims in seeking redress and justice.

However, Tombs argues, criminalisation was never ‘a key part of the state’s agenda’.⁵⁷ Its promise to protect the health, safety and welfare of workers was limited at best and illusory at worst. Therefore, in order to ‘mitigate the violent effects of capitalist production’,⁵⁸ a social harm approach leads to other considerations that are beyond, but not contrary to criminal law. ‘In particular, such approaches are likely to point to mechanisms (including the use of law) to empower those who are most likely to be the victims of particular harms’.⁵⁹ In this context, a most effective means of improving workplace health is the presence of trade unions and effective health and safety representatives. In the wider context, the redressing of power imbalances in the workplace and the resisting of managers’ ‘unhindered rights to manage’ is imperative.⁶⁰

The empirical findings of this thesis show that penalties for workplace fatalities in a very dangerous environment, namely the construction industry, are so lenient as to seriously undermine their deterrent value. The impediments placed in the way of its principal industrial organisation, the CFMEU C and G Division, along with a velvet gloved regulatory response are also factors to be considered if workplace harms are to be averted. The thesis also charted significant changes to the regulation of OHS, particularly as it pertains to the building and construction industry. Together these findings raise a series of questions that could inform future research.

Taking a social harm approach to the study of the effects of the actions and policies of the former Building Industry Taskforce and the ABCC on building and construction workers and their unions would reveal contradictions between the decriminalisation of OHS offences and the recriminalisation of workers and their

⁵⁶ Tombs S. ‘Workplace injury and death: social harm and the illusion of law’, in *Beyond criminology: taking harm seriously* (London: Pluto Press, 2004) at 176.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid at 177.

organisations in acting for OHS improvements. Among other things, this would entail a comprehensive evaluation of the ABCC's enforcement role and its legal prosecutions to determine the extent to which unions have been overrepresented in court actions. A related avenue is to determine if union organisers and site delegates have been hindered in exercising their rights to act in health and safety matters because of ABCC activities, and if workers have been intimidated from reporting OHS risks for similar reasons.

Another area of research lies in the new directive of the NSW government to relocate OHS jurisdiction from the IC to the District and Supreme Courts. These Courts are already busy jurisdictions hearing criminal and civil cases. There is no guarantee that extra resources will be allocated to carry out their new jurisdictional responsibilities, so the question is whether or not courts will be more overburdened. Research could inquire into the effects of the loss of specialist knowledge of jurists in the NSW IC in OHS cases, and whether courts will impose greater or lesser penalty amounts in the case of fatalities. Such a study would also inquire into the use of, and effectiveness of EUs.

The thesis raised the problem of perceptions of OHS harms as non-criminal happenings. It is postulated that unless relevant State institutions make it a priority to address this perception it is doubtful that these harms will be seen as anything other than regulatory matters, only dealt with summarily. A comprehensive study of the perceptions of the public and government agencies, including those involved in jurisprudence, about OHS harms could enhance future policy directions that position serious OHS offences in the criminal arena.

The operations, policies and practices of the prosecution division of WorkCover NSW remain less than transparent. Research designed to explicate its functions and to make recommendations around establishing better reporting databases on all details of prosecutions readily accessed by the public would be a useful tool and allow for more evidence informed policy development.

The conceptual model seen in Chapter One proposed that the dialectical and hegemonic relations between the neo-liberal State, the judiciary, government as legislator, government as regulator and industrial representatives of workers, produced health and safety outcomes that were not beneficial to workers. Where

industrial protection for them is weak, their exposure to workplace harm is increased. A neo-liberal economic system is one that privileges businesses, who, in construction, de-prioritise safety, and whose courts generally treat OHS infractions leniently. The construction of safety laws as representative of common interests does not recognise the realities of workplaces where rates of injury and death remain relatively constant. The interpretation of these laws necessarily emphasises the instrumental and individualising aspects of workplace health and safety incidents, at the expense of highlighting the economic imperatives driving the enterprise.

Throughout capitalist democracies, the modern state is engaged in constant struggle to maintain the stability and legitimacy of an economic system that, for all its productive potential, generates intense inequality and is the vehicle for perpetrating massive harms on humans, other species and the environment.⁶¹ Consideration of white-collar crime is seemingly divided between two approaches, the first being a radical position that vigorously contests the view that capitalism will correct itself and the harms caused by it, presumably through some market driven mechanism and a second, more reformist stance that examines how corporate harms can be reduced by State intervention. Whichever approach the researcher chooses, Haines and Sutton⁶² contend that research in this area necessarily involves political choices. In the light of current political realities, the best to be hoped for is an approach that uncovers inequalities and contradictions that can lead to better informed law, policies and actions. Whatever the outcome, dominant hegemonic relationships will ensure that the struggle will continue.

⁶¹ Haines F and Sutton A, 'The importance of being ambiguous' in *Governance and Regulation in Social Life: essays in honour of W.G Carson*, eds. Brannigan and Pavlich, (Routledge-Cavendish 2007)

⁶² Ibid.

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Appendix A

Thomas Mathiesen and Pulverisation

When an oilrig capsized in the North Sea in 1980 with a loss of 123 lives, Thomas Mathiesen¹ showed how ‘pulverising’ techniques were used in an attempt to obscure the social relations of production, which contributed to the incident. After events such as these, a ‘fundamental’ questioning about cause and relationships between events begin to be established, so, in the case of oil production, the relationships between profit and production pace or poor safety measures may be discerned. If this realisation occurs on a broad scale, ‘...the activity itself begins to be threatened’² and it is in the interest of the involved company’s representatives to obscure or pulverise these ‘revealing relationships’. An effective way to do this is to ‘...isolate the event which was the point of departure from the rest of the activity which the event is a part of...’³ The bigger and more sensational the event, the more important pulverisation becomes, serving to ‘bring people back into line...silencing them anew.’⁴

It was important for the oil industry and the Norwegian government that this incident be isolated from the industry as a whole. This was achieved in the first few days of the incident, using isolating techniques by the media and the government.⁵ The event was individualised and presented as a unique and atypical occurrence. The media ran stories, which described the event as ‘unbelievable’ ‘unthinkable’ and the loss of life unprecedented in modern times.⁶ On the other hand, another isolation technique is to normalise events, making them appear every day and ordinary occurrences, but in this case, the ‘ordinariness’ is put into other contexts and thus removed from the original context. For example, in this case, it was important for authorities to remove

¹ Mathiesen T, *Silently Silenced: Essays on the Creation of Acquiescence in Modern Society* (Winchester: Waterside Press, 2004) at 39.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

⁵ Mathiesen emphasises that the use of the term ‘technique’ implies some degree of consciousness and planning, but that this may differ according to circumstances, and that ‘other issues’ may be present.

⁶ *Ibid.* 38-39. Mathiesen observes that only two years before, the media ran an almost identical story about a fire on another oilrig.

the capsized incident out of its oil context and transform it into ‘...something relatively common and expected within another frame of reference’.⁷ The head of the Oil Directorate neatly accomplished this by declaring that while the capsized was a tragedy, it was more like a shipping accident, rather than something specifically tied to the oil industry, and was thus ‘normalised within a navigational context’. In other official statements, the event was also normalised in the contexts of mining and airline incidents.⁸

Events may be ‘splintered’ so that the event is divided into ‘...more or less free flowing and unrelated bits and pieces’.⁹ The particulars of the event, though important, become the focus, while the actuality or context of the event itself vanishes. Mathiesen argues¹⁰ that to understand the totality of an event, it is necessary to consider it in its temporal context. If the aim is to obscure associations surrounding the event, then it becomes important to obscure that temporality and this occurs when the relationships between time and space are disrupted. In other words, the past, present and future actions associated with the incident are isolated from each other. The future was isolated in the North Sea example through official statements and actions that concentrated on immediate actions, and refusal to discuss future ramifications of the incident. As Mathiesen puts it ‘...by...placing important aspects and issues tied to the events in the future, [they] are put off for a more or less indefinite period. When the time finally comes, people generally have put a distance between themselves and those who lost their lives.’¹¹

⁷ Ibid 39.

⁸ Ibid.

⁹ Ibid 40.

¹⁰ Ibid.

¹¹ Ibid 41.